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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	Filed AUG 16 2013 COURT USE ONLY
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 DECLARE COLORADO'S DEATH PENALTY SCHEME UNCONSTITUTIONAL IN LIGHT OF PEOPLE V. DUNLAP, 36 P.3D 778 (COLO. 2001) [DUNLAP II] [D-145]

CERTIFICATE OF CONFERRAL

The prosecution states that it intends to file a response to this motion.

James Holmes, through counsel, moves this Court to declare Colorado's death penalty sentencing scheme, as interpreted in *People v. Dunlap* ("*Dunlap II*"), 36 P.3d 778 (Colo. 2001), unconstitutional. In support of this motion, he states the following:

1. In *People v. Dunlap ("Dunlap II")*, 36 P.3d 778 (Colo. 2001), the Colorado Supreme Court held that the defendant was not entitled to reconsideration of his death sentence pursuant to Colo. R. Crim. P. 35(b) beyond the limited review provided for in the capital sentencing statute. The practical import of the decision is that a defendant who receives a jury trial and is sentenced to death by the jury is not entitled to Crim. P. 35(b) motion for reconsideration; however, if the defendant waives a jury and receives a death sentence from a judge, then the defendant can have the death sentence fully reconsidered under Crim. P. 35(b).

2. Thus, under the Colorado Supreme Court's decision, a defendant who *exercises* his right to a jury trial is required to give up the valuable right to sentence reconsideration, whereas if the defendant *waives* his right to the jury trial then he can receive the benefit of this reconsideration. Colorado's death penalty sentencing scheme thus punishes those defendants who exercise their right to a jury trial by removing the subsequent right to a reconsideration of their sentence. The scheme thus violates Mr. Holmes's state and federal constitutional rights to

jury trial, due process and equal protection. U.S. Const. amends V, VI, XIV; Colo. Const. art. II, secs. 16, 23, 25.

3. The *Dunlap II* scheme violates a capital defendant's due process rights under the Fourteenth Amendment of the United States Constitution and article II, section 25 of the Colorado Constitution, and *United States v. Jackson*, 390 U.S. 570 (1968), and his rights to a trial by jury and due process of law under the Sixth and Fourteenth Amendments to the United States Constitution and article II, section 23 of the Colorado Constitution, because it results in a penalty for exercising his right to trial by jury and jury sentencing. The scheme also violates the right to equal protection under the state and federal constitutions because it allows a person who waives his rights to trial by jury and jury sentencing to obtain an essentially de novo postconviction review of a death sentence, while a person who asserts the right to jury trial and jury sentencing is unable to obtain such a valuable right.

I. The History and Holding of *Dunlap II*

4. Nathan Dunlap was convicted by a jury of numerous offenses, including four counts of first-degree murder, and was sentenced to death by that same jury on March 7, 1996. The trial court imposed the death sentence and other prison sentences on May 17, 1996. Mr. Dunlap appealed and the Colorado Supreme Court affirmed the convictions and sentences in an opinion issued on March 8, 1999. *People v. Dunlap*, 975 P.2d 723 (Colo. 1999) [*Dunlap I*].

5. Pursuant to C.R.S. § 16-11-103(1) (1993) (*see also* § 18-1.3-1201(1) C.R.S. (2012)), Mr. Dunlap had a right to a jury sentencing on the capital counts unless he waived his right to trial by jury or pled guilty, in which case the trial judge decided whether the sentence would be death or life in prison without parole. *But see People v. Montour*, 157 P.3d 489 (Colo. 2007) (holding unconstitutional the portion of statute mandating judge sentencing if defendant pleads guilty). The capital sentencing statute also provided that, if a jury returned a death verdict, that verdict was "binding" on the trial court, *i.e.*, the trial court must impose the death sentence, unless the court finds in writing that the verdict was "clearly erroneous as contrary to the weight of the evidence." C.R.S. § 16-11-103(2)(c) (1993).

6. After Mr. Dunlap's convictions and death sentence were affirmed on appeal, he filed a timely motion for sentence reduction pursuant to Colo. Crim. P. 35(b), which allows a court to "reduce the sentence" after considering "the motion and supporting documents," provided a timely motion is filed. Mr. Dunlap moved for reduction of both the death sentence and the sentences he received on the non-homicide counts of conviction and asked the court to exercise its discretion based upon all relevant information. The trial court denied the motion in a written order without a hearing.

7. The Colorado Supreme Court affirmed. *People v. Dunlap*, 36 P.3d 778 (Colo. 2001) [*Dunlap II*]. The Court noted that C.R.S. § 16-11-103(2)(c) (1993) (see also current C.R.S. § 18-1.3-1201(2)(c) (2013)) provided as follows:

> In the event that the jury's verdict is to sentence to death, such verdict shall be binding upon the court unless the court determines, and sets forth in writing the basis and reasons for such

> determination, that the verdict of the jury is clearly erroneous as contrary to the weight of the evidence, in which case the court shall sentence the defendant to life imprisonment.

The issue as framed by the Court was "whether a death sentence imposed and reviewed under section 16-11-103 may then be revisited under Crim. P. 35(b)."

8. The Court held that a trial court could not, under Crim. P. 35(b), reduce a death sentence imposed by a jury after the trial court had found pursuant to C.R.S. § 16-11-103(2)(c) that the jury's verdict was not "clearly erroneous as contrary to the weight of the evidence." Since the trial court in Mr. Dunlap's case had ruled at the time it imposed the sentence in 1996 that the evidence supported the death sentence – a finding it had to make in order to impose the death sentence in the first instance – "such a finding circumscribed the limits of the court's authority to overturn that sentence under either 16-11-103(2) or to reduce it under Crim. P. 35(b)."

9. The rationale behind the Colorado Supreme Court's ruling was that the capital sentencing statute prevented a trial court from reconsidering the death sentence beyond the finding required under C.R.S. § 16-11-103(2)(c), because the jury was the sentencing body and the statute limited the court's ability to impose a life sentence in that circumstance. The court stated:

> Hence, the statute and the rule together direct that a court may only order post-conviction relief pursuant to Crim. P. 35(b) from a death sentence imposed by a jury if the circumstances delineated in section 16-11-103(2) are met.

People v. Dunlap, supra, at 781.

10. The Court also considered Mr. Dunlap's claim that the trial court's refusal to consider evidence which had not been presented at the sentencing trial, which he offered in support of his Rule 35(b) motion, violated Colorado law. Again referencing the C.R.S. § 16-11-103(2)(c) standard, the Court held that it was "not appropriate" to present mitigation evidence, *i.e.*, evidence in support of a life sentence, in a Rule 35(b) proceeding where the jury had imposed the death sentence. The Supreme Court also reiterated that if the evidence presented at the trial and original sentencing supported the death sentence under C.R.S. § 16-11-103(2)(c), the trial court could not grant relief under Crim. P. 35(b). *Id.*

11. C.R.S. § 18-1.3-1201(2)(c) (2013), contains almost exactly the same terminology as existed in Mr. Dunlap's case. It provides:

> In the event that the jury's verdict is to sentence to death, such verdict shall be unanimous and shall be binding upon the court unless the court determines, and sets forth in writing the basis and reasons for such determination, that the verdict of the jury is clearly erroneous as contrary to the weight of the evidence, in

> which case the court shall sentence the defendant to life imprisonment.

C.R.S. § 18-1.3-1201(2)(c) (2006). Similarly, under the 2006 version of the statute the same language regarding entitlement to jury trial and waiver of jury trial is used as in the statutory scheme analyzed in *Dunlap II*. *But see Montour, supra*.

II. A State Capital Sentencing Scheme Which Penalizes an Accused who Asserts His Right to Trial by Jury by Depriving Him of the Right to a Postconviction Reconsideration of a Death Sentence Violates the Due Process and Trial by Jury Clauses of the United States and Colorado Constitutions.

12. Under the scheme announced by the Colorado Supreme Court, in *People v. Dunlap*, 36 P.3d 778 (Colo. 2001) [*Dunlap II*], an accused facing a death penalty prosecution is penalized for asserting his constitutional right to trial by jury by the loss of the valuable right under Colorado Rule of Criminal Procedure 35(b) to a postconviction reconsideration of a death sentence, which would include consideration of evidence presented at the original sentencing in combination with any additional reasons in mitigation which the accused might offer after his direct appeal. If an accused wants to keep the valuable right to a reconsideration of his death sentence, under Colo. Rev. Stat. § 18-1.3-1201(2)(c) he must waive his right to a sentencing trial by jury and have a trial to the court.

13. This scheme violates the right to trial by jury under the state and federal constitutions and the right to due process under the state and federal constitutions. U.S. Const. amends V, VI, XIV; Colo. Const. art. II, secs. 16, 23, 25. It needlessly penalizes the assertion of those fundamental constitutional rights by requiring that a person waive a valuable right to an avenue of judicial review and reconsideration of a death sentence in order to assert the right to trial by jury at sentencing. *United States v. Jackson*, 390 U.S. 570 (1968); *Pope v. United States*, 392 U.S. 651 (1968); *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Woldt v. People*, 64 P.3d 256 (Colo. 2003); *Ring v. Arizona*, 536 U.S. 584 (2002); *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000); *Blakely v. Washington*, 542 U.S. 296 (2004); *Montour, supra*. It punishes him for exercising his constitutional right to have a jury decide his sentence.

14. The Colorado Supreme Court's decision in *Dunlap II* conflicts with the United States Supreme Court's decisions in such cases as *United States v. Jackson*, 390 U.S. 570 (1968), and *Pope v. United States*, 392 U.S. 651 (1968), as well as decisions of a number of other courts.

15. Such a penalty on the right to trial by jury was declared invalid in *United States v. Jackson, supra,* 390 U.S. 570, where the United States Supreme Court struck down the death penalty provision of the Federal Kidnapping Act, 18 U.S.C. § 1201, which allowed a defendant to be sentenced to death only after a jury trial. The Court held that the provision thereby penalized the defendants' Fifth Amendment right against self-incrimination and Sixth Amendment right to a jury trial by needlessly encouraging guilty pleas and jury waivers to avoid death sentences.

> For the evil in the federal statute is not that it necessarily *coerces* guilty pleas and jury waivers but simply that it needlessly *encourages* them. A procedure need not be inherently coercive in order that it be held to impose an impermissible burden upon the assertion of a constitutional right.

Id. at 583.

16. In *Pope v. United States*, 392 U.S. 651 (1968), the United States Supreme Court vacated a death sentence imposed under the Federal Bank Robbery Act because the Act suffered from the same infirmity as the Federal Kidnapping Act provision which was invalidated in *Jackson.*

17. The principle of *Jackson*, that needlessly penalizing the assertion of a fundamental right is itself unconstitutional, has been cited and enforced in a variety of circumstances. *See, e.g.*, *Robtoy v. Kincheloe*, 871 F.2d 1478 (9th Cir. 1989) (murder statute authorizing life without parole sentence only for defendants who exercise right to trial by jury and providing for sentence of life *with parole* for defendants who pled guilty invalidated under *Jackson*); *Haynesworth v. Miller*, 820 F.2d 1245, 1257 (D.C. Cir. 1987) ("In sum, we see no reason to retreat from the settled principle that it is 'patently unconstitutional' to 'penaliz[e] those who choose to exercise' constitutional rights."); *Matter of Hynes v. Tomei*, 92 N.Y.2d 613, 684 N.Y.S.2d 177, 706 N.E.2d 1201 (1998) (New York statute under which the death penalty was only possible if the accused proceeded to trial, struck down on the basis of *Jackson*); *People v. Michael A.C.*, 27 N.Y.2d 79, 313 N.Y.S.2d 695, 261 N.E.2d 620 (1970) (procedural provision requiring waiver of trial by jury in order to obtain "youthful offender treatment" held to violate *Jackson.*).

18. Under the interpretation of C.R.S. § 16-11-103(2)(c) (now 18-1.3-1201(2)(c)) and Crim. P. 35(b) set forth in *Dunlap II*, the right to a trial by jury at sentencing is impermissibly burdened by denying those who exercise it the benefit of a post-conviction sentence reconsideration of a death sentence pursuant to Rule 35(b). The statute and rule were interpreted in Mr. Dunlap's case such that, if a death verdict is returned *by a jury* and is imposed by a judge in the first instance under the "clearly erroneous as contrary to the weight of the evidence" standard set forth in the capital sentencing statute, C.R.S. § 18-1.3-1201(2)(c) – a determination which the trial court must make before actually imposing the death sentence at all – the trial court cannot "reconsider" or reduce the death sentence pursuant to Crim. P. 35(b). The "right" to a Rule 35(b) reconsideration of a death sentence is therefore non-existent when, and only when, the accused asserts his right to a trial by jury.

19. The practical reality of the scheme set forth in *Dunlap II, supra*, is that a Rule 35(b) sentence reconsideration is not available to an accused who has been sentenced to death by a jury. A "sentence reduction" motion under Rule 35(b) is an entirely different proceeding in a case where the accused facing a death sentence has asserted his rights to trial and sentencing by jury than where he has not. In the case of a jury sentencing, the statute arbitrarily prevents the trial court from granting the Rule 35(b) motion, and in fact mandates that the court must deny it without considering any new evidence in mitigation, if the sentence was imposed in accordance

with C.R.S. § 18-1.3-1201(2)(c).[1] In the case of a judge sentencing, the statute upon which the Colorado Supreme Court based its decision has no application because it relates solely to jury verdicts of death. Thus, there would be no impediment to a normal, full reconsideration of the sentence under the rule.

20. The only factor which will deny an accused like Mr. Holmes of a meaningful reconsideration of any possible death sentence is the assertion of the right to trial and sentencing by jury.

21. If an accused has waived his right to trial and sentencing by jury and has been sentenced to death by a judge only, C.R.S. § 18-1.3-1201(2)(c) does not apply and, pursuant to Rule 35(b), the court may "reconsider, in the interests of justice, the sentence previously imposed in light of all relevant and material factors which may or may not have been initially considered by the court and, in its sound discretion, to resentence the defendant to a lesser term 'within the statutory limits.'" *People v. Perry*, 981 P.2d 667, 668 (Colo. App. 1999) (quoting *People v. Smith*, 189 Colo. 50, 536 P.2d 820 (1975)).

22. Colorado case law has long interpreted Rule 35(b) to require a "second round" before the sentencer, *e.g., People v. Arnold*, 907 P.2d 686, 687 (Colo. App. 1995), where the trial court must consider all relevant information, including information not presented at the original sentencing. *Mikkleson v. People*, 199 Colo. 319, 321, 618 P.2d 1101, 1102 (1980); *People v. Smith*, 189 Colo. 50, 52, 536 P.2d 820, 822 (1975) (construing the then-applicable version of Crim. P. 35(a), which was substantially similar to the present Crim. P. 35(b)); *People v. Lyons*, 44 Colo. App. 126, 128, 618 P.2d 673, 675 (1980). Under Crim. P. 35(b), a court "has an affirmative obligation to exercise judicial discretion in deciding whether to modify the sentence previously imposed and to base the decision on relevant evidence, not personal whim." *Spann v. People*, 193 Colo. 53, 55, 561 P.2d 1268, 1269 (1977).

23. For example:

> Crim. P. 35(b) permits courts to reconsider in the interests of justice a previously imposed sentence, taking into account factors which may or may not have been initially considered. *People v. Smith*, 189 Colo. 50, 52, 536 P.2d 820, 822 (1975) (construing the then applicable version of Crim. P. 35(a), which rule was substantially similar to Crim. P. 35(b)); *see also People v. Lyons*, 44 Colo. App. 126, 128, 618 P.2d 673, 675 (1980). Under Crim. P. 35(b), a court "has an affirmative obligation to exercise judicial discretion in deciding whether to modify the sentence previously imposed and to base the decision on relevant evidence, not personal whim." *Spann v. People*, 193 Colo. 53, 55, 561 P.2d 1268, 1269 (1977).

[1] If the sentence was not imposed legally under that provision there would of course be no death penalty at the time the accused filed the Rule 35(b) motion.

> In ruling upon a defendant's Crim. P. 35(b) motion, a trial court must consider "all relevant and material factors which may affect the decision on whether to reduce the original sentence." *Mikkleson v. People*, 199 Colo. 319, 321, 618 P.2d 1101, 1102 (1980). In *People v. Morrow*, 197 Colo. 244, 246-47, 591 P.2d 1026, 1028 (1979), we noted that in sentence reconsideration proceedings relevant factors include the offensive nature of the crime involved, the prior criminal history of the defendant, and the consequences of a jail sentence on the defendant and the defendant's dependents. In *People v. Bridges*, 662 P.2d 161, 165-66 (Colo. 1983), we also noted that a trial court may consider the desirability of giving the defendant an incentive to continue rehabilitative progress while in prison, the defendant's conduct in prison, and the educational achievements by the defendant while in prison in exercising its discretion to reduce a sentence in a Crim. P. 35(b) proceeding. The ability to measure accurately a defendant's educational achievements while in prison takes time. Furthermore, as illustrated by the facts here, rehabilitation classes and educational programs often are not immediately available to an incarcerated defendant.

Mamula v. People, 847 P.2d 1135, 1139-40 (Colo. 1993). *See People v. Lyons*, 44 Colo. App. 126, 127, 618 P.2d 673 (Colo. App. 1980) ("The purpose of Crim. P. 35(a), insofar as it is here pertinent, is to permit the trial court to re-examine the propriety of a sentence previously imposed.").

24. As evidenced by the foregoing authorities, a Colorado Rule 35(b) motion for reduction of sentence is a valuable right. Crim. P. 32(c) mandates that courts inform all defendants at the time of sentencing of the right to seek reduction of sentences under Rule 35(b). *See, e.g., Swainson v. People*, 712 P.2d 479 (Colo. 1986) (failure to file timely Crim. P. 35(b) motion upon request could be ineffective assistance of counsel); *People v. Arnold*, 907 P.2d 686, 687 (Colo. App. 1995):

> A motion for reduction of sentence pursuant to Crim. P. 35 is essentially a plea for leniency. It is intended to give every convicted offender a second round before the sentencing court and to give the court the opportunity to reconsider the sentence in light of further information about the defendant or the case which is presented after the initial sentencing. *United States v. Colvin*, 644 F.2d 703 (8th Cir. 1981).

See also U.S. v. Golden, 854 F.2d 31 (3rd Cir. 1988) (describing the right to have the trial court exercise its discretion in a sentence reconsideration under Fed. R. Crim. P. 35(b) prior to its amendment in 1987, as a "significant substantive right," in the course of remanding the case for a hearing on the accused's contention that his counsel's failure to timely file such a motion was ineffective assistance of counsel); *United States v. Angiulo*, 852 F. Supp. 54 (Mass. 1994):

> [T]he underlying objective of Rule 35, . . . is to "give every convicted defendant a second round before the sentencing judge, and [afford] the judge an opportunity to reconsider the sentence in light of any further information about the defendant or the case which may have been presented to him in the interim." *United States v. Ellenbogan* [Ellenbogen], 390 F.2d 537, 543 (2d Cir. 1968). Fed.R.Crim.P. 35(b) advisory committee's notes (as amended through 1983).

Id. at 56.

25. In a capital case, the ability to present information not available to the original sentencer may be particularly important in light of the Colorado Supreme Court's current interpretation of the scheme pursuant to *Dunlap I.*[2] Under that scheme, the prosecution may introduce non-statutory aggravation at step four. If the court were to fail to require the prosecution to provide the defense with notice of the specific non-statutory aggravation it intends to introduce, the defense may not have a full and fair opportunity to rebut this information at step four in front of the jury. Thus, for example, the opportunity to present evidence of good conduct in prison, *see Skipper v. South Carolina*, 476 U.S. 1 (1986), and security conditions at prison, to the court on a Rule 35(b) motion may be especially valuable if the prosecution were to make an allegation of "future dangerousness" as a non-statutory aggravating circumstance.

26. Moreover, the Court's holding that new mitigation was not appropriate in the context of a Rule 35(b) motion in a capital case where the accused has a jury trial is radically at odds with all prior case law regarding a court's obligation to consider all relevant information by way of a Rule 35(b) motion whether or not presented earlier. *Mamula v. People*, 847 P.2d 1135, 1139-40 (Colo. 1993); *Mikkleson v. People, supra*, 199 Colo. 319, 321, 618 P.2d 1101, 1102 (1980); *People v. Arnold*, 907 P.2d 686, 687 (Colo. App. 1995).

27. "To punish a person because he has done what the law plainly allows him to do is a due process violation 'of the most basic sort.'" *United States v. Goodwin*, 457 U.S. 368, 372 (1982) (*quoting Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978)). Depriving a person of an important avenue of judicial review as a penalty for asserting his right to trial by jury is a violation of due process and the right to trial by jury. Consequently, Mr. Holmes moves this Court to find that the current death penalty scheme in Colorado is unconstitutional and strike the death penalty as an option in this case.

III. A State Capital Sentencing Scheme Which Deprives Only Defendants Who Have Asserted Their Right to Trial by Jury of a Postconviction Reconsideration of Any Death Sentence Violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

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[2] Mr. Holmes has filed separate motions challenging the constitutionality of the *Dunlap I scheme.*

28. Under the scheme announced by the Colorado Supreme Court in *People v. Dunlap*, 36 P.3d 778 (Colo. 2001) [*Dunlap II*], Colorado's capital sentencing statute[3] deprives *only* those defendants who assert their right to trial by jury and are sentenced to death by the jury of the right to a broad sentence reconsideration under Rule 35(b) based on all relevant information, including that which was not presented at the original sentencing. In its place, such defendants are merely entitled to a determination by the trial court as to whether the death sentence was "clearly erroneous as contrary to the weight of the evidence" pursuant to C.R.S. § 18-1.3-1201(2)(c) before the sentence becomes determinative. In other words, if the death sentence was legally imposed by the court in the first instance pursuant to the jury verdict, it cannot be reconsidered by the trial court on review following the conviction.

29. In contrast, under the Colorado statute, a capital defendant who waives the right to trial by jury shall be sentenced by the court, which must determine the sentence "in the same manner in which a jury determines its verdict . . . ." C.R.S. § 18-1.3-1201(2.5). Neither the *Dunlap II* court nor the statutes involved restrict these defendants' abilities to obtain review of their sentences pursuant to Rule 35(b). Moreover, all other criminal defendants in Colorado receive the full protections of sentence review afforded by Rule 35(b).

30. This disparate treatment violates the Due Process and Equal Protection Clauses of the state and federal constitutions.

31. First, a criminal sentencing scheme that (1) imposes an onerous "clearly erroneous" standard of review to defendants who receive jury-imposed death sentences but affords a more relaxed, discretionary standard to all other defendants who enjoy the full ability to litigate reductions in their sentences pursuant to Rule 35(b) and (2) prohibits consideration of new mitigation for defendants who received jury-imposed death sentences but not for any other class of defendants violates the Equal Protection Clauses of the Colorado and United States Constitutions.

32. A legislative enactment which infringes on a fundamental right is subject to strict scrutiny and violates equal protection unless it is "necessary to promote a compelling state interest." *Dunn v. Blumstein*, 405 U.S. 330, 342 (1972); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440-41 (1985).

33. The Colorado Supreme Court's interpretation of the capital sentencing scheme articulated in *Dunlap II* infringes upon a capital defendant's fundamental constitutional right to a sentencing trial by jury. *Woldt v. People*, 64 P.3d 256 (Colo. 2003); *Ring v. Arizona*, 536 U.S. 584 (2002); *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Blakely v. Washington*, 542 U.S. 296 (2004); *Montour, supra*. *See also United States v. Jackson*, 390 U.S. 570 (1968); *Pope v. United States*, 392 U.S. 651 (1968). There is no state interest, let alone any compelling state interest, in infringing upon a capital defendant's right to a sentencing trial by jury in the manner described above.

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[3] The statute has been amended or changed several times since 1993 when Dunlap's offense took place. However, the current version of 18-1.3-1201 are virtually identical to the 1993 version in this particular regard.

34. Further, the *Dunlap II* court's interpretation of this scheme infringes upon a capital defendant's fundamental right to life under the Fourteenth Amendment because it deprives capital defendants – whose very lives are at stake – of avenues of relief following conviction and sentence that it provides to every other criminal defendant. *See, e.g., Yick Wo v. Hopkins,* 118 U.S. 356, 370 (1886) (acknowledging the fundamental rights "to life, liberty and the pursuit of happiness"); *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938) (discussing "the fundamental human rights of life and liberty"). *See also Garner v. Memphis Police Department*, 710 U.S. 240 (6th Cir. 1983) ("right to life" under the Fourteenth Amendment as basis for claim under 42 U.S.C. § 1983) *affirmed on Fourth Amendment grounds, Tennessee v. Garner*, 471 U.S. 1 (1985).

35. As with an analysis under the Equal Protection Clause, when a State infringes upon a fundamental right is involved, the Due Process Clauses require a State to justify any action affecting that right by demonstrating a compelling state interest. *Roe v. Wade,* 410 U.S. 113 (1973). Laws which infringe on fundamental rights must be "narrowly drawn to express only the legitimate state interests at stake." *Id.* at 155.

36. There is no "compelling state interest" in denying an accused the opportunity to have his death sentence reconsidered in light of all relevant evidence. There is no legitimate governmental interest involved at all. The only purpose served by the heavier "clearly erroneous" burden and the prohibition *Dunlap II* places on consideration of information not presented at the original sentencing versus the normal standard under Rule 35(b) is a nefarious one: to ensure that death sentences are artificially protected.

37. The Due Process and Cruel and Unusual Punishment Clauses of the state and federal constitutions, require special attention to the accuracy, fairness and reliability of death sentences, not less. *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977); *Mills v. Maryland*, 486 U.S. 367, 376 (1988) ("in reviewing death sentences, the Court has demanded even greater certainty [than in other criminal cases] that the jury's conclusion rested on proper grounds."); *California v. Ramos*, 463 U.S. 993, 998-99 (1983) (qualitative difference of death from all other punishments "requires a correspondingly greater degree of scrutiny of the capital sentencing determination").

38. Finally, even if the "clearly erroneous" standard contained in the capital sentencing statute that the *Dunlap II* court found applies to judicial consideration of a jury-imposed death sentence did not effectively prevent any Rule 35(b) relief, the application of such a standard also violates due process because it places an overly onerous burden upon a capital defendant. *See, e.g., Cooper v. Oklahoma*, 517 U.S. 348 (1996) (Oklahoma law presuming that a criminal defendant is competent to stand trial unless he proves his incompetence by clear and convincing evidence places such an onerous burden on the defendant as to violate due process); *Francis v. Franklin,* 471 U.S. 307 (1985) (jury instruction relieving State of burden of persuasion on element of an offense violates Due Process Clause); *Taylor v. Kentucky*, 436 U.S. 478 (1978) (trial court's refusal to instruct on presumption of innocence in case where prosecution suggested defendant's status was evidence of guilt violated due process).

39. For the foregoing reasons, the Colorado death penalty sentencing scheme is unconstitutional and cannot be applied in this case. Mr. Holmes therefore requests that this Court

declare the death penalty scheme unconstitutional and preclude the possibility of the death penalty in this case.

Request for a Hearing

40. 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).

41. Mr. Holmes moves for a 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.

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Dated: August 16, 2013

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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

ORDER RE: MOTION TO DECLARE COLORADO'S DEATH PENALTY SCHEME UNCONSTITUTIONAL IN LIGHT OF PEOPLE V. DUNLAP, 36 P.3D 778 (COLO. 2001) [DUNLAP II] [D-145]

Defendant's motion is hereby GRANTED _____ DENIED _____.

BY THE COURT:

_____ _____

JUDGE Dated

I hereby certify that on August 16, 2013, I

____ mailed, via the United States Mail,
____ faxed, or
__√__ hand-delivered

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

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