District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff v. **JAMES HOLMES,** Defendant	σ COURT USE ONLY σ
DOUGLAS K. WILSON, Colorado State Public Defender Daniel King (No. 26129) Tamara A. Brady (No. 20728) Chief Trial Deputy State Public Defenders 1300 Broadway, Suite 400 Denver, Colorado 80203 Phone (303) 764-1400 Fax (303) 764-1478 E-mail: state.pubdef@coloradodefenders.us	Case No. **12CR1522** Division 26
MOTION TO STRIKE THE DEATH PENALTY BECAUSE IT VIOLATES THE STATE AND FEDERAL CONSTITUTOINAL PROHIBITIONS AGAINST CRUEL AND UNUSUAL PUNISHMENT, THE SUBSTANTIE DUE PROCESS CLAUSE OF BOTH CONSTITUTIONS, AND THE RIGHT TO LIFE CLAUSE OF THE COLORADO CONSTITUTION [D-165]	

CERTIFICATE OF CONFERRAL

The prosecution states that they object, and will file a responsive pleading to this motion.

James Holmes, by and through counsel, moves this Court to strike the death penalty because it violates the state and federal constitutional prohibitions against cruel and unusual punishment. Measured by "the evolving standards of decency that mark the progress of a maturing society," *Trop v. Dulles,* 356 U.S. 86, 100-101 (1958), the punishment is so disproportionate as to be cruel and unusual and thus in violation of the Eighth and Fourteenth Amendments to the United States Constitution, and Article II, § 20 of the Colorado Constitution.[1]

[1] The language of the Colorado Constitution and the Eighth Amendment is identical: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual

In addition, Mr. Holmes moves this Court to strike the death penalty because it violates the state and federal constitutional provisions that guarantee substantive due process, and the right to life clause of the Colorado Constitution. U.S. Const. amend. XIV, § 1; Colo. Const. art. II, §§ 3, 25. These provisions protect a person's fundamental interest in his own life, no matter what process is afforded, unless the infringement is narrowly tailored to serve a compelling state interest.

In support of this motion, Mr. Holmes states the following:

The Eighth Amendment places a substantive restriction on the State's power to take an offender's life, no matter how heinous the crime for which the person has been convicted. *Atkins v. Virginia,* 536 U.S. 304, 321 (2002); *Panetti v. Quarterman*, 551 U.S. 930 (2007). "[T]he Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions. The right flows from the basic precept of justice that punishment for crime should be graduated and proportioned to [the] offense." *Roper v. Simmons*, 543 U.S. 551, 560 (2005) (internal quotations omitted), *quoting Atkins*, 536 U.S. at 311 (*quoting Weems v. United States,* 217 U.S. 349, 367 (1910)).

The Colorado Constitution contains an additional provision guaranteeing the right to life. *See e.g.* Article II, Section 3: "all persons have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; that

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punishments inflicted." The U.S. provision is applicable to the States through the Fourteenth Amendment. *Furman v. Georgia,* 408 U.S. 238, 239 (1972) (per curiam)*; Robinson v. California,* 370 U.S. 660, 666-667 (1962); *Louisiana ex rel. Francis v. Resweber,* 329 U.S. 459, 463 (1947) (plurality opinion). The Colorado Constitution contains additional provisions guaranteeing the right to life. See e.g. Article II, Section 3: "all persons have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; and of seeking and obtaining their safety and happiness."

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The United States and Colorado Constitutions guarantee that no person shall be deprived of life, liberty, or property without due process of law. U.S. Const. amend. XIV, § 1; Colo. Const. art. II, § 25. "[T]he touchstone of due process is protection of the individual against arbitrary action of government." *County of Sacramento v. Lewis,* 523 U.S. 833, 845 (1998) (quoting *Wolff v. McDonnell,* 418 U.S. 539, 558 (1974)). *See also Dias v. City & County of Denver*, 567 F.3d 1169, 1181 (10th Cir. 2009); *People v. Strean*, 74 P.3d 387, 394 (Colo. App. 2002).

If a legislative enactment burdens a fundamental right, the infringement must be narrowly tailored to serve a compelling government interest. *Washington v. Glucksberg,* 521 U.S. 702, 721 (1997); *Roe v. Wade*, 410 U.S. 113, 155-56 (1973); *Kramer v. Union Free School District*, 395 U.S. 621, 627 (1969); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963). A defendant's right to substantive due process is violated when the government infringes upon a fundamental liberty interest, no matter what process is afforded, unless the infringement is narrowly tailored to serve a compelling state interest. *People v. Garlotte,* 958 P.2d 469 (Colo.App.1997); *Lujan v. Colo. State Bd. of Educ.,* 649 P.2d 1005, 1014-16 (Colo.1982); *Reno v. Flores,* 507 U.S. 292 (1993); *United States v. Salerno*, 481 U.S. 739 (1987); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965); *Aptheker v. Secretary of State*, 378 U.S. 500, 508 (1964); *Cantwell v. Connecticut*, 310 U.S. 296, 307-308 (1940). *See Eisenstadt v. Baird*, 405 U.S. 438, 460, 463-464 (1972) (White, J., concurring in result).

Substantive due process "forbids the government to infringe ...fundamental liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored

to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 301-302 (1993); *see also People v. Dash,* 104 P.3d 286, 290 (Colo.App. 2004); *Roe v. Wade*, 410 U.S. 113, 155 (1973) (substantive due process requires that any regulation restricting fundamental rights be subjected to strict scrutiny, so as to assure that statute is justified by some compelling state interest).

Because the right to human life is fundamental, and its extinction by the Government is the most intrusive invasion possible, a law permitting the State to kill one of its own citizens must be supported by a compelling governmental interest and a means suitably tailored towards achieving that compelling interest.

The Relationship Between Due Process and Cruel and Unusual Punishment

There may be a temptation to analyze this claim as one solely under the cruel and unusual punishment clause. While the Colorado Supreme Court has never expressed a preference for analyzing state constitutional due process claims under its cruel and unusual punishment clause, the United States Supreme Court has done so from time to time.[2] On the other hand, the Supreme Court has occasionally referred to the substantive due process standard in addressing issues concerning the death penalty.[3]

In *Furman*, the Supreme Court essentially treated the Eighth Amendment and substantive due process standards as interchangeable. *Id.* As Justice Marshall wrote in *Furman,* 408 U.S. at

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[2] The Supreme Court has held that "[w]here a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of governmental behavior, 'that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims.' " *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (*quoting Graham v. Connor*, 490 U.S. 386, 395 (1989)). The Eighth Amendment provides such an "explicit textual source of constitutional protection." *Id.*

[3] *See e.g., Herrera,* 506 U.S. at 419 (O'Connor, J. and Kennedy, J., concurring), 435–37 (Blackmun, J., Stevens, J., and Souter, J., dissenting).

359 n. 141, "[t]he concepts of cruel and unusual punishment and substantive due process become so close as to merge ..." (Marshall, J., concurring). Justice Marshall explained:

> This [Eighth Amendment] analysis parallels in some ways the analysis used in striking down legislation on the ground that it violates Fourteenth Amendment concepts of substantive due process.... There is one difference, however. Capital punishment is unconstitutional because it is excessive and unnecessary punishment, not because it is irrational.
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> ...
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> [T]he substantive due process argument reiterates what is essentially the primary purpose of the Cruel and Unusual Punishments Clause of the Eighth Amendment -- *i.e.*, punishment may not be more severe than is necessary to serve the legitimate interests of the State.

Ibid. Under either test – due process or cruel and unusual punishment – the Court's focus is on the stated purpose of the penalty, and whether the penalty is needed to attain that purpose.

Colorado courts apply the traditional substantive due process standards to claims that certain punishments violate that clause. The Colorado Court of Appeals has considered, discussed, and rejected claims that the Colorado Sex Offender Lifetime Supervision Act of 1998[4] is an unconstitutional violation of substantive due process. *See e.g. People v. Dash*, 104 P.3d 286, 290 (Colo. App. 2004) (substantive due process "forbids the government from infringing upon fundamental liberty interests, no matter what process is afforded, unless such infringement is narrowly tailored to serve a compelling state interest"); *People v. Strean*, 74 P.3d 387 (Colo.App.2002) (applying rational basis review because the defendant did not argue for intermediate scrutiny, and, as a convicted sex offender, he had no fundamental right to freedom from incarceration); *People v. Oglethorpe*, 87 P.3d 129 (Colo.App.2003) (same).[5] In all of these cases, the Colorado courts considered and decided the substantive due process claims.

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[4] § 18–1.3–1001, et seq., C.R.S. 2003.

[5] The fact that Colorado courts applied the rational basis standard to the challenges to the Lifetime Supervision Act does not dictate the standard this Court should use. An adult offender

Thus, the substantive due process and cruel and unusual standards require that the State have a compelling state interest with a means narrowly tailored to attaining it (substantive due process), and the State cannot enact a penalty that is more severe than necessary to serve its legitimate interests (cruel and unusual punishment). Under both tests, the Colorado death penalty is unconstitutional.

Mr. Holmes also bases his claim on the right to fundamental fairness, which is a concept grounded in due process, the prohibition on cruel and unusual punishment, and equal administration of justice.

The Constitutional Provisions Restrict Legislative Authority

Legislative prerogatives of defining and punishing criminal conduct, while accorded great deference, are not absolute. *See Coker v. Georgia*, 433 U.S. 584, 597 (1977) (plurality opinion); *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (plurality opinion); *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion); *Weems v. United States*, 217 U.S. 349, 373 (1910). *See Stanford v. Kentucky*, 492 U.S. 361, 391-92 (1989) (Brennan, J., dissenting). In the late 1800's, the Supreme Court rejected Eighth Amendment challenges in a summary fashion, primarily in the context of challenges to particular modes of carrying out death penalties. *See, e.g., McElvaine v. Brush*, 142 U.S. 155 (1891) (solitary confinement of death row inmates); *In re Kemmler*, 136 U.S. 436 (1890) (death by electrocution); *Wilkerson v. Utah*, 99 U.S. 130 (1879) (death by firing squad).

In *Weems v. United States*, 217 U.S. 349, 373 (1910), the Court, for the first time, examined at length the history and scope of the Eighth Amendment and held unconstitutional a

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has no fundamental liberty interest in freedom from incarceration. *People v. Young*, 859 P.2d 814, 818 (Colo. 1993). However, Mr. Holmes does have a fundamental right to life, even after conviction and even after sentencing.

sentence of imprisonment for twelve years and one day at hard labor with a chain at the ankle and wrist. The *Weems* Court affirmed the principle that legislative authority to define and punish offenses, while normally unfettered, is limited by a principle of proportionality inherent in the purpose of the Eighth Amendment. The *Weems* Court compared the penalty and the offense with other punishments and offenses defined by United States and Philippine Island legislation, declared the subject legislation to be unconstitutional, reversed the defendant's conviction, and dismissed the case.

The Court addressed Eighth Amendment issues in various contexts only cursorily after its decision in *Weems* until its decision in *Trop v. Dulles*, 356 U.S. 86 (1958). That case arose in the context of a civil action filed by Trop against the United States Secretary of State and others seeking a declaration that he was a United States citizen. Because he had earlier been convicted of desertion in a court martial proceeding for leaving his foreign military base without authorization for one day, Trop lost his citizenship by virtue of a provision of the Nationality Act of 1940.[6] A majority of the Court concluded that the statutory provision at issue was unconstitutional. Chief Justice Warren authored a plurality opinion that found the legislation violative of the Eighth Amendment. The plurality opinion explained the importance of the limitation upon Legislative power: "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards." *Trop*, 356 U.S. at 100 (opinion of Warren, C.J.) (footnotes and citation omitted).

The plurality recognized "that the words of the Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of

[6] Pub.L. No. 853, § 401(g), 54 Stat. 1137, 1168-69 (1940) (amended by Pub.L. No. 221, § 1, 58 Stat. 4, 4 (1944)).

decency that mark the progress of a maturing society." *Id.* at 100-01 (footnote omitted). The plurality then referred to the treatment of deserters in eighty-four nations before concluding that a punishment of denationalization for the offense of desertion was unconstitutional.

In *Robinson v. California*, 370 U.S. 660 (1962), the Court held that a California statute punishing the medical status of drug dependency violated the Eighth Amendment. The Court also held in *Robinson* that the due process clause of the Fourteenth Amendment made the Eighth Amendment directly applicable to the states. *Robinson,* 370 U.S. at 666-67.[7] Again, the Court emphasized the importance of human dignity in the Supreme Court's independent assessment of the constitutionality of legislative action. In the modern era, the Court's Eighth Amendment jurisprudence has consistently recognized that the proportionality component of the Eighth Amendment reflects constitutional concern for human dignity. *Furman v. Georgia*, 408 U.S. 238 (1972). *See also Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Coker v. Georgia*, 433 U.S. 584 (1977); *Enmund v. Florida*, 458 U.S. 782 (1982); *Tison v. Arizona*, 481 U.S. 137 (1987); *Stanford v. Kentucky*, 492 U.S. 361 (1989).

Legislative prerogative is also restricted by the due process clause, which "cover[s] a substantive sphere as well, barring certain government actions regardless of the fairness of the procedures used to implement them." *Sacramento v. Lewis,* 523 U.S.833, 840 (1998) (quotation omitted). This substantive component guards against arbitrary legislation by requiring a

[7] "As in *Trop* and *Weems*, the Court in *Robinson* suggested that concern for human dignity lies at the heart of the Amendment." *People v. Cisneros*, 855 P.2d 822, 834 (Colo. 1993) (Kirshbaum, J. dissenting from the majority's conclusion that the age of the offender is irrelevant in a constitutional proportionality analysis).

relationship between a statute and the government interest it seeks to advance. Absent that relationship, courts are obligated to exercise judicial authority to strike the statute.

Modern Standards used to Assess Constitutionality

To determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to "'the evolving standards of decency that mark the progress of a maturing society.'" *Graham v. Florida*, 560 U.S. 48, ___, 130 S.Ct. 2011, 2021 (2010), *quoting Estelle v. Gamble,* 429 U.S. 97, 102 (1976) (quoting *Trop v. Dulles,* 356 U.S. 86, 101 (1958) (plurality opinion)). The Clause "may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems v. United States*, 217 U.S. at 378.

As the Court explained in 2010:

> 'This is because '[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.'

Graham, 130 S.Ct. at 2021 (*quoting Kennedy v. Louisiana*, 554 U.S. 407, 519, 128 S.Ct. 2641, 2649 (2008)). Again and again, the United States Supreme Court has made it clear that this is not a question that is viewed "through a historical prism." *Miller v. Alabama*, __ U.S. ___, ___, 132 S. Ct. 2455, 2463 (2012). Thus, it does not matter that there was a death penalty at the time Colorado joined the United States, nor that the penalty existed in Colonial America. Rather, the Eighth Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society. *Trop v. Dulles*, 356 U.S. at 101; *Atkins v. Virginia*, 536 U.S. 304, 311–12 (2002); *Miller v. Alabama*, *supra*, 132 S. Ct. at 2463.

In assessing standards of decency, courts (1) look to objective indicia, and (2) bring their own judgment to bear on the question. *Atkins, supra; Roper v. Simmons*, 543 U.S. 551, 563 (2005). In *Atkins,* the Court noted objective indicia of society's standards, as expressed in

legislative enactments and state practice with respect to executions of people who have mental retardation. However, as the Supreme Court noted three terms later:

> [In *Atkins*,] [t]he inquiry into our society's evolving standards of decency did not end there. The *Atkins* Court neither repeated nor relied upon the statement in *Stanford* that the Court's independent judgment has no bearing on the acceptability of a particular punishment under the Eighth Amendment. Instead we returned to the rule, established in decisions predating *Stanford* [*v. Kentucky,* 492 U.S. 361 (1989)], that "the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." 536 U.S., at 312 (quoting *Coker v. Georgia,* 433 U.S. 584, 597 (1977) (plurality opinion)).

Roper v. Simmons, 543 U.S. 551, 563 (2005). Thus, the Court rejected the *Stanford* notion that courts are reduced to a mere tabulation of societal preferences, as expressed through statutes. Courts play a much more active role and make a determination "in the exercise of our own independent judgment…." *Roper*, 543 U.S. at 563.

The last time that the Colorado Supreme Court spoke on the question of the constitutionality of the Colorado death penalty was in its 1990 opinion in *People v. Davis*, 794 P.2d 159, 172 (Colo.1990).[8] However, as will be seen, the Court failed to apply the correct standards under both the U.S. Constitution and the Colorado Constitution. Moreover, as will be seen, there has been a sea change in evolving community standards since 1990.

In *People v. Davis*, *supra,* the Colorado Supreme Court assumed that courts have a very limited, or no, role in determining whether a statute is unconstitutionally excessive under the "evolving standards of decency" criterion articulated in *Weems* and *Trop v. Dulles*, *supra.*

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[8] The Court rejected a challenge nine years later in *People v. Dunlap*, 975 P.2d 723, 735 (Colo. 1999). However, in *Dunlap*, the Court added nothing to its previous language and simply stated succinctly: "This court has previously upheld the constitutionality of the death penalty in Colorado under a prior version of the statute at issue. *See People v. Davis,* 794 P.2d 159, 170-72 (Colo.1990). Indeed, it is now well-settled that the death penalty is not inherently cruel and unusual under the Eighth Amendment. *See Gregg v. Georgia,* 428 U.S. 153 (1976)." Having

People v. Davis, 794 P.2d 159, 172 (Colo.1990) (legislatures, not courts, effect the moral will of the people in a democracy). This "limited role" in determining the standards for evolving decency has been debunked, and obliterated, by the United States Supreme Court in recent years. *See e.g. Roper, supra.* The Court expressed a belief, now shown to be mistaken, that the judiciary must simply stand by and accept any punishment that is adopted by the voters or by the General Assembly. Relying upon ***dissenting opinions*** from *People v. Drake,* 748 P.2d 1237 (Colo. 1988) and *Gregg v. Georgia*, 428 U.S. 153 (1976), Justice Mularkey, writing for the majority, ruled, absent presentation of evidence and with nothing else to go on, the Court had to regard the statute as constitutional, as it expressed the will of "[t]he citizens of Colorado, directly and through their elected representatives." *Davis*, 794 P.2d at 172.

In *Davis*, the Court used an analytical framework that has now been wholly repudiated by the United States Supreme Court. As the Supreme Court said in *Gregg v. Georgia*: "This does not mean that judges have no role to play, for the Eighth Amendment is a restraint upon the exercise of legislative power." *Gregg v. Georgia*, 428 U.S. 153, 174 (1976). The *Gregg* Court quotes Justice White's concurring opinion from *Furman*, which was obviously shared in this regard by the majority of Justices that held the death penalty to be unconstitutional:

> Judicial review by definition, often involves a conflict between judicial and legislative judgment as to what the Constitution means or requires. In this respect, Eighth Amendment cases come to us in no different posture. It seems conceded by all that the Amendment imposes some obligations on the judiciary to judge the constitutionality of punishment and that there are punishments that the Amendment would bar whether legislatively approved or not.

Furman v. Georgia, 408 U.S., at 313-314 (White, J., concurring), quoted in *Gregg, supra*, 428 U.S. at 174.

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concluded that the issue had already been decided, the Court moved on to the procedural challenges.

Moreover, in assessing evolving standards of decency under the Colorado Constitution, the *Davis* Court looked to the period ranging from about 1891 to about 1979. In other words, the *Davis* Court was using "a historical prism" rather than assessing "'the evolving standards of decency that mark the progress of a maturing society.'" *Miller*, __ U.S. at ___, 132 S. Ct. at 2463, *quoting Estelle v. Gamble,* 429 U.S. 97, 102 (1976) (quoting *Trop v. Dulles,* 356 U.S. 86, 101 (1958) (plurality opinion)). As will be seen, as Colorado's Governor noted just this past May, Colorado now has "the benefit of information that exposes an inequitable system."[9]

The Colorado Supreme Court has only once ever referred to the concept of "the evolving standards of decency" in a death penalty case, and then only to uphold a state statute that compelled a capital defendant to prove his mental retardation. *People v. Vasquez*, 84 P.3d 1019 (Colo. 2004).[10] The Supreme Court was not called upon to make any decision about the constitutionality of the death penalty, but the Court did note that the constitution places a substantive restriction upon legislative action and appeared to adopt the methodology followed in *Atkins*. *Vasquez*, 84 P.3d at 1022.

On April 11, 2013, the Colorado Court of Appeals issued an opinion setting aside a 112-year sentence for a person who was a juvenile at the time of his offenses. *People v. Rainer*, No. 10CA2414, 2013 WL 1490107 (Colo. App. April 11, 2013). The Court of Appeals set forth, and followed, the standards that the United States Supreme Court has articulated:

> The Eighth Amendment to the United States Constitution prohibits cruel and unusual punishment. *Graham,* —— U.S. at ——, 130 S.Ct. at 2021. 'To determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to 'the evolving standards of decency that mark the progress of a maturing

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[9] Executive Order D-2013-006, Death Sentence Reprieve (issued in case of Offender No. 89148) (May 22, 2013) (page 3).

[10] On remand, the defendant proved that he had mental retardation and the death penalty was barred.

> society.' ' *Id.* (quoting *Estelle v. Gamble,* 429 U.S. 97, 102 (1976)).

Id. at ¶ 40 (footnote omitted). The Court of Appeals adopted the *Roper-Atkins-Graham* methodology described above for evaluating the constitutionality of the challenged sentencing practice:

> the Court first considers 'objective indicia of society's standards, as expressed in legislative enactments and state practice' to determine whether there is a national consensus against the sentencing practice at issue. *Roper,* 543 U.S. at 563, 125 S.Ct. 1183. In this phase of the analysis, the Court has regularly relied on social sciences data and statistics to discern 'society's evolving standards of decency.' *Id.* at 560–77 (survey of rulings relying on sociological studies, behavioral sciences, and review of national and international practices). Next, guided by 'the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose,' the Court determines whether the punishment in question violates the Constitution. *Graham*, (3) U.S. at ——, 130 S.Ct. at 2022 (quoting *Kennedy,* 554 U.S. at 421, 128 S.Ct. 2641).

Id. at ¶ 43. Using this methodology, the Court of Appeals concluded that "*Graham*'s holding or its reasoning can and should be extended to apply to term-of-year sentences that result in a de facto life without parole sentence." *Id.*, at ¶59.

Thus, it seems certain that, when and if presented with the opportunity, the Colorado Supreme Court will (as it must) acknowledge that, in deciding questions under both the federal and state constitutions, courts have a significant role to play in not only determining contemporary standards of decency, but also in bringing the court's judgment to bear on the question of the constitutionality of the Colorado death penalty. In this motion, Mr. Holmes will next discuss both contemporary standards of decency, and this court's independent judgment.

The Colorado death penalty constitutes cruel and unusual punishment under objective indicia of evolving standards of decency.

The types of objective indicia of evolving standards that weigh heavily in the constitutional analysis include: (1) whether there has been a decline in the penalty in not only

legislative enactments, but also in the actual use of the penalty,[11] (2) if there has been a change in the use of a penalty, whether the change has been in a consistent direction,[12] (3) whether the use of a penalty or practice is rare or unusual, especially compared to its potential use,[13] (4) whether, regardless of the absolute numbers related to use of the sentencing practice, it is confined in practice, geographically or otherwise, to only a smaller subset of jurisdictions that permit the practice;[14] (5) international practice,[15] and (6) the risk of error and tolerance for that risk.[16] In *Roper*, the United States Supreme Court found "objective indicia of consensus in ... the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice." *Roper*, *supra*, at 567.

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[11] *Graham v. Florida*, 130 S.Ct. at 2023 (looking to not only the number of states that permit the sentencing practice but also to "actual sentencing practices," which "are an important part of the Court's inquiry into consensus.") *Ibid. (citing Enmund*, at 794-796; *Thompson*, at 831-832 (plurality opinion); *Atkins*, 536 U.S. at 316; *Roper*, 543 U.S. at 572; *Kennedy*, 128 S.Ct. at 2657-58).

[12] Citing *Atkins, supra*, at 315, the *Roper* Court noted the direction of the national change away from execution of juveniles and noted that no State reinstated the death penalty for juveniles even after a prior opinion of the Supreme Court had held it to be a constitutional sentencing practice. *Roper*, 543 U.S. at 566.

[13] *Graham v. Florida*, 130 S.Ct. at 2023 ("an examination of actual sentencing practices in jurisdictions where the sentence in question is permitted by statute discloses a consensus against its use"); *Miller v. Alabama*, 132 S.Ct. at 2472 n. 10 ("In assessing indicia of societal standards, *Graham* discussed 'actual sentencing practices' in addition to legislative enactments, noting how infrequently sentencers imposed the statutorily available penalty" (*citing Graham*, 130 S.Ct. at 2023)).

[14] *See Graham v. Florida*, 130 S.Ct. at 2024; *Roper v. Simmons*, 543 U.S. at 565.

[15] *See* citations, *infra,* this motion.

[16] The *Roper* Court noted that, while youth was supposed to be mitigating, the prosecutor had actually used it as an aggravating circumstance in his arguments to the jury. *Roper,* 543 U.S. at 558. Thus, there was a risk that the death penalty was being imposed notwithstanding statutory language providing for mitigating factors to be considered by the jury.

In deciding Mr. Holmes's challenge under the Colorado Constitution, it is appropriate for this Court to consider factors that apply within the State of Colorado. For example, in addition to considering national and international practice (which are relevant under the both the federal and state constitutions), this Court should consider intra-state issues such as regional practice within Colorado, the rate and direction of change within Colorado, and similar factors. For each of the factors identified below, on which Mr. Holmes will present evidence at a hearing on this motion, Mr. Holmes will provide the national/international perspective (both constitutions), as well as the more localized, Colorado perspective (state constitution).

1. The death penalty is in decline throughout the United States and in Colorado.

In measuring and assessing contemporary standards of decency, one important consideration is whether there is a decline in the use of a practice:

> Consistent change might counterbalance an otherwise weak demonstration of consensus. See *Atkins,* 536 U.S., at 315 ('It is not so much the number of these States that is significant, but the consistency of the direction of change'); *Roper,* 543 U.S., at 565 ('Impressive in *Atkins* was the rate of abolition of the death penalty for the mentally retarded').

Kennedy v. Louisiana, 554 U.S. 407, 431 (2008). Throughout the country and in Colorado, the death penalty is in steep and consistent decline.

Across the country, states are abandoning the death penalty. In 2004, the courts declared the death penalty to be unconstitutional in New York. In 2007, New Jersey repealed its death penalty law, with New Mexico following suit in 2009, Illinois in 2011, Connecticut in 2012, and Maryland in 2013. In several other states, there has been a de-facto moratorium on executions for many years.[17] In 2013, a majority of Nebraska lawmakers voted to repeal the death penalty, but the bill died because of a filibuster by opponents.[18]

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[17] A de-facto moratorium exists in Arkansas, California, Kentucky, North Carolina, and Oregon. DPIC, Colorado is considered to have a "moratorium." Oregon has a formal

Even the very architects of the modern capital scheme have given up. In 2010, the American Law Institute withdrew its support for the model capital sentencing statute it had drafted, citing "intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment."[19]

Colorado legislators came within one vote of repealing the death penalty in 2009, and within two committee votes of going to the House with a repeal measure in 2013. Support for the penalty is at an all-time low in the General Assembly. As Governor Hickenlooper recently acknowledged after extensive research into the subject, "the people of Colorado, and their elected representatives, are divided on the question of whether a punishment of death or a punishment of life in prison without the possibility of parole should be the maximum penalty for criminals in Colorado."[20]

The Supreme Court has indicated that jury verdicts are one way of determining the evolving standards of the community. However, "death qualification" of the jury in capital cases compromises the jury's role as the "voice of the community." Death-qualified juries echo the

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moratorium. *See* "Death Penalty in Flux," http://www.deathpenaltyinfo.org/death-penalty-flux (last visited August 29, 2013).

[18] K. O'Hanlon, "Death penalty bill dies for year," LINCOLN JOURNAL STAR (online edition) May 14, 2013 ("A bill to abolish Nebraska's death penalty perished for the year Tuesday when supporters were unable to muster enough votes to end a filibuster against it. After eight hours of first-round debate over two days, supporters of the bill (LB543) needed 33 votes to end the filibuster. The vote was 28 to 21. But it was the first time since 1979 that a majority of the 49 lawmakers appeared willing to vote for abolishing the death penalty.")

[19] Carol S. Streiker & Jordan M. Streiker, *Report to the ALI Concerning Capital Punishment, in* REPORT OF THE COUNCIL TO THE MEMBERSHIP OF THE AMERICAN LAW INSTITUTE ON THE MATTER OF THE DEATH PENALTY, annex B at 1 (2009), *available at* http://www.ali.org/doc/capital%20punishment_web.pdf

[20] Executive Order D-2013-006, Death Sentence Reprieve (issued in case of Offender No. 89148) (May 22, 2013) (page 1).

voice not of the community as a whole, but of the "death-qualified community," and their verdicts do so only when there has not been substantial instructional error or jury misconduct.

Around the country, new death sentences dropped to 78 in 2011, representing a dramatic 75% decline since 1996, when 315 individuals were sentenced to death. 2001 was the first time since 1976 that the country produced fewer than 100 death sentences in a single year. Executions also have steadily decreased nationwide, with 43 in 2011 and 46 in 2010, representing a 56% decline since 1999, when there were 98.[21] Colorado's jury verdicts for death have slowed to a standstill in the past 17 years, with only one such case in Arapahoe County – in which the two co-defendants were prosecuted and tried separately and each received a death sentence that has not yet been subject to appeal – and one execution since the 1960's. In Colorado, even more than the rest of the country, the actual sentencing practice of execution is "exceedingly rare." *See Graham v. Florida*, 130 S.Ct. at 2026.

Although the death penalty continues to exist in 32 states, it is actually carried out by only a small percentage of jurisdictions. For example, in 2012 only 9 states carried out an execution. From the time the death penalty was reinstated in 1976 to April 2013, almost 82% of the executions that have taken place have been in the South.

Around the country and in Colorado, the death penalty is practiced in only a handful of counties. This is true regardless of how one evaluates the incidences of use of the death penalty. Statistics on a recent county-by-county analysis of the death penalty, conducted by Professor Frank Baumgartner at University of North Carolina,[22] reveal:

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[21] R. Dieter, "The Slow Demise of the Death Penalty," Nov. 12, 2012 (published in numerous media outlets, e.g. Huffington Post Blog 11/12/2012, at http://www.huffingtonpost.com/richard-c-dieter/the-slow-demise-of-the-de_b_2101621.html). Dieter is the Executive Director of the Death Penalty Information Center in Washington, D.C.

- Less than 1% of the total number of counties in the country (which is less than 1% of the total number of counties in states with the death penalty) account for 30% of the executions in the U.S. since 1976.

- Only 10 counties in the country account for over 27% of all death row inmates as of Jan. 1, 2013, even though these 10 counties represent less than 1% of the counties in the U.S. and less than 1% of the counties with the death penalty in the U.S.

- This is true not only over time, but also in more recent experience. Death sentences in nine counties represent 35% of the sentences handed down in 2012. Again, these nine counties represent less than 1% of the counties in the U.S. and less than 1% of the counties with the death penalty in the U.S.

The Colorado experience reflects this same pattern. There has been only one execution – in a case out of Adams County. In May 2013, the only Colorado men under a death sentence are all from one county (Arapahoe County).

In order to evaluate the evolving standards of decency under the Colorado Constitution, this Court should consider the rate of the decline in the death penalty among Colorado jurors who are properly instructed.[23] And, as the United States Supreme Court has noted time and time again, "[i]t is not so much the number of these States [to have abandoned a challenged

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[22] Death Penalty Information Center Posted Professor Baumgartner's county analysis at: http://www.deathpenaltyinfo.org/executions-county

[23] *See* discussion, *infra.* The complexity of the procedures surrounding death prosecutions have led to reversals of no less than four jury death verdicts since 1979. In three, the jury instructions were so flawed that the errors were grounds for reversal. *People v. Duree*, 690 P.2d 165 (Colo. 1984); *People v. Drake*, 748 P.2d 1237 (Colo.1988); *People v. O'Neill*, 803 P.2d 164 (Colo. 1990). In the fourth case, jury misconduct was so severe that the death verdict had to be set aside. *People v. Harlan*, 109 P.3d 616 (Colo. 2005). When a sentencing jury is instructed so poorly, or engages in such severe misconduct, that reversal of a death sentence is required, surely that jury verdict cannot fairly be deemed to represent the "voice" of even the death-qualified community, so those cases are not used herein. To afford the Colorado statute every possible benefit, the two pre-appeal cases (*Owens* and *Ray*) are included here; it is worth noting, though, that very serious prosecutorial misconduct, jury misconduct and jury instructional errors having been alleged in each case, casting serious doubt that either of those death verdicts will survive appeal.

sentencing practice] that is significant, but the *consistency of the direction of change*." *Atkins,* 536 U.S., at 315, *quoted in Roper*, 543 U.S. at 565 (emphasis added).

The following chart summarizes the dramatic and consistent evolution of (even death-qualified) Colorado jurors away from the death penalty:[24]

[24] The chart is based in large part upon research presented by S. Hindson, H. Potter, and M. Radelet, *Race, Gender, Region and Death Sentencing in Colorado*, 1980-1999, U. of Colo. L. Rev. 77:549-594 (2006) (hereinafter "Hindson, et al."), supplemented with research on individual defendants at the website of the Colorado Department of Corrections.

Fig. 1. **Colorado Death Penalty Jury Sentencing Hearings,** 1980-2013[25]

Time Period	Cases	Counties with Jury Sentencing hearings	Jury Death Verdicts	Jury Rejected Death
Pre-*Davis* era (1980-May 1990)	**21**	**9**	**7**[26]	**14**[27]
Post-*Davis* era (May 1990-2013)	**11**	**6**	**4**[28]	**7**[29]

[25] The county of origin is used, notwithstanding a change of venue to a different county. The date of the sentencing hearing is used.

[26] A jury imposed a death sentence on Steven Morin (Jefferson County) on August 14, 1984; he did not appeal and he was executed in Texas the following year. The other jury death sentence was imposed on Johnnie Arguello (Weld County) on July 23, 1982; he died by suicide prior to an appeal. The other two jury death sentences were Frank Rodriguez (Denver), whose death sentence was imposed on December 18, 1986; he died on death row of natural causes prior to exhaustion of his final appeals. The fourth jury death sentence was imposed on Gary Davis (Adams County) on July 21, 1987, and he was executed about ten years later. There were three additional death verdicts, but in all of them, reversible jury instructional errors infected the sentencing proceedings such that they cannot be used as a legitimate "voice of the community." *People v. Duree*, *supra* (Weld County); *People v. Drake*, *supra* (Mesa County); *People v. O'Neill*, *supra* (Jefferson County).

[27] The jury rejections of death came in Adams County (Ricky Saathoff, sentenced on June 4, 1988; Marvin Walker, sentenced on May 19, 1988), Arapahoe County (Ross Thomas, sentenced on April 28, 1983), Denver County (Chris Rodriguez, sentenced on December 16, 1985; Michael Tenneson, sentenced on March 25, 1988; Timothy Vialpando, sentenced on June 17, 1988), Douglas County (Robert Williams, sentenced on Dec. 7, 1981), El Paso (Roger Cullen, September 21, 1980; Vernon Templeman, sentenced on February 2, 1984), Jefferson County (Richard Borrego and Anthony Lucero, both sentenced on July 7, 1987), Weld County (James Manners, sentenced on Sept. 30, 1981, Allen Andrade, sentenced on April 22, 2009); Yuma County (Charles Smith, sentenced on August 8, 1984).

[28] Nathan Dunlap (Arapahoe County) was sentenced on May 17, 1996; Sir Mario Owens and Robert Ray (also Arapahoe County), two codefendants whose cases are pending appeal, were sentenced in June 2008 and June 2009 respectively. Another defendant, Robert Harlan, was sentenced in 1995, but the death sentence was reversed because of jury misconduct, *People v. Harlan*, 109 P.3d 616 (Colo. 2005), thus depriving the verdict of the ability to serve as the legitimate "voice of the community."

[29] The jury verdicts rejecting death were in Adams County (Allen Thomas, sentenced on June 7, 1993); Arapahoe County (Dante Owens, sentenced on March 5, 2004); Denver (Kevin Fears, sentenced on April 15, 1993); El Paso County (Frank Orona, sentenced on Dec. 10, 1990); Jefferson County (Albert Petrosky, who died post-verdict and pre-sentence, and Robert Riggan, sentenced on April 16, 1999); and Lincoln County (David Bueno, sentenced on April 22, 2008).

The first relevant time period is from about 1980, when death penalty prosecutions resumed, until the Colorado Supreme Court's decision in *People v. Davis*, 794 P.2d 159 (Colo. May 14, 1990),[30] in which the Court rejected out of hand a challenge to the constitutionality of the penalty. During this initial period, 9 Colorado counties participated in 21 death penalty jury sentencing proceedings spread out around 9 different judicial districts. Even though the death-qualification process excluded many Coloradans from juries, it is clear that many Coloradans were involved in administration of the death penalty in the State.

The next period of time for comparison purposes comes after issuance of *People v. Davis* in May 1990. During this second period of time, death penalty sentencing shrunk to about half of its former scope. Whereas there were 21 death penalty jury sentencing hearings in the decade 1980-1990, there have been only 11 since then.[31] Instead of involvement of jurors from 9 different Colorado counties in the previous decade, only 6 Colorado counties have held jury sentencing hearings in the post-*Davis* era. As compared to 7 jury death verdicts in the preceding period, in the post-*Davis* jury era, Colorado juries returned only 4 death sentences.[32]

Thus, viewed through any lens – number of capital jury sentencing proceedings, counties participating in jury sentencing proceedings, or number of jury death verdicts -- Colorado has dramatically constricted the size and scope of jury capital sentencing proceedings. In fact, in the

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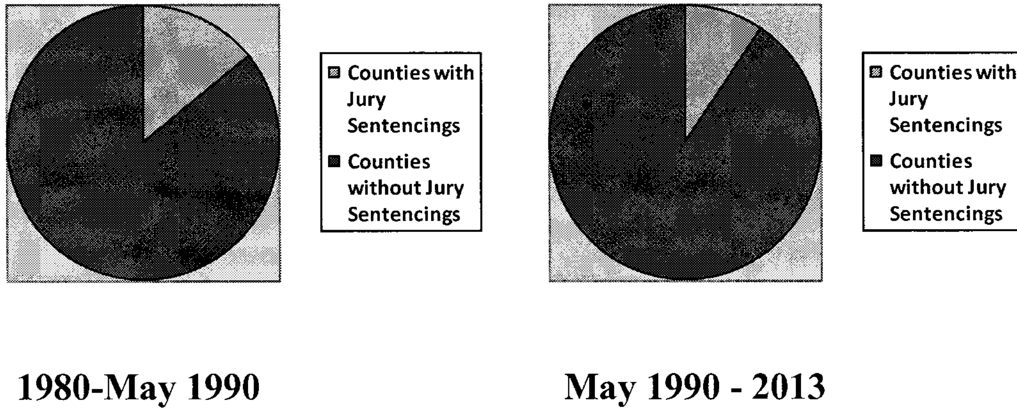
[30] Two weeks later, the Colorado Supreme Court decided *People v. Frank Rodriguez*, 794 P.2d 965 (Colo. May 29, 1990). However, the Court did not decide the constitutionality of the death penalty, but ruled only on particular instructions, evidence, and procedures used.

[31] There were 8 judge death penalty sentencing hearings during Colorado's judge-sentencing era (4 death verdicts, 4 LWOP verdicts). Because these are judge – not jury – verdicts, though, they tell us nothing about the evolving standards of decency among death-qualified juries. Judges were split on the imposition of the penalty and its rejection (4-4), but all of the death sentences were reversed because they violated *Ring v. Arizona*.

past decade, jurors in only two Colorado counties – both of which are contained in a single Judicial District – were involved in death penalty sentencing proceedings.

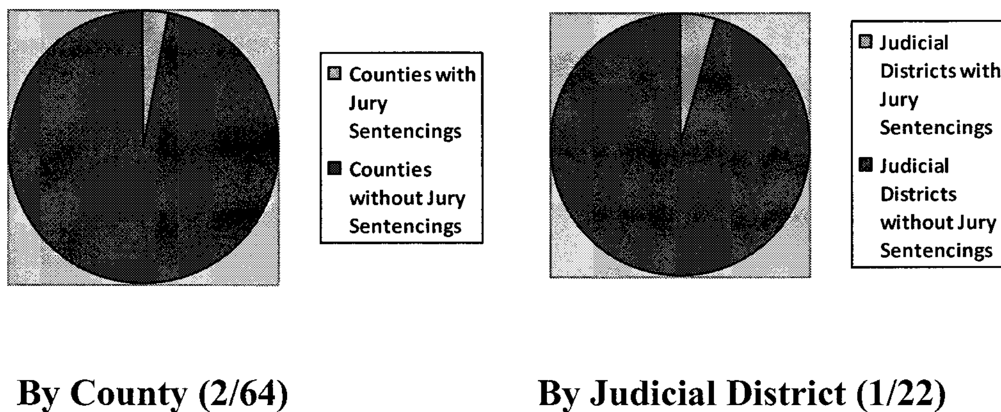
Fig. 2 - Colorado Death Penalty in Decline, 1980-2013
(community involvement in sentencing juries - counties)



1980-May 1990 **May 1990 - 2013**

In the past ten years, the indicia are even more stark: Colorado juries have been involved in jury sentencings in only 2 counties out of 64, in only one judicial district out of 22:

Fig. 3 - Colorado Death Penalty in Decline, 2003-2013
(community involvement in sentencing juries – counties and judicial districts)



By County (2/64) **By Judicial District (1/22)**

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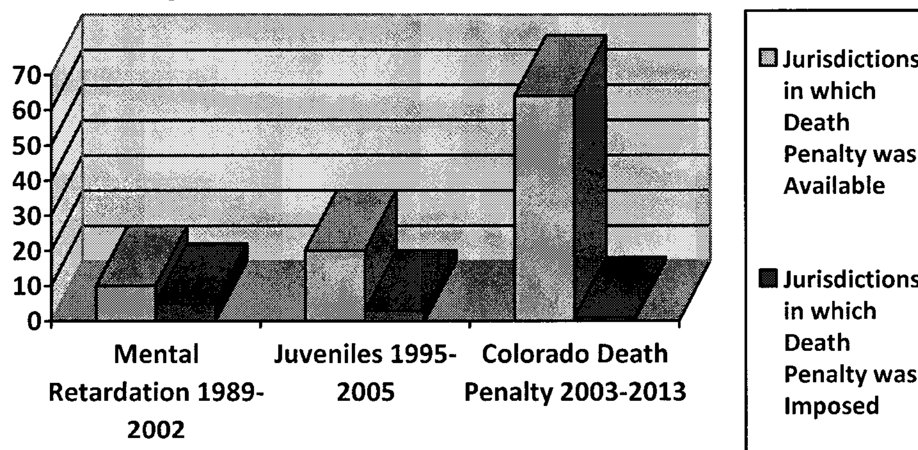
[32] As noted, *supra*, reversals based on substantial jury errors of constitutional magnitude can hardly be relied upon as the "legitimate voice of the community" as expressed through jury verdicts.

Just as in *Roper v. Simmons*, in which the Supreme Court looked at actual sentencing practices to identify the jurisdictions that did, in fact, execute juveniles, this Court must undertake the same analysis with respect to Colorado counties and judicial districts. In *Roper,* even though there were at the time twenty states without a formal prohibition on executing juveniles, in practice, in the previous ten years, only three states had done so. 543 U.S. at 565. In Colorado, even though the death penalty is available as a punishment in all of Colorado's 21 judicial districts and 64 counties, in the past ten years only one county (in a single judicial district) has even entered a death sentence and even then, in a single case involving two co-defendants. Viewed through the lens of the Colorado State Constitution, then, this penalty is even more unusual than were the penalties at issue in *Atkins, Roper, Graham, and Miller*. This is shown in the next figure.

Fig. 4 – Comparison of Colorado's Death Penalty Imposition Rate to Rates for Two Other Death-Ineligible Classes of Defendants: Persons Having Mental Retardation (*Atkins*) and Juveniles (*Roper*)



In *Atkins*, the Supreme Court found that between 1989 and 2002, 5 of the 10 states in which the death penalty was an eligible sanction (for defendants with mental retardation) imposed death on such defendants. 536 U.S. at 313-316. When *Atkins* was issued, 31 states

allowed the death penalty and 21 states prohibited the death penalty in cases of defendants with mental retardation. In *Roper v. Simmons*, it was important to the Supreme Court that, even though there were at the time 20 states without a formal prohibition on executing juveniles, in practice, in the previous ten years, only three states had done so. *Roper,* 543 U.S. at 565. This methodology was also used in *Graham v. Florida*, in which the Court noted that, even though the sentencing practice at issue – LWOP for persons under the age of 18 at the time of the offense – was legally allowed in 37 states and the District of Columbia, such offenders were actually serving such a sentence in only 11 states. *See Graham*, 130 S. Ct. at 2025 (making a comparison between actual imposition of the penalty "in proportion to the opportunities for its imposition" and concluding that, under that standard, the penalty "is as rare as other sentencing practices found to be cruel and unusual.").

The State may take the position that the use of the death penalty statute should be measured by the number of prosecutions, not the number of proceedings that involve members of the Colorado community serving as jurors. Mr. Holmes submits that this does not most accurately reflect evolving and contemporary community values. However, even if evaluated in terms of death penalty prosecutions, there is clear evidence that the frequency of these prosecutions as well as their scope reflect a dramatic and consistent decline. After the Governor's decision to indefinitely forego executions, Colorado has a de facto moratorium and it is doubtful that any more executions will ever take place in this state.

As the then-District Attorney of Colorado Springs stated in 2008, when he announced that his office would not seek the death penalty against a defendant who pleaded guilty to killing Colorado Springs Police Officer Kenneth Jordan:

> History has shown that the death penalty is almost non-existent in Colorado. It is a legal option, but the practical application almost

never happens. If it is imposed by the jury, the chances of an appellate court overturning the conviction are high.[33]

Figure 5 demonstrates the jump in Colorado death penalty prosecutions that followed abolition of jury sentencing in 1995. Death penalty prosecutions dropped back down when Colorado returned to jury sentencing following the United States Supreme Court's decision in *Ring v. Arizona*:

Fig. 5 - Colorado Death Penalty Prosecutions, 1980-2013

Time Period	Formal death penalty prosecutions		
	Cases	Counties	Judicial Districts
Pre-*Davis* era (1980-May 1990)	65	23	14
Post-*Davis* era (May 1990-July 1, 1995)[34]	20	9	8
Judge Sentencing era (July 1995-July 2002)	26	9	7
Post-Judge era (2003-2013)	12	7	5

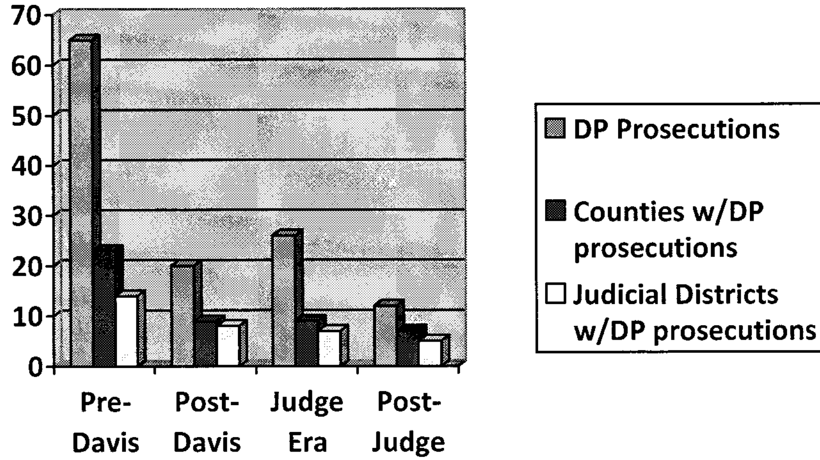
Thus, other than a temporary and predictable "bump" in death prosecutions upon the advent of the three-judge panel sentencing scheme – prosecutors made it very clear in lobbying for the judge sentencing scheme that they had no confidence they could get death penalty verdicts from juries in sufficient numbers to make it a reliable system[35] -- death prosecutions have consistently been in a dramatic freefall for about the past quarter century, as shown here:

[33] Statement of District Attorney John R. Newsome, reprinted in Fox21, Colorado Connection, "Marco Lee sentenced to life without parole or appeal," December 19, 2008.

[34] Unlike in Figures 1, 2 and 3, the effective dates of the legislative enactments and the date of prosecution, rather than the date of the sentencing hearings, define the date ranges. That is because Figure 5 shows prosecutions – not community involvement as measured through jury sentencing hearings.

[35] See e.g. Testimony of then-Chief Appellate Deputy District Attorney for the Second Judicial District, Nathan Ben Coates, before the House Judiciary Committee (March 2, 1995)

Fig. 6 - Colorado Death Penalty in Decline, 1980-2013
(as measured by death penalty prosecutions)

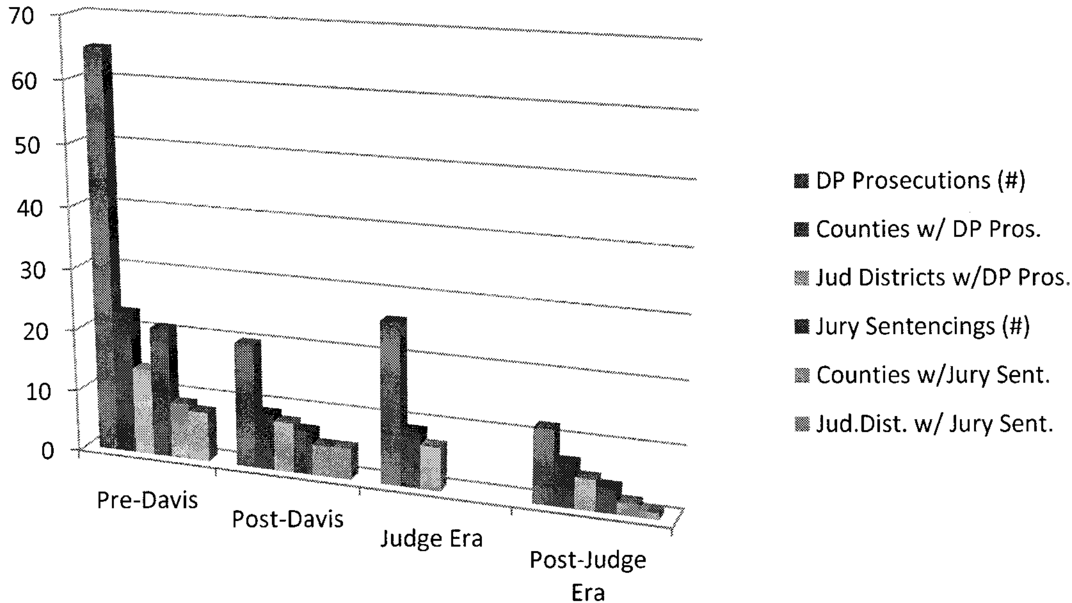


The result is the same, whether one examines the prosecution's attempts to use the death penalty process or the number of times it was able to actually do so by holding of a jury sentencing hearing.

Figure 7 (below) illustrates the decline when all of these measures are presented:

(testifying that, under the jury sentencing system, the death penalty was not viable and, because of its infrequency, it was merely "a lightning shocker, a strike out of the blue.")

Fig. 7 - Colorado Death Penalty in Decline, 1980-2013
(as measured by death penalty prosecutions and jury sentencing proceedings held)



The death penalty is in steep and consistent decline in Colorado. Thus, even if this Court restricts its view to the Colorado Constitution, it should strike the death penalty as inconsistent with the evolving standards of decency that mark the progress of a maturing society.

2. The death penalty is rejected by almost every democracy in the world.

The Supreme Court has taken into consideration international movement away from death penalty practices -- not as dispositive or controlling, but as an indication of whether the United States (and/or Colorado) is adhering to a sentencing practice that is increasingly rejected among other democratic, non-totalitarian regimes. As the Supreme Court explained in *Graham v. Florida*:

> The judgments of other nations and the international community are not dispositive as to the meaning of the Eighth Amendment. But ' '[t]he climate of international opinion concerning the acceptability of a particular punishment' ' is also ' 'not irrelevant.' ' *Enmund*, 458 U.S., at 796, n. 22. The Court has looked beyond our Nation's borders for support for its independent conclusion that a particular punishment is cruel and unusual. *See, e.g., Roper*,

> 543 U.S., at 575–578; *Atkins, supra*, at 317–318, n. 21; *Thompson [v. Oklahoma,* 487 U.S. 815], 830 [1988] (plurality opinion); *Enmund, supra*, at 796–797, n. 22; *Coker*, 433 U.S., at 596, n. 10 (plurality opinion); *Trop*, 356 U.S., at 102–103 (plurality opinion). Today we continue that longstanding practice in noting the global consensus against the sentencing practice in question.

Graham v. Florida, __ U.S. at __, 130 S.Ct. at 2033. As the Court explained, "the opinion of the world community, while not controlling our outcome, provide[s] respected and significant confirmation for our own conclusions." *Id.*

As recognized in *Roper*, 543 U.S. at 575, "at least from the time of the Court's decision in *Trop,* the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments.' [*Trop v. Dulles*,] 356 U.S., at 102-103 (plurality opinion) ("The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime"). This methodology continues today.

International law and practice played a role in both of the Court's recent decisions to limit application of the death penalty. In *Atkins*, the Court looked to the overwhelming disapproval of the "world community" to sentencing to death those offenders who have mental retardation. *Atkins v. Virginia,* 536 U.S. 304, 316 n. 21 (2002). The Court explained: "Although these factors are by no means dispositive, their consistency with the legislative evidence lends further support to our conclusion that there is a consensus among those who have addressed the issue." *Id.* In *Roper v. Simmons*, the Supreme Court also made a point of referencing the international treatment of juvenile offenders: "It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty." *Roper*, at 578; *see also Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977) (in holding death sentence for rape conviction to be Eighth Amendment violation, stating that "[it] is not irrelevant that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue."); *Enmund v. Florida*, 458 U.S. 782, 796 n.22

(1982) (as to felony murder, stating that "the climate of international opinion concerning the acceptability of a particular punishment" is an additional consideration that is "not irrelevant"); *Thompson v. Oklahoma,* 487 U.S. 815, 830-831, and n. 31 (1988) (plurality opinion) (noting the abolition of the juvenile death penalty 'by other nations that share our Anglo-American heritage, and by the leading members of the Western European community,' and observing that '[w]e have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual'). States have also considered international law and the practices of other countries in deciding issues raised under state constitutions.[36] Thus, international consensus on the question of whether the death penalty is cruel and unusual punishment is important, because "the overwhelming weight of international opinion against" the penalty "provide[s] respected and significant confirmation for our own conclusions." *Roper*, at 572.

[36] *See, e.g., A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000) (Massachusetts Supreme Court referred to Israeli Supreme Court case in construing privacy claims at issue in in vitro fertilization contract); *Boehm v. Superior Court,* 223 Cal. Rptr. 716 (Cal. Ct. App. 1986) (California Court of Appeals relied on Universal Declaration of Human Rights to interpret state statutory duty to provide assistance benefits to poor); *Sterling v. Cupp*, 290 Or. 611, 625 (1981) (Oregon Supreme Court referred to international instruments in construing the guarantee against "unnecessary rigor" in the state constitution); *Santa Barbara v. Adamson,* 610 P.2d 436, 439 (1980) (California Supreme Court cited international law in interpreting the right to privacy under the state constitution); *Pauley v. Kelley*, 255 S.E.2d 859 (W.Va. 1979) (West Virginia Supreme Court cited the Universal Declaration of Human Rights in holding education to be a fundamental right under the state constitution); *New Hampshire v. Robert H.,* 393 A.2d 1387, 1390 (N.H. 1978) (New Hampshire Supreme Court cited International Covenant on Civil and Political Rights and International Covenant on Economic, Social, and Cultural Rights to interpret parental rights under state constitution). *See generally*, The Honorable Margaret H. Marshall, "*Wise Parents Do Not Hesitate to Learn from Their Children": Interpreting State Constitutions in an Age of Global Jurisprudence*, 79 N.Y.U. L. REV. 1633 (2004); Anna Maria Gabrielidis, *Human Rights Begin at Home: A Policy Analysis of Litigating International Human Rights in U.S. State Courts*, 12 Buff. Hum. Rts. L. Rev. 139, 169 (2006).

Since 1975, the United Nations has issued reports every five years on global developments in the law and practice of the death penalty.[37] According to the 2010 report, more than two-thirds of the countries of the world have abolished the death penalty.[38] As of 2010, 95 countries had abolished the death penalty for all crimes while eight had abolished it for ordinary crimes. *Id.* At least 35 additional countries have abolished the death penalty in practice. *Id.*

The United States stands virtually alone among democratic governments in use of the death penalty. According to data collected by Amnesty International:[39]

Countries with the Most Confirmed Executions in 2012:

1. China (thousands)
2. Iran (314+)
3. Iraq (129+)
4. Saudi Arabia (79+)
5. United States (43)
6. Yemen (28)
7. Sudan (19+)

Countries with the Most Confirmed Executions in 2011:

1. China (thousands)
2. Iran (360+)
3. Saudi Arabia (82+)
4. Iraq (68+)
5. United States (43)
6. Yemen (41+)
7. North Korea (30+)

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[37] Report of the Secretary-General, Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty, E/2010/10 (18 Dec. 2009), at 5.

[38] *Id.* at 7 [hereinafter ECOSOC Report].

[39] Amnesty International, Death Sentences and Executions 2012 (AI Publications, 2013), at 9 (hereinafter "AI, 2012 Report"). "Official figures on the use of the death penalty were available only in a small number of countries. In Belarus, China, Mongolia, and Viet Nam, data …continued to be classified as a state secret. Little or no information was available in...Belize, Egypt, Eritrea, Libya, Malaysia, North Korea, Suriname, and Syria…." *Id.* Counsel compiled these lists from Amnesty International reports from 2008 through 2012, (available in individual Amnesty International reports posted at http://www.deathpenaltyinfo.org/death-penalty-international-perspective).

Countries with the Most Confirmed Executions in 2010:

1. China (thousands)
2. Iran (252+)
3. North Korea (60+)
4. Yemen (53+)
5. United States (46)
6. Saudi Arabia (27+)
7. Libya (18+)

Countries with the Most Confirmed Executions in 2009:

1. China (thousands)
2. Iran (388+)
3. Iraq (120+)
4. Saudi Arabia (69+)
5. United States (52)
6. Yemen (30+)
7. Sudan and Viet Nam (at least 9 each)

Countries with the Most Confirmed Executions in 2008:

1. China (thousands)
2. Iran (346)
3. Saudi Arabia (102+)
4. United States (37)
5. Pakistan (36)
6. Iraq (34)
7. Vietnam (at least 19)

On December 20, 2012, the plenary session of the United Nations General Assembly adopted a fourth resolution on a moratorium on the use of the death penalty. Resolution 67/176, which was adopted by 111 votes in favor and 41 against, reaffirms previous calls for a moratorium that were passed in 2007, 2008, and 2010.[40] More UN member states supported that resolution than at the previous vote in 2010.[41]

The international consensus, at least among democracies, is overwhelming: The United States – which is the only country to have carried out executions in the Americas in 2012 – and Belarus – the only such country in all of Europe or Central Asia last year – are the only two of the 56-member states of the Organization for Security and Cooperation in Europe to have carried

[40] AI, 2012 Report, at 8.

out executions.[42] In 2012, only 5 of the 54 member states of the African Union were known to have carried out judicial executions. No executions were recorded in all of the 10 member states of the Association of Southeast Asian Nations. This list goes on and on, and each year there are fewer executions and more abolitionist states.

The United States Supreme Court "has treated the laws and practices of other nations and international agreements as relevant to the Eighth Amendment not because those norms are binding or controlling but because the judgment of the world's nations that a particular sentencing practice is inconsistent with basic principles of decency demonstrates that the Court's rationale has respected reasoning to support it." *Graham v. Florida,* at __, 130 S.Ct. at 2034. This Court should do no less.

This Court should find that the Colorado death penalty (1) constitutes cruel and unusual punishment because the penalty is excessive in relation to the penological justifications offered for it, and (2) violates the due process clause of the United States Constitution, and the right to life and due process clauses of the Colorado Constitution, because it extinguishes the most fundamental of rights without a compelling governmental interest and a means narrowly tailored to attaining that interest.

Article III of the State and U.S. Constitutions give the judiciary a fundamental role in barring cruel and unusual punishments, and those that violate the substantive due process clause, by conducting what the Supreme Court calls "the judicial exercise of independent judgment:"

> Community consensus, while 'entitled to great weight,' is not itself determinative of whether a punishment is cruel and unusual. *Kennedy*, 554 U.S., at ___, 128 S.Ct., at 2658. In accordance with the constitutional design, 'the task of interpreting the Eighth Amendment remains [the Court's] responsibility.' *Roper*, 543 U.S., at 575. The judicial exercise of independent judgment requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question. [citations omitted] In this inquiry the Court also considers whether the challenged statutory practice serves legitimate penological goals. *Kennedy, supra*, at ___, 128 S.Ct., at 2661-65; *Roper, supra*, at 572; *Atkins, supra*, at 318-320.

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[41] *Id.*

[42] *Id.*, p. 7.

Graham v. Florida, 130 S.Ct. at 2026.

In *Gregg v. Georgia*, 428 U.S. 153 (1976), the Supreme Court explained that unless a criminal sanction serves a legitimate penological function, it constitutes "gratuitous infliction of suffering" in violation of the Eighth Amendment. The Court then identified three societal purposes for death as a sanction: deterrence, incapacitation, and retribution. *See id.*, at 183, and n. 28 (joint opinion of Stewart, Powell, and Stevens, JJ.). At a hearing on this motion, Mr. Holmes will prove that the Colorado death penalty fails to satisfy any of these objectives, and, in fact, thwarts them.[43]

(1) The death penalty does not deter murder.

In the past, the few governments that use the death penalty offered as a reason that the penalty deters murders. However, in reality, there is no evidence whatsoever that the death penalty has any more impact on the homicide rate than does a sentence of life imprisonment without parole. The Government cannot prove that the Colorado death penalty statute, on its face or in practice, positively impacts the rate of aggravated murder, or even the rate of murder in general.

Just last year, the National Research Council of the National Academy of Sciences reported:

> research to date on the effect of capital punishment on homicide is not informative about whether capital punishment decreases, increases, or has no effect on homicide rates. Therefore, the committee recommends that these studies not be used to inform deliberations requiring judgments about the effect of the death penalty on homicide. Consequently, claims that research demonstrates that capital punishment decreases or increases the homicide rate by a specified amount or has no effect on the

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[43] Because counsel do not know yet what, if any, penological justifications the prosecution will claim to be furthered by the death penalty, counsel, of course, reserve the right to respond to the prosecution's claims and offer the following in anticipation of the types of claims the prosecution might make.

> homicide rate should not influence policy judgments about capital punishment.[44]

Even if, hypothetically, a death penalty law could influence the rate of homicides, in the real world there are too many variables that prevent any cause-and-effect linkage. An example of such a variable is the fact that death sentences often do not result in an execution. The NRC Report explains:

> When a defendant is convicted and sentenced to death, theoretically what follows is an execution. An execution, however, does not follow a death sentence very swiftly or at all for a variety of reasons. The Bureau of Justice Statistics reports that only 15 percent of people sentenced to death between 1973 and 2009 had been executed by the end of 2009. Of these cases, 46 percent ended in alternate ways, including reversed convictions, commuted sentences, or the death of the inmate.[45]

Justice Brennan had foretold as much in his concurring opinion in *Furman v. Georgia:*

> [T]his [deterrence] argument cannot be appraised in the abstract. We are not presented with the theoretical question whether under any imaginable circumstances the threat of death might be a greater deterrent to the commission of capital crimes than the threat of imprisonment. We are concerned with the practice of punishing criminals by death as it exists in the United States today. Proponents of this argument necessarily admit that its validity depends upon the existence of a system in which the punishment of death is invariably and swiftly imposed.
>
> Our system, of course, satisfies neither condition. A rational person contemplating a murder or rape is confronted, not with the certainty of a speedy death, but with the slightest possibility that he will be executed in the distant future. The risk of death is remote and improbable; in contrast, the risk of longterm imprisonment is near and great. In short, whatever the speculative validity of the assumption that the threat of death is a superior deterrent, there is no reason to believe that as currently administered the punishment of death is necessary to deter the commission of capital crimes. Whatever might be the case were all or substantially all eligible

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[44] Committee on Deterrence and the Death Penalty, D. Nagin and J. Peppers, editors, Committee on Law and Justice, Division on Behavioral and Social Sciences and Education of the National Research Council, DETERRENCE AND THE DEATH PENALTY (National Academies Press, 2012), at 2 (hereinafter "NRC Report").

[45] NRC Report, at 30.

> criminals quickly put to death, unverifiable possibilities are an insufficient basis upon which to conclude that the threat of death today has any greater deterrent efficacy than the threat of imprisonment.

Furman v. Georgia, 408 U.S. 238, 301-302 (1972) (Brennan, J., concurring). In 1972, Justice Brennan and the other Justices did not have the benefit of the type of research that is available today. Nor did they have the benefit of four decades' worth of information about Colorado's experiment with the death penalty. It is precisely because of this research and experience that the death penalty is being abandoned throughout the country, and in Colorado. Colorado has reached the tipping point beyond which it cannot be shown that the deterrence rationale provides the compelling governmental interest required to maintain a death penalty system in Colorado.

Nor does forty years of deterrence research support the proposition – which the Government must also prove to be true – that maintenance of the death penalty system is the least intrusive mechanism available to achieve any legitimate governmental interest in deterring murders. In other words, to the extent that the behavior of would-be murderers is impacted at all by Colorado criminal law, the mandatory sentence of life imprisonment without parole ("LWOP") is just as powerful an incentive. As the NRC concluded, however, there is no data that can prove the incremental impact of a potential sentence of death, over a potential sentence of LWOP:

> After all, as a practical question of public policy, the key question is not whether a hypothetical capital punishment regime in which execution is the only available sanction for murder would deter some offenders. Rather, it is whether a plausible capital punishment regime will have a *meaningful incremental effect* on homicide rates in the United States when added to a specific program of lesser sanctions. Hence, state-level data on alternative punishments are necessary, most specifically, the prison sentence lengths for murders that might also be candidates for capital punishment.
>
> Such data do not exist.

NRC Report, at 36 (emphasis added).

The opinions of leading criminologists and law enforcement officials are overwhelmingly consistent with the view that the death penalty has no proven deterrent value. A 2009 study by Professor Michael Radelet and Traci Lacock of the University of Colorado found that 88% of the nation's leading criminologists do not believe the death penalty is an effective deterrent to crime. The study, *Do Executions Lower Homicide Rates? The Views of Leading Criminologists,* published in the Journal of Criminal Law and Criminology, concluded, "There is overwhelming consensus among America's top criminologists that the empirical research conducted on the deterrence question fails to support the threat or use of the death penalty."[46] Overall, 94% agreed that there was little empirical evidence to support the deterrent effect of the death penalty. Ninety percent (90%) said the death penalty had little effect overall on the committing of murder; 91.6% said that increasing the frequency of executions would not add a deterrent effect; and 87.6% said that speeding up executions would not make it into a deterrent. In fact, by siphoning off precious resources that could be used to prevent murders before they happen, the death penalty system is more likely to contribute to crime rates than it is to lower them.

In order to justify the death penalty based on deterrence, the Government would need to demonstrate that states that have a death penalty have a reduced murder rate; in fact, U.S. Census Bureau and FBI statistics demonstrate exactly the opposite: the murder rate in non-death penalty states has remained consistently lower than the rate in states with the death penalty, and the gap has grown since 1990.[47] For 2008, the average murder rate of death penalty states was 5.2 per 100,000 people, compared to 3.3 per 100,000 in states with no death penalty was 3.3 per 100,000

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[46] *Id.*, 99 J. Crim. Law & Criminology 489 (2009). A previous study in 1996 had come to similar conclusions. Michael L. Radelet & Ronald L. Akers, *Deterrence and the Death Penalty: The Views of the Experts*, 87 J. CRIM. L. & CRIMINOLOGY 1, 10 (1996).

[47] *See* http://www.deathpenaltyinfo.org/deterrence-states-without-death-penalty-have-had-consistently-lower-murder-rates.

people.[48] The same is true in Colorado, as stated most recently by the District Attorney for the 20th Judicial District, who testified that "[i]n the nearly 140 years since statehood, Boulder County has never had a death sentence handed down, and yet Boulder County has one of the lowest crime rates and homicide rates of any comparable county in the United States."[49] There is simply no support for the debunked deterrence theory. It is not a sound penological justification, and, thus, cannot serve as the compelling governmental interest that the Government in order to maintain the death penalty in Colorado.

(2) Incapacitation cannot justify killing the offender, because recidivism in prison can be managed through a sentence of life imprisonment without parole and sound prison classification, management, and treatment of offenders.

Sometimes, the government seeks to justify maintenance of a death penalty system because execution of an offender ensures that she or he will never kill again. This theory presupposes at least two falsehoods: it presumes that executions take place (and take place soon enough to in fact incapacitate an offender through death) and it presumes that the Department of Corrections has no other lesser means of incapacitating offenders. Especially in Colorado, neither of these things is true.

Because (unless the defendant himself "volunteers" for a speedier execution by dropping his appeals) any execution takes place decades after the murder, a defendant who is sentenced to die does, in fact, serve a life sentence. Frank Rodriguez, for instance, had served a life sentence by the time he died of natural causes prior to his execution. With an average life expectancy of

[48] http://www.deathpenaltyinfo.org/murder-rates-nationally-and-state.

[49] Stan Garnett, District Attorney for the 20th Judicial District, Testimony before the Colorado House Judiciary Committee on House Bill 13-1264 (March 19, 2013), p. 107.

between about 64 and 72 years old for an average prisoner serving a life sentence,[50] and some 20-40 years that seem to be required to accomplish a "successful" execution, the burden on the government is high: the government must show a compelling governmental interest in any specific incapacitation only in between the time that an execution will actually take place, and the prisoner's life expectancy. Ironically, the younger a defendant at the time of the offense, the more likely he is to be executed before he dies of natural causes, thus reserving the so-called "ultimate punishment" for the young.[51] Youth is supposed to be regarded as mitigating.[52] There is no penological purpose for reserving the sentence of execution for the youngest offenders, while sparing older offenders by virtue of the fact that they are most likely to die of natural causes in the decades following imposition of a death sentence.

Far from representing a compelling governmental interest, the execution of a prisoner after decades of delay provides almost zero incapacitative benefit beyond that provided by LWOP. And it raises another constitutional quagmire – i.e., the potential that these lengthy incarceration periods prior to execution are themselves unconstitutional. In *Thompson v. McNeil*, Justice Stevens expressed the view that "executing defendants after such delays is

[50] The Court of Appeals has recently noted statistics from the Center for Disease Control to the effect that an incarcerated defendant had a life expectancy of between 63.8 and 72 years. *People v. Rainer*, 10CA2414, 2013 WL 1490107 (Colo. App. April 11, 2013), at ¶36.

[51] The term "ultimate punishment" is a misnomer. In Europe, North and South America, and virtually every other democracy in the world, and as a matter of law or practice in most states and almost every judicial district in Colorado, the "ultimate punishment" for murder is life imprisonment and no credible argument can be made that all those defendants are not receiving the "ultimate punishment" for their crimes. Making such an argument is as ludicrous as would be the claim that justice was not being served in any of those other jurisdictions all over Colorado and the globe.

[52] Section 18-1.3-1201(4), C.R.S. *See Roper v. Simmons, supra; Miller v. Alabama, supra.*

unacceptably cruel...." *Id.*, 556 U.S. ----, ----, 129 S.Ct. 1299, 1300 (2009). He and Justice Breyer issued the following statement:

> [T]he delay itself subjects death row inmates to decades of especially severe, dehumanizing conditions of confinement. *See [Thompson v. McNeil*, 556 U.S. ----, ----, 129 S.Ct. 1299, 1299-1300 (2009)](STEVENS, J., respecting denial of *certiorari*); [*Lackey v. Texas*, 514 U.S. 1045, 1046-1047 (1995)] (STEVENS, J., statement respecting denial of *certiorari*) *Lackey*, 514 U.S., at 1046-1047 (same); *see also Furman v. Georgia,* 408 U.S. 238, 288 (1972) (Brennan, J., concurring) ('[T]he prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death.'). Second, 'delaying an execution does not further public purposes of retribution and deterrence but only diminishes whatever possible benefit society might receive from petitioner's death.' *Thompson*, 556 U.S., at ----, 129 S.Ct., at 1300 (STEVENS, J., respecting denial of certiorari). In other words, the penological justifications for the death penalty diminish as the delay lengthens. *Id.*, at 1300; *Lackey,* 514 U.S., at 1046-1047.

Johnson v. Bredesen, 130 S. Ct. 541, 543 (2009) (Stevens, J., joined by Breyer, J., statement respecting denial of *certiorari*).

When this Court evaluates whether there is a compelling governmental interest and a means suitably and narrowly tailored toward achieving it, this Court must agree that sound prison management can reduce or literally eliminate the risk that any particular offender will kill again while in prison. The incremental incapacitative "benefit" of an execution over a sentence of life imprisonment without parole is nil, and is certainly not a compelling governmental interest sufficient to uphold the constitutionality of Colorado's death penalty statute.

(3) Retribution is not a sufficient justification because alternative and sufficient penalties exist, and because the retribution rationale is nullified by the risk of error.

Proponents of execution have never rested their sole justification upon the penological justification of retribution. Thus, the Supreme Court has never ruled that retribution alone is a sufficient governmental interest that can warrant maintenance of a death penalty system in a state

which has the alternative penalty of life imprisonment without any chance of parole. This Court writes on a clean slate.

The notion of "retribution" is fundamentally a moral concept, not a utilitarian principle like deterrence or incapacitation. To assess a claim that "retribution" is a sufficient societal purpose or a compelling governmental interest, it is vital that this Court begin by isolating the question.

The retribution question is not whether an offender deserves the worst possible punishment. That is a circular statement. If the "worst possible punishment" were LWOP, retributive goals would be fully met by imposition of that sentence instead of death. This Court must ask a much more specific question than simply whether or not murder warrants the worst punishment as a matter of retribution.

Rather, the questions are to what extent execution of an individual, above and beyond the punishment inflicted by life imprisonment, serves the retributive principle and whether that incremental retributive value or purpose is compelling enough to save the statute.

As Justice Stevens noted in his concurring opinion in *Baze v. Rees*, the retributive rationale is satisfied only marginally by modern executions, in which the State must meticulously ensure that the condemned suffers no pain at the moment of death:

> This trend [to protect the inmate from enduring any punishment that is comparable to the suffering inflicted on his victim], while appropriate and required by the Eighth Amendment's prohibition on cruel and unusual punishment, actually undermines the very premise on which public approval of the retribution rationale is based.

Baze v. Rees, 553 U.S. 35, 81 (2008) (Stevens, J., concurring). The "thirst for vengeance," *id.*, at 80, that lies at the core of the retributive rationale is not quenched by modern executions, which deny the "intuitive sense of equivalence" that drives the retribution rationale in the first place.

Id., at 81, *quoting* Kaufman–Osborn, *Regulating Death: Capital Punishment and the Late Liberal State*, 111 Yale L.J. 681, 704 (2001).

The retributive rationale evaporates in the face of the reality that the penalty will inevitably cause the execution of innocent individuals. Unlike the deterrence rationale, which does not depend as heavily upon the guilt of the person executed,[53] execution of an innocent person wholly defeats the government's retribution purposes.

In deciding in 2002 that it is no longer constitutional to execute people who have mental retardation, the Supreme Court wrote that "we cannot ignore the fact that in recent years a disturbing number of inmates on death row have been exonerated." *Atkins*, 536 U.S. at 320 n. 25. "[G]iven the real risk of error in this class of cases, the irrevocable nature of the consequences is of decisive importance." *Baze v. Rees*, 553 U.S. 35, 85 (2008). There have been over 140 exonerations in 26 different States. Here in Colorado, in the case of Timothy Masters, the judicial system is still reeling with the revelation that Mr. Masters was convicted, sentenced to life imprisonment without parole, and later indisputably exonerated for the murder.

A study of capital cases from 1973 to 1995 reported that one of the two most common errors prompting the reversal of state convictions in which the defendant was sentenced to death was the improper failure of police or prosecutors to disclose "important evidence that the defendant was innocent or did not deserve to die." James S. Liebman, *et al., A Broken System: Error Rates in Capital Cases, 1973–1995* at ii (2000).

[53] The risk of execution of an innocent person might hypothetically be outweighed by the deterrent value of executions, because the theory is that executions prevent future crimes and while it is horrible that an innocent person is executed, the governmental purpose in deterrence could hypothetically be met by the execution of even an innocent person.

Serious errors appear to be common in capital cases. After analyzing more than 4500 appeals of capital cases, the same study found that "the overall rate of prejudicial error in the American capital punishment system was 68%." *Id.* at i. As the authors later wrote:

> For cases whose outcomes are known, an astonishing 82% of retried death row inmates turned out not to deserve the death penalty; 7% were not guilty. The process took nine years on average. Put simply, most death verdicts are too flawed to carry out, and most flawed ones are scrapped for good. One in 20 death row inmates is later found not guilty.

James Liebman, *et al.,* "Technical Errors Can Kill," *Nat'l L.J.,* Sept. 4, 2000, at A16. Societal intolerance for the errors and arbitrariness inherent in the penalty are further evidence that the penalty is outside the bounds of evolving standards of decency.

Another powerful counterbalance against the retribution rationale is the fact that murder victims' families are often compelled to suffer more, for markedly longer periods of time, and sacrifice their healing and lives for the thirst of the prosecution for death.

Imposition of the death penalty is rare, unusual, freakish, and inconsistently applied throughout the State of Colorado.

In *Furman*, justices regarded a death sentence rate of approximately 15-20% to be so infrequent that the Court was willing to presume arbitrariness and Justice White was willing to presume the death penalty served no penological purpose.[54] This Court has found (and the prosecution has conceded) a death sentence rate of about 0.50 %.

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[54] Justice White concluded that, "as the statutes before us are now administered, the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice;" that "the death penalty is exacted with great infrequency even for the most atrocious crimes," and that "there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." *Furman v. Georgia*, 408 U.S. 238, 313 (1972).

Colorado's death penalty statute is supposed to be the mechanism which ensures that society's evolving standards are observed with respect to the distinction between the most culpable murders and all the others, and in this respect, the statute has failed to do its job. The death penalty poses essentially no threat of execution in a jurisdiction with such a low death sentence rate. Colorado's death penalty, therefore, can serve no deterrent or other penological purpose.

Over more than the past decade, there are so few capital sentencing jury proceedings, confined to essentially one jurisdiction – the Eighteenth Judicial District – that it cannot be said that any of these capital sentencing hearings, or the freakishly rare death sentences that result – serve any penological purpose. None of the proffered penological justifications are satisfied by a penalty that is applied so rarely and so inconsistently – or, as noted above, by a penalty that is actually imposed (if ever) many years or decades into the future, *see Lackey v. Texas*, 514 U.S. 1045, 1046 (1995) ("[T]he penological justifications for the death penalty diminish as the delay [between sentence and execution] lengthens."). For Colorado defendants, that delay is essentially a lifetime which, ultimately, is served behind bars without an execution anyway.

The inconsistent and freakishly rare use of the death penalty in Colorado is a violation of the cruel and unusual punishment and substantive due process clauses of the state and federal constitutions, as well as Article II, section 3 of the Colorado Constitution, because it means that those who are actually sentenced to death and executed are not categorically more deserving of the penalty than are the vast majority of murders throughout the State.[55]

[55] *Cf. Graham v. Florida*, 130 S.Ct. at 2027, noting the importance of sentencing statutes in drawing meaningful lines that recognize that, categorically, certain offenses are more deserving of the most serious forms of punishment (*citing Kennedy, supra; Enmund, supra,* 458 U.S. 782; *Tison v. Arizona*, 481 U.S. 137 (1987), and *Coker, supra*, 433 U.S. 584).

CONCLUSION

The evolving standards of decency that mark the progress of a maturing society no longer tolerate this punishment given the lack of sufficient penological/societal purposes for it. As Justice Stevens, who upheld many death sentences before his own views evolved, stated when he announced his belief that the death penalty is unconstitutional under all circumstances:

> Imposition of the death penalty represents 'the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State [is] patently excessive and cruel and unusual punishment violative of the Eighth Amendment.'

Baze v. Rees, 553 U.S. 35, 86 (2008)(concurring opinion of Stevens, J.)(quoting *Furman v. Georgia*, 408 U.S. 238, 312 (1972) (White, J., concurring)."

Finally, Mr. Holmes also incorporates by reference the arguments made in D-158, D-159, D-160, D-161, D-162, D-163, and D-164.

Request for a Hearing

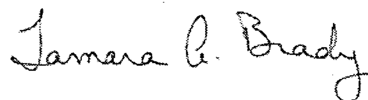
It is beyond dispute that the "heightened standard of reliability" applies to the capital sentencing proceedings in this case. *See, e.g.*, *Spaziano v. Florida*, 468 U.S. 447, 456 (1984); *Beck v. Alabama*, 447 U.S. 625, 637 (1980) (risk of unreliable conviction "cannot be tolerated" in case where defendant's life is at stake); *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). *People v. Young*, 814 P.2d 834, 846 (Colo. 1991); *People v. Rodriguez*, 786 P.2d 1079 (Colo. 1989).

Therefore, Mr. Holmes also specifically requests that this Court refrain from ruling on this motion until the parties have completed briefing on this issue.

Additionally, Mr. Holmes moves for an evidentiary hearing on this motion.

Mr. Holmes files this motion, and makes all other motions and objections in this case, whether or not specifically noted at the time of making the motion or objection, on the following grounds and authorities: the Due Process Clause, the Right to a Fair Trial by an Impartial Jury, the Rights to Counsel, Equal Protection, Confrontation, and Compulsory Process, the Rights to Remain Silent and to Appeal, and the Right to be Free from Cruel and Unusual Punishment, pursuant to the Federal and Colorado Constitutions generally, and specifically, the First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Fourteenth Amendments to the United States Constitutions, and Article II, sections 3, 6, 7, 10, 11, 16, 18, 20, 23, 25 and 28 of the Colorado Constitution.

Daniel King (No. 26129)
Chief Trial Deputy State Public Defender



Tamara A. Brady (No. 20728)
Chief Trial Deputy State Public Defender

Kristen M. Nelson (No. 44247)
Deputy State Public Defender

Dated: August 30, 2013

<table>
<tr><td>District Court, Arapahoe County, Colorado
Arapahoe County Courthouse
7325 S. Potomac St., Centennial, CO 80112</td><td rowspan="2">

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<tr><td>THE PEOPLE OF THE STATE OF COLORADO,
Plaintiff

v.

JAMES HOLMES,
Defendant</td></tr>
<tr><td>DOUGLAS K. WILSON, Colorado State Public Defender
Daniel King (No. 26129)
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Division 26</td></tr>
<tr><td colspan="2">ORDER RE: MOTION TO STRIKE THE DEATH PENALTY BECAUSE IT VIOLATES THE STATE AND FEDERAL CONSTITUTOINAL PROHIBITIONS AGAINST CRUEL AND UNUSUAL PUNISHMENT, THE SUBSTANTIE DUE PROCESS CLAUSE OF BOTH CONSTITUTIONS, AND THE RIGHT TO LIFE CLAUSE OF THE COLORADO CONSTITUTION [D-165]</td></tr>
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Defendant's motion is hereby GRANTED _____ DENIED _____.

BY THE COURT:

______________________________ ______________________________

JUDGE Dated

I hereby certify that on August 30, 2013, I

____ mailed, via the United States Mail,
____ faxed, or
_✓_ hand-delivered

a true and correct copy of the above and foregoing document to:

George Brauchler
Jacob Edson
Rich Orman
Karen Pearson
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6450 S. Revere Parkway
Centennial, Colorado 80111
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