DATE FILED: February 24, 2023 3:10 PM
FILING ID: 4D191ADAEEB28
CASE NUMBER: 2023SA2

SUPREME COURT
STATE OF COLORADO

2 East 14th Avenue
Denver, CO 80203

Original Proceeding
District Court, Adams County, 2022CR1524
Court of Appeals Case No. 2022CA2062

In re:

Plaintiff,

PEOPLE OF THE STATE OF COLORADO,

v.

Defendant,

JERRELLE AIREINE SMITH.

▲ **COURT USE ONLY** ▲

Case No. 2023SA2

PHILIP J. WEISER, Attorney General
MICHAEL KOTLARCZYK, Senior
Assistant Attorney General*
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 6th Floor
Denver, CO 80203
Telephone: 720-508-6187
E-Mail: mike.kotlarczyk@coag.gov
Registration Number: 43250
*Counsel of Record

THE DISTRICT COURT AND COURT OF APPEALS' JOINT ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

☒It contains 4,107 words (principal brief does not exceed 9500 words; reply brief does not exceed 5700 words).

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

☒In response to each issue raised, the appellee must provide under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant's statements concerning the standard of review and preservation for appeal and, if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

/s/ Michael Kotlarczyk

Signature of attorney or party

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

CASES

TABLE OF AUTHORITIES

CONSTITUTIONS

TABLE OF AUTHORITIES

STATUTES

TABLE OF AUTHORITIES

OTHER AUTHORITIES

STATEMENT OF THE ISSUES

1. Whether the District Court correctly determined Petitioner Jerrelle Smith was charged with a "capital offense" for purposes of determining bail eligibility.

2. Whether the Court of Appeals correctly dismissed Smith's appeal of the District Court's order denying bail under § 16-4-204(3), C.R.S. (2022).

STATEMENT OF THE CASE

A. Proceedings in the District Court.

Petitioner Jerrelle Smith was arrested in 2022 and charged with first-degree murder. *See* App'x A.[1] On October 10, 2022, at the preliminary hearing, Smith asked the District Court to set bail. TR 10/10/2022, p 255. In Colorado, all defendants are eligible for bail unless (as relevant here) the defendant is charged with a "capital offense" and "proof is evident or presumption is great." Colo. Const. art. II, § 19(1)(a).

---

[1] The appendices and transcripts cited in this brief refer to the attachments to Smith's petition. The Court Respondents also attach two additional exhibits to this brief, which are cited as Exhibits 1 and 2.

Smith argued that because the death penalty had been legislatively abolished in Colorado, first-degree murder was no longer a "capital offense" for which bail could be denied. The District Court requested additional briefing and set the matter for oral argument. TR 10/10/2022, p 260.

When the matter reconvened a couple days later, the District Court expressed agreement with much of Smith's argument.

> I have read the cases, and I am just going to simply say that Ms. Lanzen brings up a really good point, she truly does. . . . And I agree with the criticism that the New Mexico Supreme Court has about *Tribe*, I truly do. And I agree with the lengthy citations in *State v. Ameer*, 458 P.3d 390, New Mexico Supreme Court, about what historically the notion capital crime means, and it means where one is subject to death. That's what it has historically has meant for a few hundred years. . . . Ms. Lanzen's argument not only has historical support but it has logical support too[.]

TR 10/12/2022, p 4. But the District Court ultimately concluded "I'm bound to follow State Supreme Court precedent . . . . [U]nless and until the Colorado Supreme Court or the Colorado Court of Appeals tells me otherwise, I have to follow the minority rule, which Colorado is a part of." *Id.*

The District Court thus held that first-degree murder remained a capital offense for purposes of bail. *Id.* at 5. It then held proof was evident and presumption was great, and so denied Smith bail. *Id.* at 11.

B. Proceedings in the Court of Appeals.

Smith petitioned the Court of Appeals under § 16-4-204 to review the District Court's order denying bail. *See* Ex. 1. The People filed a response to the petition, arguing (1) that section -204 does not permit appellate review of a district court's order denying bail, and (2) even if it did, the District Court correctly found Smith was charged with a "capital offense." *See* Ex. 2. The Court of Appeals, "[u]pon consideration of the Petition for Review . . . and the People's response," dismissed the petition. App'x C.

Smith then petitioned this Court under Colorado Appellate Rule 21, seeking review of both the District Court's determination that Smith was charged with a "capital offense" and the Court of Appeals' order dismissing Smith's appeal.

SUMMARY OF THE ARGUMENT

The District Court correctly applied this Court's precedent when it determined that first-degree murder remains a capital offense for purposes of bail. In 1972, the Court held that the state constitution classified murder as an offense for which bail could be withheld, even when the defendant cannot receive the death penalty. This precedent has been reaffirmed throughout the last 50 years. This case presents a different circumstance in that the legislature has now abolished the death penalty in Colorado. But under this Court's precedent, that distinction doesn't matter—because the Court has held that the constitution classifies murder as a nonbailable offense, a legislative act cannot alter that classification.

While the District Court faithfully applied this Court's precedent in denying Smith bail, the District Court expresses no opinion whether the Court should overrule or reinterpret its precedent. The District Court only desires a clear and easily applicable rule to apply in this and future cases. To that end, the District Court briefly discusses three different analytical frameworks this Court may adopt.

Finally, the Court of Appeals correctly dismissed Smith's appeal for the same reasons the District Court correctly denied bail. Under this Court's precedent, first-degree murder is a capital offense for which bail can be denied when proof is evident or presumption great. Contrary to the Petition, the Court of Appeals did not dismiss Smith's appeal on jurisdictional grounds, but rather on the merits.

ARGUMENT

This Court directed an order to show cause to both the District Court and the Court of Appeals. In the name of efficiency, the District Court and Court of Appeals file this as a joint brief. But in recognition of the separateness of the two courts, Part I of the below argument is filed only on behalf of the District Court, and Part II is filed only on behalf of the Court of Appeals.

I. The District Court appropriately applied existing precedent in concluding that first-degree murder is a capital offense for bail purposes.

A. Standard of review and preservation.

Bail determinations are usually reviewed for abuse of discretion. *See In re People v. Blagg*, 2015 CO 2, ¶ 11. But where, as here, the

question turns on statutory and constitutional interpretation, the Court employs de novo review. *See id.*

Smith preserved this issue for review. *See* TR 10/12/2022.

B. The legal background of bail eligibility and the death penalty in Colorado.

1. The constitutional right to bail.

"Bail, as a matter of right, for all but the most heinous crimes, has been recognized in Colorado since our Constitution was adopted." *People ex rel. Dunbar v. Dist. Court*, 500 P.2d 358, 359 (Colo. 1972). Specifically, Colorado's Bill of Rights provides: "All persons shall be bailable by sufficient sureties pending disposition of charges except [] [f]or capital offenses when proof is evident or presumption is great[.]" Colo. Const. art. II, § 19(1)(a). The Colorado Revised Statutes contain an identically worded statute. § 16-4-101(1), C.R.S. (2022). This provision "confers an absolute right to bail in all cases, except for capital offenses, where the proof is evident and the presumption is great that the accused committed the crime." *Gladney v. Dist. Court*, 535 P.2d 190, 191 (Colo. 1975). "Capital offense" is not defined.

In 1994, a referendum added a second nonbailable category for crimes of violence committed while the defendant was on parole or probation, on bail, or after the defendant committed two prior felonies. Colo. Const. art. II, § 19(1)(b).

The capital offense exception for bail exists in many state constitutions and states have generally developed two different theories as to how to interpret it:

- **Penalty theory:** "A substantial majority of jurisdictions across the country . . . have held that an offense is a nonbailable capital offense only if it may be punished by imposition of the death penalty." *State v. Ameer*, 458 P.3d 390, 393 (N.M. 2018). This is because "no amount of bail is likely to secure a defendant's voluntary appearance at a trial that may result in a death sentence." *Id.* at 394.

- **Classification theory:** In contrast, other states find that this provision "define[s] a class of crimes which permit the denial of bail." *Dunbar*, 500 P.2d at 359. As its justification, this theory emphasizes "the gravity of [certain] offenses both for the purpose of fixing bail before trial and for imposing punishment after conviction." *People v. Anderson*, 493 P.2d 880, 899 n.45 (Cal. 1972), *superseded on other grounds as recognized in Ghent v. Superior Court*, 90 Cal. App. 3d 944, 952 n.9 (Cal. Ct. App. 1979).

Colorado has "adopted the 'classification' theory when dealing with the question of what constitutes a capital offense with respect to

bail." *Tribe v. Dist. Court*, 593 P.2d 1369, 1370 (Colo. 1979). In *Dunbar*, the defendant argued that he was entitled to bail because he could not be sentenced to death on his first-degree murder charge due to the U.S. Supreme Court's moratorium on the death penalty imposed in *Furman v. Georgia*, 408 U.S. 238 (1972). The Colorado Supreme Court disagreed because Colorado's "Constitution has defined a class of crimes which permit the denial of bail. Murder is within that class of crimes." *Dunbar*, 500 P.2d at 359. The Court reiterated a few years later "that murder remained a capital offense despite the unconstitutionality of the death penalty." *Tribe*, 593 P.2d at 1370 (rule requiring sequestration of jury in "capital cases" applied even though "the death penalty cannot be imposed in this case"). As recently as 2015, this Court reiterated that "[f]irst degree murder is a capital offense, even in a case where the death penalty is not at issue." *Blagg*, 2015 CO 2, ¶ 12 (citing *Tribe*).

2. Colorado's prior experience with death penalty abolition.

The death penalty was available as a punishment for first-degree murder for most of Colorado's history. But this history is not unbroken.

In 1897, the General Assembly abolished the death penalty: "capital punishment is hereby abolished in this state; and hereafter every person convicted of murder in the first degree shall suffer imprisonment for life[.]" 1897 Colo. Sess. Laws 135. This abolition was short lived—just four years later, Colorado repealed the 1897 law and reimposed the death penalty for murder in the first degree. 1901 Colo. Sess. Laws 153, 153-54. Undersigned counsel did not locate any cases addressing whether defendants charged with murder were eligible for bail during these four years.

In the 1970s, two judicial decisions rendered capital punishment unavailable in the state for a few years. First, the U.S. Supreme Court's 1972 decision in *Furman* created a de facto moratorium on the death penalty in the United States. *See Dunbar*, 500 P.2d at 359 (recognizing "that the death penalty cannot be constitutionally permitted under the circumstances that existed in the cases which were before the Supreme Court" in *Furman*). This moratorium ended in 1976. *See Gregg v. Georgia*, 428 U.S. 153 (1976). Two years later, this Court held that Colorado's death penalty statute was unconstitutional. *See In re People*

v. District Court, 586 P.2d 31 (Colo. 1978). A new death penalty statute was enacted the following year. *See* 1979 Colo. Sess. Laws 673.

Other than these few years in the 1970s when capital punishment was unavailable due to judicial decisions, capital punishment was statutorily authorized from 1901 through 2020. Between 1967 and 2020, only one person was actually put to death, in 1997. *See* Michael L. Radelet, *The History of the Death Penalty in Colorado* 87-108 (2017).

3. SB 20-100.

In 2020, the Governor signed SB 20-100. Section 1 of the bill provides:

> For offenses charged on or after July 1, 2020, the death penalty is not a sentencing option for a defendant convicted of a class 1 felony in the state of Colorado. Nothing in this section commutes or alters the sentence of a defendant convicted of an offense charged prior to July 1, 2020. This section does not apply to a person currently serving a death sentence. Any death sentence in effect on July 1, 2020, is valid.

§ 16-11-901. The next 13 sections of SB 20-100 amend parts of Titles 16 and 18 impacted by the repeal. But SB 20-100 did not amend § 16-4-101(1)(a) (or the corresponding constitutional provision), which still

provides an exception to bail for "capital offenses when proof is evident or presumption is great[.]"

C. The District Court's opinion appropriately applied this Court's precedent.

The District Court faithfully applied the classification theory, as it has been articulated by this Court, to Smith's case. The facts in *Dunbar* are nearly identical to those here: a first-degree murder defendant who could not legally be sentenced to the death penalty sought bail. 500 P.2d 358. The Court held bail was unavailable because "[o]ur Constitution has defined a class of crimes which permit the denial of bail. Murder is within that class of crimes." *Id.* at 359. This Court has not wavered from *Dunbar*'s categorical rule in the last 50 years. *See, e.g.*, *Blagg*, 2015 CO 2, ¶ 12 ("First degree murder is a capital offense, even in a case where the death penalty is not at issue."); *Tribe*, 593 P.2d at 1371 (treating first-degree murder case as a "capital case" for rule governing jury sequestration even though the Supreme Court had declared the death penalty statute unconstitutional).

The only difference between this case and *Dunbar* is who made the death penalty unavailable: in *Dunbar*, it was the result of a judicial decision (*Furman v. Georgia*); here, it is a legislative decision (SB 20-100). But nothing in *Dunbar* or subsequent cases gives that distinction any import. To the contrary, *Dunbar* rests the classification of murder as a capital offense within the Constitution itself. *See Dunbar*, 500 P.2d at 359 (asserting that the "Constitution has defined a class of crimes which permit the denial of bail"). If the classification is made by the Constitution, then neither a judicial nor a legislative abolition can alter the classification.

> The constitution is the supreme law of the state, solemnly adopted by the people, which must be observed by all departments of government; and if any of its provisions seemingly impose too great a limitation, they must be remedied by amendment, and cannot be obviated by the enactment of laws in conflict with them.

In re Senate Bill No. 9, 56 P. 173, 174 (Colo. 1899). The District Court thus correctly applied the constitutional classification of murder as a capital offense to conclude that Smith was ineligible for bail.

D. The District Court expresses no opinion as to whether the Court should keep, modify, or replace the existing rule.

The District Court has an interest in this Court announcing a clear, easily administrable rule for what constitutes a "capital offense" for bail purposes in light of SB 20-100. But the District Court has no opinion as to what that rule should be.

To assist the Court in articulating a clear rule, the District Court briefly describes three analytical frameworks the Court could apply that would provide clear guidance to district courts going forward.

1. Keep the classification theory—follow *Dunbar*.

First, this Court could reaffirm the rule from *Dunbar* that the Constitution classifies first-degree murder as a capital offense. Under this rule, only a constitutional amendment could make murder bailable in all instances.

Two additional arguments support this approach. First, SB 20-100 did not amend the bail statutes, though it amended other criminal procedure statutes impacted by the death penalty repeal. Courts presume that the General Assembly "acted with an awareness of prior

decisional law on the subject matter under inquiry," so the failure to amend the bail statute may be seen as expressing an intent to leave bail for first-degree murder unaffected by the death penalty repeal. *People v. Green*, 734 P.2d 616, 621 (Colo. 1987). Such legislative intent may not be controlling because the term "capital offense" is constitutional, not just statutory. But to the extent "capital offense" is ambiguous in article 2, section 19, the legislature is entitled to some deference. *See In re Great Outdoors Colo. Trust Fund*, 913 P.2d 533, 539 (Colo. 1996) ("In enacting legislation, the General Assembly is authorized to resolve ambiguities in constitutional amendments in a manner consistent with the terms and underlying purposes of the constitutional provisions.").

Second, following *Dunbar* is arguably most consistent with the crime-of-violence exception. *See* Colo. Const. art. II, § 19(1)(b); § 16-4-101(1)(b), C.R.S. Unlike the capital-offense exception, the crime-of-violence exception expressly provides that the General Assembly "may . . . define[]" what constitutes a crime of violence. Colo. Const. art. II, § 19(1)(b)(I), (II), (III). Additionally, the crime-of-violence exception also makes bail unavailable to defendants based on the seriousness of their

offense (the main rationale for the classification theory), not on their likelihood of appearing for trial (the rationale for the penalty theory). And if the capital-offense exception no longer applies, the continued application of the crime-of-violence exception could produce odd results. For example, bail may be available to some defendants charged with murder while those charged with lesser violent crimes would be ineligible for bail if they committed their offense while on probation, parole, bail, or are a repeat offender. This outcome could be justified based on the risk such offenders pose to the public if out on bail. *See* Colo. Const. art. 19, § 1(b) (crime-of-violence exception requires district court to find "the public would be placed in significant peril if the accused were released on bail"). But Colorado voters likely understood the crime-of-violence exception would be in addition to, and not in lieu of, an exception for first-degree murder.

2. Abandon the classification theory and adopt the penalty theory.

In 2018, after New Mexico legislatively abolished the death penalty, its supreme court issued a detailed opinion interpreting an

identical bail provision in its constitution. The court explicitly endorsed the penalty theory, rejected the rationales of the ten states (including Colorado) who subscribe to the classification theory, and held that first-degree murder was bailable because there were no longer any "capital offenses" in New Mexico. *Ameer*, 458 P.3d at 390.

Two primary arguments support this approach. First, the penalty theory would give effect to the plain language of "capital offense." As the New Mexico court recognized, "Since at least the late 1400s, the term 'capital' has meant . . . 'punishable by death.'" *Id.* at 392 (quoting *The Oxford English Dictionary* vol. II (2d ed 1989) at 862). And while the Court in *Dunbar* adopted the classification theory instead of the penalty theory, dicta in a pre-*Dunbar* case is consistent with this rationale supporting the penalty theory. *See People v. Spinuzzi*, 369 P.2d 427, 430 (Colo. 1962) ("The historical reason for denying bail in a capital case is because temptation for the defendant to leave the jurisdiction of the court and thus avoid trial is particularly great in such case."), *overruled on other grounds by People v. Kirkland*, 483 P.2d 1349 (Colo. 1971). Second, adopting the penalty theory would align Colorado with the

"substantial majority of jurisdictions across the country addressing the same constitutional interpretation issue." *Ameer*, 458 P.3d at 393-94 (citing 22 states as adopting the penalty theory).

3. Modify the classification theory to permit the General Assembly to remove murder as a capital offense.

Finally, the Court could maintain the classification theory but distinguish (or, if necessary, overrule) *Dunbar* and its progeny on the grounds that they did not address a legislative abolition of the death penalty. As the New Mexico Supreme Court said, "no case in any jurisdiction, including . . . *Tribe*, has held that a constitutional provision guaranteeing bail in all but 'capital offenses' will permit bail to be denied after a *legislative* abolition of capital punishment for an offense." *Ameer*, 458 P.3d at 395.

No case in Colorado has expressly decided whether the General Assembly can define the class of capital offenses for purposes of the

constitutional provision governing bail. Statements in prior decisions can be found supporting and opposing such an approach.[2]

The biggest advantage to this approach is avoiding the question *Dunbar* did not answer: if the General Assembly does not define what is a capital offense, who does? One possibility is that whatever was a

---

[2] Statutes define the classification:

- "[C]ase law has defined 'capital case' to mean a case in which a sentence of death is potentially available under the statutes applicable to the offense[.]" *People v. Reynolds*, 159 P.3d 684, 688 (Colo. App. 2006).
- "In [a prior case] the pertinent Statute itself provided that no death penalty could be administered under the facts alleged in the charge." *Tribe*, 593 P.2d at 1371.

The Constitution categorizes first-degree murder as a capital offense:

- "Traditionally and acceptedly, there are offenses of a nature as to which a state properly may refuse to make provision for a right to bail. . . . Certainly, first-degree murder . . . is such an offense." *Corbett v. Patterson*, 272 F. Supp. 602, 607 (D. Colo. 1967).
- "Our Constitution has defined a class of crimes which permit the denial of bail. Murder is within that class of crimes." *Dunbar*, 500 P.2d at 359.
- "Since Colorado has adopted the classification theory, we hold that the procedural aspects of a capital case . . . remain in effect for crimes which have previously been classified as capital." *People v. Haines*, 549 P.2d 786, 790 (Colo. App. 1976), *overruled on other grounds by People v. Deason*, 670 P.2d 792 (Colo. 1983).

capital offense in 1876 would be treated as a capital offense today. But the constitution did not define a specific set of crimes as unbailable, it referred to capital offenses generally, which is not a fixed category of crimes. In fact, capital punishment's reach was different in 1876 than it was in 2019. *See* Michael L. Radelet, *The History of the Death Penalty in Colorado* 29, 74 (2017). For example, capital punishment applied to all murders in 1876; not until 1883 did the statutes distinguish between degrees of murder. *See Kearney v. People*, 17 P 782 (1888). So if the meaning of "capital offense" is unchanged from 1876, potentially all voluntary homicides could be covered.

Finally, if the Court adopts this analytical framework, it is not necessarily outcome determinative. After deciding that the legislature *can* define "capital offense" to exclude murder, the Court would need to decide whether SB 20-100 *did* so. This would require determining whether the General Assembly intended to leave bail unaffected since it did not modify the bail statutes, as discussed above. Additionally, the plain language of SB 20-100 does not abolish capital offenses per se, but instead provides that "the death penalty is not a sentencing option" for

murder. § 16-11-901. The District Court, bound by *Dunbar*'s constitutional rule, did not reach these questions and expresses no opinion about them here.

II. The Court of Appeals correctly applied this Court's precedent when it dismissed Smith's appeal.

A. Standard of review and preservation.

Matters of statutory and constitutional interpretation are reviewed de novo. *Blagg*, 2015 CO 2, ¶ 11. Smith preserved this issue by petitioning the Court of Appeals for review of the order denying bail and including the issue in his Rule 21 petition. *See* Pet. 10.

B. The Court of Appeals correctly applied this Court's precedent in dismissing Smith's appeal.

A district court's bail order is subject to review under § 16-4-204. That section provides four options to the Court of Appeals when reviewing a bail order:

> After review, the appellate court may:
>
> (a) Remand the petition for further hearing if it determines that the record does not disclose the findings upon which the court entered the order; or
>
> (b) Order the trial court to modify the terms and conditions of bail or appeal bond; or

> (c) Order the trial court to modify the terms and conditions of bail or appeal bond and remand for further hearing on additional conditions of bail or appeal bond; or
>
> (d) Dismiss the petition.

§ 16-4-204(3).

Smith argues that the Court of Appeals erred by improperly concluding that it lacked jurisdiction to review the District Court's bail decision under § 16-4-204. But the Court of Appeals did not dismiss for lack of jurisdiction. *See People v. Jones*, 2015 CO 20, ¶¶ 16, 28 (holding that the Court of Appeals had jurisdiction to review a bail decision under another statutory section not expressly mentioned in § 16-4-204). Rather, the Court of Appeals reviewed the petition on the merits and dismissed the petition under section -204(3)(d) because it agreed that the District Court correctly applied controlling precedent. As argued above, the rule set forth in *Dunbar*, and reaffirmed in *Tribe* and *Blagg*, provides that the Constitution establishes first-degree murder as a capital offense for purposes of bail. The Court of Appeals is bound by this caselaw to the same extent as the District Court. The Court of Appeals takes no position on whether the Supreme Court should

maintain the rule from *Dunbar*. But the Court of Appeals correctly applied this precedent in dismissing the petition.

CONCLUSION

Both the District Court and the Court of Appeals correctly applied this Court's precedent in determining that Smith committed a "capital offense" for purposes of his eligibility for bail. Neither of these courts takes any position as to whether this Court should revise that precedent in light of the legislative abolition of the death penalty in Colorado.

Dated: February 24, 2023

PHILIP J. WEISER
Attorney General

/s/Michael Kotlarczyk
MICHAEL KOTLARCZYK, 43250*
Senior Assistant Attorney General
Attorneys for the Court Respondents
*Counsel of Record

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **DISTRICT COURT AND COURT OF APPEALS' JOINT ANSWER BRIEF** upon all counsel of record who have entered their appearance on behalf of the parties via the Colorado Courts e-Filing System, this 24th day of February, 2023.

/s/ *Xan Serocki*