EXPERIMENTING WITH DEATH: AN EXAMINATION OF COLORADO'S USE OF THE THREE-JUDGE PANEL IN CAPITAL SENTENCING

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INTRODUCTION

I expected reporters; I expected crowds; I expected *some* indication of the momentous proceedings happening within.[1] But there is little fanfare of any kind. Later, as I exit the courthouse to walk to my car, I notice a black wooden chair in the main entryway. A black teddy bear hangs from a noose above its empty seat. Although I do not know why it is there, it is the only indication I have thus far seen of the decision that the court will make this week—the decision of whether Donta Page will someday sit in his own black chair.[2]

Mr. Page committed an atrocious crime. He did not know his victim, Peyton Tuthill, a young woman who had recently graduated from college and moved to Denver. But he was in her house, looking for money and items to sell, when she returned from a job interview. Instead of leaving her home, Mr. Page stayed to beat Peyton Tuthill, tie her up, stab her, slit her throat, rape her repeatedly, and eventually, kill her. Clearly, Ms. Tuthill did not deserve to die such a tortured death. Clearly, her death resulted from an egregious crime. However, the answer to the question of whether Mr. Page should be executed for committing this murder is not as clear. Some would answer affirmatively, others negatively. An important question is: who should decide?

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1. I am referring to the sentencing hearing in the case of *People v. Page*, No. 99CR2029 (Colo. Dist. Ct. filed 1999). I attended portions of this hearing as part of my research for this Comment. See *infra* Part IV.C.6 for a discussion of the *Page* case.

2. The "black chair" is a metaphor; executions in Colorado are performed by lethal injection. COLO. REV. STAT. § 16-11-401 (2000).

Capital punishment is an exceedingly controversial issue in our society, and personal viewpoints surrounding this topic are as diverse as the nation in which it exists. The death penalty has been analyzed from moral, religious, emotional, and philosophical points of view. This comment avoids references to these overarching controversies about capital punishment in favor of examining it from a purely procedural standpoint.

Capital sentencing statutes in the thirty-eight states[3] that impose death as the ultimate punishment reflect the diversity of views about the penalty. The United States Supreme Court has been "unwilling to say that there is any one right way for a state to set up its capital sentencing scheme."[4] Instead, the Court has established three mandatory protections to ensure that the death penalty will "not be imposed arbitrarily or capriciously."[5] The first of these protections is a bifurcated trial in which the defendant's guilt is established in a primary trial, known as the "guilt phase."[6] If the fact-finder determines that the defendant is guilty, his sentence is determined in a second "penalty trial."[7] Mandates of "explicit statutory guidelines for making the life or death decision" and "automatic appellate review of all death sentences by the state's highest appellate court"[8] are the two other procedures thought to protect the defendant from caprice.

Historically, juries participated in determining both the defendant's guilt and his sentence in capital trials.[9] However, the Supreme Court no longer requires jury participation in the

3. Roxanne Perrusso, *And Then There Were Three: Colorado's New Death Penalty Sentencing Statute*, 68 U. COLO. L. REV. 189, 191 (1997); *Death Penalty Information Center*, *at* http://www.deathpenaltyinfo.org (last visited Jan. 28, 2002).

4. Spaziano v. Florida, 468 U.S. 447, 464 (1984).

5. Gregg v. Georgia, 428 U.S. 153, 155 (1976).

6. Phyllis L. Crocker, *Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Penalty Cases*, 66 FORDHAM L. REV. 21, 23 (1997); *see also* William J. Bowers et al., *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision-Making*, 83 CORNELL L. REV. 1476 (1998) (referring alternately to the primary trial as both the "guilt trial" and the "guilt phase") [hereinafter *Foreclosed Impartiality*].

7. *Foreclosed Impartiality*, *supra* note 6, at 1490.

8. *Id.* at 1479–80.

9. *Spaziano*, 468 U.S. at 469–70, 476–77.

sentencing phase of such a trial.[10] While the Court recognizes that jury sentencing can perform "an important societal function" in a capital case,[11] it no longer holds that sentencing is the only "vehicle through which the community's voice can be expressed."[12] According to the Court, the legislators who define the circumstances under which the death penalty shall be imposed adequately reflect the community's voice.[13] Thus, if a state legislature determines that judges will decide whether a defendant receives a life or death sentence, this reflects the community's desires, as it elected the legislators.

In fact, the Supreme Court has suggested that "judicial sentencing should lead . . . to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases."[14] In spite of the Supreme Court's reasoning, only three states adhere to "pure" judicial sentencing, in which the trial judge imposes the capital sentence by himself.[15] Four states subscribe to a jury override procedure in which the jury makes the initial sentencing decision, but the judge may override its decision if he[16] has a different opinion about the propriety of the sentence.[17] Two states authorize the

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10. *Spaziano* was the first case in which the United States Supreme Court upheld a state's right to allow judges, rather than juries, to impose death sentences. *Id.* at 448.

11. Proffitt v. Florida, 428 U.S. 242, 252 (1976) (quoting Witherspoon v. Illinois, 391 U.S. 510, 519 n.15 (1968)).

12. *Spaziano*, 468 U.S. at 462 (1984).

13. *Id.*

14. *Proffitt*, 428 U.S. at 252.

15. The three states in which capital sentencing is performed by the trial judge are Arizona, Idaho, and Montana. ARIZ. REV. STAT. § 13-703 (2000); IDAHO CODE § 19-2515 (Michie 2000); MONT. CODE ANN. § 46-18-301 (2000). The United States Supreme Court recently granted certiorari in the case of *Ring v. Arizona* to re-examine "the respective roles of judges and juries in criminal sentencing." Linda Greenhouse, *Major Death Penalty Appeal Accepted; Supreme Court to Decide on Case That Affects 800 on Death Rows*, N.Y. TIMES, Jan. 12, 2002, at A10; Ring v. Arizona, 25 P.3d 1139 (Ariz. 2001), *cert. granted*, 70 U.S.L.W. 3246 (U.S. Jan. 11, 2002) (No. 01-488). It is likely that the Court's decision in *Ring* will affect Colorado's three-judge panel procedure.

16. Throughout this article, I use the male pronoun when referencing judges. This reflects the reality that, at the present time, the majority of judges are male. *See* Judith Resnick, *"Naturally" Without Gender: Women, Jurisdiction, and the Federal Courts*, 66 N.Y.U. L. REV. 1682, 1704–10 (1991).

17. Alabama, Delaware, Florida, and Indiana have judicial override statutes. ALA. CODE § 13A-5-46 (2000); DEL. CODE ANN. tit. 11, § 4209 (2000); FLA. STAT. ch. 921.141 (2000); IND. CODE § 35-50-2-9 (2000).

use of multi-judge panels in capital sentencing. Nevada's statute allows a three-judge panel to impose a capital sentence only under specific circumstances: if the jurors cannot agree on the appropriate sentence;[18] if the defendant pleads guilty or guilty but mentally ill; or if the guilt phase was tried before a judge, without a jury.[19] Nebraska's statute gives the trial judge discretion to decide whether he would like the assistance of two other judges in the sentencing phase of a capital case.[20] On July 1, 1995, Colorado became the only state in which a three-judge panel determines sentences in *all* capital cases.[21]

This Comment examines the viability of Colorado's three-judge panel sentencing procedure as it has been applied to date. Have the panel decisions met the expectations of the statute's proponents? What do its opponents think about its operation thus far? What are the problems with the procedure, and what are its benefits? Are the panels' decisions consistent and nondiscriminatory, thus satisfying current Supreme Court mandates regarding the constitutional application of the death penalty?

Part I of this Comment describes the way in which judges are selected for each panel under Colorado's current capital sentencing statute. Part II analyzes the most prevalent arguments for and against judicial sentencing. These arguments are presented with minimal commentary, so that the reader may weigh each argument on his or her own. Part III explores the circumstances surrounding the Colorado legislature's enactment of the three-judge panel and discusses some of the cases in which Colorado juries did and did not impose death sentences before the change in statute. Part IV examines the decisions of the three-judge panels to date. Part V attempts to answer some of the above questions, and also sets forth the results of an informal survey of judges who have participated in the panels, and trial lawyers who have litigated before the panels. Lastly, Part VI concludes with recommendations from the author. Although the data presented in this Comment led me to conclude that consistency in capital sentencing is unlikely to be achieved by either juries or judges, the same data may lead each reader to a different conclusion. That is

18. NEV. REV. STAT. 175.556 (2000).
19. NEV. REV. STAT. 175.552 (2000).
20. NEB. REV. STAT §§ 29-2520, 29-2522 (2000).
21. COLO. REV. STAT. § 16-11-103 (2000).

this Comment's intent: to place the reader in the position of a "jury of one" in answering the question of who should decide.

I. SELECTION OF PANEL JUDGES UNDER COLORADO'S SENTENCING STATUTE

Colorado Revised Statute section 16-11-103 allows a jury to make the initial determination of guilt or innocence in capital cases. The jury is then dismissed. Upon a verdict of guilty in the first degree, the trial judge is joined by two other district court judges, who are selected by the Chief Justice of the Colorado Supreme Court. The statute encourages the selection of additional judges "from the judicial district in which the case was filed or from adjoining judicial districts."[22] The Colorado Supreme Court clarified the selection process in a directive which delineates four regions of grouped districts.[23] This directive further provides that a judge's "designation will be made by random selection from a pool of then-sitting district court judges of the region wherein the charge was filed."[24] Once a judge has served on a sentencing panel in a given year, he is no longer eligible for selection for the remainder of that calendar year.[25]

After the panel has been selected, it presides over the sentencing phase of the trial and determines whether the defendant will be sentenced to death or serve a life sentence without parole. The judges consider both parties' evidence, which includes their presentation of any aggravating and mitigating factors that may exist, as well as the "certified transcripts of the trial."[26] In order to impose a death sentence, the finding must be unanimous.[27] If the judges agree on the appropriate sentence, they are required to issue "specific written findings of fact."[28] If the panel's sentencing decision is not unanimous, each judge must make a separate record of his position, and the defendant must then be sentenced to life imprisonment.[29]

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22. COLO. REV. STAT. § 16-11-103(1)(a.5)(I) (2000).
23. Chief Justice Directive 95-04, Colo. Supreme Court, Nov. 17, 1995.
24. *Id.*
25. *Id.*
26. COLO. REV. STAT. § 16-11-103(1)(a.7) (2000).
27. COLO. REV. STAT. § 16-11-103(2)(b)(II) (2000).
28. COLO. REV. STAT. § 16-11-103(2)(c) (2000).
29. COLO. REV. STAT. § 16-11-103(2)(d) (2000).

II. THE DEBATE OVER JUDGE VERSUS JURY SENTENCING IN CAPITAL CASES

The majority of research and commentary concerning capital sentencing has focused on jury sentencing and the jury override procedure.[30] Very little research has been conducted regarding the viability of sentencing by either a single judge or a three-judge panel.[31] In fact, one commentator went so far as to refer to "judge only" statutes as an "anomalous subgroup."[32] Arguments against judicial sentencing are myriad, ranging from a perception of the jury as the "community voice" to concerns about the political corruption of judges. Arguments in favor of judicial sentencing range from concerns about juror confusion to the benefits of a more detached sentencer. This section presents an analysis of two primary arguments that have been made in favor of judicial sentencing,[33] followed by an analysis of two arguments in favor of jury sentencing.[34] The

30. Some of the many articles discussing the jury override procedure include: Fred B. Burnside, *Dying to Get Elected: A Challenge to the Jury Override*, 1999 WIS. L. REV. 1017; Scott E. Erlich, *The Jury Override: A Blend of Politics and Death*, 45 AM. U. L. REV. 1403, 1404 (1996); Michael A. Mello, *Taking* Caldwell v. Mississippi *Seriously: The Unconstitutionality of Capital Statutes That Divide Sentencing Responsibility Between Judge and Jury*, 30 B.C. L. REV. 283 (1989); Katheryn K. Russell, *The Constitutionality of Jury Override in Alabama Death Penalty Cases*, 46 ALA. L. REV. 5 (1994); David A. Scheffel, Harris v. Alabama—*A Portrait of Deference to the States in Capital Punishment*, 19 T. JEFFERSON L. REV. 39 (1997). Studies of capital juries include: *Foreclosed Impartiality*, *supra* note 6; William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043 (1995) [hereinafter *Capital Jury Project*]; Patrick E. Higginbotham, *Juries and the Death Penalty*, 41 CASE W. RES. L. REV. 1047 (1991); Joseph L. Hoffmann, *Where's the Buck?—Juror Misperception of Sentencing Responsibility in Death Penalty Cases*, 70 IND. L.J. 1137 (1995); James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 IND. L.J. 1161 (1995).

31. The few articles which reference this issue include: Jerome R. Bowen, State v. Charboneau: *Does Idaho Have an Offense of "Capital Murder" Constitutionally Mandating Fact-Finding by a Jury Before Imposition of the Death Penalty?*, 26 IDAHO L. REV. 403 (1989/1990) (discussing a 1989 case in which the Ninth Circuit held that it was unconstitutional for a single judge to determine whether an offense is worthy of the death penalty); Max J. Burbach, *Prior Criminal Activity and Death Penalty Sentencing:* State v. Reeves, 24 CREIGHTON L. REV. 547 (1991) (focusing primarily on the evidentiary standards that should apply in sentencing hearings conducted by three-judge panels); Perrusso, *supra* note 3 (discussing the constitutionality of Colorado's three-judge panel sentencing statute).

32. *Capital Jury Project*, *supra* note 30, at n.30.

33. *See* discussion *infra* Parts II.A, II.B.

34. *See* discussion *infra* Parts II.C, II.D.

fifth section discusses ways in which these arguments may be tempered by the fact that, when a panel makes the sentencing decisions, three judges rather than one decide.[35]

A. *Judges Will Impose Consistent Sentences for Similar Crimes*

In *Proffitt v. Florida*, the Supreme Court reasoned that because judges have more sentencing experience than jurors, they will be more likely to impose consistent sentences for similar crimes.[36] The Court therefore upheld Florida's jury override procedure.[37] State supreme courts that have approved sentencing by a single trial judge rely on this same rationale.[38]

At least one commentator, however, points out that even though experience may be of assistance in "the usual sentencing context," capital cases are rare.[39] Accordingly, a judge may not develop the same level of expertise and "internal consistency" with capital punishment that he develops with crimes that are more regularly before the court.[40] Furthermore, as judges dispense disparate sentences for "ordinary" crimes, it does not make sense to expect capital sentences to be any more consistent.[41]

One benefit of judicial sentencing may lie in the judge's ability to request research on the sentences of other defendants who committed similar crimes. Such research is known as proportionality evidence and enables judges to examine prior sentences in an effort to enhance sentencing consistency.[42] Con-

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35. Because there is very little research about three-judge sentencing, the arguments in these sections are derived primarily from research about capital juries and jury overrides. *See supra* notes 30–31 and accompanying text.

36. 428 U.S. 242, 252 (1976).

37. *Id.*

38. *See, e.g.*, State v. Sivak, 674 P.2d 396, 398 (Idaho 1983); Fitzpatrick v. Montana, 638 P.2d 1002, 1012 (Mont. 1981); State v. Simants, 250 N.W.2d 881, 887 (Neb. 1977); State v. Ryan, 444 N.W.2d 610, 642 (Neb. 1989).

39. Vivian Berger, *"Black Box Decisions" on Life or Death—If They're Arbitrary, Don't Blame the Jury: A Reply to Judge Patrick Higginbotham*, 41 CASE W. RES. L. REV. 1067, 1084 (1991).

40. *Id.*

41. *Id.* at 1085.

42. People v. Davis, 794 P.2d 159, 174 (Colo. 1990); *see also* Leigh B. Bienan, *The Proportionality Review of Capital Cases by State High Courts After* Gregg: *Only "The Appearance of Justice,"* 87 J. CRIM. L. & CRIMINOLOGY 130, 138–40 (1996) (discussing the purpose of the Supreme Court's mandate, in *Furman v. Georgia*, that state appellate courts perform a thorough proportionality review).

sideration of proportionality evidence seems particularly important under Colorado's procedure, because some of the sentencing judges may reside and practice in different jurisdictions. However, the admissibility of proportionality evidence in panel sentencing hearings has proven extremely controversial.[43] Resistance to the presentation of such evidence is supported by case law: both the United States and the Colorado Supreme Courts have found that proportionality review is not required under either the federal or the state constitutions.[44] In considering proportionality review, the Colorado Supreme Court noted that Colorado has no established mechanism

> for collecting the relevant data . . . as to cases in which the death sentence was sought or could have been sought, and the factual circumstances surrounding those cases, so that this court could conduct a meaningful review of whether the sentence in a particular case is proportional when compared with all similar cases in Colorado.[45]

Colorado's panel judges have varied in their approaches toward the admissibility of proportionality evidence in sentencing hearings. In some cases the judges have admitted proportionality evidence, with varying restrictions; in others, they have not.[46]

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43. People v. Page, No. 99CR2029 (Colo. Dist. Ct. filed 1999) (The parties filed motions arguing for and against the admissibility of proportionality evidence at the sentencing hearing. The presiding judge eventually admited the evidence.); *see also* Bob Grant, *The Death Penalty—Colorado Has Executed 78 People Since 1890 for Capital Crimes. But the Debate Rages On: Is the Death Penalty a Deterrent? Capital Punishment a Valid Option*, DENV. POST, Mar. 18, 2001, at H-01 (stating that "'proportionality review' of a sentencing panel negates the individual focus that is the hallmark of the death penalty decision").

44. Pulley v. Harris, 465 U.S. 37 (1984); People v. Davis, 794 P.2d 159, 174 (Colo. 1990).

45. *Davis*, 794 P.2d at 174.

46. The panels allowed proportionality evidence in People v. Page, No. 99CR2029 (Colo. Dist. Ct. filed 1999), People v. Riggan, No. 97CR1006 (Colo. Dist. Ct. filed 1997), and People v. Richardson, No. 97CR3678 (Colo. Dist. Ct. filed 1997). The panel did not allow proportionality evidence in People v. F. Martinez, No. 97CR1699 (Colo. Dist. Ct. filed 1997). *See Defense Request that Panel Take Judicial Notice That the Only Other Duvall Defendant Against Whom the Prosecution Sought Death Was Danny Martinez, and That Danny's Capital Sentencing Hearing Ended with a Life Sentence* (filed May 18, 1999; denied May 18, 1999); *Defense Request That the Panel Receive Sammy Quintana's Presentence Report as Evidence* (filed May 18, 1999; denied May 18, 1999).

Section 16-11-103's failure to address the admissibility of proportionality evidence, and its lack of guidance as to other procedural matters, may hamper the consistency of panel sentencing decisions. For example, judges have applied varying rules of evidence in the sentencing hearings.[47] Another unresolved issue is the question of whether jurors from the guilt phase may testify at sentencing hearings. Thus far, panels have not admitted juror testimony in the two cases in which jurors asked to speak.[48] Whether courts will admit such testimony in future cases is unknown. Neither the statute nor case law has yet established guidelines regarding the above issues.

Arizona provides an example of a state in which judicial sentencing may not have achieved the desired consistency. An article that does not focus on the efficacy of Arizona's judicial sentencing procedure alludes to the "inconsistent interpretation" of definitions of the aggravating circumstances that the crime be "heinous" and "depraved" by Arizona judges.[49] The article indicates, however, that many of the interpretation problems stem from the Arizona Supreme Court's failure to adequately define these statutory factors.[50]

B. Capital Juries Often Make Their Sentencing Decisions During the Guilt Phase of a Capital Trial and Do Not Always Understand the Sentencing Procedures

Researchers are in the midst of an extensive study, the Capital Jury Project, which focuses on the decision-making process of capital jurors in fifteen states.[51] Results of the research thus far have shown that almost "half of the capital ju-

47. *See* Andrew Cohen, *Dubious Approach to Death Penalty Three-Judge Panels Appear to Make Bad Procedure Even Worse*, ROCKY MTN. NEWS (Denver, Colo.), Apr. 18, 1999, at 1B; *see also* COLO. R. EVID. 1101(d)(3) (use of the Colorado Rules of Evidence is not required in sentencing hearings).

48. Sue Lindsay, *4 Jurors Don't Want Page Executed*, ROCKY MTN. NEWS (Denver, Colo.), Dec. 14, 2000, at 5A; *see also* People v. Salmon, No. 97CR1551 (Colo. Dist. Ct. filed 1997); People v. Page, No. 99CR2029 (Colo. Dist. Ct. filed 1999). These cases are not published in any database; the Sentencing Orders for all district court cases cited in this article are on file with the *University of Colorado Law Review*.

49. Terrill Pollman, Maynard v. Cartwright: *Channeling Arizona's Use of the Heinous, Cruel, or Depraved Aggravating Circumstance to Impose the Death Penalty*, 32 ARIZ. L. REV. 193, 205 (1990).

50. *Id.* at 204.

51. *See Foreclosed Impartiality, supra* note 6, at 1486.

rors (48.3%) . . . indicated that they thought they knew what the punishment should be during the guilt phase of the trial."[52] Jurors expressed different reasons for their premature decisions, few of which could be characterized as purely legal. For instance, some jurors were convinced that the death penalty was appropriate after they saw images or evidence of a crime that was so heinous that death was "the only acceptable form of punishment."[53] These jurors were not inclined to consider mitigating evidence after that point.[54] Not only did the jurors tend to make premature decisions about the defendant's guilt, the study also showed that jurors often discussed "the legally irrelevant . . . matter of the defendant's punishment during their determination of guilt."[55] This occurred 33.6 to 45.7 percent of the time.[56] In addition, there was evidence that the jurors would negotiate sentences and punishments during the guilt phase of the trial.[57]

Other evidence showed that jurors have a great deal of difficulty understanding the jury instructions. In one case the judge provided the jury with a forty-page booklet written in "legalese" that many of the jurors could not understand.[58] One juror expressed frustration about the fact that he could not ask questions of either side.[59] Another juror was frustrated because when the jurors did ask questions, the judge reread the instructions but did not clarify them.[60] Juries also tended to misunderstand the nature of the punishment that the defendant would receive if they did not impose a death sentence; many jurors believed that if they sentenced the defendant to life in prison he would ultimately spend less than twenty years in prison.[61]

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52. *Id.* at 1488.
53. *Id.* at 1504.
54. *See id.*
55. *Id.* at 1519.
56. *Id.*
57. *Id.* at 1527.
58. Hoffmann, *supra* note 30, at 1151 (The juror actually described the booklet as being written in "legal terminology" that was "not written where a lay person could understand it.").
59. *Id.*
60. Luginbuhl & Howe, *supra* note 30, at 1169 (Many jurors found the instructions hard to understand; one described them as "very long and complicated, hard to retain and interpret.").
61. *Id.* at 1178.

C. *Political Pressure May Affect Judges' Sentencing Decisions*

In many states, citizens vote to elect or retain judges; this causes concern that political pressure will affect judges' sentencing decisions in capital cases. The Supreme Court held in *Tumey v. Ohio* that any "possible temptation" which might lead "the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law."[62] *Tumey* did not involve a capital punishment trial; rather, it involved a judge who received money for each conviction he meted out.[63] Nevertheless, the theory may apply to judges who have a career interest in remaining on the bench, and seek reelection or retention.[64] Commentators have pointed out that decisions in capital cases have increasingly been used in all manner of political campaigns.[65] "[U]npopular decisions in capital cases, even when clearly compelled by law, may cost a judge her seat on the bench, or promotion to a higher court."[66] Unfortunately, "[a] few rulings in highly publicized cases may become more important to a judge's survival on the bench than qualifications, judicial temperament, management of the docket, or commitment to the Constitution and the rule of law."[67]

Political pressure exists even where judges are appointed, as pressure may be exerted by the media, the governor, or the legislators. In Colorado, the judicial appointment process begins with a judicial nominating commission that provides the governor with a list of nominees.[68] The governor then selects an appointee from the list who is thereafter subject to retention elections.[69] Even prior to its change in sentencing scheme, Colorado saw political tension over judges' rulings in capital cases. In 1994, former Governor Richard Lamm became furi-

62. 273 U.S. 510, 532 (1927).

63. *Id.* at 520.

64. *See* Burnside, *supra* note 30, at 1045, 1049 (arguing that bias caused by the "extralegal consideration of reelection constitutes systemic arbitrariness that violates the Eighth Amendment").

65. *See* Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 760 (1995).

66. *Id.*

67. *Id.* at 785.

68. COLO. CONST. art. VI, §§ 20, 25.

69. *Id.*

ous over two state supreme court judges' rulings in death penalty cases.[70] After expressing his regret at having appointed the judges, he vowed to "publicly push to remove [Judge] Kirshbaum from the bench."[71] Lamm suggested that the second judge had four years before the next retention election to "change his mind."[72]

More recently, Colorado newspapers lambasted a judge who sat on the sentencing panel that gave defendant Lucas Salmon a life sentence, rather than death.[73] Prior to the sentencing hearing for Salmon's co-defendant George Woldt, the local newspaper stated that there was "a strong chance the judges in Colorado Springs [would] vote for death, in part because of the public outrage that erupted last year when . . . Lucas Salmon was allowed to live."[74] The same article suggested that, in El Paso County, where the case was pending, "[a] non-death verdict is the ticket to public outrage," and "[a]ny judge who votes for life is going to be unemployed when they [sic] come up for retention."[75] In fact, when the bill that created judicial sentencing was first being considered, the bill's sponsor, Senator Ray Powers, stated that he intended for the bill to have political ramifications upon the judiciary. In Senator Powers' opinion, if judges "have a liberal bias against the death penalty, maybe they should not be retained."[76]

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70. Burt Hubbard & Ann Carnahan, *Angered Over Death Penalty, Lamm Assails Two Judges: Colorado High Court Justices 'Disregard Vote of People,' Former Governor Charges*, ROCKY MTN. NEWS (Denver, Colo.), Mar. 12, 1994, at 5A.

71. *Id.*

72. *Id.*

73. *See* Vincent Carroll, *Judges Subvert Death-Penalty Law*, ROCKY MTN. NEWS (Denver, Colo.), June 27, 1999, at 1B; *No More Reprieves: By All Means, Let the Legislature Bolster the Law on the Death Penalty*, THE GAZETTE (Colo. Springs, Colo.), July 14, 1999, at NEWS6. See discussion *infra* Part IV.C.5 for a detailed account of the *Salmon* and *Woldt* cases.

74. Bill Hethcock, *Judges Face Pressure/Life Sentence for Woldt Could Spark Outrage*, THE GAZETTE (Colo. Springs, Colo.), Mar. 27, 2000, at METRO1.

75. *Id.* (quoting defense attorney Shaun Kaufman). Controversy also arose over the decision to give defendant Donta Page a life sentence in the case of *People v. Page*, No. 99CR2029 (Colo. Dist. Ct. Mar. 2, 2001) (Sentencing Order). *See* Al Knight, *Two Arrogant Opinions, One Terrible Result*, DENV. POST, Mar. 7, 2001, at B11 (calling the judges' two opinions "shallow and misleading documents" characterized by "outrageous weasel-wording"); Kit Miniclier, *Tuthills Call Ruling 'Cowardly'—Killer Deserved Death, Grieving Parents Say*, DENV. POST, Mar. 4, 2001, at A1. See *infra* Part IV.C.6. for a discussion of the *Page* case.

76. *See* Perrusso, *supra* note 3, at 208–09 (quoting *Hearings on S.B. 54*).

Contrast the situation of judges with that of jurors, who are not subject to the same political pressures, and "rarely have any concern about possible reprisals after their work is done."[77] One method that has been suggested to limit the possible effects of political pressure on judges is to assign capital cases to "judges who do not face the voters from the locality of the crime."[78] Another suggested remedy is to ensure that the reviewing courts "acknowledge the reality of the political pressures on trial judges, and, where the potential for such influence is present, . . . carefully scrutinize rulings without the normal deference accorded to trial judges."[79]

D. Juries Are Better Able to Represent the Community Than Judges

Juries have been referred to as everything from "the palladium of liberty"[80] to "the lamp that shows that freedom lives."[81] They have also been condemned as incompetents who prevent legal certainty by applying "laws they don't understand to facts they can't get straight."[82] The Supreme Court has vacillated between extolling juries as capital sentencing bodies,[83] and expressing the sentiment that sentencing in a capital case is just like sentencing in any other proceeding.[84] Originally, the Constitution's guarantee of a jury trial stemmed from "a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges" due to a "[f]ear of un-

77. Harris v. Alabama, 513 U.S. 504, 518 (1995) (Stevens, J., dissenting).

78. Bright & Keenan, *supra* note 65, at 817.

79. *Id.* at 826.

80. WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 350 (Cooley ed., 1899).

81. SIR PATRICK DEVLIN, TRIAL BY JURY 164 (1956).

82. Lisa Kern Griffin, *"The Image We See is Our Own": Defending the Jury's Territory at the Heart of the Democratic Process*, 75 NEB. L. REV. 332, 334–35 (1996).

83. *See* Witherspoon v. Illinois, 391 U.S. 510, 519 (1968) (noting that juries are "the conscience of the community," and are "given broad discretion to decide whether or not death *is* 'the proper penalty' in a given case"); *see also* Harris v. Alabama, 513 U.S. 504, 519 (Stevens, J., dissenting) ("A jury verdict expresses a collective judgment that we may fairly presume to reflect the considered view of the community.").

84. *See* Spaziano v. Florida, 468 U.S. 447, 459 (1984).

checked power."[85] Juries were thus seen as protection against government oppression and "arbitrary rule."[86]

A jury's function in capital sentencing has traditionally been held to be even more critical, because the sentence of death is thought to express the community's response to particularly egregious crimes.[87] The Supreme Court has acknowledged that retribution is the primary justification for the death penalty: it is "an expression of community outrage."[88] Judgment of whether a person lives or dies is not a purely legal decision; it is "unavoidably moral and emotional in nature, [therefore] both judges and juries will interject personal views into their penalty decision."[89] It is argued that jurors' personal views are more likely to accurately reflect the "composition and experiences of the community as a whole, and inevitably make decisions based on community values more reliably, than can that segment of the community that is selected for service on the bench."[90] This is because judges' individual characteristics of race, gender, and class are likely to differ from those of the overall community.[91]

In a survey taken by the National Opinion Research Center in 1996, "blacks were far less likely to favor the death penalty than whites (51% to 75%), and women were considerably less likely than men (65% to 79%)."[92] Because, statistically, judges are most likely to be both male and white,[93] it makes sense that, overall, "judges are far more likely than juries to impose the death penalty."[94] This has certainly been the case

85. Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

86. Walton v. Arizona, 497 U.S. 639, 711 (1990) (Stevens, J., dissenting) (quoting Duncan v. Louisiana, 391 U.S. 145, 151 (1968)).

87. *See* Gregg v. Georgia, 428 U.S. 153, 184 (1976) (describing the death penalty as "an expression of the community's belief that certain crimes are . . . so grievous an affront to humanity that the only adequate response may be the penalty of death").

88. *Spaziano*, 468 U.S. at 461.

89. Erlich, *supra* note 30, at 1435.

90. *Spaziano*, 468 U.S. at 486–87 (Stevens, J., concurring and dissenting).

91. *See id.* at 487 n.33.

92. Samuel R. Gross, *Symposium Update: The American Public Opinion on the Death Penalty—It's Getting Personal*, 83 CORNELL L. REV. 1448, 1451 (1998).

93. *See* Resnick, *supra* note 16, at 1705; Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 407 n.3 (2000).

94. Harris v. Alabama, 513 U.S. 504, 521 (1995) (Stevens, J., dissenting) (Stevens reaches this conclusion after considering the political pressures judges

in Florida, for example, where judges regularly override juries' decisions to impose life sentences in favor of sentences of death.[95]

Another possible reason for the fact that juries typically impose fewer death sentences may be that judges are jaded from the "passage of countless convicts before their eyes," whereas juries bring a "fresh perspective" to every case.[96] Judges may also be more concerned about a "generalized remedy for a global category of faceless violent criminals," whereas jurors will be more able to "focus their attention on a particular case involving the fate of one fellow citizen."[97] In addition, juries are more representative of the community because they are composed of twelve people instead of one.[98] This diversity of viewpoints has been shown to temper individual prejudices and beliefs.[99]

E. The Existence of Three-Judge Panels Alters the Effect of Arguments For and Against Judicial Sentencing

As outlined in Part II.A, commentators have argued that, contrary to the Supreme Court's assumption that judges have more sentencing experience, judges are not in fact likely to have *capital* sentencing experience because these cases are so rare. The presence of three judges increases the likelihood that at least one has prior capital sentencing experience that he may share with the other panel members. Therefore, according to the Supreme Court's theory that sentencing experience leads to consistency,[100] such shared experience may also increase consistency.

Colorado's panel system should alleviate the problems exposed by the Capital Jury Project, outlined above in Part II.B.

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face, not their races and genders. However, I contend that his conclusion is equally applicable to the lack of diversity among judges.).

95. *See* Russell, *supra* note 30, at 18–21.

96. Erlich, *supra* note 30, at 1436.

97. *Harris*, 513 U.S. at 518 (Stevens, J., dissenting); *see also* Christopher Slobogin, *Should Juries and the Death Penalty Mix?: A Prediction About the Supreme Court's Answer*, 70 IND. L.J. 1249 (1995).

98. Or three, as in the case of the three-judge panel.

99. *See* Spaziano v. Florida, 468 U.S. 447, 487 n.33 (1984) (Stevens, J., concurring and dissenting); *see also* Ballew v. Georgia, 435 U.S. 223, 232–33 (1978) (noting that for a number of reasons, empirical data has shown a positive correlation between group size and the quality of group performance).

100. *See* Proffitt v. Florida, 428 U.S. 242, 252 (1976).

Because two of the judges do not attend the guilt phase, it seems unlikely that they would make premature decisions as to punishment during that phase. Also, judges have a clear understanding of the legal standards they will apply in the penalty phase. On the other hand, the fact that two of the judges do not participate in the guilt phase may create more problems than it solves. Both the United States and the Colorado Supreme Courts have acknowledged the importance of viewing "live testimony."[101] A trial judge who "hears the witnesses live, observes their demeanor and in general smells the smoke of the battle" is better able to make findings of fact than a judge who merely reviews "a cold, printed record."[102] Indeed, this notion underlies the deference traditionally given to the trial judge in appellate review.[103]

Part of the research for this Comment included an informal survey of judges who served on three-judge panels in Colorado prior to November 1, 2000.[104] Most of the judges who participated in this survey indicated that "having to obtain information from a written record, rather than first hand,"[105] did not adversely affect their understanding of the cases. One of the judges expressed concern about "learning the case from the record only" before he participated in the panel, "but having had the opportunity to study the record and carefully view all the exhibits . . . felt fully prepared for the sentencing phase."[106] Another acknowledged that, if anything, reading the transcript "reduced the emotional impact, which is probably good for the defense."[107] A third judge felt that he may have understood the testimony even better than if he had presided

101. People v. Scott, 600 P.2d 68, 69 (Colo. 1979); *see also* Clemons v. Mississippi, 494 U.S. 738, 766 (Blackmun, J., dissenting).

102. *Clemons*, 494 U.S. at 766 (quoting Gavin v. State, 473 So. 2d 952, 955 (Miss. 1985)).

103. *See* Bright & Keenan, *supra* note 65, at 828; *see also* People v. Coca, 564 P.2d 431, 434 (Colo. Ct. App. 1977) (noting that "[f]rom a cold record we cannot evaluate the demeanor or general impression of a witness. Thus, we will not attempt to ascertain from the transcript alone whether the witness was competent at trial.").

104. The methodology used for this informal survey is described *infra* in Part V.

105. Author's survey question 12; a copy of the survey questions is provided *infra* in Attachment C.

106. Anonymous response to survey questions 2 and 12. *See infra* Attachment C.

107. Anonymous response to survey question 12. *See infra* Attachment C.

over the trial, because he "was able to read and re-read, and study and think about" the record, as opposed to having the evidence go by once, quickly, as it does during a trial.[108] One judge, however, did indicate that "it is difficult to have a thorough feel for a case without having sat through the trial."[109]

The amount of political pressure on any one particular judge may well be tempered by the presence of three judges. As described above in Part II.C, however, Colorado newspapers criticized the panel member who did not think that a death sentence was appropriate in the *Salmon* case.[110] Additional newspaper articles have criticized other decisions in which the panels have imposed life sentences, and the judges who made the decisions.[111]

Because three judges sit on each panel, they may be more likely to reflect the larger community's values, as each judge's position will be enhanced by at least two other viewpoints. However, the fact that one or more of the judges may not be from the jurisdiction in which the crime occurred may lessen the panel's understanding of a particular community's values. For instance, in the *Salmon* case,[112] the dissenting judge came from Pueblo County, which has a lower per-capita income and more liberal political bent than El Paso County, where the crime was committed.[113] It is possible that this difference between the counties' political leanings and socio-economic structures may have affected the decision, as studies show that Re-

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108. Anonymous response to survey question 4. *See infra* Attachment C.

109. Anonymous response to survey question 12. *See infra* Attachment C.

110. *See supra* notes 73–75 and accompanying text; *see also* discussion *infra* Part IV.C.5 of People v. Salmon, No. 97CR1551 (Colo. Dist. Ct. Mar. 2, 2001) (Sentencing Order).

111. *See supra* notes 73–75 and accompanying text.

112. *See* discussion *infra* Part IV.C.5 of People v. Salmon, No. 97CR1551 (Colo. Dist. Ct. Mar. 2, 2001) (Sentencing Order).

113. *See Pueblo County 1998 KidsCount! Report Card*, *at* http://www.coloradokids.org/counties/pueblo.html (last visited Jan. 28, 2002) (noting that median family income in Pueblo County is $25,784, and 29.3% of children live in poverty); *El Paso County 1998 KidsCount! Report Card*, *at* http://www.coloradokids.org/counties/elpaso.htm (last visited Jan. 28, 2002) (noting that median family income in El Paso County is $33,932, and 14.1% of its children live in poverty); *Election 2000: Presidential Vote By County—Colorado*, USA TODAY, Nov. 6, 2000, *at* http://www.usatoday.com/news/vote2000 /cbc/cocbc.htm (noting that in the 2000 presidential election, 28,888 citizens in Pueblo County voted for Gore, while 22,827 voted for Bush; in El Paso county, 61,797 citizens voted for Gore, and 128,281 voted for Bush).

publicans are more likely to favor the death penalty than Democrats.[114]

III. THE STATE OF COLORADO'S DEATH ROW WHEN JUDICIAL SENTENCING LEGISLATION WAS PROPOSED

When legislation proposing judicial sentencing was first introduced in Colorado's state legislature, proponents believed that three-judge panels would result in more death sentences.[115] At the time, many citizens and legislators felt that Colorado juries had not been aggressive enough in their application of the death penalty.[116] For example, jurors had recently decided not to impose a death sentence on Kevin Fears, who was found guilty of crimes which included two counts of first degree murder, one count of attempted first degree murder, and intimidation of a witness.[117] Jurors had also failed to impose the death penalty on Michael Tenneson, who had killed two people in Colorado and was suspected of killing three others in Wisconsin.[118] As of 1994, statistics revealed that juries in Denver County had only imposed the death penalty in one of nine capital cases brought by the district attorney in the preceding twenty years.[119] Rates in other counties were similar: in the ten preceding years Adams County prosecutors attained a

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114. *See* Gross, *supra* note 92, at 1451 (noting that sixty-one percent of Democrats and eighty-five percent of Republicans favored the death penalty in a survey conducted in 1996).

115. *See* Perrusso, *supra* note 3, at 192 (This article also provides an examination of the constitutionality of the three-judge panel and details the general history of both death penalty legislation in Colorado, and the legislative history of the three-judge sentencing statute in particular.); *see also* People v. District Court, 834 P.2d 181 (Colo. 1992) (detailing the modifications made by the courts and legislatures since Colorado first instituted the death penalty). Originally, legislators wanted the trial judge to make the sentencing decision alone. The three-judge panel was a compromise, because Governor Romer, who was in office at the time, had indicated that he would not approve a statute that allowed the sentencing decision to be made by a single judge. *See* Julia C. Martinez, *Who Rules on Death? Statehouse Bills Would Change How Sentences Handed Down*, DENV. POST, Jan. 24, 2000, at A1.

116. *See* Perrusso, *supra* note 3, at 192–93; Dan Luzadder, *Judges-as-Executioner Bill Advances*, ROCKY MTN. NEWS (Denver, Colo.), Mar. 3, 1995, at 30A.

117. *See* People v. Fears, 962 P.2d 272, 275 (Colo. Ct. App. 1997).

118. *Death Penalty is Popular, But Not Always With Juries*, ROCKY MTN. NEWS (Denver, Colo.), Mar. 13, 1994, at 80A.

119. Hubbard & Carnahan, *supra* note 70, at 5A.

death verdict in one case of five, while Jefferson County prosecutors attained death verdicts in two cases of seven.[120]

At the beginning of 1995, when the state senate was conducting its hearings regarding the judicial sentencing statute,[121] there were three men on Colorado's death row. Gary Davis, who was executed on October 13, 1997, had been convicted of first degree murder, felony murder, kidnapping, and other offenses.[122] Davis and his wife abducted Virginia May, took her to a nearby farm, and sexually assaulted her.[123] Davis shot Ms. May repeatedly as she pleaded for her life, then abandoned her under a bale of hay.[124]

A second death row inmate, Ronald White, had his sentence reduced to life pending a retrial in May, 1998; at retrial, a single judge sentenced White to life imprisonment after White waived his right to a jury trial.[125] The third death row inmate was Frank Rodriguez. Rodriguez was sentenced to death for raping, sodomizing, and stabbing Lorraine Martelli, a fifty-five year-old bookkeeper whom Rodriguez and three friends abducted as she walked to her car after work.[126]

After the legislature approved and enacted the three-judge panel sentencing statute, which became effective on July 1, 1995, juries imposed death sentences on two men whose trials had begun prior to the statute's enactment. The first was Robert Harlan, who ran Rhonda Maloney off the road while she was on her way home from work, then kidnapped and raped her.[127] When Rhonda escaped, he followed, caught, and killed her. Harlan also permanently injured a woman named Jacquie Creazzo, who had stopped to help Rhonda.[128] The second of those sentenced was Nathan Dunlap. Dunlap had been fired from his employment at a pizza restaurant.[129] He "got even" by

120. *Id.*

121. COLO. REV. STAT. § 16–11–103 (2000).

122. People v. Davis, 794 P.2d 159, 167 (Colo. 1990).

123. *Id* at 168–69.

124. *Id.*

125. *See* People v. White, 870 P.2d 424 (Colo. 1994); *Triple Murderer's Life Spared Over Legal Twists*, ROCKY MTN. NEWS (Denver, Colo.), Aug. 24, 2001, at 6A.

126. People v. Rodriguez, 794 P.2d 965 (Colo. 1990).

127. *Harlan Gets Death Sentence for '94 Rampage*, DENV. POST, Sept. 10, 1995, at B2 [hereinafter *Harlan Gets Death*]; People v. Harlan, 8 P.3d 448, 458 (Colo. 2000) (A jury found Harlan guilty on June 20, 1995.).

128. *Harlan Gets Death, supra* note 127.

129. People v. Dunlap, 975 P.2d 723, 733 (Colo. 1999).

hiding in the bathroom until after the restaurant closed, then shooting four teenage employees and his former supervisor.[130] One of the teenagers survived a gunshot wound to his face; the other four employees died.[131]

IV. POST-1995: COLORADO'S EXPERIENCE WITH THE THREE-JUDGE PANEL

A. *Recent Proposals to Modify the Three-Judge Panel Sentencing Procedure*

As evidenced by four bills that circulated through the Colorado House and Senate between January 2000 and March 2001, the move from jury sentencing in capital cases to the three-judge panel procedure has not met with unanimous approval. Three of these bills were introduced in early 2000, and stemmed from a general perception that the three-judge panels had been too lenient. The most recent bill was introduced in the spring of 2001, immediately following a panel's decision to spare the defendant's life in *People v. Page*.[132]

Two of the bills introduced in 2000 would have placed all sentencing power in the hands of the trial judge.[133] Reasons for introducing the bills included the contention that "some members of Colorado's judiciary philosophically oppose the death penalty and have tipped the scales against capital punishment."[134] In addition, the bills' proponents argued, the dissenting judges in the two non-unanimous panel decisions were from a different jurisdiction than where the crime occurred.[135] Proponents of the one-judge bills argued that, because they came from other communities, the dissenting judges were not "peers"

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130. *Id.*

131. *Id.* at 733–34.

132. No. 99CR2029 (Colo. Dist. Ct. filed 1999); *see also infra* discussion Part IV.C.6.

133. One bill was introduced in the Colorado Senate and sponsored by Ray Powers (SB 70). The other, sponsored by Gary McPherson, was introduced in the Colorado House (HB 1299). Julia C. Martinez, *Death Penalty Battle Looms; Panel Backs Jury's Choice*, DENV. POST, Feb. 10, 2000, at A8.

134. Julia C. Martinez, *supra* note 115.

135. *See* People v. D. Martinez, No. 98CR1323, (Colo. Dist. Ct. filed 1998) and *infra* discussion Part IV.C.2; People v. Salmon, No. 97CR1551 (Colo. Dist. Ct. filed 1997) and *infra* discussion Part IV.C.5.

in the constitutional sense of "a jury of one's peers."[136] Both of these one-judge sentencing bills were narrowly defeated.[137]

The third bill proposed in 2000 would have restored sentencing power in capital cases to a twelve-person jury.[138] Arguments for this bill included the idea of the jury as "the conscience of the community" as well as the recognition that judges occupy politically sensitive positions.[139] The jury bill was also narrowly defeated.[140]

In March of 2001, less than a week after judges gave Donta Page a life sentence, Senator Chlouber proposed a bill to adopt a jury override procedure.[141] Apparently, for Chlouber, the "outrageous" decision in *Page* "was the last straw."[142] Senator Hernandez agreed to co-sponsor Chlouber's bill because "the *Page* decision persuaded him it was time to change."[143] Modeled after the Florida statute, this bill proposed that jurors make the preliminary sentencing decision.[144] Their decision would not have to be unanimous; rather, ten of twelve jurors would need to agree on the sentence.[145] As in Florida, the trial judge would not be bound by the jury's recommendation; if he disagreed, he could "override" the jury's decision and impose his own sentence.[146] The proposed bill was short-lived; the

136. Julia C. Martinez, *supra* note 115.

137. SB 70 was defeated in the senate by a sixteen to eighteen vote. *See* Julia C. Martinez, *Vote Retains 3-Judge Panels in Death-Penalty Cases*, DENV. POST, Mar. 25, 2000, at A15. HB 1299 passed the Colorado House (33–32) and went on to the Senate. *See* Julia C. Martinez, *Senators Reject Return to Death-Penalty Juries; House OK's Move to 1-Judge System*, DENV. POST, Feb. 22, 2000, at A12 [hereinafter *Senators Reject Juries*].

138. This bill (SB 28) was sponsored by Dottie Wham. *See Entrust Death to Jurors*, DENV. POST, Feb. 11, 2000, at B10.

139. *Id.; see also supra* Parts II.C & II.D.

140. *Senators Reject Juries, supra* note 137.

141. John Sanko, *Death Penalty Panel Assailed: Ruling in* Page *Case Spurs Bill to Let One Judge Decide*, ROCKY MTN. NEWS (Denver, Colo.), Mar. 9, 2001, at 14A.

142. *Id.*

143. *Id.*

144. John Sanko, *Change Urged in Deciding Death Penalty: Chlouber Wants Trial Judge to Make Decision*, ROCKY MTN. NEWS (Denver, Colo.), Mar. 19, 2001, at 13A.

145. *Id.*

146. *Id.*

Senate Judiciary Committee voted against it on March 19, 2001.[147]

Although these recent proposals to eradicate the three-judge panel were defeated, it is likely that the controversy will resurface in the near future, especially because the Colorado Supreme Court has not yet ruled whether the statute is constitutional.[148] One commentator believes that the statute will pass constitutional muster, because other state supreme courts, and the United States Supreme Court, have approved the use of one-judge and jury override procedures in capital cases.[149] Thus far, the Colorado district courts that have considered motions to declare the three-judge panel unconstitutional have upheld the statute.[150]

B. Colorado's Present Three-Judge Panel Sentencing Procedure

Colorado mandates a four-step analysis for sentencing in capital murder cases. This process is clearly set forth in *People v. Tenneson*[151] and the sentencing statute,[152] and has been repeatedly reaffirmed by the Colorado Supreme Court.[153] The first step of the process is for the sentencing body to "determine if at least one of the statutory aggravating factors exists."[154]

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147. John Sanko, *Panel Kills Death Penalty Change: Bill Called For Putting Decision Into the Hands of 1 Judge, Instead of 3*, ROCKY MTN. NEWS (Denver, Colo.), Mar. 20, 2001, at 14A.

148. The United States Supreme Court, however, recently granted certiorari in the case of *Ring v. Arizona* to re-examine "the respective roles of judges and juries in criminal sentencing." Linda Greenhouse, *Major Death Penalty Appeal Accepted; Supreme Court to Decide on Case That Affects 800 on Death Rows*, N.Y. TIMES, Jan. 12, 2002, at A10; Ring v. Arizona, 25 P.3d 1139 (Ariz. 2001), *cert. granted*, 70 U.S.L.W. 3246 (U.S. Jan. 11, 2002) (No. 01-488). It is likely that the Court's decision in *Ring* will affect Colorado's three-judge panel procedure.

149. Perrusso, *supra* note 3, at 227; *supra* notes 10–15 and accompanying text; *supra* notes 36–38 and accompanying text.

150. *See, e.g.*, People v. D. Martinez, No. 98CR1323 (Colo. Dist. Co. Apr. 26, 1999) (Order Regarding Motion to Reconsider Motion to Strike the Death Penalty as Unconstitutional: Three Judge Panel Violates Fundamental Historic Notions of Due Process (D-11)).

151. 788 P.2d 786, 789 (Colo. 1990).

152. COLO. REV. STAT. § 16-11-103 (2000).

153. *See, e.g.*, People v. White, 870 P.2d 424, 438 (Colo. 1994); People v. Aguayo, 840 P.2d 336, 343 (Colo. 1992); People v. Dunlap, 975 P.2d 723, 726 (Colo. 1999).

154. *Tenneson*, 788 P.2d at 789 (the sentencing body at the time of this decision was a jury, rather than a three-judge panel). The statutory aggravating fac-

Second, if one of the aggravating factors is proven beyond a reasonable doubt, the sentencing body must consider "whether any mitigating factors exist."[155] Mitigating factors do not need to be proven beyond a reasonable doubt; in fact, no burden of proof is required for "proving or disproving mitigating factors."[156] In the third step, the sentencing body must determine whether the mitigating factors "outweigh" the aggravating factor(s) proven in the case.[157] Lastly, in the fourth step, the panel decides "whether the defendant should be sentenced to death or to life imprisonment."[158] The fourth step has been interpreted as an opportunity for the sentencing body to "consider[] all relevant evidence without necessarily giving special consideration to statutory aggravators or mitigators."[159] During the final stage, both prosecution and defense may present all admissible evidence "that the court deems relevant to the nature of the crime, and the character, background, and history of the defendant."[160] All eight of the capital sentencing panels that have been convened in Colorado thus far have strictly followed this four-step procedure.

C. Colorado's Recent Three-Judge Panel Sentencing Decisions

Colorado now has precedent for use of a three-judge panel in capital sentencing. To date, three-judge panels have made sentencing decisions in eight cases. With regard to results, five of the defendants received life sentences and three of the defendants received the death penalty.[161] Commentators gener-

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tors are listed in COLO. REV. STAT. § 16-110-103(5) and set forth in *infra* Attachment A.

155. *Id.* The statutory mitigating factors are listed in COLO. REV. STAT. § 16-110-103(4) and set forth in *infra* Attachment B.

156. *Id.* (citing COLO. REV. STAT. § 16-11-103(1)(d) (1986)).

157. *Id.* (citing COLO. REV. STAT. § 16-11-103(2)(a)(II) (1986)).

158. *Id.* (citing COLO. REV. STAT. § 16-11-103(2)(a)(III) (1986)).

159. People v. Dunlap, 975 P.2d 723, 736 (Colo. 1999).

160. *Id.* at 740 (citing COLO. REV. STAT. § 16-11-103(1)(b)).

161. The defendants in the following cases received life sentences: People v. Riggan, No. 97CR1006 (Colo. Dist. Ct. filed 1997); People v. D. Martinez, No. 98CR1323 (Colo. Dist. Ct. filed 1998); People v. Richardson, No. 97CR3678 (Colo. Dist. Ct. filed 1997); People v. Salmon, No. 97CR1551 (Colo. Dist. Ct. filed 1997); and People v. Page, No. 99CR2029 (Colo. Dist. Ct. filed 1999). The defendants were sentenced to death in: People v. F. Martinez, No. 97CR1699 (Colo. Dist. Ct. filed 1997); People v. Neal, No. 98CR2526 (Colo. Dist. Ct. filed 1998); and People v. Woldt, No. 97CR1563 (Colo. Dist. Ct. filed 1997). Because two of the defen-

ally agree that there have been too few cases to really test whether judicial sentencing will result in more consistent sentences.[162] It is interesting, however, that thus far there have been two occasions in which separate panels have considered murders committed jointly by two men.[163] In both of these cases, one defendant was sentenced to death, while the other received a life sentence.[164]

The cases described in this section involve gruesome facts. The graphic and shocking descriptions are taken directly from the record and are included to allow the reader a more complete understanding of each case.

1. *People v. Riggan*

Colorado's first three-judge panel convened in the case of *People v. Riggan* on April 12, 1999.[165] On May 16, 1997, a motorist driving in the mountains saw a man dragging a bleeding woman along an off-road path and alerted the authorities.[166] The twenty-two year-old woman, Anita Paley, was still alive, but died of a severe brain injury at the hospital.[167] Ms. Paley was also severely wounded from the insertion of a sharp object into her vagina; this wound was inflicted after she received the head injury, and before Riggan was seen dragging her along the path.[168]

The prosecution contended that Ms. Paley's head injury was "caused by one or two blows from a blunt instrument."[169]

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dants have the same last name, Danny Martinez's case is cited as *People v. D. Martinez* and Francisco Martinez's case is cited as *People v. F. Martinez*. As state district court cases are not available in an electronic database, all sentencing orders cited herein will be kept on file with the *University of Colorado Law Review*.

162. *See, e.g., Don't Junk Judicial Panels*, ROCKY MTN. NEWS (Denver, Colo.), Dec. 20, 1999, at 57A; *see also* Interview with Robert Grant, Adams County District Attorney, in Brighton, Colo. (Oct. 11, 2000); Telephone Interview with Jeanne Smith, El Paso County District Attorney (Jan. 31, 2001).

163. *See infra* Part IV.C.2, People v. D. Martinez, No. 98CR1323 (Colo. Dist. Ct. filed 1998); People v. F. Martinez, No. 97CR1699 (Colo. Dist. Ct. filed 1997); *infra* Part IV.C.5, People v. Salmon, No. 97CR1551 (Colo. Dist. Ct. filed 1997); *infra* Part IV.C.5, People v. Woldt, No. 97CR1563 (Colo. Dist. Ct. filed 1997).

164. *See id.*

165. People v. Riggan, No. 97CR1006, at 1–2 (Colo. Dist. Ct. Apr. 16, 1999) (Sentencing Order) [hereinafter *Riggan Sentencing Order*].

166. *Id.*

167. *Id.* at 3.

168. *Id.* at 5–6.

169. *Id.* at 3.

The defendant argued that Ms. Paley had committed suicide by jumping out of his van, and that the vaginal injuries were caused either by her pimp or by the breakage of a container stored in her vagina.[170] According to Riggan, he was "dragging her body to the creek to clean her up."[171] After being presented with conflicting evidence and testimony, the jury was unable to agree on a verdict concerning the charge of first degree murder after deliberation, but did find Riggan guilty of first degree felony murder.[172]

The panel selected to sentence Riggan determined that the offense was committed "in an especially heinous, cruel or depraved manner."[173] Mitigating factors included the fact that Riggan did not have any significant prior convictions, and the fact that he was raised in "a horribly dysfunctional family . . . plagued by incest, sexual abuse, squalor, poverty, and emotional neglect of Mr. Riggan and his siblings."[174] As the panel did not find that the mitigating factors outweighed the aggravating factor, it proceeded to a "step four" analysis.[175] The judges concluded that a death sentence was not appropriate for Riggan because he had been convicted of first degree felony murder, not first degree murder after deliberation.[176] In the panel's eyes, "a civilized society should not and cannot take the life of a human being, even one who commits an especially heinous, cruel and depraved offense, if a jury could not conclude beyond a reasonable doubt that the individual in fact administered the fatal injury."[177]

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170. *Id.* at 2–3.

171. Sue Lindsay, *Defense Says Prostitute Killed Herself*, ROCKY MTN. NEWS (Denver, Colo.), Oct. 14, 1998, at 14A.

172. *See Riggan Sentencing Order, supra* note 165, at 3. A mistrial was declared on the count of first degree murder after deliberation and the prosecutor decided not to retry that charge. The felony murder charge was therefore the only charge considered by the sentencing panel.

173. *Id.* at 5 (citing COLO. REV. STAT. § 16-11-103(5)(j)). The specific aggravating factors found by the panels in each particular case is set forth in "Table of Aggravating Factors" *infra* Attachment A.

174. *Id.* at 6. The specific mitigating factors found by the panels in each particular case is set forth in "Table of Mitigating Factors" *infra* Attachment B.

175. *Id.* at 9.

176. *Id.* at 9–11.

177. *Id.* at 11.

2. *People v. Danny Martinez* and *People v. Francisco Martinez*

Colorado's second three-judge panel convened on April 27, 1999, to decide the appropriate sentence for Danny Nieto Martinez, Jr.[178] The following facts apply to both Danny Martinez's case and the case of Francisco Martinez, Jr., who was sentenced by a separate three-judge panel.[179] Both men were members of the Deuce 7 Crenshaw Mafia Gangsters, seven of whom engaged in the brutal and prolonged gang rape of a fourteen year-old girl named Brandeline "Brandy" Duvall. The gang members repeatedly raped, punched, and kicked Brandy, and watched as F. Martinez sliced her anus with a knife and stuck a broom and a plunger in her anus.[180] Periodically, they took Brandy to a shower to wash her blood off and continue their assault.[181] After the gang finished sexually assaulting Brandy, F. Martinez, D. Martinez, Frank Vigil, and Samuel Quintana decided to kill the girl.[182] They discussed the details of the proposed murder in front of Brandy, then handcuffed her, covered her head, and drove into the mountains.[183] During the drive, when Brandy begged them to let her go, F. Martinez stabbed her repeatedly and tried to strangle her.[184] When the car stopped in a remote mountain location, Mr. Quintana held Brandy's head while F. Martinez stabbed her twenty-eight times.[185] Then Mr. Quintana and F. Martinez threw the child's body onto the rocks below, where she bled to death.[186] D. Mar-

178. *See* People v. D. Martinez, No. 98CR1323 (Colo. Dist. Ct. filed 1998).

179. *See* People v. F. Martinez, No. 97CR1699 (Colo. Dist. Ct. filed 1997). For the purposes of clarity, Danny Martinez will hereinafter be referred to as "D. Martinez" and Francisco Martinez as "F. Martinez" in the text.

180. Affidavit for Arrest Warrant, People v. D. Martinez, No. 98CR1323 (Colo. Dist. Co. June 15, 1997).

181. *Id.*

182. People v. D. Martinez, No. 98CR1323, at 7 (Colo. Dist. Ct. May 7, 1999) (Decision of Hon. Leland P. Anderson and Hon. Timothy L. Fasing) [hereinafter *Anderson Decision*].

183. *Id.; see also* Reporter's Transcript of trial proceedings held on April 29, 1999, at 107, People v. D. Martinez, No. 98CR1323 (Colo. Dist. Ct. filed 1998).

184. *Anderson Decision, supra* note 182, at 10.

185. Sue Lindsay, *Fellow Gang Member Testifies He Held Girl During Fatal Stabbing*, ROCKY MTN. NEWS (Denver, Colo.), Aug. 29, 1998, at 34A; *see also* People v. F. Martinez, No. 97CR1699, at 1 (Colo. Dist. Ct. May 27, 1999) (Sentencing Determination and Order) [hereinafter *F. Martinez Sentencing Order*].

186. *Anderson Decision, supra* note 182, at 10.

tinez and F. Martinez were the only two gang members for whom prosecutors sought the death penalty.[187]

In D. Martinez's case, the three-judge panel's decision was not unanimous. Two of the panel members felt that a death sentence was "the only adequate response in light of the extreme circumstances of this case."[188] One of the panel members determined that "the death penalty would not be appropriate in this case and the Defendant should be sentenced to life in prison without parole."[189] When a panel is split, Colorado law mandates that the panel "make a record of each judge's position and . . . sentence the defendant to life imprisonment."[190]

The panel was split mainly because it was F. Martinez who actually stabbed Brandy; D. Martinez was convicted of murder in the first degree under a complicity theory.[191] This prevented the majority from finding that "the defendant *intentionally* killed a person kidnapped."[192] The majority, however, looked to the Supreme Court's holdings in *Enmund v. Florida*[193] and *Tison v. Arizona,*[194] which found "that there is no constitutional bar to a complicitor being sentenced to death"[195] as long as the state shows "major participation in the felony committed, combined with reckless indifference to human life."[196] The majority found that the Colorado Supreme Court had never directly ad-

187. Mr. Quintana pled guilty to second degree murder in both Brandy's case and a prior murder in exchange for his testimony in the two Martinez cases. He received a sentence of ninety-six years in prison for both murders; forty-eight years of this sentence were imposed for the Duvall murder. Kieran Nicholson, *Slayings Net Gang Member 96 Years; Young Mother, Teen Girl Victims*, DENV. POST, Mar. 24, 1999, at B2. Mr. Vigil, who was sixteen years old at the time of the crime, was tried as an adult and received a jury sentence of life in prison without parole for first degree murder, kidnapping, and sexual assault. The other three gang members pled guilty to first degree sexual assault and were sentenced to ten to thirty-two years in prison. Sue Lindsay, *One Gang Member Still Awaits Trial of 7 Involved in Duvall Case, 4 Pleaded Guilty and 2 Were Convicted*, ROCKY MTN. NEWS (Denver, Colo.), Sept. 4, 1998, at 17A.

188. *Anderson Decision, supra* note 182, at 18.

189. People v. D. Martinez, No. 98CR1323, at 1 (Colo. Dist. Ct. May 7, 1999) (Decision of Panel Member Hon. John W. Coughlin) [hereinafter *Coughlin Decision*].

190. COLO. REV. STAT. § 16-11-103(2)(d) (2000).

191. *See Anderson Decision, supra* note 182, at 3.

192. COLO. REV. STAT. § 16-11-103(5)(d) (2000) (emphasis added) (This is one of the listed statutory aggravating factors.).

193. 458 U.S. 782 (1982).

194. 481 U.S. 137 (1987).

195. *Anderson Decision, supra* note 182, at 3.

196. *Id.* at 2 (quoting Tison v. Arizona, 481 U.S. 137, 158 (1987)).

dressed the issue of capital punishment for a complicitor.[197] There is dictum regarding this issue in *People v. Dunlap*, which states that "public interest demands that the person facing death be the perpetrator of the crime."[198] However, the *Dunlap* court was not faced with the issue of complicity, so it was "neither argued nor expressly addressed by the court."[199] The majority also found that *People v. Borrego*[200] did not mandate "a *per se* exclusion of complicitor murders from consideration of the death penalty."[201] Thus, after weighing the circumstances, the majority would have imposed a death sentence on D. Martinez despite the fact that he was a complicitor in the murder.[202]

In contrast, the dissenting judge found that "the Colorado Supreme Court clearly holds that the death penalty may not constitutionally be imposed on a defendant convicted on a complicity theory."[203] For his conclusion, the dissenting judge relied on a statement in *Borrego* that the majority rejected: "[s]ince complicity is a theory that necessitates holding one person legally accountable for the behavior of another . . . a defendant's constitutional rights are violated if the jury in a capital offense sentencing hearing is given a complicity instruction."[204] In the dissent's opinion, *Enmund v. Florida* and *Tison v. Arizona*, cited by the majority, were distinguished from the *Martinez* case because the *Enmund* and *Tison* defendants were convicted of felony murder, rather than under a complicity theory.[205] Thus, the dissent found that it was improper to sentence the defendant to death under a complicity theory.[206]

Because Francisco Martinez personally delivered all twenty-eight of the fatal stab wounds, the three-judge panel assigned to sentence him did not have to address the complicity issues raised in D. Martinez's case. The jury convicted F. Martinez of murder in the first degree after deliberation, second degree kidnapping, first degree sexual assault, and a number of

197. *See id.* at 4.
198. *Id.* at 4 (quoting People v. Dunlap, 975 P.2d 723, 765 (Colo. 1999)).
199. *Id.*
200. 774 P.2d 854 (Colo. 1989).
201. *Anderson Decision, supra* note 182, at 4.
202. *See id.* at 18.
203. *Coughlin Decision, supra* note 189, at 5.
204. *Id.* (quoting People v. Borrego, 774 P.2d at 857 (Colo. 1989)).
205. *See Coughlin Decision, supra* note 189, at 11.
206. *Id.*

other offenses.[207] The judges found that the five aggravating factors proved by the prosecution, combined with F. Martinez's egregious behavior during the pendency of his case,[208] heavily outweighed the two mitigating factors that the panel found were relevant.[209] The judges unanimously concurred that "in light of the totality of the circumstances, there is no basis for excluding this defendant from the most drastic and awful punishment the State of Colorado has chosen to impose."[210]

3. *People v. Richardson*

As in *People v. Riggan*,[211] the sentencing panel in *People v. Richardson*[212] considered a defendant whom the jury found guilty of felony murder, but not first degree murder after deliberation. Jacques Richardson admitted to raping and "hog-tying" thirty-four year-old Janey Benedict, who died of strangulation. His defense was that the killing was unintentional. The judges stated that Richardson was "morally culpable, despicable and dangerous,"[213] but they unanimously concluded that the mitigating factor of the absence of intent or premeditation "tip[ped] the scale in favor of a mandatory life sentence without parole."[214]

4. *People v. Neal*

The crimes committed by William Neal extended over six days in the summer of 1998. Neal killed two women whom he had been dating, Rebecca Holbertson and Candace Walters, with a maul.[215] He wrapped their bodies and left them in his

207. *See F. Martinez Sentencing Order, supra* note 185, at 2.

208. *See id.* at 11–13 (Among other things, defendant threatened a witness, advanced toward a sheriff's deputy with a metal shower grate as if to attack him, and laughed at Brandy's mother after she testified as to the loss of her child.).

209. For specific factors found, see *infra* Attachment A, "Table of Aggravating Factors," and Attachment B, "Table of Mitigating Factors."

210. *F. Martinez Sentencing Order, supra* note 185, at 16.

211. No. 97CR1006 (Colo. Dist. Ct. filed 1997).

212. No. 97CR3678 (Colo. Dist. Ct. filed 1997).

213. People v. Richardson, No. 97CR3678, at 3 (Colo. Dist. Ct. May 7, 1999) (Findings and Conclusions on Mitigation and Balancing (Phases 2 and 3)).

214. *Id.* at 4.

215. *See* People v. Neal, No. 98CR2526, at 5–7 (Colo. Dist. Ct. Sept. 9, 1999) (Order).

living room.[216] Neal brought a third girlfriend's young roommate, referred to in the order as JDY, home to help him "plan a surprise" for her roommate.[217] Once JDY was at the home, Neal tied her to four bolts he had placed around a mattress in the living room, showed her the two bodies, cut JDY's clothes off, and threw a blanket over her.[218] He then went to get a fourth girlfriend, Angela Fite.[219] Neal brought Ms. Fite home, promising to buy a house for her and her two children; instead, he taped her arms and legs to the same chair in which he had murdered Ms. Holbertson and Ms. Walters.[220] He made JDY watch while he killed Ms. Fite. Neal had a cigarette, then raped JDY.[221] The next day, Neal took JDY back to her apartment and kept JDY and her roommate, Sherrie Wells, in their apartment for thirty hours while he "dictated his crime spree into a recorder."[222] Following this, Neal left. He was arrested on July 9, 1998.[223]

The defendant pled guilty to three counts of first degree murder, and the three-judge panel convened for the sentencing proceedings on September 20, 1999.[224] In steps one and two of the four-step capital sentencing process, the panel determined which proposed mitigating and aggravating factors applied to each individual murder.[225] In step three, the panel determined that the mitigating factors "do not outweigh the proven aggravators,"[226] which meant that the panel moved to the step four analysis of determining the appropriate penalty for Neal.

Before imposing the death penalty on Mr. Neal, the panel considered seventeen additional attributes of the crimes.[227] These factors included the fact that Neal went out socializing and performed "daily life activities" after each murder, as well as his admission "that he got an adrenaline rush when he

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216. *Id.* at 6–8.
217. *Id.* at 7.
218. *Id.* at 8.
219. *Id.*
220. *Id.* at 9.
221. *Id.*
222. *Id.* at 10.
223. *Id.*
224. *Id.* at 2–3.
225. The specific factors found for each murder are set forth *infra* in Attachments A and B.
226. People v. Neal, No. 98CR2526, at 30 (Colo. Dist. Ct. Sept. 9, 1999) (Order).
227. *See id.* at 31–33.

committed each murder."[228] In addition, the judges considered Neal's lifelong bad behavior, such as the fact that he had molested his sister and had a habit of killing animals.[229] Neal had also stated that he planned to kill thirty more people.[230]

5. *People v. Salmon* and *People v. Woldt*

The next two cases and sentencing hearings again involve the same set of facts. Lucas Salmon and George Woldt were friends who had often talked about finding a female victim to kidnap, rape, and kill.[231] They drove to a nearby park and hit a female jogger, Amber Gonzales, with their car, then offered her a ride to the hospital.[232] Ms. Gonzales refused to get into the car with the two men and they left.[233] Later that same night, the two men saw twenty-two year-old Jacine Gielinski driving in a lane next to theirs.[234] They followed her to her boyfriend's apartment complex, and Woldt grabbed her while she was at a locked security door phoning her boyfriend.[235] Salmon helped Woldt put the struggling Ms. Gielinski into the car, and they drove to a nearby school's parking lot.[236] Once parked, Woldt raped Ms. Gielinski, followed by Salmon.[237] Afterwards, the two men made Ms. Gielinski get out of the car and lie face down in the parking lot while they had an extended discussion about whether and how to murder her.[238]

Salmon sliced Ms. Gielinski's throat; then the men told her to turn over and Woldt cut her throat a second time.[239] When Ms. Gielinski did not die from these wounds, the men decided

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228. *Id.* at 31, 33.
229. *Id.* at 33.
230. *Id.* at 33–34.
231. People v. Woldt, No. 97CR1563, at 7 (Colo. Dist. Ct. Sept. 6, 2000) (Sentencing Order) [hereinafter *Woldt Sentencing Order*].
232. *Id.*
233. *Id.* at 8.
234. *Id.*
235. *Id.*
236. *Id.*
237. *Id.*
238. *See* Reporter's Transcript of trial proceedings held on February 8, 1999, at 9–10, People v. Salmon, No. 97CR1551 (Colo. Dist. Ct. filed 1997) [hereinafter Salmon Transcript]. Because this transcript is not available in an electronic database, the portion of the transcript cited herein will be kept on file with the *University of Colorado Law Review*.
239. *Id.*

to stab her in the chest.[240] They stabbed her repeatedly, but Ms. Gielinski remained alive.[241] Finally, Woldt stepped on her stomach to "press the air out" of her body while Salmon pressed a shirt over her face to smother her.[242] After Ms. Gielinski died, both men took mud from a nearby ditch and took turns putting it in her vagina, as they "figure[d] this [would] help avoid evidence from semen samples."[243] They threw her body under a van in the parking lot.[244] The men gave each other "high fives," Salmon said that he guessed he was not a virgin anymore, and they went home to clean up.[245] A jury convicted Salmon of first degree murder after deliberation as both a principal actor and a complicitor, and felony murder.[246] Woldt was convicted by a jury of first degree murder after deliberation and felony murder.[247]

Salmon's sentencing panel convened from June 7 through June 17, 1999.[248] In steps one and two of the sentencing process, the panel agreed on the statutory aggravators and mitigators proven in the case.[249] All three judges also agreed that in the third step of the analysis, the "weight of aggravation in relation to the weight of mitigation is substantially greater beyond a reasonable doubt."[250] However, at the fourth step of their analysis the panel diverged. Two of the judges determined that the circumstances warranted the imposition of the death penalty on Salmon.[251] The dissenting judge determined that imposing "the death penalty on Lucas Salmon in this case would substantially lower the threshold for the imposition of the sentence of death in the State of Colorado."[252] Salmon was

240. *Id.* at 10–11.
241. *Id.* at 11–12.
242. *Id.* at 12.
243. *Id.* (quoting Mr. Salmon's written confession).
244. *Id.*
245. People v. Salmon, No. 97CR1551, at 7 (Colo. Dist. Ct. June 24, 1999) (Sentencing Order) [hereinafter *Salmon Sentencing Order*].
246. *Id.* at 1.
247. *Woldt Sentencing Order, supra* note 231, at 2.
248. *Salmon Sentencing Order, supra* note 245, at 4.
249. Specific mitigating and aggravating factors are set forth in the tables included *infra* as Attachments A and B.
250. *Salmon Sentencing Order, supra* note 245, at 24.
251. *Id.* at 35, 38.
252. *Id.* at 29.

therefore sentenced to life imprisonment without parole, pursuant to the statute.[253]

Salmon admitted, in his confession, that the reason the two men took turns stabbing Ms. Gielinski "was so that we could both equally be held accountable," but that was not the theory presented by his defense.[254] At trial, Salmon's defense was centered around Woldt's manipulation of Salmon, combined with a mental disorder that made him extremely susceptible to being influenced by Woldt's stronger personality.[255] The majority decision pointed out that even though Lucas Salmon would not have committed the crime but for George Woldt, neither would Woldt have committed the crime without Salmon's aid.[256] In addition, the majority found that, after a brief move to California, Salmon chose to return to Colorado to be with Woldt, despite the fact that he knew Woldt exerted a negative influence over him.[257]

Prior to meeting Woldt, Lucas Salmon grew up in a religious family and went to a Christian college.[258] He gave "free haircuts for the homeless and went on missions to Mexico where he . . . assisted in the construction of an orphanage."[259] He was extolled for the level of care he gave to an autistic man even though the man was verbally abusive to him.[260] In the dissenting judge's opinion, Salmon was not a "continuing threat to society if incarcerated . . . for the remainder of his life without the possibility of parole."[261] The dissent was not convinced beyond a reasonable doubt that the death penalty was appropriate for an individual with a severe mental impairment such as that of Mr. Salmon.[262]

The sentencing panel that heard *People v. Woldt*[263] convened on August 14, 2000. Woldt's defense also involved the presence of mental disorders. In this panel's step four considerations, however, the judges found that the mental disorders

253. *See* COLO. REV. STAT. § 16-11-103(2)(d) (2000); *Salmon Sentencing Order, supra* note 245, at 27.
254. Salmon Transcript, *supra* note 238, at 18.
255. *See Salmon Sentencing Order, supra* note 245, at 13–17.
256. *Id.* at 33–34.
257. *Id.* at 22, 32–33.
258. *Id.* at 13.
259. *Id.* at 22.
260. *Id.* at 22–23.
261. *Id.* at 27.
262. *Id.* at 28–29.
263. No. 97CR1563 (Colo. Dist. Ct. filed 1997).

did not prevent Woldt from being able to "control his behavior [and] conform his actions to the requirements of the law."[264] The panel pointed out that the defendant was able to control his behavior during the Amber Gonzalez incident earlier on the day of the murder, as well as during his incarceration prior to the sentencing hearing.[265] The panel considered the impact of the defendant's mental health concerns in a separate section of its order.[266] Ultimately, it reasoned that if the various mental disorders presented by the defense existed to the extent claimed, it would have been impossible for Woldt to control his actions as well as he did both before and after the murder.[267] The panel was unanimously persuaded that death was the appropriate punishment for Mr. Woldt.[268]

6. *People v. Page*

After serving two years of a ten-year sentence for aggravated robbery and burglary in Maryland, Donta Page was released on probation into the care of a drug and alcohol rehabilitation program in Denver.[269] Page was ejected from the program after four months and told to return the next day to get his possessions and a bus ticket back to Maryland.[270] While waiting outside the building for his bus ticket, Page saw a woman, Peyton Tuthill, leave a house down the block. Page then broke into the home to burglarize it.[271] He armed himself with a kitchen knife and helped himself to some beer; soon after this, Ms. Tuthill returned home.[272] She saw Page, screamed, and ran upstairs; Page followed her and asked where her money was.[273] Page then commenced a brutal attack on Ms. Tuthill. Although the sequence of events was never es-

264. *Woldt Sentencing Order, supra* note 231, at 59.

265. *See id.*

266. *See id.* at 46–48 (Mr. Woldt has a lesion on his brain and was diagnosed with Obsessive/Compulsive Disorder, Post Traumatic Stress Disorder, and Dependent Personality Disorder. Tourette's Syndrome was also mentioned but not thoroughly pursued.).

267. *See id.* at 59.

268. *Id.* at 62.

269. People v. Page, No. 99CR2029, at 1 (Colo. Dist. Ct. Mar. 2, 2001) (Sentencing Order) [hereinafter *Page Sentencing Order*].

270. *Id.* at 1–2.

271. *Id.*

272. *Id.*

273. *Id.*

tablished, during the attack Page raped Ms. Tuthill vaginally and anally.[274] He eventually slit her throat to quiet her screams.[275] When this failed to kill Ms. Tuthill, Page stabbed her in the chest four times.[276] Following this murder, Page went downstairs and washed his clothes in Ms. Tuthill's washing machine.[277] He left to catch his bus back to Maryland, where he was jailed for a subsequent crime.[278] Denver investigators identified Page as the killer; he was returned to Denver and eventually confessed to the crime.[279] Page's explanation for the rape and murder was that he "popped in [his] head."[280]

Although Page pled not guilty to first degree murder by reason of insanity, the jury found him guilty of first degree murder, felony murder, first degree sexual assault, aggravated robbery, and first degree burglary.[281] Page's sentencing hearing commenced on February 20, 2001. The panel judges agreed as to the mitigating and aggravating factors proven in the first two steps. They also agreed, in the third step, that the aggravating factors outweighed the mitigating factors.[282] The panel diverged, however, in its step four analysis, although all three judges ultimately concluded that a life sentence was the appropriate punishment for Mr. Page's crime.[283]

Two of the judges based their decision primarily on a proportionality review of the other Colorado cases in which the death penalty had been imposed.[284] Although the judges recognized that such a review was not mandatory, they concluded that "[s]uch a review assists in the weighty determination of whether the death sentence, if applied in this case, can be applied with fairness and consistency."[285] The judges concluded that *Page* differed from previous death penalty sentences in

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274. *Id.* at 3.
275. *Id.*
276. *Id.*
277. *Id.*
278. *Id.* at 4.
279. *Id.*
280. *Id.*
281. *Id.* at 1, 4.
282. *See id.* at 15.
283. *See id.* at 15, 41.
284. *See id.* at 17–19.
285. *Id.* at 17. The judges noted that "the Eighth Amendment requires that the death penalty be 'imposed fairly, and with reasonable consistency or not at all.'" *Id.* at 16 (quoting Eddings v. Oklahoma, 455 U.S. 104, 112 (1982); People v. Dunlap, 975 P.2d 723 (Colo. 1999)).

Colorado in several respects. First, unlike the defendants in the cases of *Rodriguez*, *Harlan*, *Dunlap*, *Davis*, *Martinez*, *Woldt*, and *Neal*, Page did not premeditate, prepare for, or plan the murder.[286] Second, the judges found that Page did not engage in the "hellish subhuman behaviors seen in the gratuitously violent killings committed by Davis, Woldt, Martinez and Neal."[287] Page "acted with sudden explosive and chaotic force," in contrast to the other Colorado murders that had resulted in the death penalty.[288] These comparisons with other cases created a reasonable doubt as to whether death was the appropriate sentence.[289] Lastly, the panel detailed the extensive physical and sexual abuse that Page suffered throughout his childhood, and concluded that it was "a significant factor in the constellation of events and circumstances leading up to the explosive outbreak of violence in the Peyton Tuthill home."[290]

The third judge did not agree that sentencing Page to death would "lower the bar" for the imposition of the death penalty in Colorado.[291] He found that the main distinguishing factor between *Page* and prior cases was the fact that Page did not premeditate the murder,[292] but he pointed out that premeditation is not a statutory prerequisite for a death sentence.[293] This judge questioned the strength of the evidence of damage to Page's frontal lobe, and the extent of physical and sexual abuse Page suffered as a child, and "felt . . . that Page deserve[d] the death penalty."[294] But the judge added that he "hesitated on the brink of casting that vote," because the combination of mitigating factors *may* have contributed to Page's violent attack.[295] The judge felt that his hesitation indicated doubt, and therefore concurred in the decision to impose a life sentence on Mr. Page.[296]

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286. *Id.* at 19. These cases are discussed *supra* Parts III and IV.
287. *Id.* at 20.
288. *Id.*
289. *Id.* at 21.
290. *Id.* at 24.
291. *Id.* at 30.
292. *Id.*
293. *Id.* at 31.
294. *Id.* at 39.
295. *Id.*
296. *Id.* at 40.

D. Comparison of Cases

The above cases exhibit some consistency in sentencing. For example, panels did not impose a death sentence on either Robert Riggan[297] or Jacques Richardson[298] because they had been convicted of felony murder, not first degree murder after deliberation. Although the United States Supreme Court has established that an individual can be sentenced to death for felony murder in appropriate circumstances,[299] Colorado courts have traditionally imposed the death penalty only on defendants found guilty of first degree murder after deliberation.[300]

Danny Martinez[301] received a life sentence for reasons similar to those set forth in the *Riggan* and *Richardson* cases. D. Martinez was convicted of first degree murder under a complicity theory, rather than felony murder. However, the dissenting panel member noted that "only 72 of the 6,831 people given the death penalty were not the individual who's [sic] action actually caused the death."[302] Because "the avowed purpose of having a three judge panel decide a death penalty case instead of a jury is 'consistency in imposing the death penalty,'" the dissenting judge determined that it would be inconsistent to impose death in the *Martinez* case given these statistics showing how few people have been sent to death row when they did not personally deliver fatal wounds.[303]

Another thread of consistency in the cases requires an examination of each of the eleven separate opinions issued in the eight cases.[304] Although the panel reached the "fourth step" in

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297. For discussion of *People v. Riggan*, see *supra* Part IV.C.1.

298. For discussion of *People v. Richardson*, see *supra* Part IV.C.3.

299. *See* Enmund v. Florida, 458 U.S. 782 (1982); Tison v. Arizona, 481 U.S. 137 (1987).

300. *See* People v. Borrego, 774 P.2d 854 (Colo. 1989); *see also* discussion of People v. D. Martinez, *supra* Part IV.C.2. (Although *Rodriguez* involved a theory of complicity, rather than of felony murder, the reasoning in regard to sentencing is similar.).

301. People v. D. Martinez, No. 98CR1323 (Colo. Dist. Ct. filed 1998); *see also* discussion *supra* Part IV.C.2.

302. *Coughlin Decision*, *supra* note 189, at 9.

303. *Id.*

304. Because the panels' decisions were not unanimous, two decisions were entered in *People v. D. Martinez*, *supra* Part IV.C.2., *People v. Salmon*, *supra* Part IV.C.5., and *People v. Page*, *supra* Part IV.C.6. There were three separate opinions issued by the judges in *People v. Salmon*, as Judge Booth wrote a concurring opinion to Judge Parrish's decision; however, both majority opinions agreed on the mitigating and aggravating factors, and I am therefore treating them as two deci-

seven of the eight proceedings, the mitigating and aggravating factors found in the first three steps seemed to have a large effect on the cases' outcomes. With the exception of the majority opinion in *Salmon*, the aggravating factors numerically exceeded the mitigating factors in four of the five opinions which held that death was appropriate.[305] On the other hand, when the mitigating factors numerically exceeded the aggravating factors, the defendant received a life sentence in all six of the opinions.[306]

Weighing the aggravating factors against the mitigating factors is the third of four steps in the sentencing process. It does not require a numerical balancing process and "is not a mere counting process in which the numbers of aggravating

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sions for the purpose of this analysis. Overall, five of the opinions recommended a death sentence (majority opinions in split panel decisions of *People v. D. Martinez* and *People v. Salmon*; unanimous decisions in *People v. Neal*, *People v. Woldt*, and *People v. F. Martinez*). Six of the opinions recommended a life sentence (minority opinions in split panel decisions of *People v. D. Martinez* and *People v. Salmon*; two opinions issued in *People v. Page*; unanimous decisions in *People v. Riggan* and *People v. Richardson*).

305. In *People v. F. Martinez*, *supra* Part IV.C.2., the panel determined that the prosecution had proven five of the statutory aggravating factors and the defense had shown two mitigating factors. In *People v. Neal*, *supra* Part IV.C.4., the panel found several mitigators under the "catch-all" provision of COLO. REV. STAT. § 16-11-103(4)(l) ("[a]ny other evidence which . . . bears on the question of mitigation"). The panel, however, was suspicious of Neal's veracity and did not enumerate the factors; it also found that one enumerated statutory mitigating factor had been established. The total of fourteen statutory aggravating factors, combined with Neal's prior bad behavior, definitely exceeded the number of mitigating factors found. In *People v. Woldt*, *supra* Part IV.C.5., the panel determined that there were five statutory aggravating factors and only one proven statutory mitigating factor. In *People v. D. Martinez* , *supra* Part IV.C.2., the two judges who determined that a death sentence would be appropriate found that there were three aggravating factors and two mitigating factors. For an enumeration of the specific aggravating and mitigating factors found in each decision, *see infra* Attachments A and B.

306. In *People v. Salmon*, *supra* Part IV.C.5., the dissenting judge found that there were ten mitigators and five aggravators. In *People v. Riggan*, *supra* Part IV.C.1., the panel determined that there were three mitigating factors as compared to one aggravating factor. In *People v. D. Martinez*, *supra* Part IV.C.2., the dissenting judge determined that there were four mitigating factors and one aggravating factor. In *People v. Richardson*, *supra* Part IV.C.3., the judges found three mitigators and one aggravator. In *People v. Page*, *supra* Part IV.C.6., the judges found that there were three aggravating factors and thirteen mitigating factors (eleven of these fell under the statutory "catch-all" provision); the dissenting judge concurred in the finding of the mitigating factors and listed at least six mitigators that he considered important. For a more complete discussion of the aggravating and mitigating factors found in each case, see *infra* Attachments A and B.

factors are weighed against numbers of mitigating factors."[307] Instead, each member of the panel is encouraged to decide "what weight to give any aggravating or mitigating factor or factors."[308] However, it seems clear that, except in the majority opinion of *People v. Salmon*,[309] these factors gave the panels significant guidance in their "step four analysis" as to whether death was an appropriate sentence in each case.

People v. Salmon is anomalous because the majority found that a death sentence should be imposed even though the number of proven mitigators was double the number of proven aggravators. Moreover, the defendants in both *People v. Salmon* and *People v. Woldt*[310] committed exactly the same crime in exactly the same manner.[311] Defendant Salmon admitted that the two men did this purposefully, so that they "could both equally be held accountable."[312] Yet Salmon received a life sentence, while Woldt joined Colorado's increasingly populous death row. Even within the *Salmon* panel, the judges disagreed on the appropriate penalty. This dichotomy can be compared to the other case in which the panel's decision was not unanimous, *People v. D. Martinez*.[313]

These inconsistencies are indicative of both the problems and the strengths that underlie capital sentencing overall. The judges in these panels were presented with the same defendants, testimony, evidence, witnesses, and records; yet they did not agree on the same sentences. While this suggests that it may be impossible to achieve the "consistency"[314] that the Supreme Court supposedly requires, it also suggests that each panel member made his own individualized decision based on the evidence he considered relevant from each defendant's "character, background, and history."[315]

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307. People v. Dunlap, 975 P.2d 723, 748 (Colo. 1999).

308. *Id.*

309. No. 97CR1551 (Colo. Dist. Ct. filed 1997); *see also* discussion *supra* Part IV.C.5.

310. No. 97CR1563 (Colo. Dist. Ct. filed 1997); *see also* discussion *supra* Part IV.C.5.

311. *See id.*

312. *Salmon Transcript*, *supra* note 238, at 18.

313. No. 98CR1323 (Colo. Dist. Ct. filed 1998); *see also* discussion *supra* Part IV.C.2.

314. Proffitt v. Florida, 428 U.S. 242, 252 (1976) (quoting Witherspoon v. Illinois, 391 U.S. 510, 519 n.15 (1968)).

315. COLO. REV. STAT. § 16-11-103(1)(b) (2000).

V. PERSPECTIVES ON THE THREE-JUDGE PANEL

As part of my research for this Comment, I conducted an informal survey of the twenty-one judges who served on three-judge panels prior to December 31, 2000.[316] Six judges completed the survey, and their comments are set forth in this section. I also interviewed two defense attorneys who argued before the panels: Nathan Chambers, who represented Robert Riggan in the first case tried to a three-judge panel in Colorado, and James Castle, who represented Donta Page. The two district attorneys I interviewed were Jeanne Smith, the El Paso County District Attorney whose office prosecuted both Lucas Salmon[317] and George Woldt,[318] and Robert Grant, the Adams County District Attorney whose office prosecuted Gary Davis[319] and Robert Harlan[320] under the jury sentencing procedure. Their comments are set forth below in an effort to better understand both the strengths and the weaknesses of judicial sentencing.

A. Consistency

Approval of the three-judge sentencing procedure is sharply divided: prosecutors generally support the panel system; defense attorneys generally oppose it. District Attorney Jeanne Smith believes that it is impossible to achieve consistency from juries, because they "have no exposure to capital punishment."[321] District Attorney Robert Grant notes the pan-

316. I requested that the judges either (a) respond to a survey, which was enclosed with a self-addressed stamped envelope, (b) agree to allow me to interview them personally, or (c) opt not to participate. A total of fifteen judges responded to my survey: six of the judges answered the questions, and nine declined to participate. For a copy of the letter and survey questions see *infra* Attachment C. As set forth in the attached letter, I promised that I would keep all survey responses confidential. Therefore, all responses to my survey have been destroyed, and are not on file with the *University of Colorado Law Review*.

317. People v. Salmon, No. 97CR1551 (Colo. Dist. Ct. filed 1997); *see also* discussion *supra* Part IV.C.5.

318. People v. Woldt, No. 97CR1563 (Colo. Dist. Ct. filed 1997); *see also* discussion *supra* Part IV.C.5.

319. People v. Davis, 794 P.2d 159 (Colo. 1990); *see also* discussion *supra* Part III.

320. People v. Harlan, 8 P.3d 448 (Colo. 2000); *see also* discussion *supra* Part III.

321. Telephone Interview with Jeanne Smith, El Paso County District Attorney (Jan. 31, 2001) [hereinafter Smith Interview].

els' consistent determinations "that a complicitor, one who hasn't actually inflicted the killing blow, is unlikely to be subject to capital punishment" even though a complicitor is legally eligible for the death penalty in Colorado under other precedent.[322]

In contrast, defense attorney James Castle believes that Colorado had achieved consistency under the jury system. "We had consistency before—only in a very rare situation would Colorado juries return death verdicts, . . . giving the message that a prosecutor shouldn't bring a death penalty case unless it's among the most heinous and horrible cases in the history of Colorado."[323] Mr. Castle does think that panel decisions will be consistent, at least in the sense that panels will impose more death verdicts than juries did. In his mind, the number of death sentences will increase because "mitigation is not well suited for legal decision-making."[324]

Judges, on the other hand, were divided as to whether they thought that "judicial sentencing [would] lead to more uniform sentencing in capital cases."[325] The judges were also divided as to whether they thought uniformity should be a goal. As one judge stated: "The imposition of death is unique to the particular case. The appropriate goal is fairness and impartiality in the application of the facts to the law in every individual case."[326]

B. Political Pressure

One district attorney, the two defense attorneys, and four of the six judges surveyed all expressed concerns about the possibility that political pressure might affect judicial sentencing in capital cases. One judge stated that politicization of the judicial branch as a result of judicial sentencing "is a distinct

322. Interview with Robert Grant, Adams County District Attorney, in Brighton, Colo. (Oct. 11, 2000) [hereinafter Grant Interview].

323. Interview with James Castle, in Denver, Colo. (Feb. 15, 2001) [hereinafter Castle Interview].

324. *Id.*

325. Survey question number 8. *See infra* Attachment C.

326. Anonymous survey answer to question number 9, which asked: "[W]hat sentencing procedure do you think would best ensure uniform sentencing in capital cases?" *See infra* Attachment C.

possibility."[327] Another judge pointed out that, although politicization is a concern, "those same concerns can exist with other controversial issues—abortion, pornography, etc. It depends on the integrity of [the] judges."[328] A third expressed the opinion that "zealots on either side of the issue may use the result of a particular case to argue that a judge should or should not be retained."[329]

District Attorney Jeanne Smith, however, believes that citizens should know if a judge does not believe in the death penalty, as judges are sworn to uphold the law, and the death penalty is a part of Colorado's law.[330] She expressed frustration with the fact that, "under the jury system, judges influenced juries a lot. They made their views apparent and influenced juries without being politically accountable."[331]

Both defense attorneys were very concerned about the possible political pressure that has been and will be exerted on the judiciary by both the media and the legislature.[332] They were also concerned about the fact that Colorado prosecutors are seeking the death penalty in an increasing number of cases. In defense attorney Nathan Chambers' opinion, his client, Robert Riggan,[333] would never have faced the death penalty under the jury system. Chambers believes "that the only reason the district attorney even sought it in that case is because it was a three-judge panel and they wanted to see how it was going to work."[334] Defense attorney James Castle echoed Chambers' concerns, as he believed that both the *Riggan* and the *Richardson*[335] cases would not have proceeded to the sentencing phase under the jury system, because the men were not found guilty

327. Anonymous survey answer to question number 6, which asked: "Do you have any concerns that this statute might politicize the judicial branch because a particular judge's position on the death penalty may become a barrier to his or her appointment or retention?" *See infra* Attachment C.

328. Anonymous survey answer to question number 6. *See infra* Attachment C.

329. Anonymous survey answer to question number 6. *See infra* Attachment C.

330. Smith Interview, *supra* note 321.

331. *Id.*

332. *See also* discussion of political pressure, *supra* Part II.C.

333. People v. Riggan, No. 97CR1006 (Colo. Dist. Ct. filed 1997).

334. Interview with Nathan Chambers, in Denver, Colo. (Jan. 29, 2001) [hereinafter Chambers Interview].

335. People v. Richardson, No. 97CR3678 (Colo. Dist. Ct. filed 1997).

of premeditated murder.[336] These concerns suggest that prosecutors may also exert political influence on the capital sentencing procedure. If prosecutors bring more death penalty cases and panels impose life sentences in those cases which historically would not have proceeded as "death penalty cases," the result may be increased pressure to impose death sentences in the remaining cases.

The judges unanimously opposed the legislature's proposed switch to a one-judge sentencing scheme. Several of the judges indicated that it was "good to have someone else to talk things over with,"[337] as this led to "a more informed, educated decision."[338] Another judge expressed his opinion that people should not try to change the procedure "based on some perception that we aren't executing enough people. . . . I do not think people should be trying to figure out a way to put more political pressure on the decision-makers so that they are more likely to succumb to that pressure and vote to execute."[339]

C. Judges' Ability to Reflect Community Values

Whether judges are able to accurately reflect the larger community's values is another issue where opinions seem to accord with the respondents' overall position on judicial sentencing. Supporters of the three-judge panel tend to believe that judges reflect the value system of the larger community, while opponents of the panels disagree. Two of the judges believe that their views do reflect the community; one pointed out that "judges aren't in a cocoon when they get off at five o'clock."[340] District Attorney Jeanne Smith suggests that the lack of diversity among judges can be ameliorated by getting

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336. Castle Interview, *supra* note 323.

337. Anonymous survey answer to question number 3, which asked: "Would you prefer that just one judge make capital sentencing decisions, rather than a three judge panel?" *See infra* Attachment C.

338. Anonymous survey answer to question number 3. *See infra* Attachment C.

339. Anonymous survey answer to question number 14, which asked: "What else do you think the legislature, litigators, or populace should know about the three judge capital sentencing procedure?" *See infra* Attachment C.

340. Anonymous survey answer to question number 10, which asked: "Do you feel that the decisions of three judge sentencing panels reflect the voice of the community? How?" *See infra* Attachment C.

people of more diverse backgrounds to go to law school in the first place.[341]

The defense attorneys disagree, insisting that juries are "more racially representative, they're more representative in terms of gender, they're more representative in terms of socio-economic status," than a panel of judges.[342] James Castle described the Texas legislature, which "rejected judicial sentences because their jurors seem to return more death verdicts than judges, [and because] they think their judges might be more liberal than their juries . . . . The point is that, on either side of the spectrum, people don't trust judges to be a good reflection of the community."[343]

Three of the judges surveyed believe that sentencing in capital cases is a "community decision" that should be left to juries. One explained his reasoning as follows: "the weighing of aggravating/mitigating circumstances, [and] the determination of what constitutes conduct requiring death is inherently a response of the community and best left to the citizens of the community."[344]

Another concern is that fewer people may apply to become judges in the first place, due to their personal beliefs about capital punishment. In fact, one Colorado judge, Michael Heydt, resigned when he was selected for the *Salmon* sentencing panel because he considered the procedure "manifestly unworkable."[345] The fact that Judge Heydt resigned, and the fear that opponents of the death penalty will not apply for positions on the bench, are indications that in the future, the existence of sentencing panels may further reduce the diversity of beliefs and ideologies represented in Colorado's judiciary.

CONCLUSION AND RECOMMENDATIONS

In the end, both jury and three-judge panel procedures have serious flaws. There are many reasons for this. Most basic is the fact that it is incredibly difficult for any individual,

341. Smith Interview, *supra* note 321.

342. Chambers Interview, *supra* note 334.

343. Castle Interview, *supra* note 323.

344. Anonymous survey answer to question number 4, which asked: "What do you consider to be the advantages and disadvantages of having a three judge panel make capital sentencing decisions?" *See infra* Attachment C.

345. Bill Johnson, *Michael Heydt, Judge of Character*, ROCKY MTN. NEWS (Denver, Colo.), Apr. 14, 1999, at 6A.

whether judge or juror, to make a decision so final and irrevocable as the sentence of death on another. This difficulty remains true even in the most horrendous crimes, and even when the person acting as judge supports the death penalty.[346] Studies have shown that "only a minority of subjects who supported the death penalty in general were willing to impose it in any of three hypothetical murder cases based on the facts of actual death row prosecutions."[347] As with many social issues, there is a "gulf between the abstract and the concrete."[348] It is easier for most people to detest a killer whom they "know" only from the media's portrayal of his crime, than to hate someone who, for example, befriended an insect and was upset when it left him,[349] or was severely abused as a child, both physically and sexually.[350]

It is thought that an average juror is more likely to be swayed by these types of personal details, however, than is an average judge.[351] This emotional reaction to crimes is what many observers consider to be both the strength and the weakness of juries. Emotional reactions tend to cause jurors to make premature sentencing decisions during the guilt phase of a trial rather than during the sentencing phase.[352] And emotions, rather than logic, may underlie a juror's fear that if he does not impose a death sentence, a defendant sentenced to life in prison without parole will be released in twenty years to kill again.[353]

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346. *See* Gross, *supra* note 92, at 1470.

347. *Id.* at 1473 (citing 1978 study by Phoebe Ellsworth; the Gross article also considered results of more recent polls).

348. *Id.* at 1474.

349. *See* Steve Jackson, *Judgment Day: The State's First Death-Penalty Panel Meets—And Spares the Life of Robert Riggan*, DENV. WESTWORD, May 6, 1999, *available at* http://www.westword.com/issues/1999-05-06/news.html/1/index.html (describing the fact that Riggan was so lonely in jail that he adopted an ant as a pet; the article also describes Riggan's "grossly dysfunctional" upbringing); *see also* discussion *supra* Part IV.C.1.

350. *See* Bill Johnson, *Killing Killers May Feel Good, But Darn It, It's Not Right*, ROCKY MTN. NEWS (Denver, Colo.), Feb. 28, 2001, at 6A (describing the various medical, mental health, and social workers who ignored the many signs of sexual and physical abuse that Donta Page suffered throughout his childhood); *see also* discussion *supra* Part IV.C.6.

351. *See* Grant Interview, *supra* note 322; *see also* Castle Interview, *supra* note 323.

352. *See* discussion *supra* Part II.B.

353. *See id.*

On the other hand, these "emotional" reactions to both the horrendous crimes and the horrendous upbringings of many defendants are necessary for two reasons. First, they "maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect the 'evolving standards of decency that mark the progress of a maturing society.'"[354] Second, without this link, individuals see only what the newspapers want them to; as a society we are responsible for the poor treatment of children that leads to our overcrowded prisons—this is rarely as newsworthy as the typical media portrayal of a cold-blooded, merciless killer.

It is true that jury decisions tend to be driven less by purely "legal" concerns than the decisions that have been and will be made by judges. However, consider the language of Colorado's statute: it does not require any burden of proof to establish mitigating factors; the "weighing" of mitigating and aggravating factors is largely unguided; and in the fourth step, the sentencer is instructed to consider "all relevant evidence" as well as "the character, background, and history of the defendant."[355] These considerations cannot realistically be characterized as purely "legal" and are inherently highly subjective. It is valuable for courts to make legal distinctions between the types of defendants who should and should not receive death sentences, such as the distinctions made in the *Riggan*, *Richardson*, and *Martinez* cases between complicitors, felony murderers, and first degree murderers.[356] These types of distinctions, however, can also be made by appeals courts and the legislature.

Faced with the horrifying nature of the crimes described in Section IV, it is understandable that prosecutors have lobbied the legislature in an effort to ensure that the death penalty will be imposed more often. Prior to the change in procedure, prosecutors were deterred from bringing capital cases, even in appropriate circumstances, because juries returned death ver-

354. Gregg v. Georgia, 428 U.S. 153, 190 (1976) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1957)).

355. People v. Dunlap, 975 P.2d 723, 736, 740 (Colo. 1999); *see also* notes 151–160 and accompanying text.

356. *See* People v. Riggan, *supra* Part IV.C.1; People v. Richardson, *supra* Part IV.C.3; People v. D. Martinez, *supra* Part IV.C.2.

dicts very infrequently.[357] Currently, Colorado prosecutors are seeking the death penalty in record numbers of cases, perhaps due to their belief that they are more likely to be successful under the panel system.[358] If they were not legally entitled to a death penalty verdict for the crimes, prosecutors would not bring these cases before the court. Because judges are more likely to focus on the legal aspects of the cases, this may lead to the imposition of more death sentences. Judicial sentencing decisions will probably be more rational and reasoned,[359] and all parties concerned will have a written statement of exactly which of the aggravators and mitigators were found and why the panel thought death or life was appropriate in each case.[360]

If Colorado retains the three-judge panel system, legislators might consider the following potential remedies to the system's problems. First, the legislature should establish clear guidelines for these procedures: the rules of evidence each court will follow, the admissibility of proportionality evidence, the admissibility of juror testimony at sentencing hearings, and other procedural disparities that have arisen in sentencing hearings to date.[361] Establishing clear guidelines for the procedures each panel should follow would further the United States Supreme Court's suggestion, in *Proffitt v. Florida*, that capital sentencing be consistent.[362]

Second, proportionality evidence should be admitted in panel sentencing hearings. It is true that each capital sentencing hearing should focus on the "character, background, and history" of the individual defendant whose life is at stake.[363] Consideration of an individual defendant's character and history, however, does not preclude consideration of the sentences imposed in other capital cases. Judicial examination of propor-

357. *See Death Penalty is Popular, But Not Always With Juries. The Issue: Death Sentence Not Sought in Tom Hollar Case. Our View: DA's Rationale Makes Sense*, ROCKY MTN. NEWS (Denver, Colo.), Mar, 13, 1994, at 80A (noting that Denver District Attorney Bill Ritter did not seek death penalty in double homicide because of juries' extreme reluctance to impose death sentences).

358. *See* Castle Interview, *supra* note 323; Chambers Interview, *supra* note 334.

359. Grant Interview, *supra* note 322.

360. Smith Interview, *supra* note 321.

361. *See* discussion *supra* Part II.A.

362. *See id.* at 252; *see also* discussion *supra* Part II.A.

363. COLO. REV. STAT. § 16-11-103(1)(b) (2000); *see also* Grant, *supra* note 43 (arguing that "'proportionality review' of a sentencing panel negates the individual focus that is the hallmark of the death penalty decision").

tionality evidence might well assist the panels in achieving consistency in capital sentencing. This evidence is particularly important under Colorado's sentencing scheme because some of the panel judges may come from outside the jurisdiction in which the crime was committed. To this end, Colorado should establish a database containing a listing of "cases in which the death sentence was sought or could have been sought, and the factual circumstances surrounding those cases."[364]

A third concern about the panel sentencing procedure is that two of the three judges do not witness the guilt phase of a defendant's trial. The most equitable solution to this problem, that all three panel members preside over both the guilt and the sentencing phases, is likely not practicable due to overloaded court dockets. However, an alternative is practicable: the guilt phase of each trial should be videotaped. I am not suggesting that the judges be required to view the trial in its entirety, but merely that a complete video be available should any judge wish to observe a particular witness' demeanor during direct or cross examination. In addition, commentators have suggested that reviewing courts give more careful scrutiny to rulings in which there is a potential for trial judges to be influenced by political pressures.[365] If this recommendation were implemented, a videotape would be available to the reviewing courts if it were determined that they should conduct a more meaningful review of these rulings.[366]

My fourth recommendation addresses the current distribution of judges in the four regions set forth in Colorado's Supreme Court Directive 95-04.[367] Currently, the regions combine liberal counties with more conservative counties. In addition, one of the regions has nineteen judges available for random selection, while another has forty-five judges. If the regions were more evenly distributed, and distributed in a manner that more closely reflects the political views of each county, each judge would have a more equal chance of being selected for a

364. People v. Davis, 794 P.2d 159, 174 (Colo. 1990) (noting that Colorado does not have such a database); *see also* discussion *supra* Part II.A.

365. Bright & Keenan, *supra* note 65, at 826; *see also* discussion *supra* Part II.C.

366. *See* Robert C. Owen & Melissa Mather, *Thawing Out the "Cold Record": Some Thoughts on How Videotaped Records May Affect Traditional Standards of Deference on Direct and Collateral Review*, 2 J. APP. PRAC. & PROCESS 411 (2000).

367. Chief Justice Directive 95-04, Colo. Supreme Court, Nov. 17, 1995.

panel[368] and the decisions would be more representative of the larger community's values.[369]

Lastly, the legislature should consider means by which to reduce political pressure on the sentencing judges. Extralegal considerations are inappropriate in a decision that concerns another human being's life. To this end, at least one of the judges should be selected from a judicial district other than that where the crime occurred, as this may reduce political pressure on at least one of the judges.[370] Another way in which political pressure could be reduced is to eliminate the statutory requirement that each judge write a separate, signed opinion if the three judges disagree on the appropriate sentence.[371] Anonymous opinions would decrease the political pressure on a particular judge resulting from an unpopular decision.

Ultimately, the procedural question of how to apply the penalty of death to an individual is as controversial as the philosophical questions that surround the sanction. Thus far, it seems that in most cases the three-judge panel decisions have mirrored what the juries would have decided. In the two cases for which panels received the most condemnation from the press, *People v. Salmon* and *People v. Page*, it appears that the juries would have also imposed life sentences.[372] In the end, it is unlikely that either judges or juries will ever produce results that appear consistent on their face, as both the defendants and their sentencers remain human, and therefore retain the capacity to be reprehensible, unpredictable, and compassionate.

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368. For example, at the current time, judges in Region I (which includes liberal Boulder County) have a one in forty-five chance of being selected for a panel, while judges in Region II have a one in nineteen chance of being selected.

369. Studies show that Republicans are more likely than Democrats to favor capital punishment. *See* Gross, *supra* note 92, at 1451 (noting that sixty-one percent of Democrats and eighty-five percent of Republicans favored the death penalty in a 1996 survey).

370. *See* Bright & Keenan, *supra* note 65, at 817; *see also* discussion *supra* Part II.C.

371. Interview with Patrick H. Furman, Professor, University of Colorado School of Law, in Boulder, Colo. (Apr. 23, 2001).

372. This is evidenced by the fact that two of the jurors in *Salmon*, and five of the jurors in *Page*, wished to speak to the panels during their sentencing determinations, as they did not feel that the death penalty was appropriate in those cases. *See supra* note 48 and accompanying text.

ATTACHMENT A: TABLE OF AGGRAVATING FACTORS

	AA	AB	AC	AD	AE	AF	AG
Riggan	~	~	~	~	~	~	N
Richardson	~	~	~	~	~	~	Y
D.Martinez – Death(2)	~	~	~	N[i]	Y	~	N
D.Martinez – Life(1)	~	~	~	N	Y	~	N
F.Martinez	~	~	~	Y	Y	~	Y
Salmon – Panel	~	~	~	Y	Y	N	Y
Neal – Holbertson	~	~	~	N	~	Y	~
Neal – Walters	~	~	~	Y	~	Y	~
Neal – Fite	~	~	~	Y	~	Y	~
Woldt	~	~	~	Y	Y	N	Y
Page	~	~	~	~	~	~	Y

	AH	AI	AJ	AK	AL	AM	AN
Riggan	~	~	Y	~	~	~	~
Richardson	~	~	N	N	~	~	~
D.Martinez – Death(2)	~	~	Y	Y	~	~	~
D.Martinez – Life(1)	~	~	N	N	~	~	~
F.Martinez	~	~	Y	Y	~	~	~
Salmon – Panel	~	N	Y	Y	~	~	~
Neal – Holbertson	Y	~	N	Y	Y	~	~
Neal – Walters	Y	~	N	Y	Y	~	~
Neal – Fite	N	~	Y	N	Y	~	~[ii]
Woldt	~	N	Y	Y	~	~	~
Page	N	~	Y	Y	~	~	~

~ Not argued by the prosecution.
N Panel did not find this to be an aggravating factor.
Y Panel found that this was an aggravating factor.

The following aggravating factors correspond to the aggravators listed in C.R.S. § 16-110-103(5); for instance, AA is § 16-11-103(5)(a), AB is § 16-11-103(5)(b), et cetera:

AA = "The class 1 felony was committed by a person under sentence of imprisonment for a class 1, 2, or 3 felony as defined by Colorado law or United States law, or for a crime committed against another state or the United States which would constitute a class 1, 2, or 3 felony as defined by Colorado law."

AB = "The defendant was previously convicted in this state of a class 1 or 2 felony involving violence as specified in section 16-11-309, or was previously convicted by another state or the United States of an offense which would constitute a class 1 or 2 felony involving violence as defined by Colorado law . . ."

AC = Paraphrased: The defendant intentionally killed a federal or state law enforcement agent or former agent; or a firefighter, judge, referee, state, county or municipal officer while such person was engaged in the course of the performance of such person's official or in retaliation for the performance of the victim's official duties.

AD = "The defendant intentionally killed a person kidnapped or being held as a hostage by the defendant or by anyone associated with the defendant."

AE = "The defendant has been a party to an agreement to kill another person in furtherance of which a person has been intentionally killed."

AF = "The defendant committed the offense while lying in wait, from ambush, or by use of an explosive or incendiary device. . . ."

AG = "The defendant committed a class 1, 2, or 3 felony and, in the course of or in furtherance of such or immediate flight therefrom, the defendant intentionally caused the death of a person other than one of the participants."

AH = "The class 1 felony was committed for pecuniary gain."

AI = "In the commission of the offense, the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense."

AJ = "The defendant committed the offense in an especially heinous, cruel, or depraved manner."

AK = "The class 1 felony was committed for the purpose of avoiding or preventing a lawful arrest or prosecution or effecting an escape from custody. This factor shall include the intentional killing of a witness to a criminal offense."

AL = "The defendant unlawfully and intentionally, knowingly, or with universal malice manifesting extreme indifference to the value of human life generally,

killed two or more persons during the commission of the same criminal episode."

AM = "The defendant intentionally killed a child who has not yet attained twelve years of age."

AN = "The defendant committed the class 1 felony against the victim because of the victim's race, color, ancestry, religion, or national origin."

AO = "The defendant's possession of the weapon used to commit the class 1 felony constituted a felony offense under the laws of this state or the United States."

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i. Because the defendant was convicted under a complicity theory.

ii. The panel also considered a number of other factors in its decision to impose the death penalty on Neal, such as his past history of pathological lying and manipulation and the fact that he forced a young girl to watch him kill Angela Fite, then raped the girl.

ATTACHMENT B: TABLE OF MITIGATING FACTORS

	MA	MB	MC	MD	ME	MF
Riggan	~	~	~	~	~	~
Richardson	N	N	N	N	N	N
D.Martinez – Death(2)	N	N	N	N	N	N
D.Martinez – Life(1)	~	~	~	Y[iv]	~	~
F.Martinez	N	N	N	N	N	N
Salmon – Panel	Y	Y[vii]	Y[viii]	~	~	Y
Salmon – Life(F)	X	~	X[x]	~	~	~
Neal – Holbertson	N	N	N	n/a	N	N
Woldt	N	N	N	N	N[xiv]	N
Page	~	Y				N

	MG	MH	MI	MJ	MK	ML
Riggan	Y	~	~	~	~	+2[i]
Richardson	N	Y	N	N	N	+2[ii]
D.Martinez – Death(2)	N	N	N	~	N	+2[iii]
D.Martinez – Life(1)	~	~	Y	~	Y	+1[v]
F.Martinez	N	N	N	N	N	+2[vi]
Salmon – Panel	Y	Y	~	~	Y	+3[ix]
Salmon – Life(F)	X	X	~	~	X	+1[xi]
Neal – Holbertson	Y	Y[xii]	N	N	N	+[xiii]
Woldt	N	Y[xv]	~	~	Y	+[xvi]
Page		Y[xvii]				+19[xviii]

~ Not discussed in the Sentencing Order.

N Panel did not find this to be a mitigating factor.

Y Panel found that this was a mitigating factor.

+n Number after the + symbol indicates the number of additional factors the panel found were relevant pursuant to C.R.S. §16-11-103(5)(l).

X Judge considered this factor to be particularly significant.

The following mitigators correspond to the mitigating factors listed in C.R.S. § 16-11-103(4); for instance MA is § 16-11-103(4)(a), MB is § 16-11-103(4)(b), et cetera:

MA = "The age of the defendant at the time of the crime."

MB = "The defendant's capacity to appreciate wrongfulness of the defendant's conduct or to conform the defendant's conduct to the requirements of law was sig-

nificantly impaired, but not so impaired as to constitute a defense to prosecution."

MC = "The defendant was under unusual and substantial duress, although not such duress as to constitute a defense to prosecution."

MD = "The defendant was a principal in the offense which was committed by another, but the defendant's participation was relatively minor, although not so minor as to constitute a defense to prosecution."

ME = "The defendant could not reasonably have foreseen that the defendant's conduct in the course of the commission of the offense for which the defendant was convicted would cause, or would create a grave risk of causing, death to another person."

MF = "The emotional state of the defendant at the time the crime was committed."

MG = "The absence of any significant prior conviction."

MH = "The extent of the defendant's cooperation with law enforcement officers or agencies and with the office of the prosecuting district attorney."

MI = "The influence of drugs or alcohol."

MJ = "The good faith, although mistaken, belief by the defendant that circumstances existed which constituted a moral justification for the defendant's conduct."

MK = "The defendant is not a continuing threat to society."

ML = "Any other evidence which in the court's opinion bears on the question of mitigation."

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i. Additional mitigating factors found in the *Riggan* case were: (1) the defendant's family was "horribly dysfunctional" and (2) Riggan was diagnosed with "antisocial personality disorder" (ASPD). People v. Riggan, No. 97CR1006 (Colo. Dist. Ct. Apr. 16, 1999) (Sentencing Order).

ii. (1) Absence of father was considered to be a very marginal mitigator because mother was strong and attentive. (2) No intent or deliberation is very strong mitigator, because every approved death sentence in Colorado involved intentional murder.

iii. (1) Unstable, underprivileged, emotionally injurious upbringing; exhibited some positive traits in his schooling. (2) Apologized to the victim's family.

iv. "Danny Martinez's actions in the actual homicide were minimal in comparison to the actions of Francisco Martinez and Samuel Quintana." People v. D. Martinez, No. 98CR1323 (Colo. Dist. Ct. May 7, 1999) (Decision of Panel Member Judge John W. Coughlin).

v. Fact that defendant was convicted under a complicity theory was significant mitigating factor.

vi. (1) The defendant's unsettled and disturbing childhood. (2) Diagnosis of bipolar disorder, post-traumatic stress disorder and anti-social personality disorder, although no expert found a "causal connection between these disorders and the defendant's conduct in committing the crimes at issue." People v. F. Martinez, No. 97CR1699, at 1 (Colo. Dist. Ct. May 27, 1999) (Sentencing Determination and Order)

vii. Partial finding of this factor; the panel found that the defendant could appreciate the wrongfulness of his conduct, but that his capacity to conform his conduct to the requirements of the law was significantly impaired.

viii. Considered in the light of this being a subpart of impairment in conforming conduct; "there was substantial influence exercised over Salmon by a much stronger personality." People v. Salmon, No. 97CR1551 (Colo. Dist. Ct. June 24, 1999) (Sentencing Order).

ix. (1) Salmon has accepted responsibility for his acts; panel may consider this separately or apart from his cooperation with authorities. (2) Good conduct in jail and at trial. (3) Prior to February, 1997, Salmon led a very Christian life and did volunteer work

x. In the sense that Salmon has a significant mental impairment that make him "profoundly susceptible to the influence and direction of third parties." People v. Salmon, No. 97CR1551 (Colo. Dist. Ct. June 24, 1999) (Sentencing Order).

xi. Judge Frasher believes that imposing the death penalty on someone of Salmon's character "would substantially lower the threshold for the imposition of the sentence of death" in Colorado. People v. Salmon, No. 97CR1551 (Colo. Dist. Ct. June 24, 1999) (Sentencing Order).

xii. Although Neal did confess to the murders, the panel found that he was not forthright about the details, and appeared to be cooperating in order to gain "favors," such as cigarettes, from the officers. In its step 3 analysis, the panel noted that it would consider Neal's cooperation with the sheriff department and prosecution.

xiii. The defendant asserted a number of other mitigating factors that the panel either suspected were untrue or found to be nonexistent, such as being remorseful about the killings and becoming religious. The panel did consider these factors in its step three analysis.

xiv. The panel did not find this to be a factor "except as to the 'mental health' issues" discussed in its Sentencing Order. People v. Woldt, No. 97CR1563 (Colo. Dist. Ct. Sept. 6, 2000) (Sentencing Order).

xv. The panel stated that Woldt's acknowledgment of his participation in the crime eased the investigation, however it did not explicitly state that it would consider this to be a mitigating factor.

xvi. The panel gave extensive consideration to the potential mitigating impact of the mental health concerns alleged to be a factor in Woldt's commission of the crime. Both an "organic malformation" in Woldt's brain and various psychological diagnoses ranging from Obsessive/Compulsive Disorder to Post Traumatic Stress Disorder to Dependent Personality Disorder were offered in Woldt's defense. The panel stated that the conflicting testimony given by a number of similarly qualified experts diminished the weight of the expert testimony in this regard. In addition, the panel believed that the facts in the record seemed to contradict this expert testimony in that Woldt did show the ability to control his behavior and not act impulsively both before and after the murder. In addition, the panel discussed the mitigators of the defendant's remorse, child abuse, the allegation that Woldt's co-defendant "led" the murder, Woldt's conversion to Christianity, and the fact that Woldt's co-defendant received a life sentence rather than the death penalty. The panel did not consider any of these factors to be substantial mitigators.

xvii. The panel stated that this factor was proven "in part," due to Page's eventual confession; the fact that he waived extradition from Maryland; the fact that offered to plead guilty and accept a life sentence; Page's offer to engage in whatever reconciliation efforts the Tuthill family requested; and Page's good behavior both during the trial and at the jail during the pendency of his case.

xviii. The court found that the following additional mitigating factors had been proven: (1) the murder was not premeditated; (2) Page accepted responsibility for the crime; (3) Page was remorseful for the crime; (4) Page was the victim of severe sexual abuse as a child; (5) Page grew up in a dysfunctional family (6) Page was born to a sixteen year-old unmarried mother, as the result of an unwanted pregnancy; (7) Page never knew his father, and lacked a positive male role model; (8) Page was a neglected child (court states that there was "some evidence" of neglect); (9) the fact that experts found it likely that Page would adjust to a prison environment was found to be a mitigating factor of minimal weight; (10) the fact that Page tried to get help for his problems, and was amenable to therapy was given little weight; (11) the fact that Page's death would be hard on his family.

The court did not accept the following factors (argued by defense) as mitigators: (1) the fact that Page confessed to the crime was found to be duplicative of his cooperation with law enforcement, C.R.S. § 16-11-103(4)(h); (2) the fact that Page was severely abused as a child was found to overlap with the statutory factor listed as C.R.S. § 16-11-103(4)(b); (3) the fact that Page may have some impairment of functioning of his frontal lobe was found to be only partially supported by expert testimony, and the court indicated that the factor was given weight in its finding that C.R.S. § 16-11-103(4)(b) was a proven mitigator; (4) the court did not find that there was sufficient evidence to conclude that Page suffered from long term psychological and emotional problems; (5) the court did not find that Page suffered from learning disabilities; (6) the fact that Page grew up in an impoverished and violent neighborhood; (7) the fact that Page has been cooperative at the jail and state hospital is duplicative of the court's finding that C.R.S. § 16-11-103(4)(b) had been proven; (8) the fact that Page was well-behaved and respectful during the court proceedings was again found to be duplicative of the court's finding that C.R.S. § 16-11-103(4)(b) had been established as a mitigating factor.

ATTACHMENT C

The following letter and questionnaire were sent to the twenty-one Colorado judges who participated in the three-judge sentencing panels for the eight cases discussed in this article:

Dear Honorable Judge _____,

I am a student at the University of Colorado School of Law, and am writing a Law Review article about the three-judge sentencing panel in capital cases. My Comment compares this procedure with jury sentencing in capital cases, and evaluates the positive and negative aspects of both procedures. The article is focused solely on Colorado's sentencing procedure in capital cases, and does not address or include anyone's personal opinions about capital punishment. Because this is the only state that uses a three-judge panel in all capital sentences, very little research has been done on the procedure. I have become convinced that interviews with all of the judges who have participated in these panels would be invaluable to its assessment.

I understand that there may be many reasons why you would not want to participate in this study, including confidentiality concerns. Therefore, I have developed several methods for your response. One possibility is an oral interview, which would be conducted at your convenience. This is my preference, because it would allow me to ask follow-up questions as necessary. However, if you would prefer responding anonymously, I have enclosed an informal survey for you to fill out. The questions are very similar to those I would ask in a personal interview. If you could find it in your heart (and your schedule) to answer these questions, and return the survey before mid-January, I would truly appreciate it.

This letter serves as my written promise to keep any and all responses to these surveys confidential, however if you would like an additional assurance in that regard I would be happy to provide it. I would also be happy to provide you with references, a resume, and/or a draft of the article that I am writing upon request.

Even if you choose not to participate, I do ask that you return the enclosed Response Form in the self addressed stamped envelope to let me know, and I appreciate the time you have taken to consider this request.

I realize that I am asking a lot, however I believe that an assessment of our unique capital sentencing procedure would benefit Colorado, as it would provide information to the legislature and legal community that does not yet exist. I would appreciate it if you would let me know whether you are willing to participate. Thank you very much for your consideration.

Sincerely,

Robin Lutz

INSTRUCTIONS:

Please answer the following questions to the best of your ability. If there is a question that you do not wish to answer, for any reason, please feel free to eliminate it. If there is a question that I have worded in a confusing manner, please feel free to change the wording, then answer the question according to this new understanding of the question. Your answers may be as long or short as you wish, and you may attach extra pages if necessary.

1. Please describe your initial reaction to the proposal that a three-judge panel perform the capital sentencing function.

2. When you found out that you would be participating in such a panel, did you have any concerns about the procedure? What were these concerns, and how did you resolve them, if they were in fact resolved?

3. Would you prefer that just one judge make capital sentencing decisions, rather than a three-judge panel? Please explain your reason for this answer.

4. What do you consider to be the advantages and disadvantages of having a three-judge panel make capital sentencing decisions?

5. Had you participated in any other capital punishment cases prior to participating in the panel? If yes, do you feel that this experience was of assistance to your panel?

6. Do you have any concerns that this statute might politicize the judicial branch because a particular judge's position on the death penalty may become a barrier to his or her appointment or retention?

7. Do you think judges should be "death qualified" the way juries used to be before sitting on a panel?

8. Do you think that judicial sentencing will lead to more uniform sentencing in capital sentences than jury sentencing?

9. If your answer to #8 is no, what sentencing procedure do you think would best ensure uniform sentencing in capital cases?

10. Do you feel that the decisions of three-judge sentencing panels reflect the voice of the community? How?

11. Do you believe prosecutors will seek the death penalty more often under this new sentencing procedure?

12. Do you think that the fact that some of the judges are coming from different jurisdictions than where the case was heard is having any bearing on the outcomes of the decisions? How do you think the two judges who did not participate in the trial phase were affected by having to obtain that information from a written record, rather than first hand?

13. Did you feel any pressure for all three judges to arrive at a unanimous decision?

14. What else do you think the legislature, litigators, or populace should know about the three judge capital sentencing procedure?