

# DEATH ELIGIBILITY IN COLORADO: MANY ARE CALLED, FEW ARE CHOSEN

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*This Article reports the conclusions of an empirical study of every murder conviction in Colorado between January 1, 1999 and December 31, 2010. Our goal was to determine: (1) what percentage of first-degree murderers in Colorado were eligible for the death penalty; and (2) how often the death penalty was sought against these killers. More importantly, our broader purpose was to determine whether Colorado's statutory aggravating factors meaningfully narrow the class*

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*of death-eligible offenders as required by the Constitution. We discovered that while the death penalty was an option in over 90% of all first-degree murders, it was sought by the prosecution initially in only 3% of those killings, pursued all the way through sentencing in only 1% of those killings, and obtained in only 0.6% of all cases. These numbers compel the conclusion that Colorado's capital sentencing system fails to satisfy the constitutional imperative of creating clear statutory standards for distinguishing between the few who are executed and the many who commit murder. The Eighth Amendment requires that these determinations of life and death be made at the level of reasoned legislative judgment, and not on an ad hoc basis by prosecutors. The Supreme Court has emphasized that in order to be constitutional a state's capital sentencing statute must limit the class of persons eligible for the death penalty such that only the very worst killers are eligible for the law's ultimate punishment. Colorado's system is unconstitutional under this standard because nearly all first-degree murderers are statutorily eligible to be executed.*

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## INTRODUCTION

This Article reports the conclusions of an empirical study<sup>1</sup>

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1. The authors of this study were solicited by attorneys for Edward Montour,

of every murder conviction in Colorado between January 1, 1999 and December 31, 2010.<sup>2</sup> Our goal was to determine: (1) what percentage of first-degree murderers in Colorado were eligible for the death penalty; and (2) how often the death penalty was sought against these killers. More generally, the purpose of the study was to determine whether Colorado's statutory aggravating factors meaningfully narrow the class of death-eligible offenders. We do not offer conclusions on whether particular cases are well suited for capital punishment; indeed, we do not scrutinize any particular prosecutorial sentencing choice. Our study reports on the failures of Colorado's capital sentencing *system*, not on any specific errors of prosecutors in seeking or not seeking death in a *particular case*.

We discovered that while the death penalty was an option in approximately 90% of all first-degree murders, it was sought by the prosecution initially in only 3% of those killings,

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who was sentenced to death in Colorado. Mr. Montour's sentence was subsequently reversed, his guilty plea was set aside, and he is currently awaiting retrial at the trial court level. Attorneys for Mr. Montour, along with paralegals and interns, collected the data described in this study and presented it to us for analysis. The compiling of the data, the analysis, and the conclusions are entirely our own. We consulted with defense counsel regarding their intended use of the study, on issues relating to timing, and in preparing earlier versions of the study for filing with the court. However, the study design is based on the best practices in the field and our judgment and analysis are independent. In particular, we relied on a leading reference book as a foundation for the study design. See David C. Baldus et al., *Empirical Studies of Race and Geographic Discrimination in the Administration of the Death Penalty: A Primer on the Key Methodological Issues*, in THE FUTURE OF AMERICA'S DEATH PENALTY: AN AGENDA FOR THE NEXT GENERATION OF CAPITAL PUNISHMENT RESEARCH (C. Lanier, W. Bowers & J. Acker eds., 2009) [hereinafter *Methodological Issues*]. We did not defer to defense counsel on any questions of form or substance. On the contrary, we have had the study methodology and the study findings independently verified by experts in the fields of law and sociology. We are indebted to counsel and Mr. Montour for their support and foresight; it is not every day that trial counsel for a defendant commissions an independent study. We are also grateful to Erin Kincaid, J.D. 2012, who has helped us research, edit, and write this Article.

2. Similar studies have been done in other states, but unlike other studies, ours is based on a complete dataset of all homicides in Colorado for a 12-year period, rather than a sample of cases. Even leading scholars such as David Baldus have compiled data and reached conclusions based on a sample of homicide cases from a district. See, e.g., Declar. of Baldus, Ex. 219, *Ashmus v. Wong*, No. 3:93-cv-00594-TEH (N.D. Cal. Nov. 19, 2010) [hereinafter Baldus Declar.] (on file with author). Other scholars have limited their study by looking at only those cases where there is an actual first-degree murder conviction, instead of cases where there was or could have been a first-degree murder conviction. See, e.g., Steven F. Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for Furman*, 72 N.Y.U. L. REV. 1283, 1333 (1997) [hereinafter *Requiem for Furman*].

pursued all the way through sentencing in only 1% of those killings, and obtained in only 0.6% of all cases.<sup>3</sup> These numbers compel the conclusion that Colorado's capital sentencing system fails to satisfy the constitutional imperative of creating clear statutory standards for distinguishing between the few who are executed and the many who commit murder.

The Eighth Amendment requires that determinations of life and death be made at the level of reasoned legislative judgment, and not on an ad hoc basis by prosecutors whose decisions, in reviewing individual cases, might be tainted by implicit biases.<sup>4</sup> More specifically, the Supreme Court has emphasized that a State's capital sentencing statute must serve the "constitutionally necessary function . . . [of] circumscrib[ing] the class of persons eligible for the death penalty" such that only the very worst are eligible for the law's ultimate punishment.<sup>5</sup> Colorado's system is unconstitutional insofar as nearly all first-degree murderers are statutorily eligible to be executed. Our study, then, shows that Colorado's statutory system fails to sufficiently narrow the class of death-eligible offenders.<sup>6</sup>

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3. By generating a complete set of homicides and including both actual first-degree murders and cases that factually justified first-degree murder convictions, we have avoided the problems associated with sampling errors and the possible skewing of data that would occur if, for example, we had only studied cases in which there was an actual first-degree murder conviction. Some scholars have noted that focusing exclusively on cases where there is an actual first-degree murder conviction might skew the dataset toward those killings most likely to be aggravated. *See, e.g., Requiem for Furman, supra* note 2, at 1333.

4. Indeed, the most comprehensive prior study of Colorado's death penalty found that "[e]ven though Colorado prosecutors appear to be quite selective in pursuing the death penalty, the evidence suggests that death penalty decisions are not being made equitably." Stephanie Hindson, Hillary Potter & Michael L. Radelet, *Race, Gender, Region and Death Sentencing in Colorado, 1980-1999*, 77 U. COLO. L. REV. 549, 581 (2006) ("The data show that prosecutorial decisions to seek death sentences in Colorado . . . are strongly correlated with race, ethnicity, and gender of the homicide victim.").

5. *Zant v. Stephens*, 462 U.S. 862, 878 (1983).

6. In *McGautha v. California*, the Court approved a system under which any person convicted of first-degree murder could be sentenced to death at the discretion of the jury. 402 U.S. 183 (1971). This form of standardless sentencing was rejected as inconsistent with the Eighth Amendment in *Furman v. Georgia*. 408 U.S. 238 (1972). More recently the Court has recognized that in certain instances where first-degree murder is very narrowly defined, the narrowing requirements of the Eighth Amendment can be accomplished by a first-degree murder conviction. *See Lowenfield v. Phelps*, 484 U.S. 231, 245 (1988). However, in order for the Eighth Amendment to be satisfied, the definition of capital murder must be very restrictive such that a conviction of first-degree murder is equivalent to finding both guilt and the presence of an aggravating factor. *Id.* at 242 (noting that under applicable state law, first-degree murder was limited to

Furthermore, the fact that nearly all first-degree murderers in Colorado are eligible for death but very, very few receive that penalty<sup>7</sup> suggests that the system is laden with arbitrariness. At first blush it may seem counterintuitive to conclude that a death penalty used too infrequently is unconstitutional. However, the statistical rarity of death sentences was a salient feature of the death penalty schemes declared unconstitutional in *Furman v. Georgia*.<sup>8</sup> As Justice Stewart explained, when the death penalty is only imposed upon a “random handful” of the defendants statutorily eligible for the punishment, its application is “cruel and unusual in the same way that being struck by lightning is cruel and unusual.”<sup>9</sup>

A constitutionally sound capital sentencing system must limit the discretion of prosecutors and jurors such that the determination of life and death is not one of caprice or arbitrariness.<sup>10</sup> This Article provides empirical support for the

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instances where, for example, the defendant kills or attempts to kill more than one person, killed for pecuniary gain, killed a peace officer, or killed a child under twelve). Unlike the statute at issue in *Lowenfield*, Colorado’s statutory definition of first-degree murder is one of the broadest in the country—indeed it includes even nonintentional killings. See *infra* text accompanying notes 70–81 (explaining Colorado’s definition of first-degree murder). Notably, Colorado’s criminal code does create a separate crime for murdering a peace officer and defines it as first-degree murder. C.R.S. § 18-3-107 (2012). Accordingly, if the Colorado legislature abolished the more general first-degree murder catchall provision, *Id.* § 18-3-102, the crime of killing a peace officer could function as a form of first-degree murder that sufficiently narrows the class of death-eligible offenders as required by *Lowenfield*.

7. See *infra* Part III.B.

8. *Furman*, 408 U.S. at 299.

9. *Id.* at 309. Scholars have observed that the Court’s conclusion that the death penalty was unconstitutional in *Furman* was based in large part on the low death sentencing ratios—that is, the low percentage of defendants who were eligible for the death penalty that were actually sentenced to death. See, e.g., *Requiem for Furman*, *supra* note 2, at 1287 (“The Court’s determination in *Furman* that the death penalty was being applied to a ‘random handful’ was grounded in empirical data concerning death sentence ratios at the time.”); *id.* at 1288 (“In *Furman*, the Justices’ conclusion that the death penalty was imposed only infrequently derived from their understanding that only 15–20% of convicted murderers who were death-eligible were being sentenced to death.”); see also Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 415 (1995) (“[T]he class of the death-eligible should not be tremendously greater than, say, [5 to 10%] of all murderers. What was intolerable at the time of *Furman* and what remains intolerable today is that the ratio of death-eligibility to offenses-resulting-in-death is much closer to [90:1] than [5:1 or 10:1].”).

10. Chelsea Creo Sharon, *The “Most Deserving” of Death: The Narrowing Requirement and the Proliferation of Aggravating Factors in Capital Sentencing Statutes*, 46 HARV. C.R.-C.L. L. REV. 223, 247 (2011) (“The narrowing

conclusion that Colorado's capital sentencing system fails to genuinely narrow the class of death-eligible offenders so as to minimize the risk of arbitrariness. Simply put, we demonstrate that there is no meaningful way to distinguish between the many who are eligible for the penalty and the very few who receive it.<sup>11</sup>

This Article proceeds as follows. Part I begins with a review of the Supreme Court's Eighth Amendment jurisprudence, focusing on the Court's requirement of qualitative and quantitative narrowing.<sup>12</sup> That is, we demonstrate that in order to be constitutional, a state sentencing scheme must both narrow the pool of the death-eligible (quantitatively narrow)<sup>13</sup> and make meaningful distinctions between who lives and who dies (qualitatively narrow).<sup>14</sup> Part II describes our own methodology from data collection through coding and analysis, and situates our study within the existing body of research in this field. Finally, we set forth our conclusions in Part III. In sum, the question of whether Colorado's death penalty statute satisfies the Eighth Amendment by narrowing the class of eligible offenders is fundamentally an empirical question. This Article responds to that question by providing empirical data demonstrating that Colorado's sentencing scheme fails to satisfy its constitutional mandate.

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requirement's primary aim is to reduce arbitrariness by confining the discretion of jurors and prosecutors to a particularly heinous group of offenders, making it more likely that culpability rather than caprice will drive their decision making.”).

11. Although our data only show the rate of death eligibility and the death sentence rate without offering an explanation for the cases where a sentence of death is imposed, because the number of death sentences is so low, it is relatively easy to draw some quick conclusions. For example, it is clear that similar crimes and arguably even more egregious crimes committed during the study period did not result in death sentences. Likewise, the fact that two of the three death sentences during our study period arose out of a single county may signal that geographic location more than aggravation tends to predict the likelihood of a death sentence.

12. See, e.g., *Requiem for Furman*, *supra* note 2, at 1294.

13. Professors Shatz and Rivkind have explained the quantitative narrowing as a requirement that the death penalty be imposed in a “demonstrably smaller” rate than all murder cases. *Requiem for Furman*, *supra* note 2, at 1294 (citing *Maynard v. Cartwright*, 486 U.S. 356, 364 (1988)).

14. See *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring) (recognizing the need for a “meaningful basis for distinguishing the few cases in which it is imposed from the many in which it is not”).

## I. THE EIGHTH AMENDMENT AND THE DEATH PENALTY

The Supreme Court has largely policed the imposition of the death penalty in the United States through the Eighth Amendment's prohibition on cruel and unusual punishment. This Part summarizes the relevant case law pertaining to eligibility and selection of defendants for the death penalty and then applies that jurisprudence to the Colorado statute.

### A. *The Narrowing Requirement*

For most of the death penalty's history in this country, the Supreme Court devoted little attention to its constitutionality. In fact, in 1971, in *McGautha v. California*, the Court held that the death penalty was such a difficult topic to sensibly regulate that the states were free to leave the ultimate determination of how it should be imposed to the whims of capital juries.<sup>15</sup> There was a sense among the Justices that drafting statutes capable of distinguishing between the most culpable defendants deserving of death and the less culpable who were not was a fool's errand.<sup>16</sup> Drafting capital sentencing statutes for this purpose was, the Court concluded, a task that is "beyond present human ability."<sup>17</sup> Consequently, the capital sentencing statutes during the pre-*Furman* era were "purposely constructed to allow the maximum possible variation from one case to the next."<sup>18</sup>

The Court abruptly reversed course in 1972 in the landmark *Furman v. Georgia* decision.<sup>19</sup> *Furman* consisted of ten total opinions: a short, one paragraph per curiam opinion and one separate opinion written by each of the nine Justices.<sup>20</sup>

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15. *McGautha v. California*, 402 U.S. 183, 185 (1971).

16. *Id.* at 204 ("To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.").

17. *Id.*

18. *Id.* at 248 (Brennan, J., dissenting); *see also Furman*, 408 U.S. at 248 (Douglas, J., concurring) ("We are now imprisoned in the *McGautha* holding. Indeed the seeds of the present cases are in *McGautha*. Juries (or judges, as the case may be) have practically untrammelled discretion to let an accused live or insist that he die.").

19. 408 U.S. 238.

20. *Id.* at 239–40 (per curiam); *see also Steiker & Steiker, supra* note 9, at 362 (identifying *Furman* as the "longest decision ever to appear in the U.S. Reports").

The only paragraph of the decision joined by five or more Justices curtly concluded that “the imposition and carrying out of the death penalty in [the cases before the Court] constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.”<sup>21</sup> Justices William Brennan and Thurgood Marshall wrote separate opinions concurring in the judgment, but concluding that the death penalty was always unconstitutional.<sup>22</sup> Three of the Justices—Potter Stewart, Byron White, and William O. Douglas—did not find the death penalty categorically unconstitutional, but rather found fault with the specifics of the sentencing systems under review.<sup>23</sup> Although there is no clear “narrowest grounds”<sup>24</sup> among these three concurring Justices, scholars and courts have tended to treat some combination of the Stewart, White, and Douglas opinions as stating the controlling constitutional rule.<sup>25</sup>

Justices Stewart,<sup>26</sup> White,<sup>27</sup> and Douglas<sup>28</sup> emphasized not the injustice of the death penalty generally, but the arbitrariness of the capital sentencing process. As Justice Douglas explained, “It would seem to be incontestable that the death penalty inflicted on one defendant is ‘unusual’ if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed *under a procedure that gives room for the play of such prejudices.*”<sup>29</sup> That is to say, Douglas was concerned about procedures that allow for too much discretion on the part of the prosecutor or the jury, and thus found the statutes under review unconstitutional because “[u]nder [those] laws no standards

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21. *Furman*, 408 U.S. at 239–40 (per curiam).

22. *Id.* at 305 (Brennan, J., concurring); *id.* at 360 (Marshall, J., concurring).

23. *See Pulley v. Harris*, 465 U.S. 37, 44 (1984) (summarizing these three Justices’ rationales underlying their three separate opinions in *Furman*).

24. According to the *Marks* rule, when there is no majority decision supporting the judgment, “the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds.” *Marks v. United States*, 430 U.S. 188, 193 (1977) (citing *Gregg v. Georgia*, 428 U.S. 153 (1976)).

25. *See* James S. Liebman, *Slow Dancing with Death: The Supreme Court and Capital Punishment, 1963–2006*, 107 COLUM. L. REV. 1, 8 (2007) (noting that Justices Douglas, Stewart, and White “controlled the outcome” of *Furman*).

26. *Furman*, 408 U.S. at 306 (Stewart, J., concurring).

27. *Id.* at 310 (White, J., concurring).

28. *Id.* at 240 (Douglas, J., concurring).

29. *Id.* at 242 (Douglas, J., concurring) (emphasis added); *id.* at 249 (Douglas, J., concurring) (“[T]he extreme rarity with which applicable death penalty provisions are put to use raises a strong inference of arbitrariness.”) (citing Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1790 (1970)).

govern[ed] the selection of the penalty [and] [p]eople live or die, dependent on the whim of one man or of 12.”<sup>30</sup> For Douglas, statutes that permit too much discretion—that fail to legislatively narrow the class of death-eligible defendants—are “pregnant with discrimination.”<sup>31</sup>

Similarly, Justice Stewart emphasized the randomness inherent in the capital sentencing statutes under review, famously noting that “[t]hese death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual.”<sup>32</sup> Of particular note, Stewart emphasized that low death sentence rates—imposing death sentences on a “random handful” of the defendants who were eligible for death—suggest that a capital sentencing system is wanton and unconstitutional.<sup>33</sup>

The third and final critical opinion in support of finding the death penalty statutes at issue in *Furman* unconstitutional—Justice White’s—again emphasized the arbitrariness of capital sentencing schemes under which the death penalty is too “seldom . . . imposed” relative to the number defendants who are statutorily death-eligible.<sup>34</sup>

What the opinions of Justices Douglas, Stewart, and White have in common, therefore, is two principal concerns regarding the arbitrariness of the state death penalty systems. First, the statutes in question did not provide a reasoned basis for determining who would be sentenced to death and who would not. Second, the scarcity of the death sentences relative to the number of defendants who were death-eligible weighed against

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30. *Id.* at 253 (Douglas, J., concurring); *accord id.* at 309–10 (Stewart, J., concurring).

31. *Id.* at 256–57 (Douglas, J., concurring) (“[T]hese discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on ‘cruel and unusual’ punishments.”).

32. *Id.* at 309–10 (Stewart, J., concurring).

33. *Id.* at 310 (Stewart, J., concurring).

34. *Id.* at 311 (White, J., concurring) (“[J]udges and juries have ordered the death penalty with such infrequency that the odds are now very much against imposition and execution of the penalty with respect to any convicted murderer or rapist.”). Justice White explained that when the death penalty is infrequently imposed on those who are eligible—when the death sentence rate is too low—the penalty serves neither deterrent nor retributive ends. *Id.* at 311–12 (White, J., concurring). On the basis of these conclusions he recognized that “[a] penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment.” *Id.* at 312–13 (White, J., concurring) (explaining that “as the statutes before us are now administered, the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice”).

the statutes' constitutionality.<sup>35</sup> If capital punishment were necessary to serve a legitimate government interest, they reasoned, it would not be imposed in only a small fraction of those cases in which it was available.<sup>36</sup> As leading death penalty scholars have observed, "What was intolerable at the time of *Furman* and what remains intolerable today is [a low] ratio of death-eligibility to offenses-resulting-in-death."<sup>37</sup> As Professor Shatz has emphasized, the decision to strike down the challenged death penalty schemes in *Furman* rested in substantial part on the fact that "only 15–20% of convicted murderers who were death eligible were being sentenced to death."<sup>38</sup> Stated more directly, scholars have recognized that a

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35. Justices Douglas, Brennan, Stewart, and White all spoke to this issue in their respective opinions. Justice Douglas cited favorably to a study finding that "[t]he extreme rarity with which applicable death penalty provisions are put to use raises a strong inference of arbitrariness." *Id.* at 249 (Douglas, J., concurring). Justice Brennan also explained that "[w]hen the punishment of death is inflicted in a trivial number of cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily." *Id.* at 293 (Brennan, J., concurring). Justice Stewart similarly explained:

These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race.

*Id.* at 309–10 (Stewart, J., concurring). Finally, Justice White wrote:

[W]hen imposition of the penalty reaches a certain degree of infrequency, it would be very doubtful that any existing general need for retribution would be measurably satisfied. Nor could it be said with confidence that society's need for specific deterrence justifies death for so few when for so many in like circumstances life imprisonment or shorter prison terms are judged sufficient, or that community values are measurably reinforced by authorizing a penalty so rarely invoked.

*Id.* at 311–12 (White, J., concurring).

36. See *id.* at 249 (Douglas, J., concurring); *id.* at 293 (Brennan, J., concurring); *id.* at 309–10 (Stewart, J., concurring); *id.* at 311–12 (White, J., concurring).

37. Steiker & Steiker, *supra* note 9, at 415. In theory, increasing the number of executions in a jurisdiction could also cure a low death sentencing rate. However, when the eligibility rate for first-degree murders is above 50%, or above 90% as it is in Colorado, it is not feasible or desirable to imagine executing this number of people. It is the high eligibility rate—the failure of the aggravating factors to meaningfully narrow—that makes the death sentencing rate unconstitutionally low. See *infra* text accompanying notes 57–58.

38. *Requiem for Furman*, *supra* note 2, at 1288; *id.* at 1289 ("Although in *Furman* and *Gregg* the Court referred to the percentage of 'those convicted of murder' who were sentenced to death, the Justices had to be concerned with the

critical calculation for purposes of evaluating the constitutionality of a capital sentencing scheme is the death sentence ratio—the number of death sentences per death-eligible murderers. Though the Court did not prescribe a set percentage that would be constitutional,<sup>39</sup> relying on the opinions from *Furman*, scholars have concluded that “any scheme producing a ratio of less than 20% would not [be constitutional].”<sup>40</sup>

States were quick to amend their capital sentencing statutes in the wake of *Furman*.<sup>41</sup> Indeed, the State of Colorado approved a new death sentencing system in 1974, within 2 years of the *Furman* decision.<sup>42</sup> In 1976, the Supreme Court revisited the constitutionality of the death penalty in *Gregg v. Georgia*, upholding the new capital sentencing scheme enacted by the Georgia legislature in response to *Furman*.<sup>43</sup> On the

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percentage of death-eligible convicted murderers sentenced to death.”) (noting that the relevant statistic, then, is the percentage of first-degree murderers who were sentenced to death).

39. Indeed, reliable numbers regarding the death sentence rate at the time of *Furman* are hard to come by; nonetheless Justices concurring in the judgment and dissenting in *Furman* agreed that the death penalty was applied in “only” 15–20% of the cases in which it was an available punishment. See, e.g., *Furman*, 408 U.S. at 386 n.11 (Burger, C.J., dissenting) (“Although accurate figures are difficult to obtain, it is thought that from 15% to 20% of those convicted of murder are sentenced to death in States where it is authorized.”); *id.* at 309 n.10 (Stewart, J., concurring) (citing Chief Justice Burger’s statistics); see also Steven F. Shatz, *The Eighth Amendment, the Death Penalty, and Ordinary Robbery-Burglary Murderers: A California Case Study*, 59 FLA. L. REV. 719, 745–46 (2007) (“When the Court decided in *Furman* that the death penalty, as then administered by the states, created too great a risk of arbitrariness, it was the Justices’ understanding that only 15–20% of death-eligible murderers were sentenced to death.”) (noting that it was the fact “that fewer than [1 in 5] statutorily death-eligible defendants were being sentenced to death . . . that caused the Justices in *Furman* to find that the death penalty was ‘exacted with great infrequency’ . . . and consequently, was inescapably arbitrary”).

40. *Requiem for Furman*, *supra* note 2, at 1289; see also *id.* at 1287 (expressing the *Furman* principle as the view that the “arbitrary administration of the death penalty was inevitable when too few murderers were being selected from too large a death eligible class”).

41. Hindson et al., *supra* note 4, at 550.

42. COLO. REV. STAT. § 16-11-103 (Supp. 1975), *invalidated by* People v. Dist. Court, 586 P.2d 31 (Colo. 1978). For a more complete history of the events surrounding the revisions to Colorado’s statute, see Hindson et al., *supra* note 4, at 555.

43. *Gregg v. Georgia*, 428 U.S. 153, 207 (1976). One scholar has nicely summarized the legal developments during this era:

In 1972 in *Furman v. Georgia*, the Supreme Court struck down capital statutes that gave broad discretion to jurors. One way that state legislatures responded to the *Furman* decision was by writing new death penalty statutes that gave sentencing jurors specific

same day, however, the Court declared North Carolina's mandatory capital sentencing system unconstitutional in *Woodson v. North Carolina*.<sup>44</sup> In striking down a mandatory death penalty for all first-degree murderers, the Court explained:

North Carolina's mandatory death penalty statute for first degree murder departs markedly from contemporary standards respecting the imposition of the punishment of death and thus cannot be applied consistently with the Eighth and Fourteenth Amendments' requirement that the State's power to punish 'be exercised within the limits of civilized standards.'<sup>45</sup>

Through cases like *Gregg* and *Woodson*, the Court mandated a two-tier capital sentencing process: there must be a narrowing of the class of murderers such that the death eligibility rate is not too high (and so that the death sentencing rate is not too low), and there must be an individualizing or culpability phase at which the actual sentence is determined.<sup>46</sup> But to suggest that the limits of the Eighth Amendment were clear by 1976 when these cases were decided would be to substantially misstate history. Emblematic of the confusion in this realm in the late 1970s, the Colorado Supreme Court noted that,

the Supreme Court's inability [in *Gregg* and *Furman*] to

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aggravating and mitigating factors to consider. Four years later, in *Gregg v. Georgia*, a plurality held that Georgia's new statute, which contained ten aggravating circumstances for juries to consider, provided 'clear and objective standards' . . . and therefore did not violate the Eighth and Fourteenth Amendments. In other cases at the same time, the Court upheld other 'guided discretion' death penalty schemes that gave specific sentencing factors or questions to jurors.

Jeffrey Kirchmeier, *Casting a Wider Net: Another Decade of Legislative Expansion of the Death Penalty in the United States*, 34 PEPP. L. REV. 1, 5-6 (2006).

44. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

45. *Id.* at 301 (quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958)). Notably, Colorado's 1974 death penalty statute was similar to the North Carolina statute struck down in *Woodson* insofar as it limited the type of mitigating evidence a defendant could present. Accordingly, the Colorado Supreme Court struck down the 1974 statute. *Dist. Court*, 586 P.2d at 34-35 (relying on *Woodson*). Colorado enacted a new death penalty statute the following year. COLO. REV. STAT. § 16-11-103 (Supp. 1979) (repealed 2002).

46. *Gregg*, 428 U.S. at 183 (stating that when considering sentencing a person to death, "the sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering"); *Woodson*, 428 U.S. at 304 (mandating individualized consideration before sentencing defendants in capital cases).

agree on a set of principles within which to judge a particular statute made it difficult for a state legislature to enact a constitutionally valid death penalty. All that the majority of the court endorsed is that under some circumstances, and subject to a number of limitations, the death penalty may be imposed.<sup>47</sup>

States seeking to impose the death penalty, then, must navigate between these two constitutional requirements. They cannot, under *Furman*, leave the sentencer the unfettered discretion whether to impose the death penalty or not,<sup>48</sup> and they cannot, under *Woodson*, require that the death penalty be imposed under certain circumstances.<sup>49</sup>

This task of complying with the dual procedural requirements of the Eighth Amendment has resulted in an ongoing dialogue between the states and the Supreme Court regarding the propriety of various sentencing systems.<sup>50</sup> Subsequent cases, perhaps none more so than *Zant v. Stephens*,<sup>51</sup> provided some necessary guidance as to the practical application of the so-called “narrowing” requirement imposed by the *Gregg*<sup>52</sup> decision. Stephens argued that Georgia’s statute violated *Furman* by permitting the jury unfettered discretion at the sentencing stage; the state countered that the meaningful distinctions between who lives and who dies that *Furman* mandated were satisfied once the sentencer made a finding of statutory aggravating factors.<sup>53</sup> Before it could resolve this question, however, the Supreme Court was forced to certify a question to the Georgia Supreme Court inquiring exactly how the state’s capital statute operates.<sup>54</sup> The state responded with the now famous pyramid metaphor:

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47. *Dist. Court*, 586 P.2d at 33.

48. *Furman v. Georgia*, 408 U.S. 238, 247–57 (1972).

49. *Woodson*, 428 U.S. at 304–05.

50. Since 1976, the Court has been “involved in the ongoing business of determining which state schemes could pass constitutional muster,” a process that has been described by some commentators as the Supreme Court’s “regulatory role” in the field of capital punishment. Steiker & Steiker, *supra* note 9, at 363.

51. 462 U.S. 862 (1983).

52. *Gregg v. Georgia*, 428 U.S. 153, 195 (1976).

53. *Zant*, 462 U.S. at 865.

54. *Id.* at 870–73.

All cases of homicide of every category are contained within the pyramid. The consequences flowing to the perpetrator increase in severity as the cases proceed from the base to the apex, with the death penalty applying only to those few cases which are contained in the space just beneath the apex. To reach that category, a case must pass through three planes of division between the base and the apex. The first plane of division above the base separates from all homicide cases those which fall into the category of murder. . . . The second plane separates from all murder cases those in which the penalty of death is a possible punishment. This plane is established by statutory definitions of aggravating circumstances. . . . The third plane separates, from all cases in which a penalty of death may be imposed, those cases in which it shall be imposed. There is an absolute discretion in the factfinder to place any given case below the plane and not impose death. . . . A case may not pass the second plane into that area in which the death penalty is authorized unless at least one statutory aggravating circumstance is found. However, this plane is passed regardless of the number of statutory aggravating circumstances found, so long as there is at least one.<sup>55</sup>

In upholding the constitutionality of this statute the Court elaborated upon the practical consequences of the *Furman/Gregg* line of cases. In explaining the holding of *Gregg*, the Court emphasized that a capital sentencing scheme avoids the arbitrariness and over-inclusiveness problems identified in *Furman* if the statutory aggravating factors “genuinely narrow the class of persons eligible for the death penalty.”<sup>56</sup> Moreover, the Court explicitly recognized that the process of narrowing is a legislative, not a prosecutorial function.<sup>57</sup>

Notably, then, it is this requirement of legislative narrowing that renders sensible the otherwise counterintuitive claim that a capital sentencing scheme that produces too low of a death sentence rate is unconstitutional. It is not that the State needs to execute more people in order to comply with the Eighth Amendment, but rather, the low death sentencing ratio is indicative of a failure to legislatively narrow the class of

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55. *Id.* at 870–72.

56. *Id.* at 877.

57. *Id.* at 877–78 (“[S]tatutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty.”).

death-eligible defendants to the worst of the worst. If the death penalty scheme is appropriately narrowed, then “it becomes reasonable to expect that juries—even given discretion *not* to impose the death penalty—will impose the death penalty in a substantial portion of the cases so defined.”<sup>58</sup>

*Zant* and its line of cases thus stand for the proposition that a valid capital sentencing statute is one that genuinely narrows the field of killers to those upon whom death could be imposed.<sup>59</sup> It is generally agreed that this narrowing must be both quantitative and qualitative.<sup>60</sup> That is, a capital statute both must reduce the *number* of killers who are eligible for death and must do so in ways that identify the worst offenders.<sup>61</sup> Once the statute has done this work, *Zant* holds, the *McGautha* principle<sup>62</sup>—that the ultimate decision of who lives and who dies may be made without guidance by a jury exercising the conscience of the community—still applies.<sup>63</sup>

Thus, the constitutionally required narrowing must occur at the legislative level in order to limit the unchecked discretion of prosecutors in deciding whom to prosecute under a statute,<sup>64</sup> and of juries in imposing the ultimate punishment. This fact has not been missed by the Colorado Supreme Court. In striking down a previous version of the Colorado capital sentencing statute, the state supreme court summarized the law as follows:

A *statute* must meet at least two requirements before it can serve as the basis for imposition of the death sentence. First, it must provide a “meaningful basis for distinguishing the . . . cases in which it is imposed from (those) in which it

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58. *Gregg v. Georgia*, 428 U.S. 153, 222 (1976) (emphasis in original); *see also* *Penry v. Lynaugh*, 492 U.S. 302, 327 (1989) (noting that if death is not imposed in a “substantial portion” of the cases where there is death eligibility, then the problems of wanton and freakish application of the death penalty are not cured) (quoting *Gregg*, 428 U.S. at 222)).

59. *Zant*, 462 U.S. at 877 (stating that the “aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty”).

60. *Id.* at 876.

61. *Id.*

62. *McGautha v. California*, 402 U.S. 183, 185 (1971).

63. *Zant*, 462 U.S. at 891.

64. The limits on prosecutorial discretion in choosing to prosecute or not under a particular statute are rare. *See, e.g.*, Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 UCLA L. REV. 105, 154 (1994) (describing the constitution as the only limit on prosecutorial discretion); Stephanos Bibas, *The Need for Prosecutorial Discretion*, 19 TEMP. POL. & CIV. RTS. L. REV. 369, 372 (2010).

is not.” To do so, the *statute* must contain “objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death.” To attain this end, *the legislature* may enumerate specific aggravating factors, the presence of which will serve to justify the imposition of a sentence of death.<sup>65</sup>

Like the Colorado Supreme Court, our study takes the following position as the baseline for reviewing the constitutionality of a capital sentencing system: while the death penalty is not per se unconstitutional, and while discretion and judgment have a role to play in the determining of the law’s ultimate punishment, in order to comply with the Eighth Amendment the capital statute itself must meaningfully narrow the class of death-eligible defendants. There must be limits on the otherwise broad and revered doctrine of prosecutorial discretion and the guided discretion enjoyed by jurors in making the final life or death determination under *Zant*.<sup>66</sup> If the *Furman* principle of narrowing<sup>67</sup> is to be given any constitutional effect, it must serve as a limit on legislatures such that the capital sentencing statute meaningfully limits the number of death-eligible defendants.

### B. *The Colorado Death Penalty Scheme*

In this section, we discuss the provisions of the Colorado death penalty statute in light of the Supreme Court’s Eighth Amendment jurisprudence. We show that the structure of the statute—with its capacious definition of first-degree murder and long list of aggravating factors—fails to meet the constitutional requirement of singling out the worst of the worst offenders for the law’s ultimate punishment.

In a general sense, the death penalty statute in Colorado<sup>68</sup> is similar in form to the statute approved by the Supreme

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65. *People v. Dist. Court*, 586 P.2d 31, 34 (Colo. 1978) (internal citations omitted) (emphasis added); *see also Woldt v. People*, 64 P.3d 256, 265 (Colo. 2003) (“The Eighth Amendment requires that the death penalty be imposed fairly and with reasonable consistency, or not at all. The *sentencing statute* must genuinely narrow the class of murderers eligible for the death penalty and must rationally distinguish between individuals for whom death is an appropriate sanction and those for whom it is not.”) (emphasis added).

66. *See Zant*, 462 U.S. at 876–77.

67. *Furman v. Georgia*, 408 U.S. 238, 313 (1972).

68. COLO. REV. STAT. § 18-1.3-1201 (2012).

Court in *Gregg*<sup>69</sup> and to those in use in most other death penalty states. In order to be sentenced to death, a defendant must be convicted of first-degree murder,<sup>70</sup> at least one aggravating factor must be found,<sup>71</sup> and the case in mitigation must not outweigh the case in aggravation.<sup>72</sup> Like other death

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69. *Gregg v. Georgia*, 428 U.S. 153, 207 (1976).

70. COLO. REV. STAT. § 18-1.3-1201(1)(a) (2012) (“Upon conviction of guilt of a defendant of a class 1 felony, the trial court shall conduct a separate sentencing hearing to determine whether the defendant should be sentenced to death or life imprisonment . . .”).

71. *Id.* § 18-1.3-1201(2)(a)(I).

72. *Id.* § 18-1.3-1201(2)(a)(II). The statute states that “[t]he jury shall not render a verdict of death unless it unanimously finds and specifies in writing that: (A) At least one aggravating factor has been proved; and (B) There are insufficient mitigating factors to outweigh the aggravating factor or factors that were proved.” *Id.* § 18-1.3-1201(2)(b)(II). Deciphering the triple negative, the statute could be read to require that death is the punishment for a defendant with an aggravator unless there is sufficient mitigating evidence to justify sparing his or her life—that is, that death is the default in such circumstances. However, the Colorado Supreme Court has described a four step sentencing process following a first-degree murder conviction:

First, the jury must determine if at least one of the statutory aggravating factors exists. If the jury does not unanimously agree that the prosecution has proven the existence of at least one statutory aggravator beyond a reasonable doubt, the defendant must be sentenced to life imprisonment. Second, if the jury has found that at least one statutory aggravating factor has been proven, the jury must then consider whether any mitigating factors exist. There shall be no burden of proof as to proving or disproving mitigating factors, and the jury need not unanimously agree upon the existence of mitigating factors. Third, the jury must determine whether sufficient mitigating factors exist which outweigh any aggravating factor or factors found to exist. Fourth, and finally, if the jury finds that any mitigating factors do not outweigh the proven statutory aggravating factors, it must decide whether the defendant should be sentenced to death or to life imprisonment.”

*People v. Tenneson*, 788 P.2d 786, 789 (Colo. 1990) (citations and internal references omitted); COLO. REV. STAT. § 18-1.3-1201(2)(a)(III) (2012) (permitting a final act of juror discretion but instructing that the jury shall render a decision “[b]ased on the considerations [of aggravating factors and whether they are outweighed by mitigating factors], whether the defendant should be sentenced to death or life imprisonment”).

Moreover, the Colorado Supreme Court has held, in relation to a prior version of the statute, that capital sentences are not mandatory whenever the facts in mitigation fail to outweigh the facts in aggravation. *People v. Young*, 814 P.2d 834, 846 (Colo. 1991) (plurality) (“[W]e hold that to authorize imposition of the death penalty when aggravators and mitigators weigh equally, as does the current version of [COLO. REV. STAT.] section 16-11-103, violates fundamental requirements of certainty and reliability under the cruel and unusual punishments and due process clauses of the Colorado Constitution.”), *superseded by statute*, COLO. REV. STAT. § 16-11-103(2)(b) (1991), *as recognized in* *People v. Dist. Court*, 834 P.2d 181, 187 (Colo. 1992)). Notably, this Colorado decision predated a U.S. Supreme Court opinion recognizing that a Kansas statute

penalty states, Colorado law provides for direct and automatic appeal to the state supreme court.<sup>73</sup> Moreover, the statute requires that a jury find the aggravating factors that make one eligible for capital punishment beyond a reasonable doubt and also decide the ultimate question of life or death.<sup>74</sup>

Regarding Colorado's mechanisms for narrowing the class of death-eligible offenders, there are two possible filters:<sup>75</sup> the distinction between first-degree murder and second-degree murder, and the aggravating factors that render a first-degree murder death-eligible.<sup>76</sup> That is to say, the Colorado legislature could expand or narrow the class of death-eligible offenders by altering the definition of first-degree murder, or by enumerating certain aggravating factors.<sup>77</sup> Colorado's statute

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requiring a sentence of death when aggravators and mitigators were in equipoise did not offend the Eighth Amendment. *Kansas v. Marsh*, 548 U.S. 163 (2006).

73. COLO. REV. STAT. §§ 18-1.3-1201(6)(a), 16-12-201(2)(c) (2012).

74. *See, e.g.*, *People v. Montour*, 157 P.3d 489, 499 (Colo. 2007) (holding that the provision of COLO. REV. STAT. § 18-1.3-1201(1)(a) (2006) that mandates that a defendant waives his or her right to a jury trial on sentencing facts when he or she pleads guilty, violated the Sixth Amendment).

75. As the Supreme Court has held, "We see no reason why this narrowing function may not be performed by jury findings at either the sentencing phase of the trial or the guilt phase." *Lowenfield v. Phelps*, 484 U.S. 231, 244–45 (1988) (citing *Jurek v. Texas*, 428 U.S. 262 (1976)).

76. The Colorado Supreme Court has held that the question of death eligibility involves both a finding of one or more aggravating factors and the determination of whether there is sufficient mitigation to outweigh aggravating factors. *See People v. Dunlap*, 975 P.2d 723, 736 (Colo. 1999) ("[T]he eligibility phase continues through step three, when the jury weighs mitigating evidence against statutory aggravators."); *see also Woldt v. People*, 64 P.3d 256, 263–64 (Colo. 2003). This latter determination—the weight of mitigation—does not, however, serve the statutory narrowing function identified in cases like *Gregg* and *Zant*. There is nothing about individualized mitigating factors and the weighing of those factors that serves to provide legislative definitions that readily distinguish those who are worthy of a death sentence from those who are not. That is to say, Colorado's definition of death eligibility appears to be in some tension with the phrase "death eligibility" as that term of art has been defined in Eighth Amendment jurisprudence.

77. *See Lowenfield*, 484 U.S. at 244–45 (rejecting the argument that because "the sole aggravating circumstance found by the jury at the sentencing phase was identical to an element of the capital crime" the death sentence was unconstitutional and noting that "[t]he use of 'aggravating circumstances' is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons"); *id.* at 246 ("It seems clear to us from this discussion that the narrowing function required for a regime of capital punishment may be provided in either of these two ways: The legislature may itself narrow the definition of capital offenses, as Texas and Louisiana have done, so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase.").

fails in both regards.

First, Colorado's definition of first-degree murder,<sup>78</sup> far from meaningfully narrowing the class of death-eligible defendants, is one of the broadest known in law. As a matter of hornbook law, what generally separates first-degree murder from lesser forms of homicide is the requirement that, in order to convict a defendant of first-degree murder, the state must show that the defendant acted after premeditation, or something similarly intentional and egregious.<sup>79</sup> Under Colorado law, by contrast, one can also be found guilty of first-degree murder for felony murder<sup>80</sup> or even murder by extreme indifference.<sup>81</sup> It is notable that in Colorado a felony murder is necessarily a first-degree murder because there is no second-degree felony murder category.<sup>82</sup>

The inclusion of these unintended killings in the definition of first-degree murder is quite unusual.<sup>83</sup> In jurisdictions in which the first-degree murder statute has been recognized as serving the constitutionally mandated narrowing function, such as Louisiana, first-degree murder is limited to specific types of intentional killings: those that occur during certain aggravated felonies or for pecuniary gain, or where the victim was a peace officer or under 12 years of age.<sup>84</sup> Because the definition of first-degree murder is so broad in Colorado, the

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78. COLO. REV. STAT. § 18-3-102 (2012).

79. *See, e.g.*, SANFORD H. KADISH, STEPHEN J. SCHULHOFER & CAROL S. STEIKER, CRIMINAL LAW AND ITS PROCESSES 373–80 (8th ed. 2007) (compiling murder statutes from various states); *id.* at 381 (observing that as an historical matter the term first-degree murder was associated with murders that were premeditated).

80. COLO. REV. STAT. § 18-3-102(1)(b) (2012) (“A person commits the crime of murder in the first degree if . . . [a]cting either alone or with one or more persons, he or she commits or attempts to commit arson, robbery, burglary, kidnapping, sexual assault . . . , sexual assault in the first or second degree . . . , or a class 3 felony for sexual assault on a child . . . , or the crime of escape . . . , and, in the course of or in furtherance of the crime that he or she is committing or attempting to commit, or of immediate flight therefrom, the death of a person, other than one of the participants, is caused by anyone . . .”).

81. *Id.* § 18-3-102(1)(d) (“A person commits the crime of murder in the first degree if . . . [u]nder circumstances evidencing an attitude of universal malice manifesting extreme indifference to the value of human life generally, he knowingly engages in conduct which creates a grave risk of death to a person, or persons, other than himself, and thereby causes the death of another . . .”).

82. Other states have various degrees of felony murder. *See, e.g.*, CAL. PENAL CODE § 189 (2012).

83. *See* COLO. REV. STAT. § 18-3-102(1)(d) (2012) (defining “extreme indifference” as a form of first-degree murder).

84. *See* *Lowenfield v. Phelps*, 484 U.S. 231, 242 (1988) (reproducing the Louisiana statute, LA. REV. STAT. ANN. § 14:30A (West 1986)).

statute does not itself serve to meaningfully narrow the class of death-eligible offenders, and thus the role of Colorado's aggravating factors is particularly crucial in ensuring that the narrowing mandated by *Furman*<sup>85</sup> and *Gregg*<sup>86</sup> occurs. If Colorado's definition of first-degree murder were more restrictive, then the death sentence rate in the State would necessarily be much higher.<sup>87</sup> In short, Colorado's first-degree murder statute seems to leave the work of narrowing to the aggravating factors.

Notably, however, Colorado's aggravating factors are also too broad to be effective at narrowing the class of death-eligible offenders. In 1976, the legislature adopted a capital sentencing statute that was designed to comply with *Furman* and *Gregg* by genuinely narrowing the class of death-eligible offenders.<sup>88</sup> This statute contained nine enumerated aggravating factors.<sup>89</sup> Since 1980, however, the statute has been amended on several occasions to add aggravating factors. By 2003, there were 17 aggravating factors in the Colorado statute.<sup>90</sup>

Not only does the existence of 17 aggravating factors render Colorado's statute broad in the aggregate,<sup>91</sup> but many of

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85. *Furman v. Georgia*, 408 U.S. 238, 313 (1972).

86. *Gregg v. Georgia*, 428 U.S. 153, 183 (1976).

87. Interestingly, not only is an unintentional, extreme indifference killing a first-degree murder under Colorado law, but in Colorado, one of the aggravating factors, "grave risk of death to another person in addition to the victim of the offense," COLO. REV. STAT. § 18-1.3-1201(5)(i), will generally be satisfied when the murder itself was "extreme indifference" first-degree murder. In other words, under Colorado law, certain unintentional killings are first-degree, capital murders.

88. COLO. REV. STAT. § 16-11-103(6) (Cum.Supp. 1976). The aggravating factors were: (a) prior violent felony; (b) killing occurred while defendant was incarcerated; (c) intentional killing of a peace officer (or similar); (d) killing of a hostage or kidnap victim; (e) party to an agreement to kill; (f) lying in wait; (g) felony murder; (h) grave risk of death to others; (i) the killing was especially heinous, cruel, or depraved manner. *Id.*

89. *Id.*

90. In 1984, the statute was amended to include eleven aggravating factors. COLO. REV. STAT. § 16-11-103(6) (1984). In 1994, a twelfth and thirteenth aggravating factor were added, Laws 1994, H.B. 94-1144, §1; Laws 1994, S.B. 94-136, §1; in 1998, a fourteenth was added, Laws 1998, Ch. 314, §34; in 2000 a fifteenth was added, Laws 2000, Ch. 110, §1; and in 2003, the sixteenth and seventeenth aggravating factors were added. Laws 2003, Ch. 202, §1; Laws 2003, Ch. 340, §1. The aggravating factors are presently codified at COLO. REV. STAT. § 18-1.3-1201(5) (2012).

91. Based on previous studies examining the capital sentencing statutes in every state, it appears that only California has more aggravating factors than Colorado. Summarizing the states with some of the highest number of aggravating factors, Professor Kirchmeier observed: "Arizona has ten, South Carolina has eleven, Nevada has twelve, Illinois has fifteen, and Pennsylvania

the individual aggravators are very broad in their application as well. For example, a defendant is death-eligible if he or she “committed the offense while lying in wait, from ambush, or by use of an explosive. . . .”<sup>92</sup> The Colorado Supreme Court has noted the application of this aggravator where the defendant conceals his purpose, conceals his presence or surprises the victim, or the defendant waits for an opportune moment to strike.<sup>93</sup> For any murderer who kills “after deliberation,” it will be the rare case in which the perpetrator did not also surprise the victim, or at least wait for an opportune moment to kill. Thus, the lying in wait aggravator has application in an extremely large number of murder cases in Colorado.

Similarly, any killing for which there is a “grave risk of death to another person in addition to the victim of the offense” is death-eligible.<sup>94</sup> This aggravator would seem to apply to any killing that occurs where other potential victims are present. Other aggravating factors are considerably less broad: if the murder was committed in order to obtain items of pecuniary value,<sup>95</sup> the defendant was party to an agreement to kill,<sup>96</sup> more than one person was killed,<sup>97</sup> the victim was pregnant,<sup>98</sup> or the victim was a government officer,<sup>99</sup> then the defendant is deemed death-eligible.

The aggregate effect of the 17 Colorado aggravating factors is as straightforward as it is capacious. In order to be ineligible for the death penalty in Colorado, the murder must not be “cruel or heinous,” it must not be committed by someone with serious prior or concurrent felonies, it must not be committed

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has seventeen aggravating circumstances. In California, if a capital jury finds one or more of twenty-one statutory special circumstances, the case proceeds to the penalty phase and the jury then is instructed to consider eleven other factors in deciding whether to impose death.” Jeffrey L. Kirchmeier, *Aggravating and Mitigating Factors: The Paradox of Today’s Arbitrary and Mandatory Capital Punishment Scheme*, 6 WM. & MARY BILL RTS. J. 345, 399 (1998).

92. COLO. REV. STAT. § 18-1.3-1201(5)(f) (2012).

93. *People v. Montour*, 157 P.3d 489, 494 (Colo. 2007) (recognizing that the lying in wait aggravator was found by the sentencing court); *see also* Sentencing Order, *People v. Montour*, No. 02CR782, at 10–11 (Colo. Dist. Ct. Douglas Cnty. Feb. 27, 2003) (noting that Montour waited until the correctional officer turned his back on the defendant and concluding that this suggested that he waited for the opportune moment and surprised him as required for the lying in wait/ambush aggravator).

94. COLO. REV. STAT. § 18-1.3-1201(5)(i) (2012).

95. *Id.* § 18-1.3-1201(5)(h).

96. *Id.* § 18-1.3-1201(5)(e).

97. *Id.* § 18-1.3-1201(5)(p).

98. *Id.* § 18-1.3-1201(5)(q).

99. *Id.* § 18-1.3-1201(5)(c).

in order to get something of monetary value, the murder must not endanger the life of anyone else, must not be the product of a plan or a surprise, and the victim must not be too young, a government official, pregnant, and so forth.<sup>100</sup>

Once a defendant is convicted of first-degree murder and at least one aggravating factor has been proven to the jury, the selection question—weighing aggravators against mitigators—is all that stands between a defendant and a death sentence.<sup>101</sup> The actual selection process by which the jury determines which first-degree murderers with aggravating factors are to be put to death and which are to receive life without parole is designed to be indeterminate and non-mechanical. The ultimate question of life or death, unlike the question of eligibility based on a statutory aggravator, is a question that rests squarely in the discretion of the jury.<sup>102</sup> That is to say, the ultimate question of sentence selection also fails to narrow the class of death-eligible offenders.

## II. STUDY DESIGN AND LITERATURE REVIEW

In this Part we describe our empirical study of Colorado's death penalty statute, situating it within the context of the extensive work that other researchers have done on the narrowing effect of state death penalty statutes. The research in this area has focused on two related topics: the failure of capital statutes to satisfy the constitutionally mandated narrowing function, and the corresponding risk of arbitrariness in the imposition of the death penalty.

### A. *Failure to Narrow*

Numerous scholars have presented persuasive explanations for why broad capital murder statutes listing numerous aggravating factors do not fulfill the narrowing

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100. As Professor Kirchmeier has observed, the result of overly inclusive and long lists of aggravating factors “is a broad range of factors that can make almost every first degree murder defendant eligible for the death penalty.” Kirchmeier, *supra* note 91, at 430–31.

101. See COLO. REV. STAT. § 18-1.3-1201(2)(a) (2012).

102. Neither the weighing nor the selection process impose a meaningful, objective way to narrow the class of death-eligible offenders. See *People v. Young*, 814 P.2d 834, 844 (Colo. 1991) (“We have held that the weighing of aggravating and mitigating factors differs fundamentally from the functions of a jury in finding facts and applying the law as instructed by the court.”).

requirement established by the United States Supreme Court.<sup>103</sup> As one commentator recently emphasized, the failure to narrow may be the “most significant remaining flaw” in the capital system,<sup>104</sup> and reform commissions have consistently recommended reducing the list of aggravating circumstances.<sup>105</sup> Such commentators stress that the over-inclusive statutes make the majority of first-degree murderers eligible for the death penalty, and leave too much room for arbitrariness to influence which select few are prosecuted as capital offenders and sentenced to death.<sup>106</sup> Some researchers, including Professor David Baldus, have undertaken empirical research to provide direct quantitative evidence of the extent to which statutes in various states fail to narrow the class of death-eligible offenders.<sup>107</sup> In order to situate our study within the existing literature, this Section provides an overview of these previous studies.

In one of his earliest and most famous reviews of death penalty practices, Baldus and his colleagues found that 86% of people convicted of murder in Georgia over a five-year period were death-eligible.<sup>108</sup> More recently, Baldus headed a research team that used a sophisticated stratified sampling system to draw a representative sample of 1,900 cases from a total of 27,453 convictions for first-degree murder, second-degree murder, and voluntary manslaughter in California between 1978 and 2002.<sup>109</sup> The researchers calculated the rates of death

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103. See generally Sharon, *supra* note 10; Kirchmeier, *supra* note 91; *Requiem for Furman*, *supra* note 2; Steiker & Steiker, *supra* note 9.

104. Sharon, *supra* note 10, at 233 n.68 (quoting James S. Liebman & Lawrence C. Marshall, *Less is Better: Justice Stevens and the Narrowed Death Penalty*, 74 *FORDHAM L. REV.* 1607, 1665 (2006)).

105. *Id.* at 233 n.69.

106. See Sharon, *supra* note 10, at 237 n.91–92; see also Steiker & Steiker, *supra* note 9.

107. DAVID C. BALDUS, GEORGE WOODWORTH & CHARLES A. PULASKI, JR., *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS*, 268 n.31 (1990) [hereinafter *EQUAL JUSTICE*] (analyzing all murder convictions in Georgia from 1974 to 1979); see also *Requiem for Furman*, *supra* note 2 (analyzing murder convictions in California from 1988 to 1992); JOHN J. DONOHUE III, *CAPITAL PUNISHMENT IN CONNECTICUT, 1973–2007: A COMPREHENSIVE EVALUATION FROM 4686 MURDERS TO ONE EXECUTION* (2011) (analyzing murders in Connecticut from 1973 to 2007).

108. *EQUAL JUSTICE*, *supra* note 107, at 268 n.31.

109. Similar to the current study, the research underlying *EQUAL JUSTICE*, *supra*, note 107, was submitted in an ongoing capital case, *Ashmus v. Wong*, and the study’s two purposes were “to evaluate the scope of death eligibility” under the post-*Furman* California statutes and “to evaluate capital charging and sentencing practices” in these death-eligible cases. Baldus Declar., *supra* note 2, at 2.

eligibility for all three types of murder under the law applicable to the case on appeal and under the 2008 California law,<sup>110</sup> and found that the rates were 55% and 59%, under the two death penalty statutes.<sup>111</sup> Focusing just on the rates under the 2008 law, the study revealed that the rates of death eligibility were 95% for the first-degree murder convictions, 38% for the second-degree murder convictions, 46% for the voluntary manslaughter convictions, and 86% for the factual first-degree murder cases.<sup>112</sup> This last category consisted of 18,982 cases where the evidence could have supported a first-degree murder conviction.<sup>113</sup>

Another study of California sentencing practices using a different approach found remarkably similar rates of death eligibility.<sup>114</sup> Professors Steven Shatz and Nina Rivkind analyzed first-degree murder convictions appealed from 1988 to 1992 and found that 84% of the killers were death-eligible.<sup>115</sup> They obtained similar results when they examined samples of appealed second-degree murder cases and unchallenged murder convictions.<sup>116</sup> Using the formula that we adopted for this study, Shatz and Rivkind divided the number of defendants who were actually sentenced to death by the number who were death-eligible and calculated a death sentence rate of 11.4%.<sup>117</sup> Shatz and Rivkind emphasize that there are constitutional problems with death sentence rates in various states, including California, that are well below the 15 to 20% the United States Supreme Court found unacceptably low in *Furman v. Georgia*.<sup>118</sup> Such reasoning has been applied

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110. Under the earlier law, the robbery felony-murder circumstance required proof of intent to kill or aid in the killing. By 2008, however, proof of intent was no longer necessary for the actual killer, and both drive by shooting, CAL. PENAL CODE § 190.2(a)(21), and street gang murder, CAL. PENAL CODE § 190.2(a)(22), special circumstances had been added. *Id.* at 5, 10, 13.

111. *Id.* at 13. The 2008 changes in the California capital statute raised the percentage of death-eligible defendants in the sample of first-degree murder, second-degree murder, and voluntary manslaughter cases from 55% to 59%. This increase of 4 percentage points constituted a 7% (4 divided by 55) relative increase in death eligibility.

112. *Id.* at 13.

113. *Id.* at 14.

114. *Requiem for Furman*, *supra* note 2, 1332.

115. *Id.*

116. *Id.* at 1330–35.

117. *Id.* at 1332.

118. *Id.*; *see, e.g.*, Baldus Declar., *supra* note 2, at 31 (emphasizing this aspect of *Furman*).

by other leading scholars and researchers.<sup>119</sup> For example, a leading empirical scholar, John Donohue, studied the death penalty in Connecticut from 1973 to 2007, and after finding a death sentence rate of 4.4% commented that “[t]he extreme infrequency with which the death penalty is administered in Connecticut raises a serious question as whether the state’s death penalty regime is serving *any* legitimate purpose.”<sup>120</sup>

In addition, while preparing his report for the *Ashmus* case in California, Professor Baldus studied death eligibility rates in other states in order to show that California compared unfavorably.<sup>121</sup> Baldus oversaw studies in other states, including New Jersey and Maryland.<sup>122</sup> In New Jersey, from 1982 to 1999, the death eligibility rate was 21% (433 of 2,104 cases)<sup>123</sup> and, coincidentally, the rate in Maryland from 1978 to 1999 was also 21% (1,311 of 6,150 cases).<sup>124</sup> Baldus used these figures to make the point that California’s rates were unacceptably high.<sup>125</sup> Other studies have used similar approaches to assess the effectiveness of a state’s capital sentencing statute.<sup>126</sup> As discussed, *infra* Part III, our methodology is consistent with the general approach set forth in these studies.<sup>127</sup>

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119. DONOHUE, *supra* note 107.

120. *Id.* at 1 (emphasis in original).

121. Baldus Declar., *supra* note 2, at 15–27.

122. *Id.* at 15–17. Death eligibility in these two states was principally determined by the Model Penal Code’s aggravating circumstances, an approach used in many of the states that still utilize the death penalty. *See, e.g.*, Raymond Paternoster et al., *Justice by Geography and Race: The Administration of the Death Penalty in Maryland, 1978–1999*, 4 U. MD. L.J. ON RACE, RELIGION, GENDER, & CLASS 1, 8–9 (2004).

123. Baldus Declar., *supra* note 2, at 18 (citing HON. DAVID BAIME, REPORT OF THE NEW JERSEY SUPREME COURT PROPORTIONALITY REVIEW PROJECT 28 (April 28, 1999)).

124. Baldus Declar., *supra* note 2, at 18; Paternoster et al., *supra* note 122, at 18.

125. Baldus Declar., *supra* note 2, at 17–20.

126. *E.g.*, David C. Baldus et al., *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973–1999)*, 81 NEB. L. REV. 486, 542 Table 2 (2002) (calculating a death eligibility rate in Nebraska of 25% (175 of 689 cases)).

127. Baldus also argued that the California death eligibility rates were unacceptably high based on an alternative approach that allows comparison to nationwide statistics reported by Fagan, Zimring and Geller. Baldus Declar., *supra* note 2, at 22 n.35 (citing Jeffrey Fagan, Franklin E. Zimring, & Amanda Geller, *Capital Punishment and Capital Murder: Market Share and the Deterrent Effects of the Death Penalty*, 84 TEX. L. REV. 1803, 1816–17 (2006)). Fagan and his colleagues calculated their rates by using the Supplemental Homicide Reports (SHR) compiled by the Federal Bureau of Investigation and, because of limitations

### B. Risk of Arbitrariness and Discrimination

A pivotal factor in the *Furman* Court's decision that the death penalty was unconstitutional as applied was the risk of arbitrariness and discrimination.<sup>128</sup> When a small number of people actually get the death penalty out of a large number who are death-eligible, there is too much room for unacceptable criteria like race to influence who will receive the ultimate punishment.<sup>129</sup> Since the death penalty was reinstated, numerous studies have been done to determine whether there is discrimination in the administration of the death penalty.<sup>130</sup>

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on the information available, were only able to categorize eight different types of crime as death-eligible. Notably, they classified a case as death-eligible if the circumstances included any of "the following elements that are part of the recurrent language of capital-eligible homicides across the states: (a) killings during the commission of robbery, burglary, rape or sexual assault, arson, and kidnapping; (b) killings of children below age six; (c) multiple-victim killings; (d) 'gangland' killings involving organized crime or street gangs; (e) 'institution' killings where the offender was confined in a correctional or other governmental institution; (f) sniper killings . . . (g) killings in the course of drug business." *Id.* They also included a count of killings of police officers obtained from the dataset Law Enforcement Officers Killed and Assaulted (LEOKA), which also is compiled by the U.S. Department of Justice through the FBI. *Id.* at 1817. Thus their percentages do not truly reflect the total number of cases that would be death-eligible in a state with a relatively large number of aggravating circumstances. In his affidavit, Baldus used these numbers to substantiate the validity of the percentages found in New Jersey, Maryland, and Nebraska using his methodology. The estimates using Baldus's case screening method compared to the SHR method are, respectively, 21% versus 25.5% in New Jersey, 21% versus 21.9% in Maryland, and 25% versus 28.9% in Nebraska. Baldus Declar. *supra* note 2, at 18. The similarity in the estimates buttresses confidence in both approaches. They are similar for these three states because the statutes in those states are similar to the Model Penal Code; the estimates are not expected to be similar in California, or in Colorado, because these two states have additional broadly applicable aggravating factors. Fagan and colleagues found that the death eligibility rate in Colorado was 26.1% which was in the higher half of the scores for the 38 states that had the death penalty at the time; that number vastly underestimated the true percentage as it only counted the eight Model Penal Code aggravators rather than the 17 aggravators actually listed in the Colorado statute. *See id.* at 16–17, 25.

128. *See supra* Part IA and accompanying text (describing the Eighth Amendment limits on the procedures used to sentence one to death).

129. *Furman v. Georgia*, 408 U.S. 238, 309 (1972) (noting that "it is equally clear that sentences are 'unusual' in the sense that the death penalty is infrequently imposed for murder").

130. *See, e.g.*, David Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638 (1998); EQUAL JUSTICE, *supra* note 107; William J. Bowers & Glenn L. Pierce, *Arbitrariness and Discrimination Under Post-Furman Capital Statutes*, 26 CRIME & DELINQ. 563, 629–30; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO GGD-90-57, DEATH PENALTY SENTENCING:

Professor Baldus and a number of colleagues provided a rigorous examination of the impact of race in the study<sup>131</sup> that was introduced in *McCleskey v. Kemp*.<sup>132</sup> Using sophisticated analyses controlling for the characteristics of the crime, this research showed that in Georgia, between 1973 and 1979, defendants who murdered whites were 4.3 times more likely to get sentenced to death than those who murdered black victims.<sup>133</sup> Black defendants who murdered white victims were the most likely to get the death penalty.<sup>134</sup>

By 1990 there were 28 studies,<sup>135</sup> including one in Colorado,<sup>136</sup> that examined whether there was discrimination in the application of the death penalty. A United States General Accounting Office review of those studies found that, in 82% of the studies, “race of the victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty, i.e., those who murdered whites were found to be more likely to be sentenced to death than those who murdered blacks.”<sup>137</sup> More recent studies continue to find this race-of-victim effect, and sometimes also an increased risk of a death sentence for the black defendant/white victim combination or for black defendants in general.<sup>138</sup> There is also

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RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES (1990), <http://www.gao.gov/assets/220/212180.pdf> [hereinafter DEATH PENALTY SENTENCING]; SAMUEL R. GROSS & ROBERT MAURO, DEATH & DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING 35–94 (1989).

131. EQUAL JUSTICE, *supra* note 107.

132. *McCleskey v. Kemp*, 481 U.S. 279, 285 (1987).

133. EQUAL JUSTICE, *supra* note 107, at 316–17, 319–20, Table 52.

134. *Id.* at 321.

135. DEATH PENALTY SENTENCING, *supra* note 130.

136. David C. Baldus et al., *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Challenge to State Supreme Courts*, 15 STETSON L. REV. 133, 138 n.14 (1986) (the study in Colorado found that the odds of a first-degree murder conviction were three times higher when the victim was white).

137. DEATH PENALTY SENTENCING, *supra* note 130, at 5.

138. See, e.g., David C. Baldus et al., *Racial Discrimination in the Administration of the Death Penalty: The Experience of the United States Armed Forces (1984–2005)*, 101 J. CRIM. L. & CRIMINOLOGY 1227, 1303 (2012) [hereinafter *Armed Forces*] (finding disparities in charging and sentencing outcomes leading to higher rates of death sentencing for defendants who killed white victims, for minority defendants accused of killing white victims, and for minority defendants in general); David C. Baldus & George Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception*, 53 DEPAUL L. REV. 1411, 1425 (2004) (a review of race-of-victim data within states that found strong evidence of race-of-victim bias such that defendants had a significantly higher chance of both being sentenced to death and executed if the victim was white); David C. Baldus &

research revealing gender discrimination,<sup>139</sup> and arbitrariness based on where the murder is committed.<sup>140</sup> Much of the evidence shows that the discrimination operates at the point where the prosecutors decide who to charge capitally among the defendants eligible for the death penalty.<sup>141</sup>

A previous study of the administration of the death penalty in Colorado found evidence of discrimination in prosecutorial decisions about when to seek the death penalty.<sup>142</sup> Hindson, Potter, and Radelet identified the 21 cases in which defendants were sentenced to death between 1972 and 2005, and the 110 cases in which the death penalty was sought between 1980 and 1999.<sup>143</sup> The authors found that the prosecution was much more likely to seek the death penalty when the victim was white than when the victim was black or Hispanic, and especially when the victim was a white woman compared to other race and gender combinations.<sup>144</sup> Our study confirms and bolsters these conclusions by showing that the death penalty system in Colorado fails to meaningfully narrow the class of

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George Woodworth, *Race Discrimination in the Administration of the Death Penalty: An Overview of the Empirical Evidence with Special Emphasis on the Post-1990 Research*, 41 NW CRIM. L. BULL. 6 (2005) (finding that, among jurisdictions where we have data, there is a consistent pattern of race-of-victim discrimination); DONOHUE, *supra* note 107, at 6–8 (finding that among death-eligible defendants, minority defendants were more likely to be charged capitally and get a death sentence when the victim was white compared to when the victim was also a minority, and that when the victim was white, minority defendants were more likely than white defendants to get the death penalty); Hindson et al., *supra* note 4, at 579 (the probability that the death penalty was sought in Colorado between 1980 and 1999 was 4.2 times higher for people who killed whites compared to those who killed blacks); Isaac Unah, *Choosing Those Who Will Die: The Effect of Race, Gender, and Law in Prosecutorial Decision to Seek the Death Penalty in Durham County, North Carolina*, 15 MICH. J. RACE & L. 135, 174 (2009) (finding prosecutors in Durham, North Carolina were six times more likely to seek the death penalty when the victim was white as opposed to when the victim was black between 2002 and 2007).

139. Hindson et al., *supra* note 4 (prosecutors are more likely to seek the death penalty when the victim is a white female); Andrea Shapiro, *Unequal Before the Law: Men, Women and the Death Penalty*, 8 AM. U. J. GENDER SOC. POL'Y & L. 427 (2000) (female defendants are less likely than male defendants to be charged capitally); Victor L. Streib, *Gendering the Death Penalty: Countering Sex Bias in a Masculine Sanctuary*, 63 OHIO ST. L.J. 433 (2002) (female defendants are less likely to get a death sentence and death sentences are more likely when the victim is female).

140. DONOHUE, *supra* note 107; Unah, *supra* note 138.

141. See, e.g., *Armed Forces*, *supra* note 138; DONOHUE, *supra* note 118; Hindson et al., *supra* note 4; Unah, *supra* note 138.

142. Hindson et al., *supra* note 4, at 581.

143. *Id.* at 552–53.

144. *Id.* at 577–80.

death-eligible offenders in a way that minimizes the possibility of arbitrary or discriminatory death sentencing determinations. That is to say, our findings point to a potential root cause for the discrimination found in the previous Colorado study. More importantly, we provide an independent basis for concluding that Colorado's system is unconstitutional as a general matter, and not just in individual cases tainted with discrimination.

Our research provides an updated, more comprehensive examination of every murder conviction in Colorado between 1999 and 2010 to determine what percentage of first-degree murders are death-eligible, what percentage of death-eligible cases are prosecuted as capital offenses, and what percentage of death-eligible cases result in a death sentence. While we have not yet analyzed our data for evidence of arbitrariness and discrimination in the administration of Colorado's death penalty statute, we conclude that the infrequency with which the penalty is sought and imposed in Colorado raises independent concerns under the Supreme Court's Eighth Amendment jurisprudence.

Previous research has shown that race and/or geography rather than egregiousness of the offense accounts for different prosecution outcomes in all but the most extreme cases where death is clearly justified or clearly unjustified.<sup>145</sup> Specifically, previous scholarship has concluded that "racial disparities in sentencing remain significant for all but the most aggravated of cases, for which offenders are sentenced to death close to [90] percent of the time."<sup>146</sup> Indeed, recent empirical evidence demonstrates that "the risk of systemic discrimination can be eliminated or drastically curtailed by limiting death eligibility to the most aggravated cases, in which there are few if any race disparities."<sup>147</sup> As our data shows, Colorado's capital sentencing statute, by failing to genuinely narrow the class of death-eligible defendants, permits unconstitutional

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145. See EQUAL JUSTICE, *supra* note 107; *Armed Forces*, *supra* note 138, at 1303; DONOHUE, *supra* note 107.

146. Sharon, *supra* note 10, at 247 (explaining a death sentencing rate of less than 85 or 90% can be expected to result in racial disparities in the application of the death penalty). "In particular, the Baldus group's study of racial discrimination in Georgia, relied upon by the petitioner in *McCleskey v. Kemp*, reached this conclusion. The study found that, among cases with nearly universal death sentencing, there was only a 2% difference between death-sentence rates for black and white defendants with white victims . . . Among less aggravated cases, where death sentences were imposed only 41% of the time, this racial variation rose to 26%." *Id.* at 247–48 n.138.

147. *Armed Forces*, *supra* note 138, at 1303.

arbitrariness to seep into the death penalty determination.

### III. DATA COLLECTION AND FINDINGS

We turn now to our study, describing the collection of cases studied, our analysis of those cases, and our findings.

#### A. *The Universe of Cases and Eliminating Cases Based on Objective Criteria*

We studied every murder case filed in Colorado from January 1, 1999 through December 31, 2010, as identified by the Colorado State Judicial Branch. We did not sample these cases, but rather investigated the entire universe of murder cases in the state's judicial records during this period. Defense counsel obtained a list of these cases (the "State Judicial List") in response to a request to the Colorado State Judiciary.<sup>148</sup> We began with a universe of 1,350 murder cases.<sup>149</sup> All of these cases are listed in the appendix.<sup>150</sup>

From this base of cases, the first step was to determine how many cases were either procedurally or factually first-degree murders.<sup>151</sup> Because only first-degree murderers are

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148. On June 20, 2011, Jessica Zender, a policy analyst for the Colorado Judicial Branch, Division of Planning and Analysis e-mailed to defense counsel the list of murder cases filed between January 1, 1999 and December 31, 2010. E-mail from Jessica Zender, Court Programs Analyst, Colo. Judicial Branch, to Bonnie Stewart, Paralegal, Office of Alt. Def. Counsel (June 20, 2011, 13:43 MST) (on file with authors).

149. To be more precise, the State Judicial List includes 1,344 cases. However, this set of cases excluded six cases that have been provided to us by counsel for Mr. Montour. Five of the cases that the State Judicial List excluded were cases from the Eighteenth Judicial District for which the prosecution filed a death notice. It appears that the record keeping method in the Eighteenth Judicial District is such that the State Judiciary's search of all murder cases did not yield the death-noticed cases from that district. The sixth excluded case was from Rio Grande County and was excluded by the State Judiciary's disclosure apparently because it resulted in a conviction for child abuse resulting in death, not murder. Mr. Montour's counsel has filed a document with the Court certifying that all known cases in which the death penalty was sought during the relevant period of time have been included in the study. It is also worth pointing out that the 1,350 total cases include 22 cases in which the prosecution pursued the death penalty at any phase of the proceedings—pretrial, guilt-phase, or sentencing.

150. See *infra* Appendix 1.

151. As explained more fully below, the study looked at two types of murders as potentially eligible for death. First, actual first-degree murders, referred to as "procedural first-degree murders," were included. Second, those cases in which there was not a first-degree murder conviction but there was a conviction for a class one or two felony, and for which the facts in the record would have supported

eligible for death in Colorado,<sup>152</sup> this was an important threshold step.

Unlike some previous studies, we did not limit our study to actual first-degree murder convictions. Steven Shatz and Nina Rivkind, authors of one of the leading studies in this field, reported only roughly 400 appealed first-degree murder convictions when they calculated the death eligibility and death sentence rates in California for a 4-year period.<sup>153</sup> In limiting their dataset to actual first-degree convictions, Shatz and Rivkind noted that their dataset would likely exclude “a significant number of less egregious first degree murder cases,” cases for which an aggravating factor would not apply.<sup>154</sup> Their result would thus overstate the death eligibility rate in California. Our study is not susceptible to this sort of skewing, however, because we counted as first-degree murders all cases in which a defendant was either convicted of first-degree murder or *could* have been convicted of first-degree murder. In this way, our study includes those cases that are less atrocious and less likely to have obvious aggravating factors, but which are nonetheless first-degree murders as a factual matter. Our approach, then, is more conservative than that of other leading studies in the field.

The only exception to our decision to include all factual as well as actual first-degree murders was what leading empirical scholars have termed the controlling fact-finder (CFF) rule.<sup>155</sup> Under the CFF rule, deference is given to the factual conclusions of a jury or judge where a “judge or jury has made an authoritative finding of fact on a factual issue (concerning criminal liability. . .).”<sup>156</sup> Any case in which a defendant was in fact convicted of first-degree murder is treated as a first-degree murder. Thus, even where it seemed to us that the facts could not support more than a second-degree murder conviction, we coded as first-degree murder any case in which a defendant was actually convicted of that crime.<sup>157</sup> Likewise, we treated

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such a finding as a matter of law under a sufficiency of the evidence standard, were also included.

152. COLO. REV. STAT. § 18-1.3-1201 (2012); COLO. R. CRIM. P. 32.1 (2012).

153. *Requiem for Furman*, *supra* note 2.

154. *Id.* at 1333.

155. *Methodological Issues*, *supra* note 1, at 165.

156. *Id.*

157. *Id.* (“Because such cases involve a legally authoritative determination of facts[,] . . . we recommend the application of what has been called the controlling fact finding [“CFF”] rule.”). The only exception to this rule was for conviction in

any case in which a jury explicitly or implicitly acquitted a defendant of first-degree murder as a non-first-degree murder—even if we would have coded it differently.<sup>158</sup>

In order to acquire data regarding each of the 1,350 cases identified by the State Judiciary, several paralegals, law students, and lawyers were employed by defense counsel to serve as a Data Collection Team (“DCT”). The DCT’s work assisted the study authors—the Expert Review Team (“ERT”)—in many ways. The first was to eliminate non-first-degree murder cases from the dataset using the CFF standard. Even if a case had clear aggravating factors, if there was an acquittal of first-degree murder, the case was not reviewed by the ERT for the presence of aggravating factors.

The DCT was also instructed to remove cases from the study based on three criteria: (1) the absence of a deceased victim—that is, cases of attempted murder, aggravated assault, etc.;<sup>159</sup> (2) the defendant was a juvenile at the time of the offense and thus ineligible for execution;<sup>160</sup> or (3) the defendant was ultimately convicted of a crime less serious than a second-degree felony.<sup>161</sup> This last category includes convictions for second-degree murder in the heat of passion, conspiracy to commit second-degree murder, manslaughter, negligent homicide, and other crimes of violence that are a class three felony or less.<sup>162</sup>

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which a first-degree murder conviction was later set aside for insufficiency of the evidence. That is, we deferred to juries unless a court concluded that no reasonable jury could have come to the same conclusion.

158. In addition, if the jury acquitted the defendant of a lesser crime, then this was treated as a CFF for purposes of precluding a finding of first-degree murder. For example, if a jury found the defendant not guilty of second-degree murder, this is treated as a CFF and the case could not be death-eligible.

159. *See Kennedy v. Louisiana*, 554 U.S. 407 (2008) (holding the Eighth Amendment prohibited the death penalty for a defendant convicted of aggravated rape).

160. *See Roper v. Simmons*, 543 U.S. 551 (2005) (holding the Eighth and Fourteenth Amendments prohibited the death penalty for defendants under the age of 18 at the time of their crime).

161. For purposes of this study, even when there was not a CFF, we excluded cases where the ultimate conviction was less than a class two felony. Our decision was based on the theory that prosecutors would not be inclined to prosecute a first-degree murder case as merely a class three felony or less. There were only 79 total cases excluded on this basis.

162. Conspiracy to commit first-degree murder is a class two felony in Colorado. COLO. REV. STAT. § 18-2-206(1) (2012). Accordingly, if the defendant was convicted of conspiracy to commit first-degree murder, and there was a deceased victim, the case remained in the study. Only cases in which it was a class three felony or lower, or where there was no deceased victim, were excluded.

The DCT was also asked to note any case in which the prosecution actually sought the death penalty against the defendant. There were five cases in which the prosecution had initially pursued the death penalty but in which the defendant was acquitted, either directly or impliedly, of first-degree murder. These cases were excluded from the study under the CFF rule.<sup>163</sup> There were an additional 17 cases in which the prosecution sought the death penalty and obtained a conviction for either first-degree murder following a plea bargain or a trial (13 cases) or for a class two felony following a plea bargain (4 cases). Because our research objective was to identify those cases in which the prosecutor could have sought death, and because we agreed with the prosecution's conclusion that these cases could have resulted in a death sentence—that they were factual first-degree murders and aggravators were present—all 17 of these cases were coded as first-degree murder with aggravating factors.<sup>164</sup>

Applying all of these objective criteria, 661 cases were excluded from the study, leaving 689 cases for which a DCT exclusion did not apply.<sup>165</sup> In addition, during the litigation of

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Accordingly, a defendant convicted of conspiracy to commit first-degree murder, which is a class two felony, could be guilty of first-degree murder as an accomplice under Colorado law.

163. See *People v. Jimenez*, 2000CR178 (Colo. Dist. Teller Cnty. July 19, 2011), *People v. Jimenez*, 217 P.3d 841, 849 (Colo. App. 2008) (convicted of a lesser offense); *People v. Wilkinson*, 2000CR638 (Colo. Dist. Adams Cnty. Aug. 25, 2000), *People v. Wilkinson*, 01CA1870 (Colo. App. Sept. 16, 2004) (unpublished) (convicted of a lesser offense); *People v. Sweeney*, 2000CR634 (Colo. Dist. Adams Cnty. Aug. 14, 2000), *People v. Sweeney*, 01CA1108 (Colo. App. Nov. 13, 2003) (unpublished) (convicted of a lesser offense); *People v. Melina*, 2000CR1675 (Colo. Dist. Adams Cnty. Feb. 5, 2001), *People v. Melina*, 02CA1989 (Colo. App. July 22, 2004) (unpublished) (convicted of a lesser offense); *People v. Perez*, 2005CR74 (Colo. Dist. Lincoln Cnty. Nov. 3, 2006) (acquitted). These cases were eliminated under the CFF Rule described *supra* notes 155–158 and accompanying text. Accordingly, there were a total of 17 death-noticed cases included in the study.

164. Baldus et al., *Methodological Issues*, *supra* note 1, at 166 (explaining that in studying prosecutorial decision making it is appropriate to give weight to the fact that the “prosecution viewed such a case as death eligible”).

165. There was a total 661 cases excluded by the DCT. Accordingly, that left 689 cases for ERT review (1,350 – 661 = 689). The 661 exclusions are comprised of 408 cases in which there was no deceased victim (for example, attempts, solicitations or conspiracies that did not result in murder, etc.), 79 cases committed by a defendant who was a juvenile at the time of the offense, 78 cases in which the conviction was for a class three felony or less, 90 cases excluded by the CFF Rule (including 5 in which the prosecution had filed a notice of its intent to seek the death penalty), and one “test” case number that was not an actual case. We excluded 5 additional cases on unique grounds: (1) one defendant extradited to Colorado on the basis of an agreement to not seek the death penalty; (2) 3 cold cases that occurred prior to Colorado's enactment of a new death penalty

the *Montour* case the prosecution, in an effort to challenge this study, identified 8 cases that the State Judicial List had omitted and that should have been sent to the ERT.<sup>166</sup> Applying the objective criteria described above, the DCT was able to determine that 7 of these cases in fact ought to have been included on the state's original list.<sup>167</sup> These 7 cases were added to the 689 received from the State Judiciary, yielding a total of 696 for expert review.

For each of these 696 remaining cases, the DCT was tasked with compiling as much information as possible in order to reveal the salient facts about each of the murders so that we could review the case in the manner described immediately below. The DCT gathered court dockets, charging information, appellate court decisions, police reports and affidavits contained in the district court file, and media accounts. Based on the DCT's research, a "case file" was generated that included all of the information that the DCT gathered regarding each of the 696 murders during the relevant time period. These case files were the basis of our review.

### *B. Expert Review*

The expert review of the case files focused on three basic questions: (1) whether there was sufficient information in the file to make the relevant determinations; and if so, (2) whether the case was either factually or procedurally a first-degree murder; and if so, (3) whether one or more of the statutorily enumerated aggravating factors was present.

If the ERT concluded that there was insufficient information in the case file, the case was sent back to the DCT for additional research. If, after additional research, there was still insufficient information, the case was excluded from the

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statute after *Gregg v. Georgia*, 428 U.S. 153 (1976) and *Lockett v. Ohio*, 438 U.S. 586 (1978); and (3) an erroneous double entry in the State Judicial List. This information can be found in Appendix A.

166. The prosecution actually identified 96 "additional cases" in a filing with the Eighteenth Judicial District that were not included on the State Judicial List. However, the State later conceded only 8 of the cases would have been included in our study, had they been reported by the State Judicial Branch. Accordingly, we focus on the 8 new cases, concluding that 7 of them meet the study's criteria for inclusion.

167. One of the 8 cases was a conviction for child abuse resulting in death. COLO. REV. STAT. §§ 18-6-401(1)(a), 18-6-401(7)(a)(I) (2012). This statute was beyond the scope of the request to the State Judicial Branch, which was asked to provide convictions related to COLO. REV. STAT. §§ 18-3-102 and 18-3-103.

study. There were 33 cases for which there was insufficient information about either first-degree murder liability, or aggravating factors, or both. In each such case the DCT was unable to obtain additional information, and the ERT conclusively determined that there was insufficient information to reach a conclusion. Because there was insufficient information to review 33 of the 696 murder cases that were part of the study, 663 total cases remained for ERT analysis.

### 1. Factual or Procedural First-Degree Murder

The ERT assessed each of the 663 cases that were ultimately included in the study. The threshold question in determining the rate of death eligibility for this class of defendants was an expert determination of whether the case was a first-degree murder. In assessing whether a case was a first-degree murder for purposes of the study, we considered whether: (1) the case was coded as first-degree murder with aggravating factors based on the prosecution's filing of a notice of intent to seek the death penalty (death-noticed); (2) the defendant was actually convicted of first-degree murder (procedural first-degree murder); or (3) the facts in the case file provided by the DCT were legally sufficient to support a first-degree murder charge (factual first-degree murder).<sup>168</sup>

The standard we used in evaluating whether a case was a factual first-degree murder was a legal sufficiency standard.<sup>169</sup> Under this standard, the question is not what the expert believes is the correct factual determination in a given case, nor how a reasonable jury should resolve the issue.<sup>170</sup> Rather, the question is whether a Colorado appellate court would

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168. The exact language of the standard agreed upon by the ERT is: "Whether, based on all of the information contained in the file—the arrest warrant affidavit, the statement of the defendant, the facts as stated in an appellate opinion, etc.—there exists sufficient evidence to support on appeal a jury verdict of first-degree murder and/or an aggravating factor?" That is, our ultimate inquiry was: "Could a jury hearing this evidence—read in the light most favorable to the prosecution—reasonably conclude that first-degree murder and/or an aggravating factor was proven beyond a reasonable doubt?"

169. See *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (holding that the evidence is sufficient to support a conviction whenever, after viewing the evidence "in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."); see also *People v. Bennett*, 515 P.2d 466, 469 (Colo. 1973) ("The same test for measuring the sufficiency of evidence [applies] whether the evidence is direct or circumstantial.").

170. *Jackson*, 443 U.S. at 319; *Bennett*, 512 P.2d at 469.

affirm a first-degree murder conviction in the case if one were returned by a jury.<sup>171</sup> That is, we reviewed the facts in the case file, giving particular weight to available appellate court opinions, and determined whether a jury verdict convicting the defendant of first-degree murder would be supported by the facts when viewed in the light most favorable to the prosecution.<sup>172</sup>

Using the approach set forth above, the ERT coded each of the 663 cases as either first-degree murder or not first-degree murder. First, we identified those cases for which there was a procedural first-degree murder—that is, an actual first-degree murder conviction. For those cases in which there was not a first-degree murder conviction, and for which the jury did not explicitly reject first-degree murder, we made the determination whether the facts satisfied the legal sufficiency standard—that is, whether the cases were factually first-degree murder. The DCT compiled our conclusions. Of the 663 cases studied, 604 cases were either factually or procedurally first-degree murder, and only 59 of the cases were not.<sup>173</sup>

Thus, including the 17 cases that were actually prosecuted as death-noticed first-degree murders—which we agree were first-degree murders—the first-degree murder rate is 91.1%.<sup>174</sup> The overwhelmingly high percentage of murders that the ERT found to be first-degree murder under Colorado law is not surprising given the breadth of Colorado’s first-degree murder statute. However, such data leaves no doubt that the constitutionally required narrowing is not occurring at the stage of first-degree murder liability.<sup>175</sup>

## 2. Aggravating Factor Liability

Of the 604 cases that we coded as either factually or procedurally first-degree murder, we determined that an additional 8 cases had to be excluded from our aggravating factor analysis because the defendants were not in fact death-

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171. Scholars conducting similar studies in other cases have applied a similar approach. *See, e.g., Methodological Issues, supra* note 1, at 165 (describing the inquiry as assessing whether the “facts of the cases could have supported a capital murder conviction”).

172. *See supra* note 168.

173. The total of 604 cases consists of 587 cases in which the prosecution sought the death penalty, and 17 in which it did not.

174. The percentage is arrived at by dividing  $604 / 663 = 91.1\%$ .

175. *See infra* note 187.

eligible. First, from the 587 first-degree murder cases in which the death penalty was not sought, we excluded 6 cases on the basis of Eighth Amendment proportionality principles.<sup>176</sup> Specifically, we concluded that 6 of the non-death-noticed first-degree murder cases had to be excluded based on the defendant's insufficient participation in the killing. As with cases excluded by the DCT because the defendant was a juvenile, these cases were excluded from the study on the basis of the defendant's inherent ineligibility for the death penalty.<sup>177</sup> These cases, then, are ineligible for death, not because of any legislative narrowing—which is the focus of this study—but because of a specific constitutional rule.<sup>178</sup> Thus, although they were used to calculate the percentage of Colorado murders that could have been first-degree murder—because they were relevant to that question—they are not death-eligible cases and were removed from the analysis at this point. Second, of the 17 cases in which the prosecution initially sought the death penalty, 2 cases were found by Colorado courts to be legally ineligible for the death penalty.<sup>179</sup>

Accordingly, we excluded a total of 8 additional cases from the aggravating factor analysis because although these cases may have had (and in many cases did have) aggravating factors, they were legally ineligible for a sentence of death. These exclusions were necessary because our study was designed to assess the effectiveness of Colorado's legislative scheme in narrowing the class of death-eligible offenders, and

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176. For a discussion of the Eighth Amendment proportionality analysis for non-killer accomplices, see *Enmund v. Florida*, 458 U.S. 782, 788, 798 (1982) and *Tison v. Arizona*, 481 U.S. 137, 155–57 (1987). We conducted an *Enmund/Tison* analysis on only the 587 non-death-noticed cases because, as mentioned, the death-noticed cases were presumed to be first-degree murders with aggravating factor(s). For an explication of these cases, see David McCord, *State Death Sentences for Felony Murder Accomplices Under the Enmund and Tison Standards*, 32 ARIZ. ST. L.J. 843 (2000).

177. See *Tison*, 481 U.S. at 158 (holding that the death penalty is permissible for a non-killer only where he or she had more than minor participation in the felonious conduct and was at least reckless with regard to death).

178. *Id.*

179. Specifically, two of the death noticed prosecutions were legally barred. See *People v. Vasquez*, 2002CR2231 (Colo. Dist. Adams Cnty. May 3, 2004) (based on *Atkins v. Virginia*, 536 U.S. 304 (2002)); *People v. Hagos*, 110 P.3d 1290 (Colo. 2005) (based on impermissible targeting in violation of the special legislation clause of the Colorado Constitution, art. V, Section 25, because of statutory changes following *Ring v. Arizona*, 536 U.S. 584 (2002)). Accordingly, the total number of death prosecutions is best thought of as 15—that is, there were 15 cases where the prosecution noticed death and was not legally barred from pursuing a death sentence at trial.

these 8 cases are ineligible for death because of rules external to applicable legislative rules.

In sum, of the entire universe of cases for which there was sufficient information, we determined that there were 596 ( $604 - 8 = 596$ ) first-degree murder cases that were potentially death eligible, but in which the death penalty was not actually sought. For each of the 596 factual or procedural first-degree murder cases, we assessed whether one or more statutory aggravating factors was present. That is to say, for every case defined as a factual or procedural first-degree murder that was not death ineligible under either the state or federal Constitution, we evaluated whether at least one statutory aggravating factor was present under the legal sufficiency standard set forth above.<sup>180</sup> As with the first-degree murder analysis, we did not code the cases based on what we believed was the correct factual determination or based on how we believed a jury should have resolved the issue. Instead, the question was whether the facts were legally sufficient to support a jury finding of one or more aggravating factors—that is, would a Colorado appellate court affirm a finding of an aggravating factor if the factor were found by a jury.<sup>181</sup> Moreover, because of time constraints, the large number of cases, and Colorado’s extensive list of aggravating factors,<sup>182</sup> we did not assess every possible aggravating factor for each case file; rather, our research question was simply whether one or more aggravating factors were supported by the evidence in the case file.<sup>183</sup> Once we were certain that at least one aggravating factor was present in a particular case, we simply moved on to the next one.

Based on our review of the 596 qualifying first-degree murder cases, we found one or more aggravating factors in 539

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180. Again, a sufficiency of the evidence standard, based on *Jackson*, was used to determine whether, based on the facts in the case file, a reasonable jury could have found an aggravating factor beyond a reasonable doubt when viewing the evidence in the light most favorable to the prosecution. See *Jackson v. Virginia*, 443 U.S. 307 (1979).

181. See *supra* note 171.

182. COLO. REV. STAT. § 18-1.3-1201(5) (2012).

183. This approach has been suggested by the United States Supreme Court. See *Godfrey v. Georgia*, 446 U.S. 420, 428–29 (1980) (suggesting that the breadth of an aggravator may be assessed by considering whether a “person of ordinary sensibility” would find the aggravator applicable to a particular factual situation); *Maynard v. Cartwright*, 486 U.S. 356, 364 (1988) (considering the breadth of an aggravator by assessing the circumstances in which an “ordinary person could honestly believe” that the aggravator applied).

of the cases.<sup>184</sup> In other words, we found that only 57 of the relevant procedural and factual first-degree murder cases did not satisfy a legal sufficiency standard as to one or more aggravating factors. This means that for the entire 12-year period, 90.4% of the factual or procedural first-degree murders that we examined in Colorado were death-eligible based on the existence of at least one aggravating factor.<sup>185</sup>

These figures demonstrate that, because of the breadth and quantity of aggravating factors specified in the Colorado statute, the system fails to meaningfully narrow the class of death-eligible offenders.<sup>186</sup> Indeed, to the best of our knowledge, this is the highest death eligibility rate of any jurisdiction that has been studied.<sup>187</sup>

### C. Findings Summarized

Figure 1 summarizes our findings in a stylized format based on the Georgia Supreme Court's metaphor of a pyramid pierced by planes.<sup>188</sup> Our pyramid moves from all of the cases identified on the State Judicial List at the bottom, through those cases in which a death sentence was actually obtained at the top.

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184. See also *infra* Appendix 1.

185. The percentage is arrived at by dividing  $539 / 596 = 90.4\%$ .

186. COLO. REV. STAT. § 18-1.3-1201(5) (2012); see also Kirchmeier, *supra* note 91, at 431.

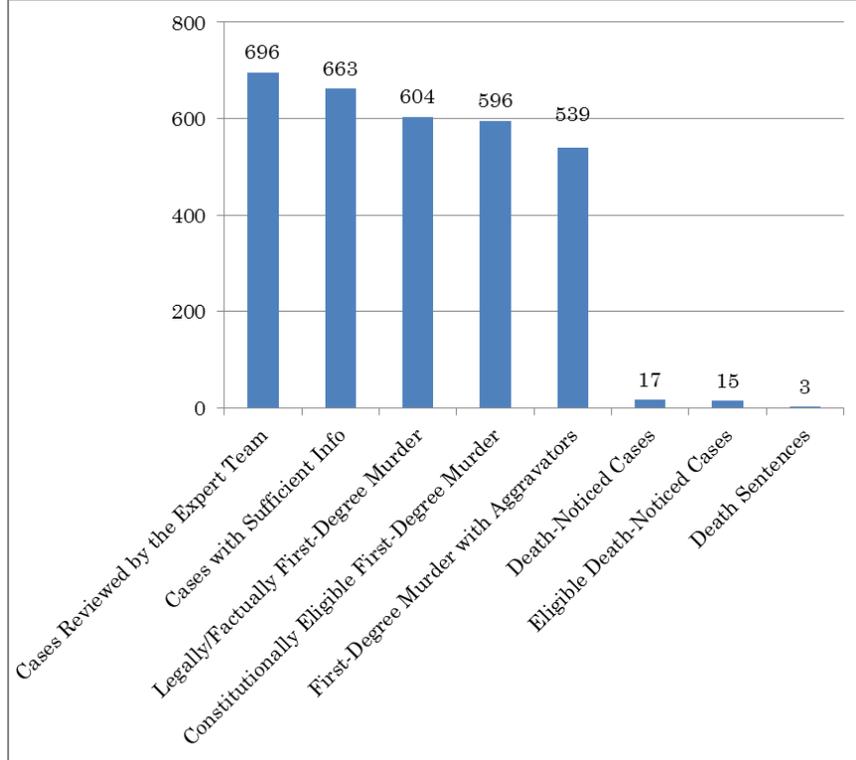
187. As explained above, the aggravating factor, or death eligibility, rate in our study is approximately 90%. For comparison purposes, in concluding that California's death eligibility rate is uniquely inconsistent with the Eighth Amendment, Shatz and Rivkind found that approximately 87% of first-degree murder cases were death-eligible. *Requiem for Furman*, *supra* note 2, at 1330; see also Steiker & Steiker, *supra* note 9, at 375 ("The most detailed study of death-eligibility within a state—conducted by the famous Baldus group—found that approximately eighty-six percent of all persons convicted of murder in Georgia over a five year period after the adoption of Georgia's new statute were death-eligible under that scheme.").

188. *Zant v. Stephens*, 462 U.S. 862, 871–72 (1983); see also *supra*, Part I.A.



**Figure 1: Case Comparisons Pyramid**

It is important to remember that Figure 1 is not to scale. Rather, it merely shows the relevant categories of our analysis. Figure 2 gives a sense of scale and demonstrates our fundamental conclusion that the Colorado death penalty statute makes many eligible for death but that very, very few cases result in a capital sentence.



**Figure 2: Case Comparisons Bar Graph**

Based on these results we calculated 4 statistics that are relevant to the constitutionality of the Colorado's death penalty system.

First, we calculated Colorado's first-degree murder rate. Including death-noticed prosecutions, there were a total of 663 cases considered. Of the 663 murder cases analyzed, 604 of them were either factual or procedural first-degree murders. Thus, we found that the percentage of murders during the study period that either were or could have been prosecuted as first-degree murder was 91.1%.<sup>189</sup> That is, fewer than 9% of those convicted of murder from 1999 through 2010 were *ineligible* for a first-degree murder conviction.<sup>190</sup>

189.  $604 / 663 = 91.1\%$ .

190. Based in part on this finding, our study takes for granted that Colorado's aggravating factors are designed to perform the requisite narrowing required by the Eighth Amendment. No other feature of Colorado's capital sentencing scheme materially, predictably, and non-arbitrarily imposes legislative limits on the death eligibility of a defendant guilty of first-degree murder. See *People v.*

Second, we calculated Colorado's aggravating factor rate. The aggravating factor rate is the percentage of factual or procedural first-degree murder cases in which there was at least one aggravating factor present. This rate was calculated using the 539 cases in which we found one or more aggravating factors, including the death-noticed cases for which the prosecution actually sought (and was legally permitted to seek) the death penalty,<sup>191</sup> and the 596 death-eligible first-degree cases, including death-noticed prosecutions. Specifically, we concluded that Colorado's aggravating factor rate during the study period was 539 of 596, or 90.4%. That is, in 90.4% of the death-eligible factual or procedural first-degree murder cases during the 12-year period studied, at least one aggravating factor was present. If one takes seriously the constitutional obligation that "states narrow death-eligibility through the use of aggravating circumstances," then this figure, standing alone, demonstrates unequivocally that Colorado's system is unconstitutional.<sup>192</sup> A scheme of "such broad death-eligibility essentially guarantees that some defendants caught in the net will not be among the truly 'worst' offenders."<sup>193</sup>

Third, we calculated Colorado's death prosecution rate. We evaluated the prosecution rate both pretrial (initial decision to formally seek death) and at trial. To calculate the pretrial

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Dunlap, 975 P.2d 723, 735 (Colo. 1999) (recognizing that in both weighing and non-weighing jurisdictions the "constitutionally mandated first step" for death eligibility is the conviction of the defendant of murder and the finding of "one aggravating circumstance (or its equivalent) at either the guilt or penalty phase") ("[T]he finding of at least one aggravating circumstance, or 'aggravating factor' under our statutory terminology, is an essential constitutional component of [the] death penalty."); see also *People v. Harlan*, 8 P.3d 448, 483 (Colo. 2000) ("[A] death sentence imposed on the basis of a statutory aggravating factor that fails to narrow the class of persons eligible for the death penalty . . . violates the constitutional ban on cruel and unusual punishment.").

191. As previously noted, *supra* note 149, the prosecution actually sought death in 22 cases during the relevant period of time. However, 5 of these death prosecutions resulted in acquittals on the first-degree murder charge and are, thus, not part of the study based on the CFF rule. Moreover, 2 of the death-noticed prosecutions were legally barred. *People v. Vasquez*, 2002CR2231 (Colo. Dist. Adams Cnty. May 3, 2004) (based on *Atkins v. Virginia*, 536 U.S. 304 (2002)); *People v. Hagos*, 1999CR2738, 110 P.3d 1290 (Colo. 2005) (based on impermissible targeting in violation of the special legislation clause of the Colorado Constitution, art. V, Section 25, because of statutory changes following *Ring v. Arizona*, 536 U.S. 584 (2002)).

192. Steiker & Steiker, *supra* note 9, at 373.

193. *Id.* at 415 ("The wrongful inclusion of such undeserving offenders is problematic in terms of both proportionality (excessive punishment) and equality (random inclusion of undeserving defendants when similarly situated offenders, and even more deserving offenders, do not get the death penalty).").

death prosecution rate, we divided the number of cases in which the prosecution formally sought the death penalty by the number of cases in which the death penalty could have been sought. Excluding the 5 death prosecution cases that resulted in acquittals, and excluding the 2 death prosecutions that were legally barred for other reasons,<sup>194</sup> the State sought death, pretrial, in 15 cases; under the statute, it could have sought death in 539 cases.<sup>195</sup> Consequently, the pretrial death prosecution rate was 15 of 539, or 2.78%.

To calculate the trial death prosecution rate, we looked at only those cases in which the prosecution continued to pursue a sentence of death at the conclusion of the guilt-phase of the case and compared the number of those cases to the number of cases in which an aggravating factor was present. Of the 15 death sentences pursued by the prosecution pretrial that were not legally barred, there were only 5 cases in which the death penalty was still being sought at the time of the sentencing phase trial.<sup>196</sup> Accordingly, the trial death prosecution rate was 5 of 539, or 0.93%.

Fourth, we evaluated Colorado's death sentence rate. To calculate the death sentence rate we compared the actual number of death sentences during this period to the number of factual or procedural first-degree murders in which there was

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194. See *supra* note 191.

195. The denominator, 539, is based upon 524 factual or procedural first-degree murder cases in which at least one aggravating factor was present, plus the 15 death prosecutions. See *supra* note 179.

196. The 5 cases that were not excluded by the CFF Rule and in which the death penalty was still being sought at the time of the sentencing hearing were: *People v. Montour*, 2002CR782 (Colo. Dist. Douglas Cnty., pending) (see *People v. Montour*, 157 P.3d 489 (Colo. 2007)); *People v. Ray*, 252 P.3d 1042 (Colo. 2011); *People v. Owens*, 228 P.3d 969 (Colo. 2010); *People v. Paige*, 01CA735 (Colo. App. Feb. 12, 2004) (unpublished); and *People v. Bueno*, 2005CR73 (Colo. Dist. Lincoln Cnty., Apr. 21, 2008). The other death prosecutions included the 5 acquittals on the first-degree murder charge, *supra* note 163, the 2 death prosecutions that were legally barred, see *supra* note 191, one in which the jury could not reach a verdict and the death notice was withdrawn prior to the second trial (*People v. Bergerud*, 223 P.3d 686, 691 (Colo. 2010)), and 9 cases in which the death penalty was dropped pursuant to a plea bargain.

To determine that only 5 cases were still death prosecutions at the time of the sentencing trial we eliminated the following cases from the 22 cases in which the prosecution originally sought death: (a) 5 acquittals on the first-degree murder charge, see *supra* note 163; (b) 2 cases in which the death penalty was legally barred, see *supra* note 191; (c) 2 cases in which the prosecution dropped the death penalty prosecution; and (d) 8 cases that resulted in a guilty plea to first-degree murder or to a lesser offense and in which no capital sentencing proceeding was held and no death sentence was imposed.

at least one aggravating factor present. That is to say, we compared the number of cases in which the prosecution could have sought death or did seek death, based on the presence of one or more aggravating factors, with the number of cases in which the prosecution in fact obtained a death sentence. Specifically, although there were 539 cases in which at least one aggravating factor was present and in which the prosecution could have sought the death penalty, a sentence of death was returned in only 3 cases.<sup>197</sup> Accordingly, Colorado has a death sentence rate of 3 of 539, or 0.56%. Scholarship in the field indicates that a substantially higher death sentence rate is necessary for a capital sentencing system to comply with the Eighth Amendment.<sup>198</sup>

Even this figure overstates the death sentence rate for two reasons. First, none of the 3 death sentences handed down during the relevant time period is yet final.<sup>199</sup> Most notably, in order to be conservative, we have counted the 2003 death sentence for Edward Montour, Jr. as one of the 3 successful death prosecutions during the study period even though it was reversed by the Colorado Supreme Court and Montour is currently awaiting resentencing.<sup>200</sup> Second, the only other 2 death sentences, which arose out of the same double homicide, are not yet final on appeal as the state court review process has not yet concluded.<sup>201</sup> Thus, these sentences might be overturned as well.

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197. See *People v. Ray*, 252 P.3d 1042 (Colo. 2011); *People v. Owens*, 228 P.3d 969 (Colo. 2010); *People v. Montour*, 157 P.3d 489 (Colo. 2007). Notably, Owens and Ray were co-defendants. So, in only two factual circumstances has a death sentence been sought and obtained.

198. Sharon, *supra* note 10, at 247 (“[A] statutory scheme should be invalidated if the offenders it renders death eligible are not sentenced to death in at least 85% of cases.”).

199. Mr. Montour is subject to re-sentencing right now. In *Ray*, 252 P.3d 1042, and *Owens*, 228 P.3d 969, ongoing litigation and appeals are still pending as of the time of writing.

200. *Montour*, 157 P.3d 489.

201. LARRY W. YACKLE, POSTCONVICTION REMEDIES § 25:13 (“The date on which the prisoner’s conviction becomes final is . . . ‘the date which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.’” (quoting the relevant federal habeas corpus statute, 28 U.S.C. § 2244(d)(1) (2012))); *id.* § 26:20 (“A conviction becomes final for [retroactivity] purposes when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied.”).

## CONCLUSION

The data compiled in this study—the first complete study of Colorado’s effectiveness in narrowing the class of death-eligible offenders—compels the conclusion that Colorado’s death penalty system is unconstitutional.

First, and perhaps most notably, in over 90% of the cases in which a person is found (or could be found) guilty of first-degree murder in Colorado, one or more of the aggravating factors applies, thus making the defendant eligible for the ultimate punishment. Given Colorado’s capacious definition of first-degree murder—a definition that permits over 91% of all murder defendants to be charged with first-degree murder—there is little question that Colorado’s system fails to comply with the narrowing obligations imposed by *Gregg*.<sup>202</sup> Leading death penalty scholars Jordan Steiker and Carol Steiker have concluded that in order to comply with the Eighth Amendment, “the class of the death-eligible should not be tremendously greater than, say, five or ten[%] of all murderers.”<sup>203</sup> In Colorado, this figure is flipped—under 10% of murders are *not* death-eligible.

In addition, the death sentencing rate in Colorado is indicative of a sentencing scheme that has failed to produce legislative standards capable of genuinely narrowing the class of death-eligible offenders.<sup>204</sup> As Justice Brennan once observed, “when the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily.”<sup>205</sup> Building on this conclusion, scholars have recognized that the holding in *Furman* that the death penalty statutes were unconstitutional is grounded in large part on the fact that “relatively few (fifteen to twenty[%]) of the number of death eligible murderers were being sentenced to death.”<sup>206</sup>

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202. *Gregg v. Georgia*, 428 U.S. 153, 183 (1976).

203. Steiker & Steiker, *supra* note 9, at 415.

204. See *supra* note 191–93 and accompanying text (establishing that over 90% of murders in Colorado during the period of the study were death-eligible).

205. *Furman v. Georgia*, 408 U.S. 238, 293 (1972) (Brennan, J., concurring).

206. *Requiem for Furman*, *supra* note 2, at 1283. In his dissent in *Furman*, Justice Powell summarized the available statistics regarding the rate at which persons who were convicted of capital murder were actually sentenced to death. *Furman*, 408 U.S. at 436, n.19 (Powell, J., dissenting) (“No fully reliable statistics are available on the nationwide ratio of death sentences to cases in which death was a statutorily permissible punishment. At oral argument, counsel for petitioner . . . estimated that the ratio is 12 or 13 to one . . .”). Others have found

Likewise, it has been observed that “[w]hat was intolerable at the time of *Furman* . . . [was] that the ratio of death-eligibility to offenses-resulting-in-death [was] much closer to [90:1] than [5:1 or 10:1].”<sup>207</sup> Of course, in Colorado, the sentence rate is far below the 90:1 that has been deemed well below the constitutional floor. In Colorado the death sentence rate is only 0.56%.<sup>208</sup> The very sort of arbitrariness that *Furman* and *Gregg* sought to guard against—the arbitrariness of having only “a capriciously selected random handful” of persons sentenced to death—pervades Colorado’s capital sentencing system.<sup>209</sup>

The question of whether Colorado’s death penalty scheme narrows the class of death-eligible defendants “sufficiently to produce an acceptable death sentence ratio is . . . a factual question.”<sup>210</sup> Our study provides these facts, and the facts are unmistakably clear. Colorado’s capital sentencing statute fails to genuinely narrow the class of death-eligible offenders. Under the Colorado capital sentencing system, many defendants are eligible but almost none are actually sentenced to death. Because Colorado’s aggravating factors so rarely result in actual death sentences, their use in any given case violates of the Eighth Amendment.<sup>211</sup>

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a higher correlation. See Richard A. McGee, *Capital Punishment as Seen by a Correctional Administrator*, 28 FED. PROBATION 11, 12 (1964) (1 of every 5, or 20%, of persons convicted of murder received the death penalty in California); Hugo Bedau, *Death Sentences in New Jersey 1907–1960*, 19 RUTGERS L. REV. 1 (1964) (between 1916 and 1955, 157 out of 652 persons charged with murder received the death sentence in New Jersey—about 20%; between 1956 and 1960, 13 out of 61 received the death sentence—also about 20%); HARRY KALVEN JR. & HANS ZIESEL, *THE AMERICAN JURY* 435–36 (1966) (21 of 111 murder cases resulted in death sentences during 3 representative years during the mid-1950’s); see also Rupert L. Koeninger, *Capital Punishment in Texas, 1924–1968*, 15 CRIME & DELINQ. 132 (1969)).

207. Steiker & Steiker, *supra* note 9, at 415.

208. See *supra* notes 197–98 and accompanying text.

209. As indicated previously, see note 146, commentators have pointed out that according to available data, there are significant racial disparities for all but the most aggravated cases, which result in a death sentence rate of nearly 90%. Sharon, *supra* note 10, at 247–48 (“Thus, if narrowing is to fulfill its primary purpose of confining death eligibility to those cases where culpability is so extreme that it overwhelms bias, the death-sentence rate required must be much higher than 20%.”).

210. *Requiem for Furman*, *supra* note 2, at 1317–18.

211. *Furman v. Georgia*, 408 U.S. 238, 309 (1972) (Stewart, J., concurring) (describing capital sentencing systems in which fewer than 1 in 5 eligible defendants were sentenced to death as so arbitrary as to approximate “being struck by lightning”).

## APPENDIX A

Chart 1 shows the reasons 661 of the cases included on the state judicial list were excluded from the study. The overwhelming majority of these exclusions were for a purely factual reason: the underlying case did not involve the death of another human being and therefore was not a homicide case at all. An additional 90 cases were removed under the controlling fact finder rule because a judge or jury rejected a charge of first degree murder; 79 cases were removed pursuant to *Roper v. Simmons*, 543 U.S. 551 (2005) which prohibited the execution of those under 18 at the time of their crime; finally, 78 cases were excluded under the study's design because they involved a conviction for a third-degree felony or less.

