DISTRICT COURT, ARAPAHOE COUNTY, STATE OF COLORADO 7325 S. Potomac St. Centennial, Colorado 80112	▲COURT USE ONLY▲
PEOPLE OF THE STATE OF COLORADO **v.** **JAMES EAGAN HOLMES,** **Defendant**	Case No. **12CR1522** Division: **201**

ORDER REGARDING DEFENDANT'S MOTION TO DECLARE THE DEATH PENALTY UNCONSTITUTIONAL FOR ITS FAILURE, IN PRACTICE, TO MEET THE MINIMUM CONSTITUTIONAL REQUIREMENTS SET FORTH IN *FURMAN*, *GREGG* AND THEIR PROGENY (D-149)

INTRODUCTION

In Motion D-149, the defendant seeks to declare Colorado's death penalty statutory scheme unconstitutional. Motion at p. 1. The motion "is based on the research conducted and analyzed by social scientists working with the Capital Jury Project [("CJP")]." Reply at p. 1. According to the defendant, the CJP research "demonstrate[s] that jurors who are serving in actual capital cases are failing—uniformly—to comprehend or discharge their duties in a manner that is consistent with the constitutional requirements articulated in the Supreme Court's Eighth

Amendment jurisprudence." *Id.* The prosecution opposes the motion. *See generally* Response.

For the reasons articulated in this Order, the Court concludes that, even assuming the validity of the CJP research, the defendant's motion lacks merit. Accordingly, it is denied without a hearing.[1]

STANDARD OF REVIEW

Whether a statute is constitutional is a question of law. *See City of Greenwood Vill. v. Petitioners for Proposed City of Centennial*, 3 P.3d 427, 440 (Colo. 2000). "To declare an act of the legislature unconstitutional is always a delicate duty, and one which courts do not feel authorized to perform, unless the conflict between the law and the constitution is clear and unmistakable." *Id.* (quoting *People v. Goddard*, 8 Colo. 432, 437, 7 P. 301, 304 (Colo. 1885)). "[P]arties challenging statutes on constitutional grounds ordinarily must prove the statute's unconstitutionality 'beyond a reasonable doubt.'" *Id.* (citations omitted). Courts must presume that the state legislature comports with constitutional standards when enacting a statute. *Id.* Thus, statutes are presumed to be constitutional. *People v. DeWitt*, 275 P.3d 728, 731 (Colo. App. 2011).

[1] The defendant requested a hearing to present evidence of the CJP study. Motion at pp. 65-66. However, his 67-page motion and its voluminous attachment set forth that evidence. For the reasons discussed in this Order, the Court finds that a hearing is neither necessary nor appropriate.

"Generally, a statute is unconstitutional on its face only 'if the complaining party can show that the law is unconstitutional in all its applications.'" *People v. Bondurant*, 296 P.3d 200, 206 (Colo. App. 2012) (quoting *Dallman v. Ritter*, 225 P.3d 610, 625 (Colo. 2010)). A facial challenge to legislation is "the most difficult challenge to mount successfully, since the challenge must establish [beyond a reasonable doubt] that no set of circumstances exists under which the [statute] would be valid." *Nat'l Treasury Emps. Union v. Bush*, 891 F.2d 99, 101 (5th Cir. 1989) (quotation omitted). The complaining party must show beyond a reasonable doubt that the statute is unconstitutional in all its applications. *Bondurant*, 296 P.3d at 209 (citation omitted).

ANALYSIS

The defendant's lengthy motion is a recycled version of a motion that has been filed and uniformly rejected in other death penalty cases, including in this jurisdiction. *See* People v. Owens, 06CR705; People v. Ray, 06CR697. It is rejected here as well.

The defendant devotes 29 pages to a summary of the history and evolution of constitutional standards governing capital punishment in the United States and Colorado. *See* Motion at pp. 5-33. The rest of the motion discusses social science research in general and the CJP specifically. *Id.* at pp. 34-65. The defendant argues that "incontrovertible, hard scientific evidence" gathered through the CJP

reveals that "the death penalty sentencing system is not being applied in compliance with constitutional mandates." *Id.* at p. 65. The Court disagrees that the CJP demonstrates beyond a reasonable doubt that Colorado's death penalty statutory scheme cannot be applied constitutionally under any circumstances. Therefore, Motion D-149 fails.[2]

A. The CJP

"The CJP is a study consisting of in-depth interviews of 1,198 jurors from fourteen states who served on 353 capital cases." *State v. Addison*, --- A.3d ---, 2013 WL 5960851, at *130 (N.H. 2013). Colorado did not participate in the study. The participating states were: California, Florida, Indiana, Kentucky, Pennsylvania, South Carolina, Texas, Virginia, Georgia, Louisiana, North Carolina, Tennessee, New Jersey, and Alabama. William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 Ind. L.J. 1043, 1062-72, 1078 nn.190, 192, 194 (1995).

The CJP selected between eight and fourteen death penalty trials in each participating state "and then interviewed randomly-chosen jurors from each trial." *Addison*, 2013 WL 5960851, at *130. The interviews took place between 1991

[2] The defendant states that the last section of his motion advances "an independent claim that the Colorado Constitution compels a finding that the death penalty statutes are unconstitutional." Motion at p. 4. However, the last section of his motion contains no such claim. In any case, the claim would fail for the reasons set forth in this Order. The defendant presents no authority to show that the Colorado Constitution provides more protection in this area than the United States Constitution.

and 1998 and were related to capital cases tried between 1986 and 1995. *Id.* Only trials that proceeded to the penalty phase were included. *Id.* A sentence to life imprisonment was imposed in 43% of the trials; a death sentence was imposed in 57% of the trials. *Id.*

Jurors who were interviewed were asked both structured and open-ended questions. *Id.* The structured questions required jurors to select among designated responses, such as "yes/no" or "agree/disagree." *Id.* The open-ended questions required narrative answers. *Id.* The CJP made findings based upon the jurors' responses. *Id.* Specifically, the study set forth seven conclusions about jurors' decision-making processes in capital cases: (1) jurors form premature sentencing decisions; (2) the jury selection process fails to remove those jurors who automatically recommend the death penalty, thereby creating jury bias; (3) jurors do not understand jury instructions; (4) jurors mistakenly believe that the death penalty is a mandatory sentence; (5) jurors do not apprehend their primary responsibility for the defendant's sentence; (6) jurors underestimate the alternatives to a death sentence; and (7) race improperly influences jurors' decisions during the penalty phase. *Id.* "The CJP determined that these conclusions reflected constitutional problems inherent in capital punishment occurring in each of the fourteen states in the study." *Id.*

B. The CJP is Insufficient to Justify Declaring Colorado's Death Penalty Statutory Provisions Unconstitutional

The defendant maintains that the CJP proves that jurors in this case will "fail to understand and/or follow" the Court's instructions and, therefore, will: (1) prematurely make their sentencing decision before any capital sentencing hearing;[3] (2) fail to comprehend capital sentencing hearing instructions; (3) believe they are required to recommend a death sentence if the evidence shows that a murder was "heinous, vile or depraved" or that the defendant would be "dangerous in the future;" (4) fail to "view themselves as most responsible for the decision they make;" and (5) grossly underestimate the amount of time the defendant will serve in prison if not sentenced to death. Motion at pp. 43-48, 54-61, 63-65. The Court is unpersuaded.

State and federal courts alike have uniformly rejected the use of the CJP research to establish that a death penalty statutory scheme is unconstitutional because it cannot be applied appropriately by jurors. *See Addison*, 2013 WL 5960851, at *138 ("federal courts have rejected the use of the CJP data" and similar studies to show that the federal death penalty scheme is unconstitutional

[3] According to the defendant, the CJP found that one of the reasons "so many jurors prematurely decide to impose death" is that the "capital jury selection" process "fail[s] to identify jurors for whom death is the only appropriate penalty," and "produces the worst possible group of jurors precisely when a criminal defendant should have a right to the most qualified jurors." Motion at pp. 49, 52. Further, asserts the defendant, the CJP data demonstrates that "the process of capital jury decision-making is influenced, not only by the race of the defendant and the race of the victim, but by both the racial composition of the jury and the race of the individual jurors." *Id.* at p. 61.

because it "[cannot] be applied appropriately by jurors") (quotation omitted). "The few decisions crediting statistical studies" to declare the federal death penalty statutory provisions unconstitutional "were overturned on appeal." *Id.* (quotation omitted).

In one of the earliest federal cases, *United States v. Llera Plaza*, the United States District Court for the Eastern District of Pennsylvania disagreed with the defendants' contention that the CJP and other empirical studies show that "the aggravating factor/mitigating factor calculus" in the Federal Death Penalty Act ("FDPA") "is not comprehensible." 179 F. Supp. 2d 444, 450 n.5 (E.D. Pa. 2001). The Court determined that "the studies do not establish that the concepts of aggravating and mitigating factors as used in the FDPA bear such a degree of intrinsic 'incomprehensibility' as to render them incapable of clarification through adequate jury instructions such as those to be crafted . . . if a sentencing hearing is required." *Id.*

The Court in *Llera Plaza* elaborated as follows:

> ***[T]here is nothing in the FDPA that can be said to raise an insuperable barrier to informed sentencing. To the extent that aggravating and mitigating factors are abstract concepts, they are capable of being rendered precise and concrete in the course of crafting instructions to the sentencing jury.*** The Supreme Court has recognized the importance of giving to jurors careful instructions on the law and how to apply it before they are authorized to decide the merits of a lawsuit. It would be virtually unthinkable to follow any other course in a legal system that has traditionally operated by following prior precedents and fixed rules of law.

> ***Statutory aggravating factors*** have been crafted by Congress. Some are reasonably precise; some are cast in rather general terms; ***all are susceptible of focused delineation in carefully drawn jury instructions. With respect to non-statutory aggravating factors and mitigating factors, Congress has, in effect, delegated authorship to government counsel and defense counsel, respectively—subject, in both instances, to the oversight of the trial judge.*** Here again, the key to clarity, and hence to comprehensibility, lies in the jury instructions.
>
> If the case at bar proceeds to a sentencing phase, counsel for the defendants and counsel for the government will have the opportunity to participate fully in the process of formulating the instructions which will frame the jury's deliberations. ***There is no reason to believe that the jury will find the collaborative handiwork of court and counsel to be incomprehensible.***

Id. at 449-50 (emphasis added) (internal citations and quotation marks omitted).

In *United States v. Hammer*, the defendant moved to declare the FDPA unconstitutional on the ground that "it is [i]ncomprehensible to [j]urors." 2011 WL 6020164, at *2 (M.D. Pa. 2011). He averred "that the process prescribed by the [FDPA] for making sentencing decisions with its 'melange of concepts' is so confusing to jurors that it prevents them from making reasoned sentencing decisions." *Id.* Relying on *Llera Plaza*, the Court disagreed. *Id.* at *3. The Court concluded that "[t]here [was] no justification . . . to hold, prior to trial, that a sentencing jury [would] be unable to comprehend the provisions of the FDPA or the instructions provided by the court or counsel." *Id.* (citation omitted). The Court added that "[c]ounsel for [the defendant] and counsel for the Government

[would] have the opportunity to participate fully in the process of formulating the instructions which will frame the jury's deliberations." *Id.* Because the defendant "offer[ed] no evidence that can overcome the assumption that juries will follow the instructions given to them during the penalty phase hearing," the Court "agree[d] with other courts that have considered substantially the same argument on the comprehensibility and constitutionally of the FDPA and have rejected it." *Id.* (citations omitted).

In *United States v. Duncan*, the defendant relied in part on the findings of the CJP to argue that the death penalty under the FDPA was "imposed in an arbitrary, capricious, and random matter [sic]." 2008 WL 544847, at *1 (D. Idaho 2008). Rejecting the contention, the United States District Court for the District of Idaho concluded that "[t]he findings of the CJP do not provide a basis for undermining the constitutionality of the FDPA." *Id.* The Court reasoned that the defendant's claims were "not particular to the facts of [the] case or even to [the] District." *Id.*[4]

As the defendant does here, the defendant in *United States v. Green* essentially asked the Court "to adopt the findings of the CJP as law, using the findings of a research project to declare [a death penalty statutory scheme] unconstitutional." 2008 WL 4000901, at *2 (W.D. Ky. 2008). The Court declined

[4] Like Colorado, Idaho did not participate in the study.

to do so because "[t]he findings of the CJP are not precedent and are not binding." *Id.* Additionally, the Court stated that the defendant made "no attempt to connect the findings of the CJP to the FDPA" and failed to show "that the FDPA produces any of the seven characteristics" set forth in the study. *Id.* Although the Court acknowledged that a few federal courts have referred to the CJP, it noted that "no court has ever adopted the CJP's findings as its own, nor have the CJP's findings ever been cited as precedent of any kind." *Id.* The Court agreed with the prosecution "that the [d]efendant's arguments [were] most suitable for consideration by a legislative body." *Id.*

In *Riel v. Ayers*, the United States District Court for the Eastern District of California found the CJP research inapposite, even though California participated in the study. 2008 WL 1734786, at *16 (E.D. Cal. 2008). The Court concluded that there is "no indication [the CJP data included] a statistically significant sample of jurors from California capital cases or even that those jurors participated in cases with instructions identical to the ones in [that] case." *Id.* The Court observed that other courts, including appellate courts, have "rejected the use of the same stud[y]." *Id.* at *15. Notably, the Court did not take issue with the state trial judge's decision not to hold an evidentiary hearing, finding that no evidentiary hearing was necessary because "the CJP study [did] not bear enough relevance to

the issues raised . . . to justify its admission in support of that claim." *Id.* at *15-16.

In *United States v. Sablan*, the Court was unpersuaded by the defendant's assertion that there was "a reasonable likelihood that the jury [would] be confused as to the concept of weighing aggravating and mitigating circumstances at the penalty phase of the proceeding." 2006 WL 1028780, at *7 (D. Colo. 2006). Judge Daniel commented as follows:

> Obviously, at this stage of the proceedings the Court and counsel have not yet formulated the penalty phase jury instructions to be given in this case. ***Defendant essentially asserts that the FDPAs' [sic] penalty scheme is so confusing that a jury will never be able to comprehend the concepts of aggravating and mitigating factors, regardless of the instructions given, and will never be able to make a reasoned decision concerning whether to impose [a] death sentence or a life sentence without the possibility of parole. I find no support for this assertion.*** Similar arguments, based on some of the same studies cited by [d]efendant in this case, have been rejected by other courts . . . . I find the reasoning in these cases persuasive and adopt it here.

Id. at *8 (emphasis added).

Similarly, in *United States v. Mikos*, the Court found that the CJP study and other statistical studies concerning the death penalty fail to show "that the FDPA is so incomprehensible to juries that it violates the Constitution." 2003 WL 22110948, at *17 (N.D. Ill. 2003). The Court reasoned as follows:

> ***There is no justification prior to trial for this court to hold that the sentencing jury will be unable to comprehend the provisions of the FDPA or the instructions provided by [the] court or counsel.*** The

government relies on *Marshall v. Lonberger*, which held that the crucial assumption underlying the system of trial by jury is that juries will follow the instructions given them by the trial judge. Further, the government cites *Boyde v. California*, which stated that jury instructions in a capital case alleged to be confusing are only constitutionally defective if there is a "reasonable likelihood" that they misled the jury into sentencing a defendant to death. ***Absent evidence to the contrary, the provisions of the FDPA are not reasonably likely to mislead the jury as required by the [United States Supreme] Court.***

. . . .

As noted above, a jury's consideration of a facially vague aggravating factor can be cured either by a limiting instruction from the court or by appellate review. ***Even if [the defendant] is correct in his assertion that the average American juror does not instantaneously understand the act of balancing mitigating and aggravating factors set forth within the FDPA, these abstract concepts have the benefit of being explained in concrete and precise terms through the use of careful jury instructions. Indeed, several abstract legislative concepts require some level of explanation to people who have not endured several years of extensive legal education.*** Courts have invalidated such facially vague aggravating factors where sentencing instructions gave the jury no guidance concerning the meaning of any of its terms. While the statutory aggravating factors drafted by Congress are reasonably clear, the use of jury instructions helps diminish any confusion over any less precise provisions . . . that may exist. If the case before this court proceeds to the sentencing phase of trial, this court will ensure that defense counsel and counsel for the government will have an opportunity to formulate instructions that will frame the jury's deliberations. ***The court finds persuasive a statement from the District Court for the Eastern District of Pennsylvania in [United States v. Llera Plaza] that "[t]here is no reason to believe that the jury will find the collaborative handiwork of court and counsel to be incomprehensible."***

Id. at *17, *19 (emphasis added) (citations and quotations omitted).

Perhaps no federal district court has used language as strong as that used by the Court in *United States v. Cheever* to reject a constitutional challenge to the FDPA based on the social science research relied on by the defendant:

> In [his] lengthy brief, which has every appearance of the "boiler-plate" variety, defendant argues that extensive sociological studies have concluded that capital juries routinely base their decisions on improper factors and reach conclusions at inappropriate stages of the trial. ***Reduced to their essence, the conclusions from these studies . . . is that the American public is either too stupid or too dishonest to field a jury pool that will carry out its constitutional duties in a capital case.*** The argument that capital juries lack the intelligence to do their job is based on findings that the instructions necessary to walk a capital jury through the guilt and penalty phases of a death penalty case are too complex for many jurors to understand. The alternative argument that the jurors disregard the instructions is based on empirical data from prior jurors who allegedly admitted that they based their decision on improper factors or made their decisions before hearing all the evidence. Disregarding the instructions is a violation of the oath administered to jurors when they are sworn, and it is on this basis that the court summarizes and paraphrases defendant's argument to be that the jurors are simply dishonest when, in voir dire, they state that they can and will follow the courts [sic] instructions, and then willfully refuse to follow those instructions and be bound by their oath.
>
> ***The jury system is a somewhat unique institution among civilized societies.*** Although other constitutional rights have been extended to American territorial possessions, the Supreme Court has been circumspect about recognizing a right to jury trial in territories that do not share our history of trial by jury.
>
> . . . .
>
> Defendant asks the court to find that, like the people of the Philippines in 1904 and Puerto Rico in 1922, the American people are not up to the task of discharging their duties under a jury system. ***Indeed, unlike the Philippines and Puerto Rico, where the Court concluded***

> ***that the citizens were simply unprepared to have a jury system imposed on them as a condition of becoming a U.S. territory, defendant would have the court conclude that the American people, once a shining example of the jury system at its finest, have now degenerated, intellectually and/or morally, to the point that they can no longer be entrusted with the responsibilities of jurors—at least in capital proceedings. Frankly, the court lacks the arrogance required to render such a sweeping condemnation of the American public.***

423 F. Supp. 2d 1181, 1214-15 (D. Kan. 2006) (emphasis added) (quotations and citations omitted).

State appellate courts have also addressed the CJP and have reached the same conclusions as the federal district courts. For example, in *Commonwealth v. Padilla* the trial court found the CJP's conclusions "'academically interesting,' but consistent with neither the law of [the] Commonwealth [of Pennsylvania], nor the court's experience." 80 A.3d 1238, 1275 (Pa. 2013). "The trial court expressed strong disagreement with the claims that death-qualified jurors were predisposed to impose the death penalty, unable to separate the actual determination of guilt from the penalty phase, or unlikely to consider mitigation evidence." *Id.* Not surprisingly, "the trial court suggested that, if the court were to adopt these defense claims, it would 'repudiate the jury system as it has traditionally existed.'" *Id.* The trial court ultimately concluded that the defendant's assertions "were nothing more than assumptions and speculation." *Id.*

On appeal, the Pennsylvania Supreme Court "agree[d] with the trial court's analysis." *Id.* The Court found that the defendant had "not formulated or advanced a specific claim that the jury in ***his*** case was predisposed toward the death penalty or did not understand the court's penalty phase instructions." *Id.* (emphasis in original). Instead, "through reliance on the published studies and conclusions of a group of social scientists, [the defendant sought] a general, major change in the policy and the statutes related to the death penalty in [the] Commonwealth." *Id.* The Court stated that "[s]uch issues are more appropriately directed to the General Assembly." *Id.*

An attempt to preclude the death penalty based on the CJP study also failed in *Wade v. State*, 41 So. 3d 857 (Fla. 2010). There, the trial court "orally denied an evidentiary hearing at which [the defendant] proposed to present testimony regarding the CJP study and denied the motion to preclude imposition of a death sentence." *Id.* at 872. On appeal, the Florida Supreme Court disagreed with the defendant's claim that two separate juries should have been used—one to determine guilt and one to decide the appropriate sentence—because the CJP study establishes "that many jurors prematurely make a sentencing decision during the guilt phase of trial." *Id.* at 874. The Court observed that the defendant's argument "collide[d] with United States Supreme Court precedent" and would result in

"repetitive trials [that] could not be consistently fair to the State and perhaps not even to the accused." *Id.* (citation omitted).

In *State v. Azania*, the Indiana Supreme Court noted that "[i]t is a foundational principle of the jury system that a jury will follow the law and not act on the biases of its members." 865 N.E.2d 994, 1007 (Ind. 2007) (citations omitted). The Court added that "it is very hard to conceive how we could have trial by jury at all if social science evidence of 'bias' on the part of a hypothetical jury would preclude the favored party from advancing a legal theory otherwise available to the party." *Id.* Moreover, courts "have developed longstanding procedures for protecting against such bias through extensive *voir dire*, *in limine* restrictions, and carefully tailored jury instructions." *Id.* at 1007-08. "[T]hese mechanisms afford protection from any prejudice that [the defendant] might otherwise suffer." *Id.* at 1008.

Finally, in *Addison*, the trial court criticized the CJP study on multiple grounds:

> [T]he court observed that "most jurors were interviewed approximately two years after the capital trials in which they had served, and some interviews took place up to five years later . . . ." Additionally, the court observed that because the CJP primarily relies upon self-reporting by jurors of their thoughts and mental states, the CJP's results depended upon the honesty and self-awareness of the interviewees. The trial court also found that the CJP "suffers from sampling problems," and the court questioned whether the CJP samples were representative. The trial court observed that the CJP data is at least ten years old and that the CJP did not use or analyze

> data (if any exists) from New Hampshire. The court noted as well that because the defendant's experts refused to disclose the raw data upon which the CJP results were based, the data was not subject to scrutiny and cross-examination, which led the court to conclude that it could not give the data "the weight the defense argues it deserves."

2013 WL 5960851, at *131. The New Hampshire Supreme Court did not disturb the trial court's finding that the defendant's social science research evidence was "fundamentally flawed." *Id.* at *134.[5] The Court further held that, even if it assumed "that the research presented statistically valid findings," the defendant's appeal would still fail "on the merits" because "the general statistics that the defendant presented were insufficient" to establish a constitutional violation. *Id.*

The Court finds the holdings in these cases persuasive and adopts their reasoning here.[6] The defendant gives the CJP much more weight than it deserves. Because Colorado was not included in the CJP, no juror from a Colorado capital case was ever interviewed by the CJP, and the CJP did not address Colorado's death penalty statutes. Yet, based on the CJP research, the defendant urges the Court to speculate that no Colorado jury would ever be able to understand, much less follow, the Court's instructions on Colorado law, including the death penalty

---

[5] Because the Court did not hold an evidentiary hearing in this case, it does not rely on any of the criticisms articulated by the trial court in *Addison* about the methodology of the CJP.

[6] The Court's research uncovered only one case where relief was granted based on the presentation of empirical research showing a reasonable likelihood of jury miscomprehension of capital sentencing instructions—*United States ex. rel. Free v. Peters*, 806 F. Supp. 705, 730-32 (N.D. Ill. 1992). However, that case was overturned on appeal in *Free v. Peters*, 12 F.3d 700, 706-07 (7th Cir. 1993).

statutes. Motion at pp. 54-57. The defendant cites no authority in support of his position, and the Court is aware of none.

At this time, it is unknown whether a capital sentencing hearing will be necessary in this case. It is entirely speculative for the defendant to assert that if such a hearing is held, the capital sentencing jury instructions the Court will craft with counsel's assistance will fail to explain Colorado law in a comprehensible manner. The Court is confident that, with counsel's collaboration, it will be able to draft comprehensible instructions. The Court is equally confident that the jury will be able to understand and follow all of its instructions, including at any capital sentencing hearing.

Significantly, in Order D-142, the Court decided to bifurcate any capital sentencing hearing into three parts because doing so will, among other things, "minimize the risk of juror confusion." Order D-142 at pp. 4-5. Each of the three bifurcated parts will include a separate set of jury instructions. Nothing in the CJP research demonstrates that jurors will be unable to comprehend or follow the Court's instructions at each part of any bifurcated capital sentencing proceeding.

Nor does the CJP research account for the type of extensive *voir dire* the Court has ordered in this case. As the parties are aware, the Court intends to use a lengthy questionnaire and conduct individual *voir dire* on multiple issues, including death qualification. There is no basis in the record to conclude that, in

the event there is a guilty verdict on a murder charge, the jury selected will be predisposed to recommend a death sentence, either based on racial discrimination or for any other reason.[7] The Court declines to adopt the defendant's assumptions and speculative assertions about jury selection.

Guided by the cases that have consistently rejected attempts to declare death penalty statutes unconstitutional based on the CJP, the Court rules that the CJP is insufficient to establish beyond a reasonable doubt that Colorado's death penalty statutory scheme is unconstitutional. The Court does so for multiple reasons: (1) no court in the land has ever adopted the CJP study as the law and the CJP's findings have no precedential value whatsoever; (2) state and federal cases that have considered the CJP have uniformly concluded that it is insufficient to declare a death penalty statutory scheme unconstitutional; (3) Colorado did not participate in the CJP and the CJP did not interview a single Colorado juror who served in a Colorado capital case and applied Colorado's death penalty statutes; (4) the CJP did not assess the comprehensibility of Colorado's death penalty statutory provisions, much less under the bifurcated capital sentencing hearing the Court intends to use in this case; (5) Motion D-149 asks the Court to speculate that no set of jury instructions would ever be capable of explaining Colorado's death penalty

[7] In *Addison*, the Court held "that the defendant's social science research [was] insufficient to establish his claim of purposeful racial discrimination." 2013 WL 5960851, at *139. The Court endorses the analysis and findings in *Addison* related to the defendant's claim that the CJP study establishes that "there exists an unacceptably high risk of racial discrimination in the administration of the death penalty." *Id.* at *133-39 (quotation omitted).

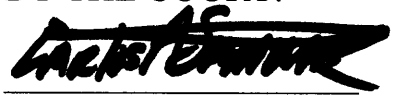
statutory provisions to a jury, and, concomitantly, that no jury would ever comprehend those provisions or carefully crafted instructions summarizing them; (6) to accept the defendant's position would be to repudiate this nation's traditional jury trial system; and (7) the arguments advanced in Motion D-149 raise policy-related issues that should be directed to the General Assembly.

CONCLUSION

For all the foregoing reasons, the Court concludes that Motion D-149 lacks merit. Even assuming the validity of the CJP study, the defendant has not met his heavy burden of demonstrating beyond a reasonable doubt that the Colorado death penalty scheme is unconstitutional. The Court declines to declare the Colorado death penalty statutes unconstitutional based on social science research from decades ago, related to other capital trials, involving other jurors, in other states, under different laws, with different jury instructions. The Court refuses to presume that the citizens of Arapahoe County, or any other county in Colorado, lack the intelligence and honesty to be able to serve on a jury in a capital case. Accordingly, Motion D-149 is denied without a hearing.

Dated this 22nd day of April of 2014.

BY THE COURT:



Carlos A. Samour, Jr.
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2014, a true and correct copy of the Court's **Order Regarding Defendant's Motion To Declare The Death Penalty Unconstitutional For Its Failure, In Practice, To Meet The Minimum Constitutional Requirements Set Forth In *Furman*, *Gregg*, And Their Progeny (D-149)** was served upon the following parties of record:

Karen Pearson
Amy Jorgenson
Rich Orman
Dan Zook
Jacob Edson
Lisa Teesch-Maguire
George Brauchler
Arapahoe County District Attorney's Office
6450 S. Revere Parkway
Centennial, CO 80111-6492
(via email)

Sherilyn Koslosky
Rhonda Crandall
Daniel King
Tamara Brady
Kristen Nelson
Colorado State Public Defender's Office
1290 S. Broadway, Suite 900
Denver, CO 80203
(via email)