STATE OF COLORADO
OFFICE OF THE PUBLIC DEFENDER

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January 4, 1978

The Honorable
George E. Lohr
Pitkin County Courthouse
506 Main Street
Aspen, Colorado, 81611

Dear Judge Lohr:

Enclosed are copies of Supreme Court opinions from Pennsylvania and California respectively. They are Commwealth v. Moody, 22 C.R.L. 2249 (Decided 11-30-77) and Rockwell v. Supreme Court, 556 P.2d 1101 (Decided 12-7-76). Regretfully, I did not discover these decisions earlier but I send them to you now for whatever value they may be.

Very truly yours,

James F. Dumas, Jr.

JAMES F. DUMAS, JR.
Chief Deputy Public Defender

JFD:ls
Encl.
cc: Milt Blakey
Kevin O'Reilly
Theodore Bundy

IN THE DISTRICT COURT

IN AND FOR THE COUNTY OF PITKIN

STATE OF COLORADO

Criminal Action No. C-1616

THE PEOPLE OF THE STATE OF COLORADO, Plaintiff, vs. THEODORE R. BUNDY Defendant.	MEMORANDUM BRIEF IN SUPPORT OF THE CONSTITUTIONALITY OF THE COLORADO DEATH PENALTY SENTENCING STATUTE

I.

INTRODUCTION

The purpose of this memorandum brief is to analyze the Colorado procedure for sentencing a defendant after a conviction of a Class 1 felony. This brief will examine the history of litigation before the United States Supreme Court concerning capital punishment as it relates to the cruel and unusual clause of the Eighth Amendment. Particular emphasis will be placed on the most recent, post Furman v. Georgia cases which, of course, are of significance because they mark the first time in recent history where the Court upheld the validity of capital punishment per se. Additionally, the new procedural requirements mandated by the Court will be analyzed and compared to C.R.S., 1973, 16-11-103; entitled Imposition of Sentence in Class 1 Felonies.

This brief, in no way, will attempt to answer or address itself to the issues presented in the brief submitted by the Public Defender's office. That brief was originally prepared for the Plaintiff in the case of People v. Wildermuth. The purposes of the People's brief, on the contrary, is an attempt to guide the trial Court in appropriately evaluating

the constitutionality of the Colorado Statute in question. In order for the Court to do that, however, the Court must be apprised of the historical and analytical development of the death penalty sentencing statutes and what that development means to the constitutionality of the Colorado Statute in question. This memorandum brief has not been designed as an argumentative reply to the irrelevancies in the Public Defender's challenge to the constitutionality of the Colorado Sentencing Statute.

II.

BACKGROUND:

THE DEVELOPMENT OF THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE

A. Definition of Cruel and Unusual Punishment

The phrase "cruel and unusual punishment," was itself a subject of much juducial controversy in early years as an attempt was made to conceive a generally accepted understanding of its scope. The history of Supreme Court litigation concerning capital punishments indicates that the precise contours of the phrase were defined with some difficulty. However, from early on the Court was confident that "unnecessary cruelty" was the underlining concept of the cruel and unusual punishment prohibition. Wilkerson v. Utah, 99 US 130, 135-36 (1879). The notion of proscribing unnecessary cruelty is clearly the cornerstone of the eighth amendment's meaning.

As the concept "cruel and unusual" was further articulated in Supreme Court cases, it became apparent that capital punishment was not among those punishments constitutionally proscribed. In Re Kemmler, 136 US 436, 447 (1890). Death sentences fell outside the ban because they did not involve torture or lingering death. Furthermore, despite the ultimate

nature of the punishment, it was not considered inhumane or barbarous, generally due to its long history of acceptance.

An advanced articulation of this Eighth Amendment concept was provided in Weems v. United States, 217 US 349 (1910). The Court in Weems invalidated for the first time a legislatively established penalty as "cruel and unusual," holding that as a "precept of justice punishment for crime should be graduated and proportioned to the offense," Id., 217 US 367. The Court thereby recognized that not only could the method of punishment be inherently cruel, as are acts of torture, but the punishment may be excessive when compared to the offense and hence cruel and unusual. In Weems, fifteen years at hard labor in ankle chains was held to be excessive for the crime of falsifying government records. The Weems decision was, however, largely overlooked by succeeding Courts mainly because the eighth amendment was not considered applicable to the States at that time. Collins v. Johnson, 237 US 502 (1915); In Re Kemmler, 136 US 436 (1890). Furthermore, although Weems did not involve capital punishment, it introduced a characterization of the eighth amendment which would have a significant impact on later death penalty decisions. The Court characterized cruel and unusual as being a dynamic, flexible concept which was subject to modification. The constitutional clause was said to be "progressive and not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice," Weems v. U.S., 217 US 378. In later years, this notion was seized upon by several justices, in the capital punishment context, in arguing that society had progressed to the point where the death penalty had become cruel and unusual. Furman v. Georgia, 408 US 238, 291 (Brennan J., concurring); 408 US 360 (Marshall, J., concurring).

Almost fifty years after Weems, the Supreme Court reconsidered the scope of the Eighth Amendment in Trop v. Dulles, 350 US 86 (1958). The Court in Trop ruled that denationalization of a convicted war time deserter, who had already served three years at hard labor, forfeited all pay, and received a dishonorable discharge amounted to a cruel and unusual punishment. The Court held that deprivation of a man's political existence affronted the dignity of man, the basic concept behind the Eighth Amendment. The meaning of the phrase "cruel and unusual" is not static referring only to punishments considered abhorrent in 1789. Rather the Amendment derives current meaning from the "evolving standards of decency that mark the progress of the maturing society," 356 US 101.

With its decision in Robinson vs. California, 370 US 660, the Supreme Court revitalized the principals it expounded in Weems. The Court ruled that incarceration for ninety days for being addicted to the use of narcotics was excessive and thus in violation of the eighth amendment. As in Weems, the Court was concerned with the excessive nature of the punishment in relation to the offense. It noticed that the cruel and unusual punishment clause must be continually reviewed in light of contemporary human knowledge to determine its current meaning. Robinson also removed any lingering doubts that the eighth amendment is applicable to the States through the Fourteenth Amendment. Francis v. Resweber, 329 US 459 (1947).

The next stage of development in this area witnessed the eighth amendment acquire a new meaning, quite different from prior considerations. The Court remained steadfast in its refusal to consider the basic issue; does the death

a death sentence, when it allo.ed the jury to impose the death penalty in a procedure void of governing standards. McGautha v. California, 402 US 183. Such a process was acceptable because it was thought to be impossible to articulate standards which would adequately enable the jury to differentiate between the situations meriting a death sentence and those which did not. Although the future direction of the Court was uncertain as a result of this change, procedural considerations remain very much a part of eighth amendment analysis. But the relevant significance of procedural matters in relation to the punishment itself was less certain. Apparently, the procedures resulting in the death sentence were beginning to overshadow the character of the punishment itself.

Thus, State Court decisions notwithstanding, by 1972 several aspects of "cruel and unusual" had been fairly well established while others remained uncertain. Therefore, the significance of the historical acceptance of punishments was uncertain. The Court almost invariably considered whether the punishment in issue had been traditionally accepted, despite the evolving standards doctrine it simultaneously espoused. More importantly, it was not certain whether the practice of reversing death sentences had been abandoned entirely. All of this took on new meaning as the cases of Furman v. Georgia, Jackson v. Georgia and Branch v. Texas, 408 US 238 (1972), were decided.

B.

Furman v. Georgia

In Furman v. Georgia, 408 US 238 (1972), the Supreme Court held in a per curiam decision that in the cases before it, the imposition and carrying out of the death penalty constituted a cruel and unusual punishment in violation

of the eighth and fourteenth Amendments. At the time Furman was decided, forty-one states, the District of Columbia, and several federal jurisdications authorized the death penalty. However, by any standard, the imposition of that penalty was infrequent. In 1970 only one hundred and twenty-seven people received the death sentence; in 1971 the number dropped to one hundred and four and to a low of seventy-five in 1972; Furman v. Georgia, 96 S. CP. 2909, 2029 n. 26. The infrequency of use prompted some commentators to conclude that the Supreme Court could, and should, declare the death penalty unconstitutional. Goldberg and Dershowitz, Declaring the Death Penalty Unconstitutional, 83 Harv. L. Rev. 1773, 1818-19 (1970). Thus, the Court was being pressured to finally rule on the constitutionality of the punishment per se. It is with this background in mind that Furman should be read so as to better understand the full importance of this landmark case.

The opinion is incredibly simple considering the complexity of the issue involved:

> Certiorari was granted limited to the following question; "Does the imposition and carrying out the death penalty in these cases constitute cruel and unusual punishment in violation of the eighth and fourtheenth amendments?" The judgment in each case is reversed in so far as it leaves undisturbed the death sentence imposed, and the cases are remanded for further proceedings. Id., 408 US at 239-40.

However, nine separate opinions were issued, each Justice expressing his own view on the matter before the Court. This reflects the true nature of the controversy more so than the per curiam opinion. Five Justices supported the per curiam judgement while four dissented.

For the purposes of this memorandum brief only, the opinion of Justice Marshall, concurred in by four other

Justices, and the dissenting opinion of Justice Burger are relevant to the case in question and the Colorado Statute before the Court. For the "majority," Mr. Justice Marshall asserted that the most important principal in analyzing the cruel and unusual clause is that its language "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Therefore, a penalty which was acceptable at one time in our history may be cruel and unusual now. The permissiblity of a particular punishment today is open to question regardless of previous decisions. This rational allowed Mr. Justice Marshall to ignore those previous decisions - Wilkerson and Resweber and Kemmler - which tacitly approved of the death penalty.

After reviewing the reasons why a legislature might select death as a punishment, which included; retribution, deterrence, prevention of repetitive criminal acts, encouragement of guilty pleas and confessions, and eugenics and economy, Marshall argued that all of these legislative purposes could be accomplished through less severe penalties. Marshall contends that punishment for the sake of retribution is not permitted by the eighth amendment. (As will be noted, infra, this now is the "minority" position). Moreover, capital punishment is not necessary as a deterrent to crime in this society, in fact, murderers are extremely unlikely to be recidivists and often become model citizens. Id., 408 US at 355. Marshall also reasons that the elimination of the death penalty would not impair the States bargaining position in obtaining confessions and guilty pleas since the threat of imprisonment would be sufficient for this purpose. Further, capital punishment can not be defended on the ground that it improves society since legislatures

have never intented eugenic goals in formulating death sentences. Finally, the death penalty can not be defended as economical since execution is actually more costly than life imprisonment. Since any possible legitimate purpose of capital punishment could be served equally well by imprisonment, Justice Marshall concluded that the death penalty is excessive punishment and is, therefore, unconstitutional. Id., 408 US at 359.

Marshall narrowed the test often used by the Courts that a punishment is valid unless "it shocks the conscience and sense of justice of the people," to include only "informed citizens." Justice Marshall argues that if the average citizen were informed as to the liabilities of the death penalty, he would conclude, as Marshall does, that the death penalty is both cruel and unusual. Justice Marshall contends that even the strongest proponent of the death penalty would find it unacceptable if he were aware that the death penalty is meted out discriminatory, that innocent people have been executed, and that the death penalty distorts our system of criminal justice, undesirably affecting the jury, attorneys, the judge, and the public during the course of certain trials. Ehrman, The Death Penalty and The Administration of Justice, 284 Annals 73, 83, (1952).

The dissenting opinion of Chief Justice Burger contains an analysis of whether the eighth amendment prohibits capital punishment and a plea for judicial non-involvement on the issue of abolition of the death penalty. It begins with an examination of the scope of the prohibition against cruel and unusual punishments. According to Chief Justice Burger's interpretation the founding fathers were most concerned with tortuous or excessively cruel punishments. Early Supreme Court decisions reflected this concern and

focused primarily on whether the punishment was "cruel" rather than whether it was "unusual". Wilkerson v. Utah, 99 U.S. 130 (1878). (See Part II A of this Memorandum)

Despite past indications of constitutionality, the Chief Justice acknowledges that whether capital punishment is cruel and unusual today must be determined by reference to contemporary standards of permissibility. Past decisions have recognized that interpretations of the eighth amendment prohibition necessarily change as the mores of society change. However, Chief Justice Berger counsels judicial restraint when a court is asked to interpret societal mores. No judicially manageable technique has been developed for measuring an evolution in society's moral consensus on capital punishment. Thus the courts must refer to the legislatures when such a judgment is needed.

The Chief Justice then asserts there are no obvious indications of societal condemnation of capital punishment sufficient to overcome the presumption of legislative validity. Public opinion polls show no universal rejection of capital punishment. Further, Chief Justice Burger rejects the contention put forth by Justices Marshall and Brennan that the infrequent imposition of the death penalty reflects widespread disapproval by society. It is argued that, in capital cases where juries impose death, they are acting arbitrarily and without sensitivity to prevailing standards of decency. However, it is the duty of the jury to reflect contemporary standards, and there is no empirical proof that juries have failed to discharge its duty. Witherspoon v. Illinois, 391 US 510 (1968). The declining rate of imposition does not establish that capital punishment is now considered intolerably cruel.

Neither of these two divergent opinions state the law as it is today. In fact, what has evolved is a hybrid and, at the same time, collateral approach to the problem. Hybrid; in that the court has now displaced much of the eighth amendment back to the legislatures but, as will be shown, infra, not totally. Collaterally; in that what is now the main focus of the court's attention lies in the procedural safeguards which insure due process and the lack of an arbitrary, capricious and freakish imposition of the death sentence. Determination of the current view, however, can only be best understood by the past historical and procedural development of the death sentence as cruel and unusual.

Reaction to the court's decision in Furman, was immediate, mixed and intense. Proponents of capital punishment were naturally disappointed. However, opponents of the death sentence were not totally satisfied either, as many of them felt the court should have found the punishment to be per se violative of the eighth and fourteenth amendments. After the courts announcement in Furman it would have been reasonable to conclude that the legislative response would weigh heavily on a subsequent decision of the court for two reasons. First, the Furman majority had forced legislators to enact new statutes in order to reinstate the death penalty. Should the legislatures reconsider the issue and conclude that the death penalty merited revitalization, the majority of the court would likely to be bound to strongly reconsider their respective positions. If, in light of Furman, the State legislatures had deemed reinstatement of capital punishment a worthwhile effort, it would indicate the possibility of a judicial misreading of then current opinion.

Second, the four dissenters felt it unwise to intrude into legislative decisions. Therefore, if only a small number of legislatures were to reinstate the death penalty, it is possible the dissenters would have felt justified in overruling these few states; for clearly that predominant legislative opinion would be opposed to capital punishment.

Following Furman, the state legislatures passed capital punishment provisions in unprecedented volume. By 1976, 35 states passed death sentence statutes. In 1974, Congress itself enacted a statute providing for the death penalty when aircraft piracy resulted in death. Anti-Hijacking Act of 1974, 49 U.S.C. §1472(i),(n). Clearly, a majority of states were willing to test the court's conviction.

This responding legislation is of two major types. First, the majority of state statutes provide for a mandatory death sentence upon conviction of a specified crime. Second, a small number of statutes call for a balancing of aggravating and mitigating circumstances before the sentence is imposed. The Colorado statute, of course, specifically provides for an aggravating-mitigating circumstances test. Thus, the stage was set for the court to once again hear argument on the issue of cruel and unusual punishment as it applied to capital punishment.

III.

THE 1976 CASES:

MANDATORY AND NON-MANDATORY DEATH SENTENCES

A. MANDATORY DEATH SENTENCES

Both North Carolina's and Louisiana's mandatory death penalty statutes were held in Woodson v. North Carolina, 96 S.Ct. 2978, and Roberts v. Louisana, 96 S.Ct. 2001, to fall

short of the eight amendment's imperative that in capital cases the character and record of the offender and the circumstances of the particular offense should be considered prior to sentencing. The North Carolina statute imposed a mandatory death sentence upon any defendant convicted of First Degree Murder. The Louisiana statute mandated a death penalty whenever a conviction was obtained for any one of five categories of homicide, regardless of any mercy recommendation by the jury. N.C. Gen. Stat. §14-17(Cum. Supp. 1975). In both cases, a 5-4 majority held that the state plan failed to provide a constitutionally tolerable response to Furman. With Justice Stewart writing the plurality opinion, the history of mandatory death penalties was examined. It was the plurality's impression that such penalties have been rejected as "unduly harsh and unworkably rigid." The plurality identified three constitutional infirmities in those states' use of a mandatory death penalty for First Degree Murder. First, the fact that juries impose the death penalty in only a small percentage of the cases in which they may exercise discretion suggests that, at least to the extent that jury sentencing reflects contemporary standards of decency, a system that automatically executes everyone convicted of a certain crime fails to meet those standards.

The second infirmity follows from the first: juries unwilling to impose the death sentence on inappropriate offenders would begin to select some defendants among those whom they considered guilty beyond a reasonable doubt for whom they would return a verdict of not guilty. Since this exercise of discretion would be undirected, the requirement of Furman that "objective standards be provided to guide,

regularize and make rationally reviewable the process for imposing a sentence of death" would not be met. Woodson, supra, 96 S.Ct. at 2991. Indeed, this infirmity was aggravated in the case of Louisana statute by its requirement that the jury in every murder case be instructed on the crimes of First Degree Murder, Second Degree Murder, and Manslaughter, whether or not there was any basis in the evidence for the latter offenses. La. Code Crim. Proc. Ann. Arts. 809, 814 (West Supp. 1975). This requirement invited juries to return a lesser verdict inconsistent with the evidence when they decided, without statutory guidance, that the death sentence was unwarranted.

Finally, and most importantly, the "enlightened policy" of requiring a sentencing procedure to consider more than the statutory description of the offense rises to a constitutional imperative when a life is at stake:

> "In capital cases the fundamental respect for humanity underlying the eighth amendment... requires consideration of the character and record of the individual offender and the circumstances of the particular offense..." 96 S.Ct. at 2991

The somewhat narrower definition of the capital offense provided by the Louisiana statute did not suffice to free it from this invalidating lack of individual focus.

After an examination of the history of mandatory death penalties, the plurality noted that many juries, finding the death penalty too severe in a significant number of cases, refused to return guilty verdicts since such verdicts would automatically have sentenced the defendants to death. In response to this reluctance to return guilty verdicts, legislatures began to enact laws which would allow juries to distinguish between murderers, to exercise discretion, and to take mitigating circumstances into account in sentencing

for capital cases. By the time the court decided Furman in 1972, mandatory sentences were widely disfavored by both legislatures and juries, which the plurality concluded was evidence that evolving standards of decency had come to reject such penalties as violating societal standards. In light of this widespread rejection of mandatory death sentences, the Stewart plurality reasoned that states enacting mandatory penalties after Furman must have done so in an attempt to respond to the confusion generated by the Furman opinion and not because of the renewed social acceptance of mandatory death sentences. Finally, the Stewart plurality, taking the historical development into account, held the North Carolina statute invalid for failing to allow mitigating circumstances to be considered before the sentence of death is imposed. Because of the qualitative difference between the death penalty and prison sentences, the Stewart plurality concluded that the fundamental respect for human dignity underlying the eighth amendment requires factors relating to the defendant to be taken into account during sentencing. Woodson, supra, 96 S.Ct. at 2991 2992.

It is submitted that the Colorado statute in question is in no way a mandatory death penalty statute. None of the constitutional defects pointed out in both Woodson and Roberts exists in the Colorado statute. In fact, it is arguable that the plurality's conclusion in Woodson that society has rejected mandatory sentencing does not square with its willingness in the Gregg, infra, opinions to defer to the state's legislative determinations concerning capital punishment. As Justice White noted in his dissent, the fact that legislatures before Furman chose jury sentencing to avoid the problems of jury nullification was not a legislative

judgment that mandatory punishments were excessively cruel. While the states thus showed a preference for discretionary sentencing, it was also true that they preferred mandatory penalties to no death sentence at all. Roberts, supra, 96 S.Ct. at 3019. Further, while the plurality found proof of societal rejection of mandatory sentencing to jury nullification, it did not adequately deal with the incontrovertible fact that since Furman the death penalty has regularly been imposed under mandatory statutes. Finally, it is not clear why the requirement that the individual characteristics of the criminal and the crime be considered before sentencing may not be satisfied by a legislative judgment that the commission of certain, especially heinous, crimes conclusively establishes a criminal's character. The plurality seriously undermined its position in this regard by noting in Roberts that murder by a prisoner serving a life sentence was a "unique problem" and it could justify a mandatory death sentence. Id., 96 S.Ct. at 3006-07 n.9. Notwithstanding this analytical defect, however, the Colorado statute cannot be scrutinized by either the Woodson or Roberts decisions. It cannot for one primary and uncontroverted reason. The Colorado statute requires the jury to take into consideration mitigating and aggravating circumstances before the sentence of death is imposed. Thus, the mandatory death sentence cases can only be used as one of the parameter positions regarding the imposition of the death penalty.

B. NONMANDATORY DEATH SENTENCE STATUTES: GREGG v. GEORGIA, PROFFITT v. FLORIDA and JUREK v. TEXAS

In Gregg v. Georgia, 96 S.Ct. 2909 (1976), Troy Gregg was charged with committing armed robbery and murder.

In accordance with Georgia procedure in capital cases, the trial proceeded in a bifurcated manner; the determination of guilt was followed by a separate sentencing stage. The jury found Gregg guilty of two counts of armed robbery and two counts of murder. The penalty stage took place before the same jury. The judge instructed the jury that it could recommend either the death penalty or life imprisonment, but it could not authorize the imposition of the death sentence unless it found, beyond a reasonable doubt, one of three aggravating circumstances. The jury ultimately found the first and second of the aggravating circumstances to exist and returned a sentence of death on each count.

Gregg v. Georgia was joined by two companion cases for arguments before the Supreme Court. Those cases, Proffitt v. Florida, 96 S.Ct. 2960 (1976), and Jurek v. Texas, 96 S. Ct. 2950 (1976) held that their respective states had devised statutes permitting capital punishment which could pass constitutional muster. In each of these three cases and the two mandatory death sentence cases, supra, the Court heard two major issues:

(1) Does the penalty of death for the crime of murder constitute a per se violation of the eighth and fourteenth amendments, and

(2) if not, does the particular death penalty statute in question create a substantial risk that the death penalty might be inflicted in an arbitrary and capricious manner, thus violating the eighth and fourteenth amendments?

After reviewing the few cases that have involved substantial eighth amendment claims, Justice Stewart, writing for the majority, distilled two tests the amendment poses

for criminal sanction: the sanction must meet "the evolving standards of decency that mark the progress of a maturing society," and it must "accord with the dignity of man, which is the basic concept underlying the eighth amendment." In support of its conclusion that the death penalty meets contemporary standards of decency, the plurality cited its long history of acceptance in the United States and England, the flurry of new death penalty statutes enacted after Furman, and the continued willingness of juries after Furman to impose the penalty. Id., 96 S.Ct. at 2929. All-in-all, seven of the Justices reached the conclusion that capital punishment does not constitute a per se violation of the Constitution. The finding of the constitutionality rested upon four major considerations: (1) the long history of judicial acceptance; (2) contemporary societal acceptance of the punishment; (3) the useful social purposes served by the sentence; and (4) the proportionality of the punishment to the particular crimes considered.

Although the plurality recognized that the eighth amendment should be interpreted in a flexible and dynamic manner, they noted that history and precedent supported the constitutionality of capital punishment. Thus, the plurality strictly adhered to the two-pronged test of Trop, supra. While verbally espousing a dynamic interpretation of "cruel and unusual" the court nevertheless appeared inextricably bound to consider historical acceptance as well. If the evolving standards approach was the sole test, reference to the framers would be unnecessary. It is evident that, regardless of formal nomenclature, the court was most sensitive to the concepts of stare decisis and precedent, and made its rule accordingly.

The court did not, however, neglect the contemporary standards aspect of the constitutionality test and, in fact,

concluded that capital punishment was acceptable to society. As a basis for this conclusion, the plurality noted that both legislatures and juries had recently expressed approval of the death penalty.

The plurality also viewed the jury as a "significant and reliable objective index of contemporary values". Gregg, supra, 96 S.Ct. 2929. Justice Stewart was not convinced that the infrequent imposition of the death sentence was caused by rejection of capital punishment per se. Rather, he felt it indicated that jurors selected only the most atrocious crimes as meriting the ultimate sanction. Combining jury and legislative acceptance, the court concluded that contemporary society was not offended by capital punishment.

The burden of showing that the death penalty is unnecessary and, therefore, unconstitutional is a heavy one, since the plurality in Gregg would invalidate a penalty only if it is "totally without penelogical justification." Id., 96 S.Ct. at 2930. The plurality stated that the death penalty was popularly regarded as serving two principle social purposes: retribution and deterrence of capital crimes by prospective offenders.

The Gregg plurality noted that "capital punishment was an expression of society's moral outrage" at particularly heinous conduct and recognized retribution by itself as a legitimate penelogical goal. Noting that empirical evidence neither supported nor refuted a deterrent effect, the majority felt it safe to assume that for some crimes the penalty did provide significant deterrence. Furthermore, since legislatures deemed the death penalty to have such a deterrent effect, Steward would not dispute that conclusion and on that basis hold the death penalty unconstitutional. Turning

to the requirement of proportionality, the plurality asserted that the penalty, although "unique in its severity and irrevocability," is not always disporportionate to the crime of murder.

Having found that the death penalty is not inherently cruel and unusual, the court examined each challenged statute to determine whether the specific method it provided for imposing the penalty violated the eighth amendment. The severity of the penalty had made the court unwilling in Furman to allow its application to be determined by the discretion of a sentencing body unless "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Id., 96 S.Ct. at 2932. Despite its recognition that discretion is exercised by the executive branch on numerous occasions in both the pre-trial and post-trial stages of the criminal process, the Court was unwilling to broaden its focus to include such sources of possible arbitrariness and refused to find in Furman a prohibition on affording mercy to selected defendants. Instead, it attempted to insure a principled application of the penalty through guidance to the sentencing body coupled with appellate review.

In the lead case of Gregg v. Georgia, supra, the Court examined Georgia's new statute and found by a 7-2 margin, that the Georgia Legislature had successfully met the requirements of Furman. The Georgia sentencing statutes permit the death penalty for five crimes in addition to murder, but the sentence attacked by the petitioner was for murder alone. The statutes called for a bifurcated trial period. The first stage is devoted to making a determination of guilt. The second stage is to determine the sentence

if the defendant is found guilty. At the sentencing stage, considerable latitude is given both the prosecutor and the defense in introducing evidence that might have a bearing on the sentencing authority's final judgment. The death penalty may only be imposed at the sentencing stage if the jury (or judge, if a bench trial) finds at least one of the statutory aggravating circumstances and then elects to impose that sentence. Even if one of the aggravating circumstances is found, mitigating circumstances brought out during the sentencing stage may influence the sentencing authority not to impose the death penalty. The aggravating circumstances are set out in GA. Code Ann. § 272534.1 (1975):

> (a) The death penalty may be imposed for the offense of aircraft hijacking or treason, in any case.
>
> (b) In all other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:
>
> (1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.
>
> (2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.
>
> (3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.
>
> (4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial official, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offense of murder, rape, armed robbery or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(9) The offense of murder was committed by a person in, or who has escaped from, a lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in section 27-2534.1 (b) is so found, the death penalty shall not be imposed.

Petitioner Gregg attacked this statutory plan as violative of the Furman requirements. He first attacked the opportunities for discretionary action under the statute, pointing in particular to the unfettered authority of the prosecutor to determine which defendants will be charged with a capital crime and which will not; the discretion of the jury to find the defendant guilty of a lesser included offense; and the discretion of the governor and the Board of Pardons

and Paroles to commute a death sentence. The Stewart plurality noted that these charges were little more than "a veiled contention that Furman indirectly outlawed capital punishment by placing total unrealistic conditions on its use." Id., 96 S.Ct. 2937 n. 50. According to the Stewart plurality, Furman held only that in order to avert a capricious and arbitrary use of the death penalty, the decision of when and how to use it had to be guided by standards focusing attention on the particular offense and offender. Thus, the existence of the various discretionary stages inherent in the criminal justice system was not a relevant factor concerning issues raised before the court.

The petitioner next charged that the statutes were so vague and broad that they left the juries "free to act as arbitrarily and capriciously" as before in determining a sentence. The Stewart plurality disagreed.

The third flaw the petitioner presented was that the statutes fell short of the requirements of Furman because the juries could refuse to impose the death penalty even if one or more of the aggravating factors were found. The Stewart plurality declared that this attack misinterprets Furman:

> Since the proportionality requirement on review is intended to prevent caprice in the decision to inflict the penalty, the isolated decision of a jury to afford mercy does not render unconstitutional death sentences imposed on defendants who were sentenced under a system that does not create a substantial risk of arbitrariness or caprice.

Finally, the petitioner objected to the wide scope of evidence and argument that is allowed at the sentencing stage of the trial. The plurality quickly disposed of this argument by saying that the more argument and evidence

presented, the better the opportunity for the jury to assess whether to impose the death penalty. Id., 96 S.Ct. at 2939.

In conclusion, the Stewart plurality stated that the basic concepts of Furman "centered on those defendants who were being condemned to death capriciously and arbitrarily." Under the present Georgia plan, the Steward plurality concluded, a jury could no longer do what it was possible to do under the old Georgia plan; that is, it cannot impose the death penalty "wantonly and freakishly; it is always circumscribed by the legislative guidelines." Juries are now directed to focus their attention on the nature and circumstances of the wrongdoer. This, along with the appellate review, assured the Stewart plurality that the concerns that prompted the decision in Furman would not be present under the new state plan.

The statute under scrutiny in Proffitt v. Florida, supra, parallels the Georgia statute in that the Florida statute provides that both aggravating and mitigating circumstances must be taken into account. Like Georgia's statutes, the Florida statute enumerates the aggravating circumstances. It also provides for review of the sentence by the State Supreme Court, although there is no form prescribed for that review. The Florida statutes specifically enumerates some mitigating circumstances for the jury to consider, but the jury is not confined to those circumstances and may take others into consideration. The finding of the jury on sentencing is merely advisory in Florida, as the trial judge makes the final determination of the sentence. The same 7-2 majority upheld the Florida statute. The Florida Aggravating circumstances are found in Fla. Stat. Ann. §921.141 (5):

> (a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, any robbery, rape, arson, burglary, kidnapping or aircraft piracy or the unlawful throwing, placing or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

Mitigating circumstances are found in Fla. Stat. Ann. §291.141 (6):

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

After rejecting the petitioner's attack on the statute for allowing inherent discretion thoughout the system

for the same reasons as it rejected that attack in Gregg, the Stewart plurality considered the argument that the statute was overbroad and vague allowing "virtually any first degree murder convict to be a candidate for the death sentence." Justice Stewart's opinion considered the statute's provisions as they have been construed by the Florida Supreme Court and concluded that the statute's provisions were neither impermissibly vague or of "inadequate guidance to those charged with the duty of recommending or imposing sentences."

The petitioner next charged that the statute gave no guidance to the jury or judge as to how to weigh the various mitigating and aggravating circumstances. Once again, the plurality opinion of Justice Stewart rejected the argument. The Stewart plurality found that while the decision of whether to impose the death penalty may be hard, it is basically the same type of decision that fact finders are routinely required to make. Furman's requirements are satisfied when the judge or jury responsible for sentencing is guided and channeled by special factors that argue for or against the death penalty, thus "eliminating total arbitrariness and discretion in its imposition."

The Florida statute does not provide a structured form of review by the State Supreme Court, thus opening up the process to the petitioner's charge that is necessarily unobjective and unpredictable. However, the Stewart plurality refused to find that the process was necessarily ineffective or arbitrary. On the contrary, they noted that the Florida Supreme Court had undertaken its functions responsibly. Proffitt, supra, 96 S.Ct. at 2969.

The Court upheld a third state statute by the same 7-2 margin in Jurek v. Texas, supra. Jerry Jurek was convicted of murder in the course of committing and attempting to

commit kidnapping and forceful rape upon a ten-year-old child. The Texas statutory scheme differs significantly from the previous two discussed. Of significance was the fact that Texas severely limits the categories of murder for which the death sentence may be imposed. The situations include intentional and knowing murders of peace officers and prison employees, murders for remuneration, murders committed in the course of carrying out particular felonies, and murders committed during an escape from a penal institution.

The statutory procedure calls for the jury to answer three questions. Essentially, the questions require the jury to consider: whether the defendant acted deliberately and with the reasonable expectation that death would result; whether the defendant would constitute a continuing threat to society; and whether the conduct of the defendant was unreasonable in response to any provocation which may have existed. If the jury finds that the state has proved beyond a reasonable doubt the answer to the three specified questions is yes, the death sentence is imposed. However, if the jury finds the answer to any of the questions to be no, a sentence of life imprisonment will be imposed. The Texas sentencing statute in its entirety reads as follows:

> (a) Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted.

(d) The court shall charge the jury that:

(1) it may not answer any issue "yes" unless it agrees unanimously; and

(2) it may not answer any issue "no" unless 10 or more jurors agree.

(e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted under this article, the court shall sentence the defendant to confinement in the Texas Department of Corrections for life.

(f) The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals within 60 days after certification by the sentencing court of the entire record unless time is extended an additional period not to exceed 30 days by the Court of Criminal Appeals for good cause shown. Such review by the Court of Criminal Appeals shall have priority over all other cases, and shall be heard in accordance with rules promulgated by the Court of Criminal Appeals.

This scheme was also upheld by the Court. In announcing the plurality opinion, Justice Stewart noted that although Texas did not adopt the aggravating-mitigating circumstances approach, an identical purpose was served by narrowing the categories of crime for which the death penalty could be

imposed. The Stewart plurality held that the carefully limited scope of murder for which capital punishment can be imposed serves the same purpose as statutory aggravating circumstances, that is, to guide and channel the jury while eliminating arbitrary discretion in the determination of the sentence. This alone would not validate the Texas plan because Furman mandates that mitigating circumstances must also be taken into account. Since the statute does not specifically deal with mitigating circumstances, the Stewart plurality carefully examined the three post-conviction questions which under the statute the jury must answer affirmatively before the death sentence can be imposed.

The Stewart plurality found that the Texas Criminal Court of Appeals had indiciated in its decision of the petitioner's case that it would interpret the second question so as to allow a defendant to bring to the jury's attention whatever relevant mitigating circumstances that he may be able to show. Thus, accepting the Texas Court's interpretation of the second question, the Stewart plurality concluded that the Texas statute is consistent with the requirements of Furman. It provides for rational, even, and consistent imposition of the death penalty and is therefore constitutional. Id., 96 S.Ct. at 2958.

The significance to this particular case is that a new concept was introduced to the capital punishment issue. Justice Stewart stated that constitutional considerations required the jury to consider mitigating circumstances. As the defendant was allowed to introduce evidence of mitigating circumstances in aiding the jury's determination of the second question, the plurality concluded that the Texas procedure adequately complied with this new demand. This was held

despite the absence of explicit reference to mitigating circumstances in the statutes. Id., 96 S.Ct. at 2957.

These three landmark cases indicate that McGautha, supra, was not an anomaly in an otherwise consistent trend of cases. The court did not refuse to rule on the death penalty per se and it did not use a procedural defect to reverse a sentence of death. Rather, the Jackson line of cases is now obsolete and once again the death sentence is a viable sentencing alternative. The impact of these decisions is significant because, given the reluctance of the present Court to intervene in legislative determinations, it is highly unlikely that the Court will grant certiorari on the issue of capital punishment per se in the immediate future. Thus, any relief sought must be accomplished through either the executive or legislative branch of government.

IV.

THE CONSTITUTIONALITY OF C.R.S., 1973, 16-11-103 AFTER GREGG v. GEORGIA, et. seq.

This Memorandum Brief has sought to analyze the cases in Furman, Gregg, Proffitt, and Jurek, supra, with some degree of detail precision. The reason is an important one; the question of whether the Colorado sentencing statute, C.R.S., 1973, 16-11-103, is constitutional depends greatly upon examining that statute against the context and historical progression of the above-cited cases. The Public Defender's Brief in Wildermuth attacks the Colorado statute against an incorrect analysis and reading of these key United States Supreme Court cases. A misconstruction of these cases, or a misinterpretation of the correct constitutional questions, is as equally fatal as a misconstruction of the Colorado

statute in question. In fact, most of the Public Defender's arguments are reiterations of those issues argued by the Petitioners in Gregg, Proffitt, and Jurek, supra, all of which, it is submitted, were rejected by the Supreme Court in those cases.

This brief does not find it necessary or appropriate to reargue the already litigated issues in Gregg, et. seq., supra. What is appropriate, however, is a determination of the constitutional requirements necessary in order to uphold the state sentencing statute when death is an alternative. For these reasons, an articulation of the minimum constitutional requirements the death statutes must possess is more useful to this Court than arguments on specified issues which are either no longer relevant or have been previously litigated.

Basically, legislatures must construct sentencing standards which prohibit judges and juries from arbitrarily or capriciously imposing the death penalty. The opportunity for imposing arbitrary sentences is reduced when the Judge and jury are provided with adequate information. The Supreme Court intimated that providing for a bifurcated procedure is the best method of assuring that a jury is given adequate guidance and information. Gregg v. Georgia, 96 S. Ct. 2909, 2939. Although this procedure is not mandatory, it should receive careful consideration. The sentencing authorities should be directed to consider the specific circumstances of the crime and the individual characteristics of the defendant. The aggravating-mitigating circumstances approach fills this requirement. A knowledge of the eighth amendment history will aid in determining which circumstances to include. Historically, the eighth amendment has proscribed barbarious and inhumane punishments as well as those which are disproportionate to the crime committed. Naturally, the death

penalty must be justified in these terms. Coker v. Georgia, 45 U.S.L.W. 3249. Therefore, the mitigating and aggravating circumstances should aid in explaining the reasons why the death sentence is humane and proportional to the crime which was perpetrated. C.R.S., 1973, 16-11-103, comports with all of these requirements.

In fact, a comparison of the Colorado mitigating-aggravating factor statute with the like statutes of Georgia, Florida and Texas, indicates that Colorado's is quite similar. That similarity is applicable in two differing, although parallel, ways: One; a plain reading comparison of these statutes shows closely drawn factors and procedures (the People feel it is not necessary to take this Court through these step-by-step; the similarities are obvious on their face); Two, the legislative intent in Colorado's statute is exactly as were those statutes in Gregg, Proffitt, and Jurek, supra. That is, to provide a sentencing procedure which allows a meaningful resolution of a factual determination within limits which prevent an arbitrary or capricious application of death as the "ultimate resolution."

The statute clearly must allow the judge and jury to consider both the aggravated and mitigating circumstances. However, it is not essential that the statutes specifically enumerate both types. Rather, the constitutional requirements are met if, somewhere in the sentencing process, be it by way of jury instruction, the answers to specific questions, or other means, due consideration is given to the reason the death penalty should not be imposed. Gregg v. Georgia, 96 S.Ct. at 2956.

Colorado, of course, has adopted the approach which conforms most strenuously to assuring that the imposition of the death penalty will not be freakish or arbitrary. That

approach is to require the prosecutor to prove at least one aggravating factor and disprove all the mitigating factors which may, potentially, be at issue. A comparison of the Colorado factors with those factors in Gregg, Proffitt, and Jurek, supra, supports the constitutionality of the Colorado procedure. (See Section III B of this Memorandum).

More generally, in either the legislative or judicial context, it is well to note the evils the eighth amendment is designed to curb. The eighth amendment, as interpreted by the Court, prevents two primary abuses. Clearly, it prohibits inhumane and barbarious punishments. Additionally, though, it minimizes the possibility of irrational and inconsistent imposition of the death penalty. With these considerations in mind, statutes and litigating strategy must be formulated which adequately deal with the recent Surpreme Court rulings. Appropriately, the Colorado statute in question has adequately been tailored to meet the constitutional requirements in Gregg, et. seq., supra.

One additional issue is of noteworthy importance: Does Colorado provide for meaningful judicial review of death sentences in Class 1 Felonies?

Article VI, Section 2 of the Colorado Constitution fixes the Appellate jurisidiction of the Colorado Supreme Court. It reads, in part:

> (2) Appellate review by the Supreme Court of every final judgment of the District Courts, the Probate Court of the City and County of Denver, and the Juvenile Court of the City and County of Denver shall be allowed and the Supreme Court shall have such other Appellate review as may be provided by law . . . (emphasis added).

C.R.S., 1973, 16-11-103, provides for a sentencing hearing to be held upon conviction of guilt of a Class 1

Felony. The procedure is finalized by the Court, either by imposing a sentence of death or life imprisonment. The sentence, therefore, becomes a judgment of the District Court and is reviewable as such by the Supreme Court.

A heavy burden is on the defendant to show grounds to hold the Colorado statute unconstitutional. In fact, that burden has been characterized as one that is beyond a reasonable doubt. Cavanaugh v. People, 61 Colo. 292, 157 P.200. People v. Howe, -- Colo. --, 496 P2d 1040. Consistent with that burden is the generally accepted and applied rule that if a statute can be construed as constitutional, that statute shall be so construed. People v. Praute, 177 Colo. 243, 493 P2d 1083 (1972).

This Court, however, need not chose to apply the above analysis to the Colorado Supreme Court's reviewability of a Class 1 Felony sentence in Colorado. Clearly, the Supreme Court may review the sentencing hearing, and its evidentiary basis just as it does that portion of the trial held on the merits directed toward guilt. If a judgment can be reversed, as a matter of law and right, on evidence insufficient to meet the burden which that judgment reflects, then certainly the Supreme Court has the ability to review the sentencing hearing under the same standard. The general appellate rights of any defendant are reflected in several areas of Colorado criminal and appellate law. One; Colorado Appellate Rules 4 (b):

> (b) Appeals in Criminal Cases. In a criminal case the notice of appeal by a defendant shall be filed in the trial court within thirty days after the entry of the judgment or order appealed from. A notice of appeal filed after the announcement of a decision, sentence, or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof. If a timely motion in arrest of judgment

or for a new trial on any ground other than newly discovered evidence has been made, an appeal from a judgment of conviction may be taken within thirty days after the entry of an order denying the motion. A motion for a new trial based on the ground of newly discovered evidence will similarly extend the time for appeal from a judgment of conviction if the motion is made within ten days after entry of the judgment. When an appeal by the state or people is authorized by statute, the notice of appeal shall be filed in the trial court within thirty days after the entry of the judgment or order appealed from. All such appeals shall be filed in Supreme Court. A judgment or order is entered within the meaning of this section (b) when it is entered in the criminal docket. Upon a showing of excusable neglect the trial court may, before or after the time has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed thirty days from the expiration of the time otherwise prescribed by this section (b).

Under this rule any defendant convicted of any class felony has appellate remedies as a matter of right. In fact, a sentence of death must be stayed upon the filing of a notice of appeal. C.A.R. 8.1 (a)(1). This rule is codified in C.R.S., 1973, 16-12-101.

Two; Colorado Appellate Rules, 4 (c)(1):

(c) Appellate Review of Sentences.

(1) Availability of Review. When sentence is imposed upon any person following a conviction of any felony in which the sentence was imposed by the Court, the person shall have the right to one appellate review of the propriety of the sentence, having regard to the nature of the offense, the character of the offender, the public interest, and the sufficiency and accuracy of the information on which the sentence was based. (emphasis added)

This rule is mandatory. Upon conviction of any felony the person convicted shall have the right to one appellate review of the propriety of the sentence.

Three; C.R.S., 1973, 18-1-410:

18-1-410. Postconviction remedy. (1) Notwithstanding the fact that no review of a conviction of crime was sought by appeal

within the time prescribed therefor, or that a judgment of conviction was affirmed upon appeal, every person convicted of a crime is entitled as a matter of right to make applications for postconviction review. An application for postconviction review must, in good faith, allege one or more of the following grounds to justify a hearing thereon:

(a) That the conviction was obtained or sentence imposed in violation of the constitution or laws of the United States or the constitution or laws of this state;

(b) That the applicant was convicted under a statute that is in violation of the constitution of the United States or the constitution of this state, or that the conduct for which the applicant was prosecuted is constitutionally protected;

(c) That the court rendering judgment was without jurisdiction over the person of the applicant or the subject matter;

(d) That the sentence imposed exceeded the maximum authorized by law, or is otherwise not in accordance with the sentence authorized by law;

(e) That there exists evidence of material facts, not theretofore presented and heard, which, by the exercise of reasonable diligence, could not have been known to or learned of by the defendant or his attorney prior to the submission of the issues to the court or jury, and which requires vacation of the conviction or sentence in the interest of justice;

(f) (I) That there has been sufficient change in the law, applied to the applicant's conviction or sentence, allowing in the interest of justice retroactive application of the changed legal standard;

(II) The ground set forth in this paragraph (f) may not be asserted if, prior to filing for relief pursuant to this paragraph (f), a person has not sought appeal of a conviction within the time prescribed therefor or if a judgment of conviction as been affirmed upon appeal.

(g) Any grounds otherwise properly the basis for collateral attack upon a criminal judgment; or

(h) That the sentence imposed has been fully served or that there has been unlawful revocation of parole, probation, or conditional release.

(2) Procedures to be followed in implementation of the right to postconviction remedy shall be as prescribed by the rule of the supreme court of the state of Colorado.

Here, every defendant has a second right of review notwithstanding the fact that his judgment was affirmed upon a direct appeal.

Finally; Colorado Rules of Criminal Procedure 35 (a):

(a) Correction of Illegal Sentence. The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence. The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a remittitur issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the appellate court denying review, or having the effect of upholding a judgment of conviction. The court may not reduce a sentence reviewed by an appellate court pursuant to C.A.R. 4(c) except as ordered by the reviewing court. The court may also reduce a sentence upon revocation of probation as provided by law.

It is arguable, under a 35 (a) motion that a defendant, convicted of a Class 1 Felony, has collateral review remedies pursuant to C.R.C.P. 35 (a). The People, in this memorandum brief, take no position concerning this argument as it is presently before the Colorado Supreme Court in the case of Ferrel v. People, S.Ct. No. 27715.

The above appellate rights are important under C.R.S., 1973, 16-11-103, for one reason: What is reviewable under the "guilt" phase of the bifurcated procedure is reviewable under the "sentencing" phase too. Clearly this statutory procedure does not contemplate a new trial on the merits for every Class 1 Felony. Indeed, often the prosecution will merely refer the jury's attention to that evidence received under the "guilt" phase (or substantive phase) in order to prove or disprove one or more of the aggravating or mitigating

factors. If that evidence is reviewable as of right in the "guilt" phase and is refered to or duplicated in the "sentencing" stage, then obviously the same appellate standards of review apply. C.A.R. 4 (b); C.A.R. 4 (c).

Therefore, this court is left with several alternative positions that are provided for a defendant convicted in Colorado of a Class 1 Felony and sentenced to death. As the Public Defender points out in the Wildermuth brief; C.R.S., 1973, 18-1-409 excludes direct appellate review of a sentence imposed by a jury for a Class 1 Felony. Colorado Appellate Rule 4 (c)(1) does not, however, and, therefore, this rule coupled with the postconviction remedies in C.R.S., 18-1-410, the illegal sentence review in Colorado Rules of Criminal Procedure 35 (a) and the general appellate review of right as reflected in Colorado Appellate Rules 4 (b), 8.1 (a)(1) and C.R.S., 1973, 16-12-101, satisfies the constitutional requirements of appellate review as enumerated in Gregg, et. seq., supra. (See part III B of this Memorandum). Indeed, the state of Florida did not have a precisely delineated review procedure of its death sentences in Proffitt, supra. The Supreme Court, however, after noting that the Florida statute did not prescribe a distinct form for review, refused to find that the process was necessarily ineffective or arbitrary and, in fact, that the Florida Supreme Court had undertaken its functions responsibly by utilizing those appellate procedures available and, thus, insuring meaningful appellate review of each death sentence imposed under the statute. Proffitt v. Florida, 96 S.Ct. at 2969 (See Part III B of this Memorandum). It seems clear, therefore, that the same process is available in Colorado that was available in Florida and upheld in Proffitt, supra.

The above rights constitute the basis for sufficient appellate review in order to satisfy the requirements of Gregg, et. seq., supra. This, however, is a standard of constitutional proportions, which, placed into the context of Gregg and its companion cases, show one clear constitutional need: each trial and sentencing hearing must become, at some point, reviewable on appeal. Either the People's reading of Article VI, Section 2, as applied to 18-1-409, or the general appellate procedures available to the defendant under C.A.R. 4 (b) and (c); C.A.R. 8.1 (a)(1); C.R.S., 1973, 16-12-101; C.R.S., 1973, 18-1-410 and C.R.C.P. 35 (a) satisfy the constitutional requirements of "meaningful appellate review" as required in Gregg, et. seq., supra.

In the final analysis, the Gregg plurality reached a conclusion which combined the desire to keep the death penalty as a viable punishment without the fear of arbitrariness. The result was a capital sentencing standard which fell within the outer parameters of a mandatory penalty on the one hand and a completely discretionary penalty on the other, but which combines elements of both. A statute cannot require the death penalty unless it permits sentencers to take into account the nature of the crime and the circumstances of the offense. Yet, this discretion must be so guided so that its application is as uniform as possible. The Colorado death penalty sentencing statute in question satisfies these constitutional perogatives as required in Gregg v. Georgia, et. seq., supra.

Respectfully submitted,

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fact that the defendant was an accomplice and not the main perpetrator of the crime, the defendant's age, his claim of duress, coercion, and everything else. But having won that case, counsel now argues in his reply brief that the judge's method there represents the kind of arbitrary and capricious discretion condemned in Furman.

In a response to a question from Mr. Justice Stevens, Kirschner said that the judge in Ervin did find a statutory mitigating circumstance. However, the judge said that that was secondary to the other aspects of the case — the nature of the offense and the history of the defendant.

Mr. Justice Stevens: Assume then that the Ohio statute permitted the judge to give independent consideration to an offender's youth, the fact that he didn't pull the trigger himself, and the fact that he cooperated with the police. Would the statute then be unconstitutional?

No, Kirschner replied.

Mr. Justice Stevens: Then you're really not in this terrible dilemma that you can't figure out the answer. Perhaps defense counsel was inconsistent, but we're not necessarily going to what he says.

Mr. Justice Stevens again pointed out that the statute as written permits character and other aspects to be taken into consideration only in determining whether one of the three mitigating circumstances exists.

But mental deficiency goes well beyond the strict definition, Kirschner replied. Looking at a person's history and the circumstances, a trial court could find mitigating circumstance in a mental deficiency or quirk even in a person with a high IQ. Duress and coercion also have broad implications.

Kirschner disputed the contention that there could be any mitigating circumstances here. Bell assisted Hall in sawing off the shotgun, he said, and Bell went to Dayton long after any drug effect which he might have had had worn off. Moreover, Bell could have left Hall while they were riding in separate cars.

Lockett v. Ohio, No. 76-6997; argued 1/17/78.

Argument for the defense in the second case was presented by Anthony G. Amsterdam, of Stanford, California. He began by describing Lockett's trial and raising the issue of improper prosecutorial argument. Lockett was convicted for aggravated murder in the shooting death of Sidney Cohen, a pawnshop proprietor. The gun was fired by Al Parker, the state's chief witness. The state's theory was that the defendant conspired with Parker, her brother James Lockett, and Nathan Dew, to rob Cohen's pawnshop; that they had all gone there for that purpose; and that the defendant remained outside in the car while the three men went in. According to Parker's testimony, Cohen snatched at the gun, and it went off accidentally and killed him.

The Chief Justice took issue with counsel's statement that the killing was "totally outside the plan of the robbery." Under that theory, the perpetrators would not have needed any bullets in the gun, would they? he asked. But they loaded it there in the shop.

They went in with bullets, Amsterdam answered, and they used a gun which was there. The plan included using a weapon but it did not include killing. What is important here is the prosecution's theory that Sandra Lockett was a party to this conspiracy to go in and rob. The defense contends that there was no plan to rob at all, and that Lockett thought the men entered the store to pawn a ring. It is only Parker's testimony that connects Lockett with the plan to rob the pawnshop. Testimony of other witnesses corroborated parts of Parker's testimony but was also consistent with a theory of Lockett's innocence.

Against her lawyer's advice, Lockett did not testify. She called Dew and her brother and they took the Fifth Amendment in front of the jury. In the prosecutor's closing argument, he repeated again and again — seven times in all — that the prosecution's evidence was uncontradicted and unrefuted. My submission, Amsterdam said, is that this directed the jury's attention to the defendant's failure to take the stand in her own behalf. It was a forbidden comment on her privilege of self-incrimination and requires reversal of her conviction under Griffin v. California, 380 U.S. 609 (1965).

Mr. Justice Marshall: If evidence is uncontradicted, then you can always tell the jury that.

It makes a difference to say it seven times, Amsterdam replied. It also makes a difference whether the defendant is the only person who can contradict or refute the prosecution's evidence. The prosecutor's argument invited the jury to say to itself "if the defendant had been

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innocent, she would have taken the stand, but she did not, so she must be guilty."

The Chief Justice: Do you think intelligent jurors don't ask that question of themselves, even if the prosecutor has never mentioned a word about it?

Amsterdam: That is a risk which is involved in the system, but it is the square holding in Griffin that the risk cannot be increased in any way by comment on the part of any of the parties to the proceedings. A prosecutor cannot invite a jury to draw the conclusion, although the jury might do it itself.

MITIGATION AND PROPORTIONALITY

Responding to a suggestion that he move on to the death penalty issues, Amsterdam stressed the relationship between the mitigation issue that had been argued in the Bell case and the question of proportionality. The latter argument is that the application of the death penalty to a person who was neither a participant in the killing nor an intentional perpetrator of any act that was directed toward a killing affronts the proportionality principle of Coker v. Georgia, 433 U.S. 584, 21 CrL 3199 (1977).

There is a relationship between those arguments, Amsterdam continued. In combination they produce still a third constitutional question which is the narrowest conceivable ground on which these cases can be decided. The Ohio statute precludes consideration of the fact that the defendant has been condemned for a crime which she did not do, did not attempt, and did not intend. So this Court could decide that whether or not it would be unconstitutional for the state to impose the death penalty in a case like this, it is unconstitutional for the state to do so while forbidding the sentencing authority even to consider that mitigating circumstance.

The Chief Justice: Are you asking us to abolish the concept of felony murder?

Amsterdam was emphatic in his denial. If Coker has any meaning, he said, it must mean that if the defendant's conviction rests only on a felony, then the death sentence is disproportionate. Our argument has nothing to do with the constitutionality of felony murder as a basis for a conviction.

Amsterdam disputed the state's argument that the jury must have found an intent on Lockett's part to kill the pawnshop proprietor. The key to this case, he said, is a jury instruction stating that "a person engaged in a common design with others to rob by force and violence an individual or individuals of their property is presumed to acquiesce in whatever may reasonably be necessary to accomplish the object," including the endangering of the victim's life. The instruction further told the jury that "if the conspired robbery and the manner of its accomplishment would be reasonably likely to produce death, each plotter is equally guilty with the principal offender as an aider and abettor * * * [and] intent to kill by an aider and abettor may be found to exist beyond a reasonable doubt under such circumstances." Thus the jury was charged, counsel concluded, that it should find Lockett guilty of purposefully killing the pawnshop proprietor if she participated in an armed robbery attempt.

Mr. Justice White: Are you saying that only the triggerman may be punished?

No, not at all, Amsterdam replied. Under Coker, the question of whose finger was on the trigger is not important. What is important is the question whether the defendant was a participant in a scheme aimed directly and deliberately at human life.

Mr. Justice White asked about Parker.

It would be unconstitutional for Ohio to forbid consideration of the fact that Parker's shooting was accidental, Amsterdam replied. But it is a different question whether, given an acceptable procedure for consideration of mitigating factors, Ohio could impose the death penalty for an unintended killing by someone who was taking steps toward killing with the knowledge that the victim's death was likely. In any event, that is not this case.

LIKE TEXAS

The state's argument was presented by Carl L. Layman, III, Assistant Prosecuting Attorney for Summit County, Ohio. After disputing Amsterdam's contention that the defendant did not envision the possibility of deadly force in the robbery, Layman turned to the question of mitigation. Like state counsel in the Bell case, he argued that the Ohio Supreme Court has construed the statute to take into account youth, degree of participation, and other factors in mitigation. What the Ohio court has done is similar to what the Texas court did in the statute which was upheld in Jurek v. Texas, 428 U.S. 262, 19 CrL 3282 (1976), he said.

It is not true that the mitigating factor of mental state never works to a defendant's advantage. Dew was given the advantage of this factor. But he was the dupe, the pawn who was directed by the petitioner, who planned this robbery. She was the mastermind in the crime.

Mr. Justice Stevens: Under the statute, how is there a principled way to distinguish between the defendant and Dew if they both had the same knowledge?

Layman: Under the mental state factor, the two may be contrasted. She was the mastermind, and he was directed by her, so she is more culpable.

Mr. Justice Stevens: You say that the Ohio courts may consider the degree of participation. But it does not fit within the language of the three specified mitigating circumstances, does it?

Counsel answered the degree of participation could be considered under any one of the three factors. Counsel also referred State v. Black, 48 Ohio St2d 262, which he said represents the latest broadening interpretation by the Ohio Supreme Court.

Mr. Justice Stevens asked how Parker and the defendant could be distinguished.

That is answered in Gregg and other cases, Layman answered, in terms of the necessity for plea bargaining. The use of mercy and plea bargaining do not involve the same kind of consideration that are presented in this case. He also said that Lockett was offered opportunities to plead to voluntary manslaughter and to aggravated murder without the specification that would bring the death penalty into play, but she refused both offers.

0011-1341/78/$00.50

NOT DISPROPORTIONATE

The defendant's disporportionality argument ignores the rules of aiding and abetting and felony murder, Layman argued. The defense is saying that she is less culpable than the triggerman. This is not the kind of thing that this Court can say per se.

Mr. Justice Marshall: The defense is talking about sentencing, not culpability.

Layman: True, but I think culpability is one of the things to be used in determining whether the sentence is imposed properly or not. To apply the disproportionality argument, this Court would have to overturn Ohio's case law on aiding and abetting.

Turning to the first issued raised by Amsterdam, Layman disputed the defense reliance on Griffin v. California. The prosecutor's comments were not objected to at trial, he pointed out. Moreover, the trial court gave an instruction telling the jury that they could not take into consideration the defendant's failure to testify.

Mr. Justice Stevens returned to the death penalty problem. Under Ohio criminal practice generally, he asked, is it normally the practice to take into consideration a defendant's prior criminal record for sentencing purposes? When counsel replied that it was, Mr. Justice Stevens asked if prior criminal record is considered in capital cases.

It can be considered, Layman replied. He referred to the same statutory language as state counsel in the prior case had pointed out, concerning the court's consideration of the character, history, and condition of the defendant.

Mr. Justice Stevens: Yes, but just for the purposes of determining whether one of the three mitigating circumstances has been established. On the other hand, in non-capital cases prior record is given independent significance, is it not?

Layman agreed that prior record may be considered among many other factors in determining sentence. The Constitution does not necessarily require that a court in a capital case consider all possible mitigating circumstances, he argued.

Layman also said that an Ohio trial judge has as much discretion as a Texas judge in deciding whether or not to impose the death penalty. Moreover, the trial judge has the benefit of a pyschiatric report and a presentence investigation. Thus the court has sufficient information to look at the defendant's background and condition.

In rebuttal, Amsterdam undertook to distinguish the Ohio and Texas statutes. The statutory question in Jurek is a broad one, as opposed to the narrow mitigating questions set forth in the Ohio mitigation provision, he stressed.

Amsterdam also commented on Ohio's felony-murder law. Most states say that if you have a killing in the course of a felony, you do not have to have intent in order to have felony murder. In Ohio you must have the intention of killing in the course of a felony. But in the case of a felony with a deadly weapon, a killing is presumed to be intentional. We are not talking about a jury inference but a statutory presumption of intent, he said.

FEDERAL JURISDICTION — HOBBS ACT — RACKETEERING.

U.S. v. Culbert, No. 77-142; argued 1/11/78.

A misinterpretation of legislative history and a mistaken notion of federalism led the Ninth Circuit to read a "racketeering" requirement into the Hobbs Act, 18 USC 1951, the federal government recently told the U.S. Supreme Court. These errors resulted in the appeals court's ruling that although an extortion defendant's conduct fell within the Act's literal language, it was nonetheless not within the Act's reach. 548 F2d 1355.

Sara S. Beale, of the Solicitor General's Office, told the Court that there was no dispute that the defendant's conduct fell within the express terms of the Act. Under its terms, the Act applies to anyone who "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires to do so * * *." Beale explained that the defendant and his accomplice attempted to extort $100,000 from a federally insured bank that was doing business in interstate commerce. The accomplice telephoned the bank's president and threatened to detonate remote control bombs at both the bank and the executive's home unless certain instructions were followed. The executive then took a package of false currency supplied by the FBI and left it at the designated spot. The package was never picked up because it was found almost immediately by two small children. After a jury trial, Culbert was convicted of violating the Hobbs Act and of attempted bank robbery. The Ninth Circuit reversed both convictions, but the government seeks review only of the ruling relating to the Hobbs Act.

Over the dissent of Judge Carter, Beale continued, the Ninth Circuit ruled that extortionate conduct such as the defendant's must be proven to constitute racketeering in order to be within the reach of the Hobbs Act. It did not define the term "racketeering" but did conclude that there was no evidence of racketeering in this case. The appeals court did not contend that Congress lacked the authority to prohibit all the conduct which does fall within the express terms of the Act.

LEGISLATIVE HISTORY

Before Beale began her discussion of the legislative history, the Chief Justice asked whether, under the government's theory of the case, one need look at the legislative history at all.

The language of the Act is very plain, Beale responded. And there is nothing in the legislative history to support a conclusion that is at variance with that plain and very broad language.

My first point, counsel said, is that although the Act was an outgrowth of congressional concern with so-called racketeering, that fact in no way indicates that Congress intended there to be some limitation to racketeering which appears neither in the Act itself nor in the committee's report.

Mr. Justice Blackmun asked whether this case and others like it represent a new use of the Act.

CHAMBERS
THE DISTRICT COURT
NINTH JUDICIAL DISTRICT, COLORADO
(303) 925-7635

COUNTIES { GARFIELD
PITKIN
RIO BLANCO

GEORGE E. LOHR, JUDGE

506 East Main
~~XXXXXXXXX~~
ASPEN, COLORADO 81611

February 28, 1978

Kenneth Dresner, Esq.
307 North Main
Gunnison, Colorado 81230

Kevin O'Reilly, Esq.
P.O. Box 1635
Glenwood Springs, Colorado 81601

Milton K. Blakey, Esq.
20 E. Vermijo Avenue - Suite 310
Colorado Springs, Colorado 80903

Re: People v. Bundy - C-1616

Gentlemen:

For your information, it appears to me that the Rule to Show Cause, copy attached, may be construed to prohibit all judicial activity in the case, including consideration of conditions of confinement and consideration of application for attorney's fees. It is not my intention to hold any hearings or enter any orders of whatever nature unless and until the Rule is discharged or the scope of the stay order is modified or clarified. If any counsel believes such activity will be necessary pending the outcome of the matters now before the Supreme Court, I suggest you apply to the Supreme Court for appropriate modification or clarification of the stay order.

Very truly yours,

George E. Lohr
District Judge

GEL:bj
ENC:
cc: Clerk of the Supreme Court

IN THE SUPREME COURT

OF THE STATE OF COLORADO

IN THE MATTER OF THE ASSIGNMENT OF A DISTRICT JUDGE TO HEAR A CRIMINAL ACTION FOLLOWING CHANGE OF VENUE	ORDER OF ASSIGNMENT

WHEREAS, it has been certified to the Chief Justice of the Colorado Supreme Court that venue in criminal action number C-1616, Pitkin County District Court, entitled The People of the State of Colorado v. Theodore Robert Bundy has been transferred from the District Court of Pitkin County, Colorado, to the District Court of El Paso County, Colorado, and the Supreme Court has determined that the same district judge hearing this action in Pitkin County should continue hearing it in El Paso County;

NOW THEREFORE, it is ordered by the Chief Justice pursuant to Article VI, Section 5(2) of the Colorado Constitution that the Honorable George E. Lohr hereby be appointed and assigned to hear the aforesaid matter in the District Court of El Paso County, Colorado.

Done at Denver, Colorado, this 23 day of February, 1978, nunc pro tunc, December 23, 1977.

Edward E. Pringle
Chief Justice
Colorado Supreme Court

IN THE SUPREME COURT

OF THE STATE OF COLORADO

THE PEOPLE OF THE STATE OF COLORADO, BY AND THROUGH THEIR DULY APPOINTED REPRESENTATIVES, FRANK G. E. TUCKER, DISTRICT ATTORNEY, Petitioners,	)	
27963 v.	)	RULE TO SHOW CAUSE
THE DISTRICT COURT OF THE STATE OF COLORADO, GEORGE E. LOHR, AS ONE OF THE DISTRICT COURT JUDGES OF THE DISTRICT COURT, Respondents.	)	Trial Court No.: C-1616

THE PEOPLE OF THE STATE OF COLORADO TO THE DISTRICT COURT OF THE STATE OF COLORADO, GOERGE E. LOHR, AS ONE OF THE DISTRICT COURT JUDGES OF THE DISTRICT COURT,

GREETING:

You are hereby ordered and directed to appear in the Supreme Court of the State of Colorado within twenty days from service hereof and answer in writing and show cause, if any you may or can have, why the relief requested in the petition herein should not be granted.

It is further ordered that the petitioners have twenty days from receipt of the answer within which to reply.

It is further ordered that all proceedings be stayed until further order of this court.

Let a true copy of this rule, together with a copy of the petition herein be served upon you and each of you.

WITNESS, the Honorable Edward E. Pringle, Chief Justice of our Supreme Court, and the seal of said court, in the City of Denver, this 5th day of January , A.D. 1978.

FLORENCE WALSH,
Clerk of the Supreme Court of the State of Colorado

By Joan M. Pilgrim
Deputy Clerk

IN THE SUPREME COURT

OF THE STATE OF COLORADO

NO. 27963

THE PEOPLE OF THE STATE OF COLORADO BY AND THROUGH THEIR DULY APPOINTED REPRESENTATIVES, FRANK G. E. TUCKER, DISTRICT ATTORNEY, Petitioners, vs. THE DISTRICT COURT OF THE STATE OF COLORADO, GEORGE E. LOHR, AS ONE OF THE JUDGES OF THE DISTRICT COURT, Respondents.	REQUEST FOR EXTENSION OF TIME

COME NOW the Respondents in the within action, by and through their attorney, Kenneth Dresner, and request this Honorable Court to grant an extension of time to April 27, 1978, within which to file their answer in writing to the rule to Show Cause issued by this Honorable Court on January 5, 1978, which is due on or before April 25, 1978,

AND as grounds therefore Respondent, by and through their attorney, state as follows:

1. That counsel intends to place said Answer in the U.S. mail on Monday April 24, 1978 and requests this extension in order to allow for delay in the mail service.

Respectfully submitted,

Kenneth Dresner

Kenneth Dresner, Reg. 4628
Attorney for Respondents
307 N. Main
Gunnison, Colorado 81230
(303)641-1444

CERTIFICATE OF MAILING

I Certify that I have served a copy of the within Request for extension of time upon the Petitioners by placing same in an envelope addressed to:

Milton Blakey, Assistant District Attorney
Ninth Judicial District
District Attorney's Office
Aspen, Colorado 81611

and deposited same with the United States Postal Service postage prepaid this 21st day of April, 1978.

Kenneth Dresner

~~839-3611~~
839-3411

IN THE SUPREME COURT

OF THE STATE OF COLORADO

NO. 27963

THE PEOPLE OF THE STATE OF COLORADO BY AND THROUGH THIER DULY APPOINTED REPRESENTATIVES, FRANK G.E. TUCKER, DISTRICT ATTORNEY, Petitioners,	)	
vs.	)	REQUEST FOR EXTENSION OF TIME
THE DISTRICT COURT OF THE STATE OF COLORADO, GEORGE E. LOHR, AS ONE OF THE JUDGES OF THE DISTRCT COURT, Respondents.	)	

COMES NOW the Respondent in the within action, by and through his attorney, Kenneth Dresner, and requests this Honorable Court to grant an extension of time to April 25, 1978, within which to file his answer in writing to the Rule to Show Cause issued by this Honorable Court on January 5, 1978, which is due on or before January 25, 1978.

AND as grounds therefore, Respondent, by and through his attorney, states as follows:

1. That the issues relating to the constitutionality of the death penalty in the Stateof Colorado are complex and of far reaching nature and will require extensive research and briefing.

2. That counsel has not previously been involved in such litigation and is presently unfamiliar with the law relating to such issue.

3. That neither the Petitioners nor the Respondent will suffer any prejudice should this Honorable Court grant said relief.

4. That no previous Extensions of Time have been requested.

Respectfully submitted,

Kenneth Dresner

Kenneth Dresner, Reg. 4628
Attorney
307 N. Main
Gunnison, Colorado 81230
(303)641-1444

IN THE SUPREME COURT

OF THE STATE OF COLORADO

NO. 27963

THE PEOPLE OF THE STATE OF COLORADO BY AND THROUGH THEIR DULY APPOINTED REPRESENTATIVES, FRANK G.E. TUCKER, DISTRICT ATTORNEY, Petitioners, vs. THE DISTRICT COURT OF THE STATE OF COLORADO, GEORGE E. LOHR, AS ONE OF THE JUDGES OF THE DISTRICT COURT, Respondents.	ENTRY OF APPEARANCE

COMES NOW Kenneth Dresner, Attorney at Law, Registration Number 4628, and enters his appearance in the within case on behalf of the Respondent, District Judge George E. Lohr.

Respectfully submitted,

Kenneth Dresner

Kenneth Dresner, Reg. 4628
Attorney
307 N. Main
Gunnison, Colorado 81230
(303)641-1444

CERTIFICATE OF MAILING

I certify that I have served a copy of the within Entry of Appearance and a copy of the Request for Extension of Time upon the Petitioners by placing same in an envelope addressed to:

Milton Blakey, Assistant District Attorney
Ninth Judicial District
District Attorney's Office
Aspen, Colorado 81611

and deposited same with the United States Postal Service postage prepaid this 20th day of January, 1978.

Kenneth Dresner

IN THE SUPREME COURT OF THE STATE OF COLORADO

THE PEOPLE OF THE STATE OF COLORADO, ETC., ET AL.,

Petitioners,

v.

No. 27963

THE DISTRICT COURT OF THE STATE OF COLORADO, ET AL.,

Respondents.

ORIGINAL PROCEEDING

Trial Court No. C-1616

~~Appeal from~~

~~County of~~

~~County~~

Upon consideration of the motion of the respondent, together with the objection thereto, it is this day ordered that said respondent have additional time, to and including April 25, 1978 within which to file answer to rule to show cause herein.

BY THE COURT, EN BANC, FEBRUARY 1, 1978.

FLORENCE WALSH,
~~Richard Nixon, President~~
Clerk Supreme Court

By Joan M Rhyne
Deputy Clerk

cc:

Kenneth Dresner, Esq.
307 N. Main
Gunnison, CO 81230

Milton Blakey,
Assistant District Attorney
Ninth Judicial District
District Attorney's Office
Aspen, CO 81611

IN THE SUPREME COURT

OF THE STATE OF COLORADO

IN THE MATTER OF THE ASSIGNMENT OF A DISTRICT JUDGE TO HEAR A CRIMINAL ACTION FOLLOWING CHANGE OF VENUE	ORDER OF ASSIGNMENT

WHEREAS, it has been certified to the Chief Justice of the Colorado Supreme Court that venue in criminal action number C-1616, Pitkin County District Court, entitled The People of the State of Colorado v. Theodore Robert Bundy has been transferred from the District Court of Pitkin County, Colorado, to the District Court of El Paso County, Colorado, and the Supreme Court has determined that the same district judge hearing this action in Pitkin County should continue hearing it in El Paso County;

NOW THEREFORE, it is ordered by the Chief Justice pursuant to Article VI, Section 5(2) of the Colorado Constitution that the Honorable George E. Lohr hereby be appointed and assigned to hear the aforesaid matter in the District Court of El Paso County, Colorado.

Done at Denver, Colorado, this 23 day of February, 1978, nunc pro tunc, December 23, 1977.

Edward E. Pringle

Edward E. Pringle
Chief Justice
Colorado Supreme Court

IN THE DISTRICT COURT

IN AND FOR THE COUNTY OF PITKIN*

STATE OF COLORADO

Criminal Action No. C-1616

THE PEOPLE OF THE STATE OF COLORADO, Plaintiff, vs. THEODORE ROBERT BUNDY, Defendant.	MEMORANDUM OPINION AND ORDER (Re: Motion to Strike the Death Penalty From Consideration)

On May 16, 1977, the defendant filed a Motion to Strike the Death Penalty from Consideration in this case on numerous grounds, including violation of the prohibition of cruel and unusual punishment pursuant to the Eighth and Fourteenth Amendments to the Constitution of the United States of America. The motion was argued on June 7, 1977 and again on June 23, 1977. The People were represented by Deputy District Attorney Milton Blakey, Esq. of the Fourth Judicial District, who had been appointed as a deputy district attorney in the Ninth Judicial District for the purpose of this case. Defendant represented himself and was assisted by James F. Dumas, Jr., Chief Deputy Public Defender, who at the time was acting as advisory counsel for the defendant.

The Court has considered the motion and argument of counsel and the briefs filed by counsel and, on the basis thereof, issues the following opinion and order.

The defendant is charged with the crime of first degree murder under the laws of the State of Colorado, pursuant to a statute which provides:

> "18-3-102. Murder in the first degree. (1) A person commits the crime of murder in the first degree if: (a) After deliberation and with the

*Transferred to El Paso County prior to entry of Order.

intent to cause the death of a person other than himself, he causes the death of that person or of another person; ..." C.R.S. 18-3-102 (1973), as amended.

Murder in the first degree is a class one felony. Id.

Upon conviction of a class one felony, a separate sentencing hearing is to be conducted before the trial jury to determine whether the defendant should be sentenced to death or life imprisonment. C.R.S. 16-11-103 (1973), as amended. That statute is lengthy and is set forth in full in the appendix to this opinion.

Defendant contends that to impose the death penalty upon conviction of the crime with which he is charged would constitute cruel and unusual punishment in violation of the Eighth and Fourteent Amendments to the Constitution of the United States.

Decisions of the United States Supreme Court in recent years provide guidelines to determine whether a punishment is cruel and unusual in the Eighth Amendment sense. If the procedures for imposing sentence create a substantial risk that the sentence will be imposed arbitrarily or capriciously, the punishment may be cruel and unusual. Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726 (1972); Gregg v. Georgia, _____U.S._____, 96 S. Ct. 2909 (1976) If the punishment is excessive, it is cruel and unusual punishment. See Gregg v. Georgia, supra.

Punishment may be excessive either because it involves unnecessary or wanton infliction of pain or because it is grossly out of proportion to the severity of the crime. See Gregg v. Georgi supra. In Coker v. Georgia, _____U.S._____, 97 S.Ct. 2861 (1977), a death sentence was held to be grossly out of proportion to the sever of the crime of rape of an adult woman.

The Eighth Amendment prohibition of cruel and unusual puni

ment is not a static concept. "(t)he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 78 S.Ct. 590, at p. 101 of 356 U.S., cited in Gregg v. Georgia, supra. "But our cases also make clear that public perceptions of standards of decency with respect to criminal sanctions are not conclusive. A penalty must also accord with 'the dignity of man' which is the 'basic concept underlying the Eighth Amendment.' Trop v. Dulles, supra..." Gregg v. Georgia, at p. 2925 of 96 S.Ct.

The death penalty does not constitute cruel and unusual punishment under all circumstances. Gregg v. Georgia, supra; Proffitt v. Florida, _____U.S._____, 96 S.Ct. 2960 (1976); Jurek v. Texas, _____U.S._____, 96 S.Ct. 2950 (1976). Murder is an offense for which, under appropriate circumstances, the death penalty may be imposed. Gregg v. Georgia, supra; Proffitt v. Florida, supra; Jurek v. Texas, supra.

In the process of deciding whether the death penalty is to be imposed, consideration of the character and record of the individual offender and the circumstances of the offense are constitutionally required. Woodson v. North Carolina, _____U.S._____, 96 S.Ct. 2978 (1976). In that case, it is stated by the plurality at p. 2991 of 96 S.Ct:

> "While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlyi the Eighth Amendment, see Tropp v. Dulles, 356 U.S., at 100 78 S.Ct., at 597 (plurality opinion), requires consideratio of the character and record of the individual offender and the circumstances of the particular offense as a constituti ally indispensable part of the process of inflicting the penalty of death."

Thus, a statute making the death penalty mandatory for first degree murder, which included any deliberate and premeditated homicide and any felony murder, without regard to the character and record of the individual offender or the circumstances of the offense is

unconstitutional. Woodson v. North Carolina, supra. Even if a mandatory death penalty statute limits the crimes for which death is to be imposed to narrowly drawn categories of first degree murder, the same constitutional infirmity exists if the sentencing procedures do not permit consideration of the character and record of the offender and the circumstances of the offense. Stanislaus Roberts v. Louisiana, _____U.S._____, 96 S.Ct. 3001 (1976). And even where a mandatory death penalty statute relates to the narrow category of killing a human being when the offender has a specific intent to kill, or to inflict great bodily harm upon, a fireman or peace officer who was engaged in the performance of his lawful duties, the imposition of the penalty is unconstitutional. Harry Roberts v. Louisiana, _____U.S._____ 97 S.Ct. 1993 (1977); Washington v. Louisiana, 428 U.S. 906, 96 S.Ct. 3214 (1976). In Harry Roberts, the Court said, at p. 1995 of 97 S.Ct.

> "To be sure, the fact that the murder victim was a peace officer performing his regular duties may be regarded as an aggravated circumstance. There is a special interest in affording protection to these public servants who regularly must risk their lives in order to guard the safety of other persons and property. But it is incorrect to suppose that no mitigating circumstances can exist when the victim is a police officer. Circumstances such as the youth of the offender, the absence of any prior conviction, the influence of drugs, alcohol or extreme emotional disturbance, and even the existence of circumstances which the offender reasonably believed provided a moral justification for his conduct are all examples of mitigating facts which might attend the killing of a peace officer and which are considered relevant in other jurisdictions."

> "As we emphasized repeatedly in Roberts* and its companion cases decided last term, it is essential that the capital sentencing decision allow for consideration of whatever mitigating circumstances may be relevant to either the particular offender or the particular offense. Because the Louisiana statute does not allow consideration of particularized mitigating factors, it is unconstitutional."

See Jurek v. Texas, supra, at p. 2958 of 96 S.Ct., where it is said:

> "What is essential is that the jury have before it all possible relevant information about the individual

*Stanislaus Roberts v. Louisiana, supra.

> defendant whose fate it must determine. Texas law clearly assures that all such evidence will be adduced."

The Court in Harry Roberts v. Louisiana, supra, left open the question whether a mandatory death penalty might pass constitutional muster where based upon intentional killing by a person serving a life sentence. It suggested that such a situation presents "a unique problem that may justify such a law" Harry Roberts v. Louisiana, supra, at p. 1995, footnote 2, and at p. 1996, footnote 5, of 97 S. Ct.

Although striking down the mandatory death penalty statutes the Court has upheld the constitutionality of certain death penalty statutes which permitted consideration of mitigating circumstances. Gregg v. Georgia, supra; Proffitt v. Florida, supra; Jurek v. Texas supra.

The purposes for which evidence of mitigating circumstances may be received under the Georgia, Florida and Texas statutes and the procedures under those statutes for determination of the appropriate penalty are instructive in determining the scope of evidence of mitigating circumstances and the purpose of such evidence which are mandated by the United States Constitution. The statutes of these three states will be considered individually, and the Colorado statute will then be compared to them.

Florida:

The Florida statute provides for a bifurcated trial, with the sentencing stage to take place before the same jury which determined guilt.

The Florida statute contains eight aggravating circumstance and the following seven mitigating circumstances:

> "(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime." Sec. 921.141(6) (Supp. 1976-1977), Florida statutes, cited in Footnote 6 of Proffitt v. Florida, supra, at p. 2965 of 96 S.Ct.

At the sentencing stage, "Evidence may be presented on any matter the judge deems relevant to sentencing and must include matters relating to certain legislatively specified aggravating and mitigating circumstances." (Emphasis added). (Conclusion as stated by the United States Supreme Court in Proffitt v. Florida, supra, at p. 2964 of 96 S.Ct.) The jury is directed to consider "(w)hether sufficient mitigating circumstances exist...which outweigh aggravating circumstances found to exist; and...(b)ased on these considerations, whether the defendant should be sentenced to life (imprisonment) or death." Florida statute, quoted in Proffitt v. Florida, supra, at p. 2965 of 96 S.Ct. The jury determination is by majority vote and is advisory only. In order to sustain a death sentence following a jury recommendation of life "...the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908, 910 (Florida; 1975), quoted in Proffitt v. Florida, supra, at p. 2965 of 96 S.Ct. The trial court must then weigh the statutory aggravating and mitigating circumstances in imposing sentence. If a death sentence is imposed, the trial court must make written findings of fact that sufficient statutory aggravating circumstances exist and that there are insufficient statutory

at p. 2920 of 96 S.Ct.

Under Georgia case law, the defendant is accorded substantial latitude as to the types of evidence he may introduce, and the jury may consider the evidence adduced at the guilt stage. Gregg v. Georgia, supra. In determining sentence, the jury is to consider "any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of (10) statutory aggravating circumstances which may be supported by the evidence..." Georgia statute, quoted in Gregg v. Georgia, supra, at p. 2921 of 96 S.Ct. The scope of the nonstatutory aggravating or mitigating circumstances is not delineated in the statute. The jury imposes a binding recommendation of sentence, and the death sentence may be imposed only if one of the statutory aggravating circumstances is found to exist beyond a reasonable doubt and the jury then elects to impose the death sentence. Gregg v. Georgia, supra. The jury must specify the aggravating circumstances found if its recommendation is death.

Texas:

Texas limits capital homicides to five specific types of especially serious homicides.

The Texas statute provides for a bifurcated trial, with the sentencing stage to take place before the same jury which determined guilt. At the sentencing stage, any relevant evidence may be produced. The jury is then required to answer the following three questions:

> "(1) Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> (2) Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> (3) If raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased."
>
> Texas statute, quoted in Jurek v. Texas, supra, at p. 2955 of 96 S.Ct.

the people or the defendant..." C.R.S. 16-11-103(2) (1973). The jury must render a verdict as to the existence or nonexistence of each of the statutory mitigating and aggravating factors. If the verdict is that none of the statutory mitigating factors exists and that one or more of the statutory aggravating factors exists, the court must sentence the defendant to death. Any other combination of findings results in a sentence to life imprisonment. The statutory mitigating factors may be summarized as: (1) under the age of 18, (2) impairment of capacity to appreciate wrongfulness of conduct or to conform conduct to requirements of law, (3) duress, (4) relatively minor participation in offense committed by another and (5) inability reasonably to foresee that his conduct would cause or create a grave risk of death to another. Seven of the eight statutory aggravating factors focus on the nature of the offense; the eighth relates to prior conviction for a crime involving a penalty of life imprisonment or death. C.R.S. 16-11-103 (1973).

Under the Colorado statute, being under the age of 18 is the only aspect of defendant's personal background and circumstances, other than mental condition at the time of the crime, which can be considered. Whether defendant is just 18 or an experienced, mature adult has no relevance. Defendant's criminal record or lack thereof has no relevance. His past contributions to family or community, his remorse or lack thereof and other factors which reflect defendant's character and background have no relevance. In Woodson v. North Carolina, supra, in the course of holding the consideration of the character and record of the individual offender to be a constitutionally indispensable part of the process of inflicting the penalty of death, it was said by the plurality at p. 2991 of 96 S.Ct:

"A process that accords no significance to relevant

> facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death."

In summary, Florida, Georgia and Texas all allow the defendant substantial latitude in introduction of evidence of mitigating circumstances at the sentencing stage in a capital case. Direct use of that evidence by the jury is an important part of determination of the sentence by the Georgia jury. Direct use of that evidence is an important part of the process by which the Texas jury answers statutory questions, such answers in turn being determinative of the sentence. In Florida, the jury uses that evidence to arrive at an advisory sentence of death or life imprisonment. The Florida courts cannot impose a death penalty in the face of an advisory sentence of life imprisonment unless it can find the facts suggesting a sentence of death to be so clear and convincing that virtually no reasonable person could differ. The narrow scope of mitigating evidence which is available to juries in Colorado at the sentencing stage in a capital case presents a marked contrast to the Florida, Georgia and Texas patterns. Viewed from the other side of the coin, many mitigating circumstances necessary to develop facets of the character and record of the defendant as a uniquely individual human being have no relevance to the mitigating factors prescribed by law in Colorado. Colorado's statutory sentencing plan is too rigid to satisfy constitutional standards.

Consideration has been given to the possibility of construing the Colorado statute to permit introduction of a broad range of mitigating evidence. The statute is presumed to be constitutional

and must be construed to preserve its constitutionality if at all possible. See People v. Prante, 177 Colo. 243, 493 P.2d 1083 (1972). A statute can be found unconstitutional only if its unconstitutionality is established beyond a reasonable doubt. See People v. Prante, supra. The statute is explicit in authorizing presentation of evidence bearing on the statutory mitigating and aggravating factors. The jury's function is to determine whether any of these mitigating factors or aggravating factors exist. There would be no legitimate use to which the jury could put evidence in mitigation not relevant to the statutory mitigating factors. Any attempt to construe the Colorado statute to permit consideration and use of mitigating evidence not relevant to the statutory mitigating factors would do violence to the statutory pattern and would constitute impermissible judicial amendment of the legislative enactment. It also would invite impermissible jury nullification. See Woodson v. North Carolina, supra, at p. 2990 of 96 S.Ct.; Stanislaus Roberts v. Louisiana, supra, at p. 3007 of 96 S.Ct.

Accordingly, it is concluded that the imposition of the death sentence pursuant to Colorado statute for the offense with which the defendant is charged would constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States of America. Whether the

Colorado Constitution imposes a higher standard is unnecessary to consider.

Defendant has urged other bases upon which he contends that the death sentence could not become a permissible sentencing alternative in his case. These will be considered briefly but not in detail in view of the conclusion expressed above.

Vagueness of Statutory Mitigating Factors:

Defendant contends that the statutory mitigating factors, except for age, are too vague to be applied. The same challenge to strikingly similar mitigating circumstances was raised and rejected in Proffitt v. Florida, supra. The Court said at p. 2969 of 96 S.Ct:

> "While these questions and decisions may be hard, they require no more line-drawing than is commonly required of a fact finder in a lawsuit."

See also, Jurek v. Texas, supra, at p. 2957 of 96 S.Ct.

Failure to provide objective standards to guide the jury in imposition of the penalty of death:

Except as defendant imports objections to the availability and scope of appellate review, limitation of evidence in mitigation, allocation of burden of proof and other objections separately stated, his argument of failure to provide objective standards seems to be a variant of the vagueness argument, considered above, with respect to statutory mitigating factors. The only aggravating factor which reasonably could be contended to be vague is the final factor "He committed the offense in an especially heinous, cruel or depraved manner." C.R.S. 16-11-103(6)(i) (1973). Florida has a similar standard, except that "atrocious" is substituted for "depraved". The Florida Supreme Court has construed the standard to be directed only at the conscienceless or pitiless crime which is unnecessarily torturous to the victim. As so construed, the United States Supreme

Court held that "We cannot say that the provision, as so construed, provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases." Proffitt v. Florida, supra, at p. 2968 of 96 S.Ct. See Gregg v. Georgia, supra, at p. 2938 of 96 S.Ct. The Court in Proffitt also found not impermissibly vague the standard that "the defendant knowingly created a great risk of death to many persons,", a standard similar to the penultimate aggravating circumstance in the Colorado statute. C.R.S. 16-11-103(6)(h) (1973).

Failure to provide for appellate review:

As pointed out in the briefs, the availability and scope of appellate review of jury findings at the sentencing stage of a first degree murder trial in Colorado are not at all clear. In Gregg v. Georgia, supra, in which the jury had the sentencing authority, the Court considered Georgia's elaborate appellate procedures for assuring proportionality of sentences to be important to the validity of the procedure for imposing the death penalty. In Florida, where they jury makes a nonbinding sentencing recommendation, the state supreme court took a similar review role on its own initiative without specific statutory authority, and this was considered important to the validity of the Florida system in Proffitt v. Florida, supra. Texas too has appellate review of the jury's decision, which includes a prediction of probabilities that the defendant would commit acts of violence that would constitute a continuing threat to society. Under the Colorado system, the appellate courts are given no legislative authority to review for proportionality. The limited evidence relevant to the mitigating and aggravating factors in many cases would inhibit the appellate court from evaluation and comparison necessary to determine proportionality of sentences. It appears that there is a substantial question whether

the Colorado appellate review procedure is adequate to assure that the death penalty will not be arbitrarily or capriciously imposed. In view of the fact that the statute has been found infirm for another reason, and in view of the absence of guidelines at this time as to how the Colorado appellate courts will view their own roles on appeal, this issue will not be pursued to the extent necessary to make a definite determination.

Failure to show that the death penalty fulfills a compelling state interest which could not be fulfilled by a less drastic means:

Defendant argues that substantive due process requires that the state demonstrate that the death sentence is the least restrictive means to further a compelling government interest.

In Gregg v. Georgia, supra, it was held that the punishment of death does not invariably violate the constitution and that a Court

> "...may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved." 96 S.Ct. at p. 2926

The Court went on to hold the death penalty constitutional as a penalty for murder under the procedure prescribed by Georgia for its imposition. Thus, defendant's argument, to the extent it is founded upon the United States Constitution, is not well taken.

Defendant urges a substantive due process analysis. The analysis proceeds from the characterization of life as a fundamental constitutional right. Infringement of a fundamental constitutional right must be subjected to strict scrutiny under a due process analysis. This requires the state to demonstrate a compelling government interest to support the infringement and to find an absence of less restrictive means to realize that compelling government interest. The analysis then proceeds to attempt to show

that the death penalty is not the least restrictive means available to satisfy the government interest to protect society from murderers and to deter murders. Such an analysis has been used by the Massachusetts Supreme Court in invalidating the imposition of the death penalty for the crime of murder committed in the course of a rape or an attempted rape under the Massachusetts declaration of rights.

The United States Supreme Court plurality has not analyzed the issue in such terms. Gregg v. Georgia, supra. Of course, the Colorado courts are free to adopt such analysis in construing the Colorado Constitution. It is unnecessary to embark on such an analysis in view of the conclusion reached above, and it would be unwise to do so absent the necessity therefor.

Violation of due process concepts of proof beyond a reasonable doubt and presumption of innocence:

The defendant argues from cases requiring the People to prove every element of their case, including negation of affirmative defenses, beyond a reasonable doubt that such a burden is constitutionally required in establishing aggravating circumstances and eliminating mitigating circumstances at the penalty stage. No case is cited directly in support of this proposition. Nothing in the Gregg, Proffitt, Jurek, Woodson, Stanislaus Roberts line of cases suggests such a requirement. The People take the position in their brief that they have the burden to establish aggravating factors and to negate the existence of mitigating factors. Even if this burden can be borne by establishing such matters by a preponderance of the evidence, no constitutional infirmity is perceived in use of such a procedure at the sentencing stage.

Based upon the foregoing Memorandum Opinion, it is found that the Colorado statutory procedures for imposition of the death

penalty violate the prohibition against cruel and unusual punishment under the United States Constitution beyond a reasonable doubt; accordingly,

IT IS ORDERED THAT the motion to strike the death penalty from consideration in this case be granted.

Defendant has moved for a bill of particulars with respect to the aggravating circumstances upon which the People will rely; based upon the foregoing order, it is found that the motion for bill of particulars is moot.

Done this 27 day of December, 1977.

BY THE COURT:

George G. Luck

District Judge

16-11-103. Imposition of sentence in class 1 felonies. (1) Upon conviction of guilt of a defendant of a class 1 felony, the trial court shall conduct a separate sentencing hearing to determine whether the defendant should be sentenced to death or life imprisonment. The hearing shall be conducted by the trial judge before the trial jury as soon as practicable. If a trial jury was waived or if the defendant pleaded guilty, the hearing shall be conducted before the trial judge.

(2) In the sentencing hearing any information relevant to any of the aggravating or mitigating factors set forth in subsection (5) or (6) of this section may be presented by either the people or the defendant, subject to the rules governing admission of evidence at criminal trials. The people and the defendant shall be permitted to rebut any evidence received at the hearing and shall be given fair opportunity to present argument as to the adequacy of the evidence to establish the existence of any of the factors set forth in subsection (5) or (6) of this section.

(3) After hearing all the evidence, the jury shall deliberate and render a verdict, or if there is no jury the judge shall make a finding, as to the existence or nonexistence of each of the factors set forth in subsections (5) and (6) of this section.

(4) If the sentencing hearing results in a verdict or finding that none of the factors set forth in subsection (5) of this section exist and that one or more of the factors set forth in subsection (6) of this section do exist, the court shall sentence the defendant to death. If the sentencing hearing results in a verdict or finding that none of the aggravating factors set forth in subsection (6) of this section exist or that one or more of the mitigating factors set forth in subsection (5) of this section do exist, the court shall sentence the defendant to life imprisonment. If the sentencing hearing is before a jury and the verdict is not unanimous, the jury shall be discharged, and the court shall sentence the defendant to life imprisonment.

(5) The court shall not impose the sentence of death on the defendant if the sentencing hearing results in a verdict or finding that at the time of the offense:

(a) He was under the age of eighteen; or

(b) His capacity to appreciate wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution; or

(c) He was under unusual and substantial duress, although not such duress as to constitute a defense to prosecution; or

(d) He was a principal in the offense, which was committed by another, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution; or

(e) He could not reasonably have foreseen that his conduct in the course of the commission of the offense for which he was convicted would cause, or would create a grave risk of causing, death to another person.

(6) If no factor set forth in subsection (5) of this section is present, the court shall sentence the defendant to death if the sentencing hearing results in a verdict or finding that:

(a) The defendant has previously been convicted by a court of this or any other state, or of the United States, of an offense for which a sentence of life imprisonment or death was imposed under the laws of this state or could have been imposed under the laws of this state if such offense had occurred within this state; or

(b) He killed his intended victim or another, at any place within or without the confines of a penal or correctional institution, and such killing occurred subsequent to his conviction of a class 1, 2, or 3 felony and while serving a sentence imposed upon him pursuant thereto; or

(c) He intentionally killed a person he knew to be a peace officer, fireman, or correctional official. The term "peace officer" as used in this section means only a regularly appointed police officer of a city, marshal of a town, sheriff, undersheriff, or deputy sheriff of a county, state patrol officer, or agent of the Colorado bureau of investigation; or

(d) He intentionally killed a person kidnapped or being held as a hostage by him or by anyone associated with him, or

(e) He has been a party to an agreement in furtherance of which a person has been intentionally killed; or

(f) He 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;

(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; or

(g) He committed a class 1, 2, or 3 felony and, in the course of or in furtherance of such or immediate flight therefrom, he intentionally caused the death of a person other than one of the participants; or

(h) In the commission of the offense, he knowingly created a grave risk of death to another person in addition to the victim of the offense; or

(i) He committed the offense in an especially heinous, cruel, or depraved manner.

Source: Repealed and reenacted, L. 74, p. 252, § 4.

Editor's note: This section became effective January 1, 1975, and applies to offenses occurring on or after said date.

Brief Book

IN THE

SUPREME COURT

OF THE

STATE OF COLORADO

NO. _____

NOLAN L. BROWN, DISTRICT ATTORNEY IN AND FOR THE FIRST JUDICIAL DISTRICT, COUNTY OF JEFFERSON, STATE OF COLORADO, Petitioner, vs. THE DISTRICT COURT IN AND FOR THE FIRST JUDICIAL DISTRICT, COUNTY OF JEFFERSON, STATE OF COLORADO, AND THE HONORABLE MICHAEL C. VILLANO, ONE OF THE JUDGES THEREOF, Respondents.	*	ORIGINAL PROCEEDING IN THE NATURE OF PROHIBITION

COMES NOW the Petitioner, NOLAN L. BROWN, District Attorney for the First Judicial District, by and through Joseph Mackey, Deputy District Attorney, who states as follows:

[1] That on October 17, 1977, a District Criminal information was filed in the District Court in and for the First Judicial District charging the Defendant, Alexandro Ruben Valdez, with Murder, First Degree, 1973 C.R.S. 18-3-102, as amended (two counts), First Degree Burglary, 1973 C.R.S. 18-4-202, as amended, Felony Joyriding, 1973 C.R.S. 18-4-409, as amended (four counts).

[2] That Murder, First Degree, is a class one felony punishable by death, according to the procedure specified in 1973 C.R.S. 16-11-103, as amended.

[3] That the People, by and through Deputy District Attorney Joseph Mackey, announced that they would seek the death penalty in case number 77CR0529, The People of The State of Colorado vs. Alexandro Ruben Valdez.

[4] That on November 18, 1977, a preliminary hearing was held in Division Eight of the Jefferson County District Court. The Court found probable cause on all counts and ordered the Defendant Bound over for trial. The Court further found the proof evident and the presumption great and ordered the Defendant held without bail.

[5] That on January 20, 1978, a hearing was held on Defendant's motion to strike from consideration the Death Penalty on the grounds that 1973 C.R.S. 16-11-103, as amended, is unconstitutional in violation of the eighth and fourteenth Amendments to the United States Constitution.

[6] That the Honorable Michael C. Villano, after reviewing briefs and hearing arguments of counsel, held the Colorado Death Penalty Statute unconstitutional.

[7] That the case of People vs. Valdez is set for trial on April 17, 1978. The People, because of Judge Villano's ruling, are precluded from selecting a Jury which could impose the Death Penalty. Because the Defendant would be placed in jeopardy in this trial, he could not be forced to face the Death Penalty in a subsequent hearing, even if Colorado's Death Penalty were later ruled constitutional.

[8] That, therefore, Petitioners herein join with Petitioners in Supreme Court Case number 27963, An Original Proceeding in The Nature of Prohibition, filed as a result of the ruling of Judge George E. Lohr, in the case of People vs. Theodore Robert Bundy.

[9] That Petitioners have no plain, speedy, and adequate remedy other than this proceeding.

[10] That a statute is presumed to be Constitutional and its unconstitutionality must be established beyond a reasonable doubt, People vs. Beaver, ____ Colo. ____, 549 P.2d 1315(1976).

[11] That the holding of Judge Villano is inconsistant with Death Penalty Constitutional requirements outlined in Jurek vs. Texas, ____ U.S. ____, 96 S.Ct. 2950, ____L. Ed. 2d ____ (1976), Woodson vs North Carolina, ____U.S. ____, 96 S.CT. 2978, ____ L. Ed. 2d ____ (1976), and Roberts vs. Louisiana, ____ U.S. ____, 96 S.Ct. 3001, ____ L. Ed 2d ____ (1976).

WHEREFORE, Petitioner prays as follows:

[1] That this Court issue an order to show cause why the respondents should not be prohibited from issuing the order striking the Death Penalty from consideration.

[2] That this Court order all further proceedings stayed pending a determination by the Court of the Constitutionality of 1973 C.R.S. 16-11-103, as amended.

Respectfully submitted,

NOLAN L. BROWN
District Attorney

By: Joseph Mackey

Joseph Mackey Reg. #6146
Deputy District Attorney
Hall of Justice
Golden, Colorado 80419
279-6511, ext. 242

CERTIFICATE OF MAILING

I hereby certify that I have this 1st day of February, A.D. 1978, mailed a true copy of the foregoing "Original Proceeding in the Nature of Prohibition.

to: Peter Schild, Deputy Public Defender
Gold Offices Bldg.
10th & Ford, Golden, CO 80401

by depositing same in the U.S. Mails, postage prepaid.

Wanda D. Church

CERTIFICATE OF MAILING

I certify that I have served a copy of the within Answer Brief of Respondents upon the Petitioners by placing same in an envelope addressed to:

Milton Blakey
Assistant District Attorney
District Attorney's Office
Colorado Springs, Colorado

and deposited same with the United States Postal Service postage prepaid this 24th day of April, 1978.

Kenneth Dresner