# AND THEN THERE WERE THREE: COLORADO'S NEW DEATH PENALTY SENTENCING STATUTE

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## I. INTRODUCTION

As recently as the mid-1940s, most United States jurisdictions made frequent use of the death penalty—with executions occurring nationally at the rate of approximately ten every month.[1] Forty-eight out of fifty jurisdictions (forty-eight states,[2] the District of Columbia, and the Federal Government) had at least one capital punishment statute and public opinion favored the death penalty by a ratio of two to one.[3] However, due to a campaign to secure review of all death sentences and to challenge the constitutionality of the death penalty, between July 1967 and December 1976 no executions were carried out in the United States.[4] Largely due to this campaign, over a five year period from 1972 to 1976, the United States Supreme Court issued a series of rulings that changed the status of the death penalty in the United States.[5] In 1972, *Furman v. Georgia*[6] struck down the existing death penalty statutes, holding that the death penalty, as then administered, violated the Eighth and Fourteenth Amendments of the Constitution.[7] However, the Supreme Court stopped short of ruling that capital punishment was per se unconstitutional. By the end of 1974, twenty-nine states had enacted new death penalty statutes.[8] In 1976, the Supreme Court upheld three of these statutes, written to conform to the Supreme Court's guidelines, and the death penalty was again alive and well in the United States.[9]

Since the mid-1940s, the number of jurisdictions with the

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1. *See* HUGO ADAM BEDAU, DEATH IS DIFFERENT 131 (1987).
2. Alaska and Hawaii did not become states until 1959.
3. *See id.*
4. *See id.* at 133.
5. *See* Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976) (plurality opinion); Roberts v. Louisiana, 428 U.S. 325 (1976) (plurality opinion); Furman v. Georgia, 408 U.S. 238 (1972).
6. 408 U.S. at 238 (finding that the arbitrary and capricious manner in which the death penalty was applied constitutes cruel and unusual punishment).
7. *See id.*
8. *See* STEPHEN A. FLANDERS, LIBRARY IN A BOOK: CAPITAL PUNISHMENT 50-51 (1991).
9. *See* BEDAU, *supra* note 1, at 133. In July 1976 the Supreme Court ratified death penalty statutes in Florida, Georgia, and Texas. *See Proffitt*, 428 U.S. at 242; *Gregg*, 428 U.S. at 153; *Jurek*, 428 U.S. at 262. See *infra* Part IV.A for a discussion of *Furman* and the United States Supreme Court's guidelines for capital punishment statutes.

death penalty has dropped. However, this number is slowly increasing again as legislators propose and update death penalty legislation. In 1994, a total of nine states introduced bills to reinstate the death penalty, but only Kansas passed a death penalty law; the Kansas statute took effect on July 1, 1994.[10] In addition, fifteen states enacted more than twenty new laws regarding various aspects of the death penalty, and the federal death penalty was expanded.[11] New York passed the most recent law reintroducing the death penalty; it took effect on September 1, 1995.[12] Currently, thirty-eight states and two federal jurisdictions have death penalty statutes.[13] Twelve states and the

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10. *See* AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: DEVELOPMENTS ON THE DEATH PENALTY DURING 1994, at 14-16 (1995) [hereinafter AMNESTY INTERNATIONAL, DEVELOPMENTS]. The governor of Kansas was against capital punishment, but let the bill become law without her signature, believing that the people of Kansas wanted the death penalty reinstated. *See id.* *See* KAN. STAT. ANN. § 21-4624 (1995).

11. *See* AMNESTY INTERNATIONAL, DEVELOPMENTS, *supra* note 10, at 2, 15. At the end of 1994 there were 2870 inmates on death row in 34 states. *See id.* Since reinstitution of the death penalty in 1976, there have been 345 executions; as of September 18th, 32 people were executed in 1996. *See* AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: DEATH PENALTY NEWSLETTER, at 13-14 (1996) [hereinafter AMNESTY INTERNATIONAL, NEWSLETTER]. The methods used for the executions since 1976 are as follows: 208 by lethal injection, 123 by electrocution, nine by gas chamber, three by hanging, and two by firing squad. *See id.* at 14.

12. *See* N.Y. CRIM. PROC. LAW § 400.27 (McKinney Supp. 1996).

13. *See* AMNESTY INTERNATIONAL, NEWSLETTER, *supra* note 11 at 13; *see also* ALA. CODE § 13A-5-46 (1994); ARIZ. REV. STAT. ANN. § 13-703(B) (West 1989 & Supp. 1995); ARK. CODE ANN. § 5-4-602 (Michie 1993); CAL. PENAL CODE § 190.3 (West 1988); COLO. REV. STAT. § 16-11-103 (Supp. 1996); CONN. GEN. STAT. ANN. § 53a-46a (West 1994 & Supp. 1996); DEL. CODE ANN. tit. 11, § 4209 (1995); FLA. STAT. ANN. § 921.141 (West 1996); GA. CODE ANN. §§ 17-10-30 to -32 (1990 & Supp. 1996); IDAHO CODE § 19-2515 (1987); 720 ILL. COMP. STAT. 5/9-1 (West 1991 & Supp. 1996); IND. CODE ANN. § 35-50-2-9 (Michie 1994 & Supp. 1996); KAN. STAT. ANN. § 21-4624 (1995); KY. REV. STAT. ANN. § 532.025(1)(b) (Michie 1990); LA. CODE CRIM. PROC. ANN. art. 905.8 (West 1984 & Supp. 1996); MD. ANN. CODE art. 27, § 413 (1992 & Supp. 1995); MISS. CODE ANN. § 99-19-101 (1994); MO. REV. STAT. § 565.001 (1986 & Supp. 1996); MONT. CODE ANN. § 46-18-301 (1995); NEB. REV. STAT. § 29-2520 (1995); NEV. REV. STAT. ANN. §§ 175.554, 175.556 (Michie 1992 & Supp. 1995); N.H. REV. STAT. ANN. § 630.5 (1996); N.J. STAT. ANN. § 2C:11-3 (West 1995); N.M. STAT. ANN. § 31-20A-3 (Michie 1994); N.Y. CRIM. PROC. LAW § 400.27 (McKinney Supp. 1996); N.C. GEN. STAT. § 15A-2000 (1988); OHIO REV. CODE ANN. § 2929.03 (Anderson 1993 & Supp. 1996); OKLA. STAT. ANN. tit. 21, § 701.11 (West 1983 & Supp. 1996); OR. REV. STAT. § 163.150 (1990); 42 PA. CONS. STAT. ANN. § 9711(F) (West 1982 & Supp. 1996); S.C. CODE ANN. § 16-3-20 (Law. Co-op. 1985 & Supp. 1995); S.D. CODIFIED LAWS § 23A-27A-4 (Michie 1988); TENN. CODE ANN. § 39-13-204 (1991 & Supp. 1995); TEX. CRIM. P. CODE ANN. § 37.071 (West 1981 & Supp. 1996); UTAH CODE ANN. § 76-3-207 (1995 & Supp. 1996); VA. CODE ANN. § 19.2-264.4 (Michie 1995 & Supp. 1996); WASH. REV. CODE ANN. § 10.95.030 (West 1990 & Supp. 1996); WYO. STAT. ANN. § 6-2-102 (Michie 1988); 18

District of Columbia do not have capital punishment.[14]

In 1994, retiring Supreme Court Justice Harry A. Blackmun asserted unexpectedly that "despite the effort of the States and courts to devise legal formulas and procedural rules," the death penalty "remains fraught with arbitrariness, discrimination, caprice and mistake."[15] In his lengthy dissent to the Court's refusal to hear an appeal from a Texas death row inmate, Justice Blackmun stated:

> It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies. From this day forward, I no longer shall tinker with the machinery of death. . . . I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed.[16]

Despite Justice Blackmun's strong words, the Supreme Court's holding that the death penalty is constitutional when applied "fairly, and with reasonable consistency" still stands.[17] Thus, states continue to *tinker* with their death penalty statutes in order to achieve the objectives laid out by the Supreme Court.

Colorado has struggled with issues surrounding the death penalty since the state was a territory. The latest statutory amendments are just another step in Colorado's journey. Colorado's new statute removes the decision of whether to impose the death penalty from the jury and places it with a panel of three judges.[18]

Those who support the death penalty are generally in favor of the statute, as they believe it will result in more death sentences. Death penalty foes generally oppose the statute, fearing that more people will be sentenced to death. Colorado prosecu-

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U.S.C. §§ 3591-3593 (1994); MIL. JUST. CODE, 10 U.S.C. § 852 (1994).

14. These states are: Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. *See* AMNESTY INTERNATIONAL, NEWSLETTER, *supra* note 11, at 13. Massachusetts death penalty statute is still on the books, but was found unconstitutional in *Commonwealth v. Colon-Cruz*, 470 N.E.2d 116 (Mass. 1984). *See* NATIONAL SURVEY OF STATE LAWS 72 (Richard A. Leiter ed., 2d ed. 1997).

15. Callins v. Collins, 510 U.S. 1141, 1144 (1994) (Blackmun, J., dissenting).

16. *Id.* at 1145; *see also* AMNESTY INTERNATIONAL, DEVELOPMENTS, *supra* note 10, at 2 (noting that Blackmun's *Callins* dissent was 7000 words long).

17. Eddings v. Oklahoma, 455 U.S. 104, 112 (1982).

18. *See* COLO. REV. STAT. § 16-11-103(1)(a) (Supp. 1996).

tors, frustrated by juries who refused to impose the death penalty, back the new statute.[19] Supporters of the statute argue that the decision is better placed in the hands of judges, who will apply the law more consistently. Opponents argue that the new system will politicize judges and make their position on the death penalty a "litmus test" for appointment or reelection. They also contend that jurors are the voice of the community and should not be silenced by having this decision taken out of their hands. Finally, opponents argue that judicial sentencing is unconstitutional as it violates a defendant's Sixth Amendment right to a jury trial.

Before the latest statutory amendments, the Colorado Supreme Court upheld Colorado's death penalty law.[20] Nevertheless, due to the controversial move to judicial sentencing, opponents of the death penalty believe they have new grounds to attack Colorado's law as unconstitutional. Death penalty foes win a victory, even if a temporary one, each time Colorado's statute is found unconstitutional.[21]

This comment addresses the constitutionality of Colorado's judicial sentencing statute. It begins in Part II.A with a history of the death penalty in Colorado. Part II.B outlines the basic tenets of the new statute along with its legislative history. Part III provides an overview of different perspectives on the statute from defense attorneys, district attorneys, a victim of violent crime, and a judge. Part IV discusses the death penalty's struggle for constitutionality in the United States Supreme Court and death penalty legislation/sentencing statutes in other states. Finally, Part V evaluates potential federal constitutional chal-

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19. Between 1980 and 1994 over 1000 defendants were charged with first-degree murder in Colorado. *See* Ginny McKibben, *"Death-Penalty Panel" May Delay Justice, More Judges Would Be Tied Up, Legal Observers Say*, DENV. POST, May 21, 1995, at C1. Prosecutors sought the death penalty in thirty-one cases, but Colorado juries returned a death verdict in only seven. *See id.* Three of the seven death verdicts were overturned on appeal. *See id.*

20. *See* People v. Rodriguez, 794 P.2d 965 (Colo. 1990); People v. Davis, 794 P.2d 159 (Colo. 1990).

21. After the United States Supreme Court's 1972 decision in *Furman v. Georgia* struck down existing death penalty statutes, Colorado's death penalty statute has been found unconstitutional two additional times. *See* People v. Young, 814 P.2d 834 (Colo. 1991) (finding the statute unconstitutional as it permitted imposition of the death penalty when aggravators and mitigators weighed equally); People v. District Court, 586 P.2d 31 (Colo. 1978) (determining that the statute did not sufficiently allow the defendant to present mitigating circumstances).

lenges to judicial sentencing in death penalty cases generally, and concludes that Colorado's new statute is constitutional.

## II. THE DEATH PENALTY IN COLORADO

### *A. History of Colorado's Death Penalty*

The death penalty has a long history of public support and acceptance in Colorado. Even as a territory, Colorado had a death penalty. Colorado's initial capital punishment legislation was passed in 1861 when the first territorial legislature met in Denver.[22] The legislation imposed a mandatory death penalty for the crime of murder.[23] Justice was swift: after a conviction by a jury, the guilty party was hanged neither less than fifteen nor more than twenty-five days from the time of sentencing.[24] Early decisions of the Colorado Supreme Court upheld the imposition of the death penalty by the jury.[25]

In 1870, new legislation was passed that explained how the death penalty statute was to be construed.[26] The legislation mitigated the harshness of the death penalty statute. It limited the availability of the death penalty to cases in which the jury found not only that the defendant was guilty of murder, but also that the killing was deliberate, premeditated, or committed during the perpetration (or attempted perpetration) of a felony.[27] The sentence for all other murders was life in prison with or without hard labor.[28] However, in a hotly contested case arising

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22. Denver was the capital of the new territory. *See* John O. Sindall, Capital Punishment in Colorado 2 (1973) (unpublished manuscript, on file with the Colorado Historical Society).

23. *See* Act of Nov. 5, 1861, div. IV, § 20, 1861 Colo. Terr. Sess. Laws 293 (codified at Colo. Terr. Rev. Stat. ch. XXII, § 20 (1868)). "The punishment of any person or persons of [sic] the crime of murder shall be death." *Id.*

24. *See id.* § 179.

25. *See, e.g.*, Jordan v. People, 36 P. 218 (Colo. 1894); Minich v. People, 9 P. 4 (Colo. 1885); Smith v. People, 1 Colo. 121 (1869).

26. *See* Act of Feb. 11, 1870, 1870 Colo. Terr. Sess. Laws 70.

27. *See id.* § 1.

> That section twenty of said chapter twenty-two, of the revised statutes of Colorado territory, shall be hereafter construed so that the death penalty for the crime of murder, shall not be ordered to be inflicted by the courts of the territory, unless the jury trying the case shall, in their verdict of guilty, also indicate that the killing was deliberate or premeditated, or was done in the perpetration or attempt to perpetrate some felony.

*Id.*

28. *See id.* § 2.

from murders that occurred in 1875, the defendants used a loophole in the language of the 1870 legislation to avoid the death penalty by pleading guilty.[29] This led to a revision of the criminal code in 1883. The new statute closed the loophole by adding language that the death penalty could be imposed even if the defendant pled guilty; and for the first time, the statute established degrees of murder.[30] For a conviction of first degree murder, the death penalty was mandatory; for a conviction of second degree murder, the death penalty was not available.[31]

In the meantime, Colorado had become a state in 1876. The state's first legal hanging took place on February 3, 1877, in West Las Animas.[32] Until 1889, all hangings were carried out in public, sometimes with a carnival-like atmosphere.[33] The last person to be legally publicly executed was Andrew Green, who was hanged in Denver.[34] He was executed July 27, 1886, for shooting and killing a streetcar conductor during a robbery

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> Any person hereafter found guilty of the crime of murder, by the verdict of a jury, without any indication in such verdict whether the killing was deliberate or premeditated, or was done in the perpetration or attempt to perpetrate some felony, shall be sentenced to confinement in the penitentiary for and during such person's natural life; which confinement may be with or without hard labor, or both, at the discretion of the court.

*Id.*

29. *See The Italian Murderers*, ROCKY MTN. NEWS, May 2, 1876. Based on the 1870 statute quoted *supra* note 27, it was determined that "a defendent [sic] has it in his own power, by simply entering a plea of guilty, to tie up the hands of the court and commute his punishment from hanging to imprisonment for life." *Id.* The Italian Murders, as they were nicknamed, involved a quadruple murder. On October 21, 1875, four bodies were found in the basement of a house on Lawrence Street in Denver. The motive for the murders was a supposed secret stash of money. Filomeno Gallotti and his associates were arrested for the crime. However, due to the loophole in the statute none of the convicted men received the death penalty. *See* WILLIAM M. KING, GOING TO MEET A MAN 15 (1990). In 1876, Colorado became a state, and the first legislature enacted both the 1868 Colorado Territorial Revised Statute and the 1870 provision construing it. *See* Colo. Gen. Laws ch. XXIV, div. IV, § 615 (1877); Colo. Gen. Laws ch. XXIV, div. XV, §§ 868, 869 (1877).

30. *See* Colo. Gen. Stat. ch. XXV, div. IV, § 709 (1883).

> If any person indicted for murder shall plead guilty to the indictment, the court shall thereupon impanel a jury as in other cases, to whom shall be submitted as the sole issue in the case, the question whether the killing was murder of the first or second degree. The jury in every such case shall find the degree thereof, and the court shall thereupon give sentence accordingly.

*Id.*

31. *See id.* For second degree murder the minimum penalty was ten years in the penitentiary with a maximum penalty of life imprisonment. *See id.*

32. *See* KING, *supra* note 29, at 163 n.3.

33. *See* Sindall, *supra* note 22, at 3.

34. *See* KING, *supra* note 29, at ix.

attempt.[35] The publicity surrounding Andrew Green's sentencing and execution rekindled the debate and drive to prohibit public hangings.[36] The *Denver Tribune-Republican* ("*Tribune*") called for reform the day Andrew Green was hanged: "We desire to say to the many Eastern visitors now in the city that the public hanging which will to-day [sic] disgrace this beautiful town is as repulsive to the majority of the citizens of Denver as it can be to them."[37]

Following the *Tribune's* many editorials calling for reform, a law that was passed in 1889 provided that executions not be carried out in public view.[38] It required that all death sentences pronounced in the state be carried out by the warden at the state penitentiary.[39] Details of the execution, including the time, were kept secret; the only information released was that the convict was executed.[40] In conformance with the new law, an execution building was constructed at the state penitentiary in Cañon City during the summer of 1889.[41] Over the next six years, there were twelve hangings in the new execution building; all those executed were men convicted of first degree murder.[42]

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35. *See* Sindall, *supra* note 22, at 3; *Editorial*, DENV. TRIB.-REPUBLICAN, July 27, 1886, at 4. The *Denver Tribune-Republican* was a daily, morning newspaper. *See id.*

36. *See* KING, *supra* note 29, at 92. The drive to prohibit public hangings was originated in 1885 by Representative Lafe Pence of Ouray after the execution of Margaret Cuddigan for the murder of her daughter. *See id.*

37. *Id.* at 142 (quoting *Editorial*, DENV. TRIB.-REPUBLICAN, July 27, 1886, at 4).

38. *See* Act of Apr. 19, 1889, § 1, 1889 Colo. Sess. Laws 118. "The commissioners of the State Penitentiary, at the expense of the State of Colorado, shall provide a suitable room or place enclosed from public view . . . ." *Id.*

39. *See id.* "[T]he punishment of death must, in each and every case of death sentence pronounced in this State, be inflicted by the warden of the said State Penitentiary . . . ." *Id.*

40. *See* Act of Apr. 19, 1889, § 3, 1889 Colo. Sess. Laws 119.

> The time fixed by said warden for said executions shall be by him kept secret and in no manner divulged, except privately to the persons by him invited to be present as aforesaid; and such persons so invited shall not divulge such invitation to any person or persons whomsoever, nor in any manner disclose the time of such execution. All persons present at such execution shall keep whatever may transpire thereat secret and inviolate, save and except the facts certified to by them as hereinafter provided. No account of the details of any such execution, beyond the statement of the fact that such convict was on the day in question duly executed according to law at the State Penitentiary, shall in any manner be published in this State.

*Id.*

41. The execution building was two stories, had 1680 square feet, and had a high tin roof; it contained six large cells, an execution room, and two other rooms for attendants. *See* Sindall, *supra* note 22, at 5.

42. *See id.* at 7, 19-20. Vigilante hangings also took place periodically in the state. *See id.* at 7.

Later, in 1897, death penalty foes won a victory when Colorado passed a new law abolishing capital punishment.[43] However, this victory was short-lived, lasting only four years.[44] Two murders that led to lynchings raised allegations of a crime wave, and the public and press demanded that the death penalty be restored.[45] The resulting controversy placed the death penalty debate at the top of the agenda at the next session of the State Legislature, which reinstated capital punishment in 1901.[46] This legislation differed from previous laws. For a conviction of first degree murder, the jury was given a choice between imposing a sentence of death or life imprisonment with hard labor.[47] Also, if an individual was under eighteen years old at the time of conviction, or was convicted based on circumstantial evidence only, a death sentence could not be imposed.[48]

In 1933, an "emergency" situation was declared in Colorado because most of the executions by hanging, instead of breaking the condemned's neck, were in fact resulting in strangulation.[49]

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43. *See* Act of Mar. 29, 1897, § 1, 1897 Colo. Sess. Laws 135. "Capital punishment is hereby abolished in this State; and hereafter every person convicted of murder in the first degree shall suffer imprisonment for life at hard labor in the Penitentiary." *Id.*

44. *See* Hugo Adam Bedau, *Background and Developments, in* THE DEATH PENALTY IN AMERICA 23 (Hugo Adam Bedau ed. 3d prtg. 1982), *reprinted in* CAPITAL PUNISHMENT 18 (James A. McCafferty ed., 1972).

45. *See* Sindall, *supra* note 22, at 7-9. In the first incident, occurring in January 1900, Thomas Reynolds killed a guard when he escaped from the Cañon City Penitentiary. After Reynolds was apprehended, he was returned to Cañon City where 200 men overpowered the guards and promptly hung Reynolds from the nearest telephone pole. The second incident occurred in November of the same year. Louise Frost, a twelve-year-old, was attacked in the family buggy outside Limon, Colorado. She was pulled from the buggy, badly beaten, sexually assaulted, and left by the side of the road; although she was found alive, she died a short time later. The alleged perpetrator was John Porter, a sixteen-year-old who was apprehended in Denver and confessed to the crime. Unfortunately, the *Rocky Mountain News* reported the time that Porter was to arrive in Limon for trial, and a crowd of between 200 and 300 were waiting. The crowd tied Porter to a railroad tie, gathered wood and burned him at the stake. Louise's father lit the fire himself. *See id.*

46. *See id.* at 9; Act of May 2, 1901, 1901 Colo. Sess. Laws 153.

47. *See* Act of May 2, 1901, § 2, 1901 Colo. Sess. Laws 153, 154. "[I]f murder of the first degree, the jury shall in its verdict fix the penalty to be suffered by the person so convicted, either at imprisonment for life at hard labor in the penitentiary, or at death; And the court shall thereupon give sentence accordingly." *Id.*

48. *See id.* at 154. "Provided, [t]hat no person shall suffer the death penalty who, at the time of conviction, was under the age of eighteen (18) years; nor shall any person suffer the death penalty who shall have been convicted on circumstantial evidence alone." *Id.*

49. *See* Sindall, *supra* note 22, at 11 (implying that death by breaking the neck

In March 1933, the Colorado General Assembly changed its capital punishment laws, and Colorado became the second state in the nation to adopt lethal gas as its method of execution.[50] The first person executed by lethal gas in Colorado was William Cody Keely on June 22, 1934.[51]

From November 1890 to August 1964 there were a total of seventy-six executions at the state penitentiary; forty-five men were hanged, and thirty-one men were executed by lethal gas.[52] Although during that time there were laws providing for the death penalty in a variety of crimes, all seventy-six men executed at Cañon City had been convicted of murder.[53]

The next challenge to Colorado's implementation of the death penalty arose in 1965. On May 6, 1965, the State Legislature passed an act abolishing the death penalty in Colorado, effective January 1, 1967.[54] This act was subject to a vote of the citizens of Colorado at the next general election under the provisions of the referendum.[55] In 1966, Colorado's citizens overwhelmingly retained capital punishment by a vote of 389,707 to 193,245.[56] Following this vote, the seventy-seventh execution at Cañon City,

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is considered more humane than death by strangulation). From 1890 to 1933 in forty-four hangings the felon's neck only broke four times while in the other forty instances death was by strangulation. *See* KING, *supra* note 29, at 92.

50. *See* Sindall, *supra* note 22, at 10, 12. Roy Best, the warden of the state penitentiary at the time, designed and supervised construction of the gas chamber. The gas chamber contained three seats and during its twenty-two years in use was nicknamed "Roy's Penthouse." *See id.* at 12.

51. *See id.* at 13.

52. *See id.* at 19-20; Robert R. Maiden, Legal Executions in Various Colorado Counties Prior to 1989, 5 (unpublished paper on file at the Colorado Historical Society).

53. *See* Sindall, *supra* note 22, at 19-20; Maiden, *supra* note 52, at 5.

54. *See* Act of May 6, 1965, § 1, 1965 Colo. Sess. Laws 507.

> After January 1, 1967, the maximum penalty which shall be imposed for any criminal offense committed within this state after said date shall be life imprisonment in the state penitentiary, and any laws of this state in conflict with this act are hereby repealed insofar as there exists such a conflict with respect to such crimes.

*Id.*

55. *See id.* § 3.

> This act shall be submitted to a vote of the qualified electors of the state of Colorado at the next biennial regular general election, for their approval or rejection, under the provisions of the referendum. . . . Each elector . . . shall cast his vote as provided by law either 'Yes' or 'No' on the proposition: 'Shall capital punishment be abolished?'.

*Id.*

56. *See* William O. Hochkammer, Jr., *The Capital Punishment Controversy*, 60 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 360, 364 (1969), *reprinted in* CAPITAL PUNISHMENT 73 (James A. McCafferty ed., 1973).

the last execution to date in Colorado, took place on June 2, 1967, when Luis Jose Monge was executed for murder.[57]

After the United States Supreme Court's 1972 decision, which effectively struck down existing death penalty statutes as unconstitutional,[58] Colorado citizens voted on whether capital punishment was appropriate.[59] Capital punishment was approved once again by a large margin of the voters, and the legislature moved quickly to adopt a new death penalty statute in 1974.[60] Again, following the established tradition, the capital punishment statute provided for sentencing by a jury unless a jury trial was waived.[61]

From 1974 to date, there has been a continuing struggle in Colorado to enact a death penalty statute that will withstand constitutional scrutiny. In 1978, the Colorado Supreme Court held that the state's 1974 death penalty statute was unconstitutional.[62] The statute did not provide for the jury "to hear all the relevant facts relating to the character and record of the individual offender or all the circumstances of the particular case."[63] Determined to have a death penalty statute, the legislature amended it again in 1979, attempting to cure the defects.[64] Over the next several years the statute was amended again several times and was upheld despite a variety of attacks on its constitutionality.[65] However, in 1991, based on statutory amendments

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57. *See* James A. McCafferty, *Attack on the Death Penalty*, *in* CAPITAL PUNISHMENT 226 (James A. McCafferty ed., 1973). Luis Jose Monge was also the last person executed in the United States until 1977. *See* VICTOR L. STREIB, DEATH PENALTY FOR JUVENILES 25 (1987).

58. *See* Furman v. Georgia, 408 U.S. 238 (1972).

59. *See* People v. Davis, 794 P.2d 159, 171 (Colo. 1990) (noting that Colorado voted in 1974 to reinstate the death penalty).

60. *See* Act of Mar. 19, 1974, ch. 52, § 4, 1974 Colo. Sess. Laws 251, 252 (codified as amended at COLO. REV. STAT. § 16-11-103 (Supp. 1975)).

61. *See id.*

62. *See* People v. District Court, 586 P.2d 31 (Colo. 1978).

63. *Id.* at 34.

64. *See* Act of Aug. 7, 1979, ch. 158, § 1, 1979 Colo. Sess. Laws 673, 673 (codified as amended at COLO. REV. STAT. § 16-11-103 (1978 & Supp. 1979)).

65. The statute was amended in 1984, 1985, and 1987. *See* Act of Apr. 12, 1984, ch. 120, §§ 1-8, 1984 Colo. Sess. Laws 491-96; Act of June 18, 1985, ch. 145, § 8, 1985 Colo. Sess. Laws 647, 653; Act of June 6, 1985, ch. 146, § 3, 1985 Colo. Sess. Laws 655, 657; Act of Apr. 30, 1987, ch. 120, § 1, 1987 Colo. Sess. Laws 625. The Colorado Supreme Court held the death penalty was not per se unconstitutional under the Colorado Constitution and upheld the statute in the face of other constitutional challenges. *See* People v. Davis, 794 P.2d 159 (Colo. 1990).

that occurred in 1988,[66] the Colorado Supreme Court again declared the sentencing statute unconstitutional.[67] As a result, the death penalty could not be imposed for crimes committed on or after July 1, 1988, and prior to September 20, 1991.[68]

Moving swiftly, on September 20, 1991, the General Assembly repealed and reenacted the death penalty sentencing statute with amendments in another effort to conform the legislation to constitutional guidelines.[69] Moreover, in order that there be no hiatus in the imposition of the death penalty, the General Assembly also passed a provision to impose the death penalty for the period of July 1, 1988, to September 20, 1991.[70]

Additionally, there was a change in how the death penalty was to be administered. In 1988, Colorado legislators passed a statute changing the method of execution from lethal gas to lethal injection.[71] At first the change was only to apply to offenses committed on or after July 1, 1988, but in 1993 the statute was updated so that lethal injection became the method of execution in Colorado regardless of when the crime had been committed.[72]

### *B. Colorado's New Death Penalty Sentencing Statute*

Colorado's newest death penalty legislation was passed on June 5, 1995. Until that time, the jury had performed the sentencing function in capital cases. Current Colorado law

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66. Act of Apr. 11, 1988, ch. 114, §§ 1-3, 1988 Colo. Sess. Laws 673, 673-75 (codified as amended at COLO. REV. STAT. § 16-11-103 (Supp. 1988)).

67. *See* People v. Young, 814 P.2d 834, 846 (Colo. 1991) (determining that the 1988 sentencing procedure was facially unconstitutional because it permitted the imposition of the death penalty when aggravating and mitigating factors were equal).

68. *See* People v. Aguayo, 840 P.2d 336, 340 (Colo. 1992) (Vollack, J., dissenting).

69. *See* Act of Sept. 20, 1991, ch. 4, § 1, 1991, 2d Ex. Sess., Colo. Sess. Laws 8, 8-13 (codified as amended at COLO. REV. STAT. § 16-11-103 (Supp. 1992)). See *infra* Part IV.A for constitutional guidelines.

70. *See* Act of Oct. 11, 1991, ch. 6, § 1, 1991, 2d Ex. Sess., Colo. Sess. Laws 16, 16-22 (codified at COLO. REV. STAT. § 16-11-401 (Supp. 1992)).

71. *See* Act of May 29, 1988, ch. 113, § 1, 1988 Colo. Sess. Laws 671, 671 (codified as amended at COLO. REV. STAT. § 16-11-401 (Supp. 1988)).

72. *See* COLO. REV. STAT. § 16-11-401 (Supp. 1996). Executions will take place at the new Colorado State Penitentiary, five miles east of Cañon City, instead of the old Territorial Correctional Facility. Two prison employees will inject chemicals into intravenous lines attached to each of the inmate's arms. One employee will be injecting a placebo so neither will know who injected the combination of three lethal drugs. *See* Dick Foster, *Prison Preparing for First Execution Months in Advance, One of State's 3 Death Row Inmates Might Exhaust His Appeals by 1997*, ROCKY MTN. NEWS, Feb. 18, 1995, at 6A.

provides that the death penalty is a possible sentence if a defendant is convicted of a class one felony.[73] Although there has not been an execution in Colorado since 1967, there are currently five inmates on death row in Colorado, sentenced by juries to death.[74]

Colorado Senate Bill 54 became effective July 1, 1995, and applies to offenses committed on or after that date.[75] This law, sponsored by Senator Ray Powers and Representative Jeanne Adkins, concerns the imposition of the death penalty. Basically, the new law amended section 16-11-103 of the Colorado Revised Statutes to provide for judicial sentencing in a death penalty case instead of sentencing by a jury.

### 1. Basic Tenets of the Statute's Provision for Judicial Sentencing

Under the new statute, when a defendant is convicted of a class one felony, a panel of three judges will conduct a separate sentencing hearing to determine whether the defendant should be sentenced to death or life in prison.[76] The panel will be composed of the judge who presided at the trial or before whom a guilty plea was entered, and two additional district court judges designated by the Chief Justice of the Colorado Supreme Court.[77] The Chief

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73. *See* COLO. REV. STAT. § 16-11-103(1)(a) (Supp. 1996). "Upon conviction of guilt of a defendant of a class 1 felony . . . [there shall be] a separate sentencing hearing to determine whether the defendant should be sentenced to death or life imprisonment . . . ." *Id.*

74. The five inmates currently on death row in Colorado are Frank Rodriguez, Gary Lee Davis, Ronald Lee White, Robert Harlan, and Nathan Dunlap. *See* Ginny McKibben, *It's Death for Dunlap*, DENV. POST, Mar. 8, 1996, at 1A.

75. *See* Act of June 5, 1995, ch. 244, § 5, 1995 Colo. Sess. Laws 1290, 1294 (codified as amended at COLO. REV. STAT. § 16-11-103 (Supp. 1995)).

76. *See* COLO. REV. STAT. § 16-11-103(1)(a) (Supp. 1996). "Upon conviction of guilt of a defendant of a class 1 felony, a panel of three judges, as soon as practicable, shall conduct a separate sentencing hearing to determine whether the defendant should be sentenced to death or life imprisonment . . . ." *Id.* Defendants who are under the age of 18 when the crime is committed, or are mentally retarded, will be sentenced to life imprisonment. *See id.*

77. *See id.* § 16-11-103(1)(a.5)(I).

> The panel of judges that conducts the sentencing hearing shall consist of the judge who presided at the trial or before whom the guilty plea was entered, or a replacement for said judge in the event he or she dies, resigns, is incapacitated, or is otherwise disqualified, and two additional district court judges designated by the chief justice of the Colorado supreme court [sic]. The chief justice may select the two additional district court judges, and any necessary replacement for the trial judge,

Justice may also replace the judge who presided at the trial in the event he or she dies, resigns, is incapacitated, or is otherwise disqualified.[78] According to the statute, the judges can be selected from any judicial district in the state. It is recommended, however, that they be selected from the judicial district where the case was filed or from adjoining districts.[79] The judges selected for the panel must be regularly sitting judges.[80] If necessary, however, a retired justice of the Colorado Supreme Court or a retired judge can be selected for the panel.[81] At the sentencing hearing, the trial judge is to be the presiding judge. If the trial judge is replaced, the judges appointed to the panel will choose a presiding judge from among themselves.[82]

The sentencing hearing is to be held as soon as possible after the trial, and not later than sixty days after the trial verdict.[83] The three-judge panel will consider the certified transcripts of the trial as well as the evidence presented by the parties at the sentencing hearing.[84] After hearing all the arguments and evidence from both the defendant and the prosecuting attorney, the panel of judges will determine whether to impose a death sentence. The decision to impose the death sentence must be

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> from any judicial district in the state but is encouraged to select from the judicial district in which the case was filed or from adjoining judicial districts. In selecting the district court judges for the panel, the chief justice shall select only those district court judges who are regularly sitting judges; except that the chief justice, pursuant to section 5 (3) of article VI of the state constitution, may select a retired justice of the supreme court or a retired judge as one of the additional judges for the panel.

*Id.*

78. *See id.*

79. *See id.*

80. *See id.*

81. *See id.*

82. *See id.* § 16-11-103(1)(a.5)(III). "The trial judge shall be the presiding judge for purposes of the sentencing hearing. If a replacement judge has been appointed for the trial judge, the district court judges appointed to the panel shall choose a presiding judge from among themselves." *Id.*

83. *See id.* § 16-11-103(1)(a.7).

> At the sentencing hearing, in addition to the evidence presented by the parties, the three-judge panel shall consider the certified transcripts of the trial. The sentencing hearing shall be held as soon as practicable following the trial, but not later than sixty days after the trial verdict is returned, unless for good cause shown.

*Id.*

84. *See id.*

unanimous and find at least one aggravating factor which is not outweighed by mitigating factors.[85]

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85. *See id.* § 16-11-103(2)(b)(II)(A)(B).

> The panel of judges shall not impose a death sentence unless it unanimously finds and specifies in writing that: (A) At least one aggravating factor has been proved; and (B) There are insufficient mitigating factors to outweigh the aggravating factor or factors that were proved.

*Id.*

> The statute lists the following as aggravating factors:
> (a) 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; or
> (b) 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 in section 16-11-309; or
> (c) The defendant intentionally killed any of the following persons while such person was engaged in the course of the performance of such person's official duties, and the defendant knew or reasonably should have known that such victim was such a person engaged in the performance of such person's official duties, or the victim was intentionally killed in retaliation for the performance of the victim's official duties:
> (I) A peace officer or former peace officer as defined in section 18-1-901 (3)(l), C.R.S.; or
> (II) A firefighter as defined in section 24-33.5-1202 (4), C.R.S.; or
> (III) A judge, referee, or former judge or referee of any court of record in the state or federal system or in any other state court system or a judge or former judge in any municipal court in this state or in any other state. For purposes of this subparagraph (III), the term "referee" shall include a hearing officer or any other officer who exercises judicial functions.
> (IV) An elected state, county, or municipal official; or
> (V) A federal law enforcement officer or agent or former federal law enforcement officer or agent; or
> (d) The defendant intentionally killed a person kidnapped or being held as a hostage by the defendant or by anyone associated with the defendant; or
> (e) The defendant has been a party to an agreement to kill another person in furtherance of which a person has been intentionally killed; or
> (f) The defendant committed the offense while lying in wait, from ambush, or by use of an explosive or incendiary device. As used in this paragraph (f), "explosive or incendiary device" means:
> (I) Dynamite and all other forms of high explosives; or
> (II) Any explosive bomb, grenade, missile, or similar device; or
> (III) Any incendiary bomb or grenade, fire bomb, or similar device, including any device which consists of or includes a breakable container including a flammable liquid or compound, and a wick composed of any material which, when ignited, is capable of igniting such flammable liquid or compound, and can be carried or thrown by one individual acting alone.
> (g) 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; or
> (h) The class 1 felony was committed for pecuniary gain; or

If the judges cannot unanimously agree on a sentence, they must make a record of each judge's position and then sentence the defendant to life imprisonment.[86] The panel of judges must support its sentence, whether it is the death penalty or life imprisonment, by specific written findings.[87] These amendments,

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(i) 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; or
(j) The defendant committed the offense in an especially heinous, cruel, or depraved manner; or
(k) 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.
(l) 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; or
(m) The defendant intentionally killed a child who has not yet attained twelve years of age.

*Id.* § 16-11-103(5).

The statute lists the following as mitigating factors:

(a) The age of the defendant at the time of the crime; or
(b) 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 significantly impaired, but not so impaired as to constitute a defense to prosecution; or
(c) The defendant was under unusual and substantial duress, although not such duress as to constitute a defense to prosecution; or
(d) 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; or
(e) 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; or
(f) The emotional state of the defendant at the time the crime was committed; or
(g) The absence of any significant prior conviction; or
(h) The extent of the defendant's cooperation with law enforcement officers or agencies and with the office of the prosecuting district attorney; or
(i) The influence of drugs or alcohol; or
(j) The good faith, although mistaken, belief by the defendant that circumstances existed which constituted a moral justification for the defendant's conduct; or
(k) The defendant is not a continuing threat to society; or
(l) Any other evidence which in the court's opinion bears on the question of mitigation.

*Id.* § 16-11-103(4).

86. *See id.* § 16-11-103(2)(d). "If the panel of judges cannot unanimously agree on a sentence, it shall make a record of each judge's position and shall then sentence the defendant to life imprisonment." *Id.*

87. *See id.* § 16-11-103(2)(c). "The sentence of the panel of judges, whether to death or to life in prison, shall be supported by specific written findings of fact based

effective July 1, 1995, establish judicial sentencing in Colorado death penalty cases and eliminate the jury's role in the sentencing phase.

2. Designation of Judges

The Supreme Court of Colorado has issued a directive concerning how the district judges for the sentencing hearing panel are to be chosen.[88] The districts of the state are divided into four regions.[89] District court judges sitting in the region where the charge was filed are eligible to be chosen for the panel. "[T]wo district court judges for the panel and any necessary replacement for the trial judge will be designated by the Chief Justice from a computer-based random number generator."[90] When a district court judge is designated to serve on a panel "which conducts a sentencing hearing, that judge's name shall be eliminated from the random selection for the remainder of that calendar year."[91]

3. Legislative History

The Colorado Senate and House Judiciary Committees met in separate hearings about the proposed amendments and heard testimony from a wide range of sources. The committees considered many questions surrounding the proposed amendments, including examining the use of judicial sentencing in death penalty cases by other states. The four main topics discussed at both hearings were: (1) the purpose of the statute; (2) judges versus juries making sentencing decisions; (3) whether the statute would politicize judges; and (4) the probable impact of the statute on the appeals process.[92] In introducing the bill to the

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upon the circumstances as set forth in subsections (4) and (5) of this section and upon the records of the trial and the sentencing hearing." *Id.*

88. *See* Chief Justice Directive 95-04, concerning Designation of Judges in Death Penalty Cases, Colorado Supreme Court, Nov. 17, 1995.

89. *See id.* Region I consists of four districts and has a total of 45 judges. Region II consists of four districts and has a total of 19 judges. Region III consists of six districts and has a total of 27 judges. Region IV consists of eight districts and has a total of 20 judges. The regions represent geographic divisions that can generally be described as western, northeastern, east central, and southeastern. *See id.*

90. *Id.*

91. *Id.*

92. There is no written transcript of the legislative history in Colorado. However, audiotapes of the hearings before both the Senate and House Judiciary

House Judiciary Committee, Representative Jeanne Adkins briefly summarized the history of the legislation.[93] Initially, the bill began in the Senate as a proposal to adopt a statute like Arizona's, which mandates sentencing by the trial judge in capital cases.[94] However, Governor Roy Romer stated that he did not believe death penalty sentencing by one judge was appropriate and that he would veto the bill.[95] Therefore, the three-judge panel, adopted as a compromise position, is similar to Nebraska's death penalty sentencing scheme.[96] In comments to the Senate Judiciary Committee, Senator Ray Powers remarked that "[judicial sentencing] is now being used in several states, has passed [U.S. Supreme Court] muster and is a process that is working out very effectively."[97]

### *a. Purpose of the Statute*

The stated purpose for amending the state's death penalty statute is to "ensure uniformity in the application of the law."[98] Proponents of the statute contend that they are simply responding to the "frustration of the people in the state of Colorado who believe that there should be a *workable* death penalty."[99] Along these lines, it was stated that "somewhere between eighty percent and ninety percent [of the citizens in Colorado] are of the opinion that the death penalty should be imposed . . . and that we need a stricter, more rigid death penalty."[100] Judicial sentencing is proposed as a way of adding consistency to the current process, and avoiding the "offensive" situation of eleven-to-one jury decisions where, "one juror can in fact prevent the death penalty from being imposed."[101]

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Committees were audited for this section. *See A Bill for an Act Concerning Imposition of the Death Penalty, Hearings on S.B. 54,* Colorado Legislature (audiotapes Jan. 16, 23, Mar. 2, 1995) (codified as amended at COLO. REV. STAT. § 16-11-103 (Supp. 1995)) [hereinafter *Hearings on S.B. 54*].

93. *See Hearings on S.B. 54, supra* note 92, at Mar. 2, 1995.

94. *See id.*

95. *See id.*

96. *See* NEB. REV. STAT. § 29-2520 (1995).

97. *Hearings on S.B. 54, supra* note 92, at Jan. 16, 1995.

98. *Id.* (statement of Bob Grant, District Attorney for Adams County and Chairman of District Attorneys' Council Capital Litigation Subcommittee).

99. *Id.* (emphasis added).

100. *Id.* (statement of Sen. Ray Powers).

101. *Id.* For example, the jury vote was eleven-to-one in favor of the death

Consistency in death penalty sentencing is certainly a goal that is both desirable and one that is mandated by the United States Supreme Court.[102] However, proponents believe that achieving the goal of consistency will ultimately result in more death penalty sentences. This was the understanding of at least one senator, who was "astounded" that the proponents seemed unwilling to address this issue directly.[103]

### *b. Sentencing Decisions—Juries vs. Judges*

At the committee hearings, the main argument made for judicial sentencing in death penalty cases is that jurors are not prepared to make this kind of decision.[104] Judges, on the other hand, are "people who are in fact dealing with these sentencing decisions every day of their lives . . . who understand the law and the justice system."[105] "Judges know what cases have gone before them and they can put it in perspective."[106] Conversely, jurors might be overwhelmed by the gravity of the situation, confused by the jury instructions, too emotional, or just unwilling, no matter what the circumstances, to impose the death penalty.[107] Judges, it was stressed, are professionals who are familiar with the law and bound to follow and uphold it.[108] They will be more rational and less emotional.[109] It was also asserted that "this kind of reform will eliminate the technical complexity of selecting jurors" and "reduce the vast expenditure of system resources."[110] Judicial sentencing is seen as a return to the historical roots of

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penalty in the sentencing of Allen Thomas Jr. in Adams County. *See* Ginny McKibben, *Jurors often Balk at Death Penalty*, DENV. POST, Mar. 14, 1994, at 1A.

102. *See* Furman v. Georgia, 408 U.S. 238 (1972).

103. *Hearings on S.B. 54, supra* note 92, at Jan. 16, 1995 (testimony of Sen. Mares). Senator Mares asked, "Why don't we then just say that we want more death penalties . . . ?" *Id.*

104. *See Hearings on S.B. 54, supra* note 92.

105. *Id.* at Jan. 16, 1995 (statement of Bob Grant, District Attorney of Adams County).

106. *Id.* (statement of Paul McMurdie, Chief Counsel of Criminal Appeals Section of Arizona Attorney General's Office).

107. *See Hearings on S.B. 54, supra* note 92, *passim.*

108. *See id.*

109. *See id.*

110. *Hearings on S.B. 54, supra* note 92, at Jan. 16, 1995 (statement of Bob Grant, District Attorney of Adams County).

this country where for "almost 200 years, judges . . . [were] the basis for sentencing in [most] criminal cases."[111]

### c. *Potential Politicization of Judges*

Opponents of the judicial sentencing statute contend that it will politicize the process of choosing judges, whether they are elected or appointed. The fear is that a judge's position on the death penalty will become a "litmus test" in the election or appointment process. Testimony at the committee hearings on the issue of the politicization of judges centered mainly around Arizona's experience with judicial sentencing. In Arizona, there are two systems for appointing judges to the bench.[112] In two counties, Pima and Maricopa, the governor is given recommendations and appoints judges, whereas in the other counties judges are elected.[113] Several judges going through the appointment process stated that the governor never asked their position on the death penalty.[114] Likewise, elected judges said it had not come up as a campaign issue in the election process.[115] This seems to indicate that judges will not be politicized.

The fear of politicizing the judicial branch is further minimized because the Colorado statute requires the judges to make written findings that will inform the public of the panel's reasoning.[116] The written findings requirement worked in Arizona in a case where six Buddhist priests were murdered and the judge imposed a life sentence on the defendant instead of the death penalty.[117] His findings were published in a newspaper and there were no apparent political ramifications from his refusal to impose the death penalty.[118]

On the other hand, the sponsor of the judicial sentencing bill believes political ramifications will result. He assumes the death penalty "is a question that comes up in appointing judges," and

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111. *Id.* (statement of Paul McMurdie, Chief Counsel of the Criminal Appeals Section of the Arizona Attorney General's Office).

112. *See id.*

113. *See id.*

114. *See id.*

115. *See id.*

116. *See Hearings on S.B. 54, supra* note 92, at Mar. 2, 1995 (testimony of Katherine Clark, staff attorney for Colorado District Attorneys' Council).

117. *See id.*

118. *See id.*

"if they have a liberal bias against the death penalty, maybe they should not be retained."[119]

### d. *Probable Impact on Appeals*

Judicial sentencing is a "potential way to shorten the appellate process without affecting reliability, because there will be less issues and the records will be smaller."[120] Again, Arizona provides an example. The typical reversal rate in capital cases in states without judicial sentencing is approximately fifty percent, while in Arizona the reversal rate is approximately twenty-five percent.[121] This is attributed to the fact that, due to statutory requirements, there is a better appellate record and fewer technical grounds available for reversal.[122] However, the Arizona statute does not appear to affect the number of appeals, the length of time it takes to go through the appellate process, or the number of death penalty cases filed.[123] The length of time the appeals process takes is still approximately ten years, but the case records are much smaller, due most likely to fewer grounds for appeal.[124] Because the new Colorado statute provides for judicial sentencing like Arizona's, Colorado should expect similar results.

## III. PERSPECTIVES ON THE STATUTE

### A. *Public Defender and Defense Attorney*

A nationally known death penalty opponent predicts that the number of death penalty cases in Colorado will skyrocket under the new judicial sentencing scheme.[125] "Once they see it is like

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119. *Hearings on S.B. 54, supra* note 92, at Jan. 16, 1995 (statement of Sen. Ray Powers).

120. *Hearings on S.B. 54, supra* note 92, at Mar. 2, 1995 (statement of John Dailey, Deputy Attorney General).

121. *See Hearings on S.B. 54, supra* note 92, at Jan. 16, 1995 (testimony of Paul McMurdie, Chief Counsel of the Criminal Appeals Section of the Arizona Attorney General's Office).

122. *See id.*

123. The Arizona statute requires specific findings of aggravating and mitigating factors. *See* ARIZ. REV. STAT. ANN. § 13-703(E)-(G) (West 1989 & Supp. 1995).

124. *See id.*

125. *See* McKibben, *supra* note 19, at C1.

getting candy from a baby to get a death verdict, prosecutors will crank up the death machine."[126]

Another concern of both public defenders and defense attorneys is that the statute will intensify public scrutiny and pressure on judges. "Judges up for retention are going to be conscious about what the public wants in a case if they want to stay a judge."[127] "It means a judge is going to be hard-pressed to give a life sentence . . . [j]udges are not elected for giving breaks to convicted killers."[128]

On the other hand, one criminal defense attorney sees a bright side to the changes in the death penalty statute. "The legislature has given us on the defense a wonderful tool by goofing around with the law for political expediency. They have given us new life to attack the [death penalty] law as unconstitutional."[129]

### *B. District Attorneys*

The twenty-two District Attorneys in Colorado are unanimous in their support of the change from jury sentencing to judicial sentencing in death penalty cases.[130] One district attorney acknowledges that getting a death sentence should be difficult; however, he asserts that in Colorado it is not just difficult, but next to impossible.[131] "[O]ur experience in Denver at least, is that some juror or jurors . . . are not just awed by [the decision], they're overwhelmed by it."[132] Another district attorney says that judicial sentencing will be a "guarantee that the law will be followed" and that there will be a "rational decision-making process."[133] In addition, it will eliminate "potential technical reversals and problems inherent in jury instructions."[134]

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126. *Id.* (quoting attorney David Lane).

127. *Id.* (quoting David Vela, Colorado State Public Defender).

128. *Id.* (quoting attorney David Lane).

129. *Id.* (quoting criminal defense attorney Craig Truman).

130. *See Hearings on S.B. 54, supra* note 92, at Jan. 16, 1995 (testimony of Bob Grant, District Attorney for Adams County).

131. *See id.* (testimony of Bill Ritter, District Attorney for Denver's Second Judicial District).

132. *Id.*

133. *Id.* (statement of Bob Grant, District Attorney for Adams County).

134. *Id.*

### C. *A Victim of Violent Crime*

Steven Curtis, a victim of violent crime, has been active in the death penalty debate.[135] His roommate Frank Magnuson was to testify against Roger "Roy" Young, implicating him in a burglary.[136] Roy's brother Joseph Young and Kevin Fears broke into Curtis' home to kill Magnuson in order to prevent him from testifying. After trying to force Curtis and a friend Dan Smith to disclose Frank's location, they fatally shot Smith in the back of the head. Curtis testified he was shot in the back of the head twice, but miraculously, survived and remained conscious.[137] Young and Fears ransacked the house to make it look like a burglary, and as they were leaving, Magnuson returned.[138] Young and Fears shot and killed Magnuson in the backyard and left, believing all three men were dead.[139]

Kevin Fears was convicted of first degree murder, but during the sentencing phase of the trial, the defense presented seventy-three mitigating factors to the jury to convince them the death penalty was inappropriate.[140] Curtis felt that this confused the jury, and that a trial judge would "know the difference between fact and fiction and Fears would be on death row."[141] In this case, the jury was deadlocked six-to-six in the sentencing phase, and the judge imposed life in prison.[142]

Despite the horrifying facts of this case, half the jury found that the death penalty was unsuitable. Therefore, it is arguable that a panel of three judges would have reached the same decision as this jury. This result is not as compelling as the cases where the jury votes eleven-to-one in favor of the death penalty,

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135. Curtis has testified numerous times in trials and hearings and is an active proponent of an enforceable death penalty. *See* Greg Lopez, *35 Minutes of Horror Lives On*, ROCKY MTN. NEWS, Apr. 3, 1994, at 6A.

136. *See id.*; *Hearings on S.B. 54, supra* note 92, at Jan. 23, 1995 (testimony of Steven Curtis).

137. *See Hearings on S.B. 54, supra* note 92, at Jan. 23, 1995 (testimony of Steven Curtis).

138. *See id.*

139. *See id.*

140. *See id.* One of the mitigating factors that the jury considered was "the supposed alcohol use of Fears' mother during her pregnancy with the gunman." *See* Jennifer Gavin, *Bill to Let Judges Levy Death Penalty Gains Panel Unswayed by Gov. Romer*, DENV. POST, Jan. 24, 1995, at B1.

141. *Hearings on S.B. 54, supra* note 92, at Jan. 23, 1995 (statement of Steven Curtis).

142. *See Hearings on S.B. 54, supra* note 92, at Jan. 23, 1995.

with one holdout juror thwarting the will of the majority.[143] However, as it only takes one juror to prevent the imposition of the death penalty, Curtis feels that what we "in effect have is a jury of one."[144]

### *D. Judge*

Denver District Court Judge Lynne Hufnagel believes that Colorado's new statute will be difficult to follow as a practical matter.[145] Since the new procedure requires three judges, it may be expensive, time-consuming, and cumbersome. Two of the judges on the panel will have to read the trial transcript; this will take substantial time, perhaps causing a backlog in the criminal court dockets.[146] Judge Hufnagel also disagrees with the contention that sentencing in a death penalty case is a highly technical decision and therefore should be left to the judiciary. In fact, it shows a lack of respect for jurors to suggest that they are unable to do what we ask them. If jurors do not impose the death penalty, it is not because of a lack of understanding.[147]

Again, Judge Hufnagel expressed a concern that the statute has the potential for "politicizing the appointment of judges in terms of whether they favor the death penalty or not."[148] Since judges are sworn to uphold the law, their personal position on the death penalty should not be at issue.[149]

This section illustrates how individuals involved in or affected by the legal system differ in their views on Colorado's new death penalty sentencing statute. The Colorado District Attorneys and a victim of violent crime see judicial sentencing as a move to sentencing decisions that will be guided by the law and not emotion. On the other hand, a public defender and a criminal defense attorney fear that the statute will tend to politicize the selection of judges. Judge Lynne Hufnagel has the same concern, but she also criticizes the statute as causing practical difficulties for judges trying to follow it. Only time and the application of the

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143. *See* McKibben, *supra* note 101, at 1A.
144. *Id.*
145. *See* McKibben, *supra* note 19, at C1 (comments by Judge Lynne Hufnagel).
146. *See id.*
147. *See id.*
148. *Id.* (quoting Judge Lynne Hufnagel).
149. *See id.* (comments by Judge Lynne Hufnagel).

statute will determine whether the predictions and concerns about judicial sentencing voiced in this section have merit.

## IV. STATUS OF DEATH PENALTY LEGISLATION IN OTHER STATES

In response to the 1972 United States Supreme Court decision that in effect proclaimed existing death penalty statutes unconstitutional,[150] states have developed a variety of sentencing schemes. This section begins with a discussion of the United States Supreme Court decisions affecting the death penalty. Following this discussion, the various death penalty sentencing schemes will be analyzed.

### *A. The Supreme Court and the Constitutionality of the Death Penalty*

In *Furman v. Georgia*,[151] the Court examined the death penalty as it was then applied to three cases,[152] and determined that the death penalty was "cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."[153] Significantly, although a majority agreed that the Georgia and Texas statutes were unconstitutional, the Justices aligned themselves in two separate camps. Justices Brennan and Marshall agreed that the death penalty per se violated the Eighth Amendment, as it was cruel and unusual punishment.[154] Justices Douglas, White, and Stewart agreed that death penalty sentencing procedures were unconstitutional because the statutes gave judges and juries uncontrolled discretion.[155]

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150. Furman v. Georgia, 408 U.S. 238 (1972).

151. The United States Supreme Court issued its landmark decision in *Furman v. Georgia* on June 29, 1972. *See id.*

152. In *Furman*, the Court examined the facts of three cases, two from Georgia and one from Texas. The cases involved three convicted felons who were sentenced to death, one for murder and two for rape. *See id.* at 239 (consolidating Furman v. Georgia (No. 69-5003), Jackson v. Georgia (No. 69-5030), and Branch v. Texas (No. 69-5031)).

153. *Id.* at 240. The decision in *Furman* was five to four. In lengthy concurrences, invoking statistics and historical research, each of the five Justices in the majority issued a separate opinion. *Id.* For a discussion of *Furman*, see generally Malcolm Stewart, *The Death Penalty, Enactment of the Florida Death Penalty Statute, 1972: History and Analysis*, 16 NOVA L. REV. 1299 (1992).

154. *See Furman*, 408 U.S. at 305 (Brennan, J., concurring); *Id.* at 370 (Marshall, J., concurring).

155. According to Justice Stewart, the result of this uncontrolled discretion was

Although *Furman* specifically addressed the Georgia and Texas statutes, the broad holding effectively declared every state's death penalty statute unconstitutional.[156] As a result, more than six hundred people across the country sentenced to die were not executed.[157] After *Furman*, states either dropped the death penalty or revamped existing statutes in an effort to conform to the vague guidelines from the Supreme Court.[158]

In 1976, the United States Supreme Court again addressed the question of the constitutionality of the death penalty. This time, a series of five decisions by the Court helped identify which sentencing schemes would pass constitutional scrutiny.[159] For instance, mandatory death sentencing upon conviction of specified crimes was rejected as violative of the Eighth Amendment.[160] Conversely, the Court upheld statutes that provided for bifurcated proceedings, where death penalty cases are divided into two phases: (1) determining guilt; and (2) sentencing, where aggravating and mitigating factors must be considered by the sentencer.[161] Thus, the process of more accurately defining the vague outlines of the *Furman* decision began.

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that "[t]hese death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. . . . [T]he petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed." *Id.* at 309-10 (Stewart, J., concurring).

156. *See generally* Daniel D. Polsby, *The Death of Capital Punishment? Furman v. Georgia*, 1972 SUP. CT. REV. 1 (implying that most or all of the death penalty statutes existing at the time of *Furman* were unconstitutional).

157. *See* Michael Mello, *Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row*, 37 AM. U. L. REV. 513, 518 n.15 (1988).

158. Chief Justice Burger accurately predicted what ultimately occurred when he said, "[l]egislative bodies may seek to bring their laws into compliance with the Court's ruling by providing standards for juries and judges to follow in determining the sentence in capital cases . . . ." *Furman*, 408 U.S. at 400 (Burger, C.J., dissenting). Only two years later, twenty-nine states had passed death penalty statutes designed to comply with *Furman*. *See* FLANDERS, *supra* note 8, at 51.

159. *See* Roberts v. Lousiana, 428 U.S. 325 (1976) (plurality opinion); Woodson v. North Carolina, 428 U.S. 280 (1976) (plurality opinion); Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Gregg v. Georgia, 428 U.S. 153 (1976).

160. *See Roberts*, 428 U.S. at 325 (eliminating sentencing discretion violates the Eighth Amendment); *Woodson*, 428 U.S. at 280 (holding a mandatory death penalty unconstitutional).

161. *See Gregg*, 428 U.S. at 195; *Proffitt*, 428 U.S. at 248; *Jurek*, 428 U.S. at 267.

### *B. Sentencing Schemes in States with the Death Penalty*

In the wake of *Furman* and its progeny, most states retained the jury function of pronouncing the sentence in capital cases. However, some states, in an effort to comply with *Furman,* developed other variations on sentencing procedures in capital cases.

Roughly two-thirds of death penalty states and the federal government provide that a jury must sentence the defendant unless the defendant requests sentencing by the court.[162] For example, Kansas and New York, the most recent states to reenact the death penalty, followed the majority of states in their death penalty sentencing schemes.[163] Nevada has a slight variation on this scheme. There, the jury imposes the sentence in a capital case, but if the jury cannot agree on a unanimous verdict, a panel of three judges may impose the sentence.[164]

Other states provide different alternatives. Florida, Alabama, Indiana, and Delaware have a procedural scheme known as a jury override statute.[165] The trial process is bifurcated with a special post-conviction phase to address sentencing. The jury recommends whether the defendant should receive the death penalty based on evidence presented during the sentencing phase.[166] The trial judge considers the jury's recommendation, but is not required to follow it when sentencing the defendant.[167] Therefore, the jury and judge can disagree as to the appropriate sentence, with one or the other favoring the death penalty. However, the judge's decision is final and thus the judge can effectively override the jury's decision.[168]

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162. *See* Katheryn K. Russell, *The Constitutionality of Jury Override in Alabama Death Penalty Cases,* 46 ALA. L. REV. 5, 9 (1994).

163. *See* KAN. STAT. ANN. § 21-4624(b) (1995); N.Y. CRIM. PROC. LAW § 400.27 (McKinney Supp. 1996).

164. *See* NEV. REV. STAT. ANN. §§ 175.554, 175.556 (Michie 1992 & Supp. 1995).

165. *See* Russell, *supra* note 162, at 5-6. Florida was the first state to reestablish capital punishment after the Supreme Court's decision in *Furman v. Georgia,* passing its statute in 1972. *See* BEDAU, *supra* note 1, at 182. The legislative history indicates that the provision allowing jury override was a result of "horse-trading in the legislative conference committee." *Id.* The committee was appointed to "resolve differences in the proposed capital statutes separately voted by the two houses of the Florida legislature." *Id.*

166. *See* BEDAU, *supra* note 1, at 182.

167. *See id.*

168. *See id.* Florida, Indiana, and Delaware have adopted a case law standard to control the applicability of the jury override. However, Alabama has not developed

Two states, Ohio and Kentucky, also refer to the jury's decision as to life or death as a recommendation.[169] However, the sentencing provision is slightly different than a jury override scheme. Although the trial judge can reduce a jury recommendation of death to a life sentence, the trial judge cannot increase a jury's recommendation for life imprisonment to a death sentence.[170]

Other states have implemented sentencing procedures in which judges alone play the primary role in determining whether the death penalty should be imposed. Three states, Arizona, Idaho, and Montana, allow a single judge to sentence the defendant to either life in prison or death.[171] Finally, Nebraska's statute, which is most similar to Colorado's, allows for sentencing by either a single judge or a three-judge panel.[172] Nebraska's statute was passed in an effort to conform Nebraska's death penalty to the United States Supreme Court's requirements in *Furman*. The statute's legislative history indicates that there was general confusion among the Nebraska senators as to what type of death penalty statute would pass constitutional muster.[173]

Ultimately, the Nebraska legislators agreed on one major change. They decided that the jury would no longer determine what the defendant's sentence would be; instead the jury would only decide the defendant's guilt or innocence.[174] The Attorney General saw this as a return to "more of a true trial."[175] The jury would "simply try the fact issues" and the judge would fix the

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a case law standard and the Supreme Court recently decided to address the constitutionality of the Alabama jury override. *See* Russell, *supra* note 162, at 5-6.

169. *See* Michael 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, 284-85 n.3 (1989).

170. *See id.*

171. *See* ARIZ. REV. STAT. ANN. § 13-703(B) (West 1989 & Supp. 1995); IDAHO CODE § 19-2515 (1987); MONT. CODE ANN. § 46-18-301 (1995).

172. *See* NEB. REV. STAT. § 29-2520 (1995).

173. *See A Bill for an Act Relating to Crimes and Punishments, Hearings on L.B. 268*, Nebraska Legislature, 83rd Legis., 1st Sess. (1973) [hereinafter *Hearings on L.B. 268*]. The legislative history includes this interesting exchange between senators: Senator Luedtke: "I wonder if . . . that's what the court opinion, Supreme Court opinion requires, I wonder if we've done it." Senator Rasmussen: "Well, of course you are a lawyer, Senator Luedtke." Senator Luedtke: "That doesn't mean I understand the Supreme Court opinion. I want it clearly understood that I'm not sure that I do." *Id.* at 9-10.

174. *See id.* at 30.

175. *Id.*

sentence.[176] The bill was passed and judicial sentencing in capital cases has been the law since 1973 in Nebraska.

Although death penalty statutes were revised to comply with *Furman*, the struggle did not end there. The new statutes shifting the sentencing responsibility from the jury to judges were soon challenged as violating the defendant's Sixth Amendment right to a jury trial.

## V. CONSTITUTIONAL CHALLENGES

Constitutional challenges have been raised in each state adopting judicial sentencing in capital cases. This section examines applicable United States Supreme Court rulings and important rulings by state courts.

### *A. The Supreme Court's Rulings*

The Supreme Court has recognized that jury sentencing in capital cases can perform the important societal function of maintaining a link between contemporary community values and the penal system.[177] However, in *Proffitt v. Florida* [178] the Court addressed for the first time whether jury sentencing was constitutionally required. *Proffitt* challenged the constitutionality of Florida's capital sentencing procedure, in which the trial judge determines the sentence and the jury plays only an advisory role in the sentencing phase.[179] The Court upheld Florida's legislation, which was a response to the Court's *Furman* guidelines, and determined that it passed "constitutional muster."[180] Although the Court acknowledged the jury's role in capital sentencing, it went on to state:

> [This Court] has never suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing should lead, if anything, 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

176. *Id.*

177. *See* Gregg v. Georgia, 428 U.S. 153, 181 (1976); Witherspoon v. Illinois, 391 U.S. 510, 519 n.15 (1968).

178. 428 U.S. 242 (1976).

179. *See id.* at 242.

180. *Id.* at 259.

> jury, and therefore is better able to impose sentences similar to those imposed in analogous cases.[181]

This language has been quoted or referred to in virtually every case since 1976 that has addressed the constitutionality of judicial sentencing.[182]

The Supreme Court scrutinized this issue more directly in two cases, *Spaziano v. Florida*[183] and *Hildwin v. Florida*,[184] when it upheld Florida's jury override sentencing scheme for the second and third times. In *Spaziano*, the defendant was convicted of first degree murder for killing two women.[185] A majority of the jury at the sentencing hearing recommended life imprisonment, but the judge imposed a sentence of death, effectively ignoring the jury's advisory recommendation.[186] The defendant claimed that the jury override provision was unconstitutional because it violated his Sixth Amendment right to a jury trial and that all capital sentencing decisions should be made by a jury.[187] The defendant argued that as most states leave the sentencing function to the jury, this is a nearly unanimous recognition that juries are better equipped than judges to make reliable capital sentencing decisions.[188] This is because the primary purpose of the death penalty is retribution, and the nature of the decision between life and death sets capital sentencing apart from noncapital sentences.[189] Therefore, as the jury represents the voice of the community, it is in the best position to decide whether a particular crime is so heinous that a death sentence is appropriate.[190]

The Court found the argument appealing, but ultimately flawed.[191] Although the Court acknowledged that a majority of

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181. *Id.* at 252.

182. *See, e.g.*, State v. Vickers, 768 P.2d 1177 (Ariz. 1989); State v. Gillies, 691 P.2d 655 (Ariz. 1984); State v. Harding, 670 P.2d 383 (Ariz. 1983); State v. Gretzler, 659 P.2d 1 (Ariz. 1983); State v. Sivak, 674 P.2d 396 (Idaho 1983); State v. Creech, 670 P.2d 463 (Idaho 1983); Fitzpatrick v. State, 638 P.2d 1002 (Mont. 1981); State v. Ryan, 444 N.W.2d 610 (Neb. 1989); State v. Moore, 316 N.W.2d 33 (Neb. 1982); State v. Simants, 250 N.W.2d 881 (Neb. 1977).

183. 468 U.S. 447 (1984).

184. 490 U.S. 638 (1989).

185. *See* 468 U.S. at 450-51.

186. *See id.* at 451-52.

187. *See id.* at 458.

188. *See id.* at 461.

189. *See id.*

190. *See id.*

191. *See id.*

the states view capital sentencing as a jury function, it admonished that it was for the Court to judge whether the Constitution was violated by judicial sentencing.[192] Regardless of that fact, however, the Court stated that "despite its unique aspects, a capital sentencing proceeding involves the same fundamental issue involved in any other sentencing proceeding—a determination of the appropriate punishment to be imposed on an individual."[193] No court has held that the Sixth Amendment guaranteed a right to a jury determination of sentencing,[194] even where the sentence turns on specific findings of fact.[195] Although retribution plays a more prominent role in a capital case, it is also an element in every other criminal case.[196] Although the jury may represent the voice of the community, its voice is also heard when the legislature passes a death penalty statute and defines the circumstances under which death may be imposed.[197]

The Court concluded that neither the nature of the death penalty nor the purpose behind it requires jury sentencing.[198] In addition, the Court held that neither the Sixth Amendment nor the demands of fairness and reliability in capital cases require jury sentencing.[199] Finally, the Court reiterated that it refuses to limit the manner in which states may set up capital sentencing schemes.[200]

In *Hildwin*, the Court cited its decision in *Spaziano* and briefly commented on judicial sentencing in roughly two pages as compared to its eight page discussion in *Spaziano*. The opinion did include comments that erased any doubt about the Court's *Spaziano* opinion. It reiterated that there is no Sixth Amendment right to jury sentencing, and that the Sixth Amendment does not mandate that the jury make the specific findings required to impose the death penalty.[201] The strong, clear statements by the Court in these cases build on the dicta in

192. *See id.* at 463-64.
193. *Id.* at 459.
194. *See id.*
195. *See* McMillan v. Pennsylvania, 477 U.S. 79, 93 (1986).
196. *See* Spaziano v. Florida, 468 U.S. 447, 462 (1984).
197. *See id.*
198. *See id.* at 464.
199. *See id.*
200. *See id.*
201. Hildwin v. Florida, 490 U.S. 638, 640-41 (1989).

*Proffitt* and support the constitutionality of judicial sentencing in capital cases.

These three Supreme Court decisions demonstrate that Colorado's new sentencing statute, if challenged, should be upheld as constitutional. By upholding Florida's jury override statute, the Supreme Court has gone farther than would be necessary to uphold Colorado's judicial sentencing scheme. The Court has permitted a judge to impose a sentence of death when the jury recommended life imprisonment and has allowed the judge to make the specific, written findings of fact necessary for this sentence. Upholding sentencing by a panel of three judges which issues written findings seems less tenuous than upholding a plan that effectively ignores the jury's decision. Therefore, although Colorado's sentencing statute is different from Florida's, applying the reasoning from *Proffitt*, *Spaziano*, and *Hildwin* suggests that Colorado's statute is also constitutional.

The Court's decision in *Walton v. Arizona*[202] also supports the conclusion that the Colorado statute is constitutional. Colorado's new sentencing scheme more closely resembles Arizona's than it does Florida's. Arizona's statute requires the judge to decide what aggravating and mitigating circumstances are present and then to impose the sentence based on those findings.[203] In Arizona the decision is left to one judge, while in Colorado there is a panel of three judges. The defendant in *Walton* tried to distinguish the Florida and Arizona sentencing schemes by arguing that in Florida, the aggravating factors found by the jury were only sentencing considerations. In Arizona, however, they were elements of the offense.[204] Based on this difference, the defendant argued that the aggravating and mitigating circumstances must be found by a jury.[205] The Court rejected this attempted distinction, calling aggravating and mitigating circumstances simply standards that are used to guide the decision-making process in the sentencing phase.[206] The Court cited *Proffitt*, as well as *Spaziano* and *Hildwin*, as evidence of its repeated rejection of constitutional challenges to sentencing by

202. 497 U.S. 639 (1990).
203. *See* ARIZ. REV. STAT. ANN. § 13-703 (1989 & Supp. 1995).
204. *See Walton*, 497 U.S. at 648.
205. *See id.*
206. *See id.*

the judge and not the jury.[207] In concluding that Arizona's statute did not violate the Sixth Amendment, the Court stated: "*Any argument* that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court."[208]

Based on the reasoning of this decision, Colorado's analogous sentencing statute would not be subject to constitutional attack for its judicial sentencing component. Although the United States Supreme Court has issued its word on the constitutionality of judge-imposed death penalties, judicial sentencing schemes involving one or more judges and no jury participation have also been challenged at the state level.

### *B. Judicial Sentencing Challenges at the State Level*

This section highlights state court decisions addressing judicial sentencing. Idaho, Nebraska, Montana, and Arizona all have judicial sentencing statutes that have been challenged as unconstitutional.

#### 1. Idaho

Idaho's judicial sentencing statute [209] provides for sentencing by one judge, and the Idaho Supreme Court has addressed its constitutionality several times. In 1983, the court ruled on four different cases challenging the lack of participation of the jury in the sentencing process under both the United States and Idaho Constitutions.[210] In each case, the court upheld Idaho's sentencing scheme as constitutional. The decisions in *Creech* and *Sivak* are dispositive.[211] A more recent 1985 case arrived at the same

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207. *See id.* at 647-48.

208. *Id.* at 647 (emphasis added) (quoting Clemons v. Mississippi, 494 U.S. 738, 745 (1990)).

209. IDAHO CODE § 19-2515 (1987) (sentencing determined by one judge).

210. *See* State v. Paradis, 676 P.2d 31 (Idaho 1983); State v. Gibson, 675 P.2d 33 (Idaho 1983); State v. Sivak, 674 P.2d 396 (Idaho 1983); State v. Creech, 670 P.2d 463 (Idaho 1983).

211. *See Sivak*, 674 P.2d at 396; *Creech*, 670 P.2d at 463. The Idaho Supreme Court used the dicta from *Proffitt* to support its decisions as *Spaziano* and *Hildwin* had not yet been decided. *See id.*

conclusion and cited *Spaziano* as supporting its position.[212]

In *Creech*, the Idaho Supreme Court addressed the constitutionality of the state's sentencing provision under the United States Constitution. Based on *Proffitt*, the court held that there was no federal constitutional requirement of jury participation in the sentencing process.[213] The court stated that it agreed with the Idaho legislature that judicial control of the sentencing process would provide more consistency than sentencing by juries.[214] The court was not concerned that the judge's sentences would not reflect the community's norms and values because the judges are elected and are not "ivory tower elitists."[215]

In *Sivak*, the court considered whether excluding the jury violated Article I, Section 7 of the Idaho Constitution, which states "[t]he right of trial by jury shall remain inviolate."[216] It began its analysis by looking at the role of the jury in capital sentencing cases in Idaho at the time its Constitution was adopted.[217] In 1864, every person convicted of first degree murder received a mandatory death sentence.[218] Therefore, the jury, in finding the defendant guilty of first degree murder, essentially issued the death penalty.[219] Idaho had defined degrees of murder by 1887 so that those convicted of first degree murder received the death penalty, while those convicted of second degree murder were punished by imprisonment from ten years to life.[220] These were the circumstances surrounding the adoption of the Idaho Constitution in 1889.[221] The *Sivak* court recognized that, historically, the jury's determination of which crime the defendant was guilty of affected the sentence that could be imposed.[222] However, according to the court, this "incidental effect" did not mean the jury was an integral part of the sentencing process at the time the Idaho Constitution was adopted.[223] The court distinguished the fact-finding function of the jury in deciding the

212. *See* State v. Beam, 710 P.2d 526, 530 (Idaho 1985).
213. *See Creech*, 670 P.2d at 474.
214. *See id.*
215. *Id.*
216. IDAHO CONST. art. I, § 7.
217. *See* State v. Sivak, 674 P.2d 396, 400 (Idaho 1983).
218. *See id.* at 399.
219. *See id.* at 400.
220. *See id.* at 399.
221. *See id.*
222. *See id.* at 400.
223. *See id.*

degree of crime from the sentencing function performed by the court.[224] Therefore, the Idaho Constitution, when adopted in 1889, did not constitutionalize a right to be sentenced by a jury in capital cases.[225]

As in Idaho, at the time Colorado's Constitution was adopted, the death penalty was an automatic sentence if the jury found a person guilty of murder that was deliberate, premeditated, or committed in the perpetration of or attempt to perpetrate some felony.[226] The sentence for all other murders was life in prison with or without hard labor. Therefore, as in Idaho, the jury's decision as to the nature of the murder in effect determined the punishment. Since Colorado's early history is similar to Idaho's in this respect, the Idaho court's analysis is applicable. Although the jury's decision as to the crime the defendant committed affected the punishment imposed in Colorado during its early history, this too was an "incidental effect." Therefore, the Colorado Constitution's guarantee of a jury trial does not encompass jury sentencing in a capital case.

2. Nebraska

Nebraska's statute is similar to Colorado's in that it provides that either the trial judge or a panel of three judges may pass sentence on the defendant.[227] In *State v. Simants*,[228] the Nebraska Supreme Court upheld the judicial sentencing statute by relying on the *Proffitt* decision.[229] The court stated that it did not need to consider the relative merits of sentencing by a judge versus a jury.[230] According to the court, this was for the legislature to determine.[231] The court's concern was the constitutionality of the sentencing procedure, which it found did not violate either the Nebraska or the United States Constitution.[232] A more recent Nebraska Supreme Court case upheld this sentencing procedure once again and cited to the *Simants* decision as well as

224. *See id.*
225. *See id.*
226. *See supra* Part II.A.
227. *See* NEB. REV. STAT. § 29-2520 (1995).
228. 250 N.W.2d 881 (Neb. 1977).
229. *See id.* at 887.
230. *See id.* at 888.
231. *See id.*
232. *See id.*

the United States Supreme Court's decisions in *Spaziano* and *Hildwin*.[233]

### 3. Montana

When Montana passed its single judge sentencing statute in 1977,[234] it was promptly challenged as unconstitutional. The issue before the court in *State v. Stewart* [235] was whether the judge could determine facts that related only to the severity of the punishment after the defendant's guilt had been established, or if the right to a jury trial mandated that a jury determine these facts.[236] The court held that if the facts determined by the judge only make a substantial difference in punishment, and not the difference between guilt and innocence, the Due Process Clause does not require the prosecutor to carry the burden of persuasion beyond a reasonable doubt.[237] Therefore, it was within the power of the state to allow the trial court to make the factual determinations required for a possible death sentence.[238] Based on this analysis, the statute passed constitutional scrutiny.

The Montana Supreme Court addressed the constitutionality of the provision again in 1981 in *Fitzpatrick v. State*.[239] The jury convicted the defendant of deliberate homicide, aggravated kidnapping, and robbery, and the defendant was sentenced by the judge to death.[240] The defendant claimed that because the jury was not involved in the sentencing, he was denied his rights under the Sixth, Eighth, and Fourteenth Amendments.[241] The defendant pointed out that an Oregon court had recently struck down its statute by finding that judicial sentencing was unconstitutional.[242] However, the court distinguished the cases.[243] The Oregon statute required the judge to determine whether the murder was deliberate, which was an element of the crime.[244]

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233. *See* State v. Ryan, 444 N.W.2d 610, 642-43 (Neb. 1989).
234. *See* MONT. CODE ANN. § 46-18-301 (1995).
235. 573 P.2d 1138 (Mont. 1977).
236. *See id.* at 1146.
237. *See id.*
238. *See id.*
239. 638 P.2d 1002 (Mont. 1981).
240. *See id.* at 1002.
241. *See id.* at 1012.
242. *See id.* (citing State v. Quinn, 623 P.2d 630 (Or. 1981)).
243. *See id.*
244. *See id.*

This made the Oregon statute unconstitutional.[245] In Montana, on the other hand, the judge does not determine elements of the crime, but decides whether to impose the death penalty instead of a life sentence. This type of statute is sometimes referred to as an enhanced penalty statute, which the Oregon Court agreed was constitutional.[246] Therefore, the court stated that Montana's statute was not analogous to Oregon's.[247] The court also cited the Supreme Court's dicta in *Proffitt* as convincing authority that jury sentencing is not constitutionally required and held that Montana's statutory scheme is constitutional.[248]

Both Montana cases support the conclusion that Colorado's new sentencing provision is constitutional. Although judges will make specific written findings as to the aggravating and mitigating factors, these factors only affect punishment, not the determination of the guilt or innocence of the defendant. Therefore, judges will not determine elements of the crime and thus, Colorado's statute is analogous to Montana's.

4. Arizona

Arizona's single-judge sentencing statute[249] has faced numerous challenges as to whether the defendant has a right under the Sixth Amendment to a jury determination of the sentence.[250] These challenges culminated in the Supreme Court's decision *Walton v. Arizona*, which upheld Arizona's sentencing statute as constitutional.[251] The early decisions by the Arizona Supreme Court upholding the state's judicial sentencing scheme relied on the United States Supreme Court decisions in *Proffitt* and *Spaziano*.[252] Since 1990, the Arizona Supreme Court has

245. *See id.*

246. *See id.* at 1013-14 (citing State v. Quinn, 623 P.2d 630 (Or. 1981)).

247. *See id.*

248. *See id.*

249. ARIZ. REV. STAT. ANN. § 13-703(B) (West 1989 & Supp. 1995) (providing for sentencing by one judge).

250. *See* State v. Apelt, 861 P.2d 654 (Ariz. 1993); State v. Greenway, 823 P.2d 22 (Ariz. 1991); State v. Walton, 769 P.2d 1017 (Ariz. 1989); State v. Vickers, 768 P.2d 1177 (Ariz. 1989); State v. Gillies, 691 P.2d 655 (Ariz. 1984); State v. Lambright, 673 P.2d 1 (Ariz. 1983); State v. Harding, 670 P.2d 383 (Ariz. 1983); State v. Richmond, 666 P.2d 57 (Ariz. 1983); State v. Gretzler, 659 P.2d 1 (Ariz. 1983).

251. *See supra* Part V.A.

252. *See Vickers*, 768 P.2d at 1188; *Gillies*, 691 P.2d at 659; *Gretzler*, 659 P.2d at 15.

routinely rejected the right to a jury-determined sentence argument, citing *Walton*.[253] Moreover, since at least 1983, this issue has merited only cursory treatment in the opinions. Two quotations illustrate the impatience the Arizona Supreme Court has with the Sixth Amendment argument: "This argument has been rejected by the United States Supreme Court . . . and has likewise been rejected by this court on numerous occasions,"[254] and "we have repeatedly rejected the notion that jury participation is required in capital sentencing determinations."[255]

Colorado courts should be able to analogize the state's new sentencing statute to Arizona's similar judicial sentencing statute. Therefore, *Walton* provides support that Colorado's statute is constitutional. Colorado courts can also point to the numerous times that Arizona's statute has been challenged and held constitutional by Arizona's Supreme Court. Based on not only the decisions in Arizona, but on decisions in the other three states that have judicial sentencing as well, Colorado has strong precedent that the new sentencing statute is constitutional.

## VI. CONCLUSION

In the United States, the death penalty has been the subject of controversy for at least fifty years. One result of this controversy was the United States Supreme Court's *Furman* decision in 1972 holding the death penalty unconstitutional as then applied.[256] Because *Furman*, in effect, proclaimed existing death penalty statutes unconstitutional, states had to reevaluate existing death penalty statutes and enact new legislation. However, within a short period of time, the United States Supreme Court ratified revamped death penalty legislation in several states and the death penalty was revived.[257]

Along with the rest of the nation, Colorado has struggled with issues related to the death penalty. However, the death penalty has a lengthy history of public support and acceptance in

253. *See Apelt*, 861 P.2d at 658; *Greenway*, 823 P.2d at 27.

254. *Harding*, 670 P.2d at 398.

255. *Gillies*, 691 P.2d at 659. Interestingly, even after the Supreme Court's decision in *Walton*, defendants continue to make this argument as if it is part of the standard slate of arguments expected. *See Apelt*, 861 P.2d at 658; *Greenway*, 823 P.2d at 27.

256. *See* Furman v. Georgia, 408 U.S. 238 (1972).

257. *See supra* Part I.

Colorado. Despite this, no execution has been carried out in the state since 1967, and prosecutors have been frustrated by juries that have refused to impose the death penalty. In response to this frustration, district attorneys supported Colorado's new sentencing statute, which became effective July 1, 1995.[258] The statute moved sentencing in death penalty cases to a panel of three judges and eliminated the jury's role in the sentencing phase.[259] Colorado therefore joined a minority of states that use judicial sentencing in death penalty cases.

When states varied from the use of a jury in capital cases by providing for judicial sentencing, it was attacked as unconstitutional. However, the United States Supreme Court has held specifically that it will not mandate one particular sentencing scheme to the states. In addition, the Court has addressed judicial sentencing directly in a variety of cases, and has approved it as one method of complying with the demands of reliability and consistency in death penalty sentencing. State courts have also upheld the constitutionality of judicial sentencing in Idaho, Nebraska, Arizona, and Montana.

Based on current case law, the sentencing phase of a death penalty trial is viewed as a separate proceeding, but not as a "trial" for purposes of the Sixth Amendment's guarantee of a jury trial. Additionally, the judge is not determining facts that are elements of the crime, but only factors that relate to the severity of the punishment that will be imposed. Also, the courts have consistently held that the community's voice is not silenced when the jury does not sentence in a capital case. The community voice still is clearly heard through citizens' participation in electing judges and the government officials who appoint judges.

Once again Colorado has "tinker[ed] with the machinery of death."[260] However, current case law, from both the United States Supreme Court and several state supreme courts, clearly indicates that Colorado's new judicial sentencing statute will withstand constitutional scrutiny.

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258. *See* COLO. REV. STAT. § 16-11-103(1)(a) (Supp. 1996).
259. *See id.*
260. Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).