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Effecting Colorado's Capital Sentencing Scheme in the Aurora Theater Shooting Trial

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EFFECTUATING COLORADO'S CAPITAL SENTENCING SCHEME IN THE AURORA THEATER SHOOTING TRIAL

JUDGE CARLOS A. SAMOUR, JR.[†]

ABSTRACT

This Article discusses how the court effectuated Colorado's four-step capital sentencing scheme in the sentencing hearing held in the case of *the People of the State of Colorado v. James Eagan Holmes* in July and August 2015. Although the Colorado Supreme Court has analyzed on multiple occasions the sequential decisions required by this State's death penalty statute, it has never had occasion to address the structure of a sentencing hearing or, more specifically, whether the questions that must be answered should be presented to the jury one at a time in a furcated proceeding that follows a logical sequence or all at once at the end of a continuous proceeding that is uninterrupted by intermediate deliberations. In the *Holmes* trial, the court found that trifurcating the sentencing hearing was the most prudent course of action under the circumstances involved, especially considering the defendant's insanity plea. The court combined the two middle steps of the capital sentencing scheme into one step, for a total of three steps, and divided the sentencing hearing into three separate phases, one dedicated to each step. The jury was required to deliberate at the end of each phase, and it was only allowed to continue to the next phase if it made certain findings. Of course, this is by no means the only method of applying the State's capital sentencing scheme—as the old adage goes, "there is more than one way to skin a cat." However, I remain convinced that it was the most appropriate approach in the *Holmes* case, as it significantly minimized the risk of confusing the jury, guided counsel in the presentation of evidence and arguments, and allowed the court to maintain optimal control over the proceedings.

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I. BACKGROUND

During the early morning hours of July 20, 2012, the community of Aurora, in Arapahoe County, Colorado, experienced one of the deadliest mass shootings in this nation's history.[1] In what is considered the shooting incident with the largest number of casualties ever in the United States,[2] James Eagan Holmes was accused of killing twelve people and injuring seventy others inside auditoriums eight and nine of the Century 16 Theatres during the midnight premiere of the Batman movie *The Dark Knight Rises*.[3] Holmes was charged with two counts of Murder in the First Degree for each of the twelve deceased victims and two counts of Attempt to Commit Murder in the First Degree for each of the seventy injured victims who survived.[4] Holmes was also charged with one count of Possession or Control of an Explosive or Incendiary Device based on evidence recovered from his apartment, which police officers concluded had been booby-trapped.[5] Thus, Holmes faced a total of one hundred and sixty-five substantive counts.

1. CNN Library, *30 Deadliest Mass Shootings in U.S. History Fast Facts*, CNN, http://www.cnn.com/2013/09/16/us/20-deadliest-mass-shootings-in-u-s-history-fast-facts/ (last updated Feb. 5, 2016, 12:11 PM); Editorial, *Deadliest U.S. Mass Shootings: 1984-2015*, L.A. TIMES (Dec. 2, 2015, 12:39 PM), http://timelines.latimes.com/deadliest-shooting-rampages/; Elizabeth Chuck & Helen Kwong, *Tragic List: The Deadliest Mass Shootings in U.S. History*, NBC NEWS (Oct. 1, 2015, 7:58 PM), http://www.nbcnews.com/news/us-news/deadliest-mass-shootings-u-s-history-n437086.

2. *See* Jeff Glor, *Colorado Massacre Could Have Been Worse: Reports*, CBS NEWS (July 23, 2012, 10:11 AM), http://www.cbsnews.com/news/colorado-massacre-could-have-been-worse-reports/

3. Order: (1) Regarding Defendant's Motion to Revise List of Attorneys and Staff Attached to Juror Questionnaire; and (2) Attaching Final Juror Questionnaire, Final Judge's Introductory Remarks, and Final Videotaped Remarks Before Individual *Voir Dire* (Including Chart) (D-269) Attachment 2 at 3, People v. Holmes, No. 12CR1522 (Arapahoe Dist. Ct. Jan. 9, 2015) [hereinafter Order D-269].

4. Jury Instructions at Nos. 2, 11, 13, 15, 17, People v. Holmes, No. 12CR1522 (Arapahoe Dist. Ct. July 14, 2015).

5. *See* Jury Instructions, No. 19, People v. Holmes, No. 12CR1522 (Arapahoe Dist. Ct. July 14, 2015); Order Regarding Motion to Suppress Mr. Holmes' July 20, 2012 Statement to Special Agent Gumbinner and Detective Appel (D-127) at 22–24, People v. Holmes, No. 12CR1522 (Arapahoe Dist. Ct. Jan. 9, 2014).

On April 1, 2013, the District Attorney's Office for the Eighteenth Judicial District announced that it intended to seek the death penalty against Holmes.[6] A couple of months later, on June 4, Holmes entered a plea of not guilty by reason of insanity to all 165 substantive charges.[7]

Following two extensive court-ordered sanity examinations of the defendant, as well as related protracted litigation, the case proceeded to trial on January 20, 2015. The jury was selected on April 14, and counsel made their opening statements on April 27. A little less than three months later, on July 16, the jury found the defendant guilty of all the charges, although the guilty verdicts on six counts of Attempt to Commit Murder in the First Degree involving three victims in auditorium eight, an auditorium the defendant never accessed, were for the lesser included offense of Attempt to Commit Murder in the Second Degree.[8] The capital sentencing hearing on the murder counts commenced on July 22 and ended on August 7. Because the jury could not unanimously decide whether the appropriate sentence on each murder count was a life sentence without the possibility of parole or a death sentence, the court was required to impose a life sentence without the possibility of parole on each such count.[9]

Not surprisingly, the selection of the jury was a formidable task and took almost as long as the guilt portion of the trial and the capital sentencing hearing combined. For multiple reasons, the court felt compelled to summon nine thousand prospective jurors, reportedly the largest jury pool ever assembled in the United States.[10] First, the case received intense and pervasive pretrial publicity, including local, national, and in-

6. Notice of Intent to Seek the Death Penalty People's Motion P-38, People v. Holmes, No. 12CR1522 (Arapahoe Dist. Ct. Apr. 1, 2013) [hereinafter Motion P-38].

7. Advisement Regarding Plea of Not Guilty By Reason of Insanity at 1, People v. Holmes, No. 12CR1522 (Arapahoe Dist. Ct. June 4, 2013).

8. Verdict Forms, People v. Holmes, No. 12CR1522 (Arapahoe Dist. Ct. July 22, 2015).

9. COLO. REV. STAT. § 18-1.3-1201(2)(d) (2016) ("If the jury's verdict is not unanimous, the jury shall be discharged, and the court shall sentence the defendant to life imprisonment."); *see also* Judgment of Conviction, Sentence, People v. Holmes, No. 12CR1522 (Arapahoe Dist. Ct. Aug. 27, 2015); Final Sentencing Verdict Forms, People v. Holmes, No. 12CR1522 (Arapahoe Dist. Ct. Aug. 11, 2015) (referencing the Final Sentencing Verdict Forms for all twenty-four counts sought against James Holmes).

10. *See* Order Amending Juror Questionnaire, Increasing the Number of Prospective Jurors, and Providing Additional Information About Jury Selection (C-159) at 1, People v. Holmes, No. 12CR1522 (Arapahoe Dist. Ct. Nov. 7, 2014) [hereinafter Order C-159] (increasing the number of jury summonses from 6,000 to 9,000); Order Regarding Defendant's Request to Continue Trial (D-245-B) at 2 n.1, People v. Holmes, No. 12CR1522 (Arapahoe Dist. Ct. Oct. 27, 2014) [hereinafter Order D-245-B] (explaining why the court anticipated that selecting a jury would be difficult and time-consuming); Order Regarding Defendant's Request to Close Jury Selection to the Public (D-154-a-2) at 1 n.1, People v. Holmes, No. 12CR1522 (Arapahoe Dist. Ct. June 11, 2014) [hereinafter Order D-154-a-2] (referring to 6,000 citizens being summoned for jury service); Order Regarding Defendant's Motion for Juror Postponements and Excusals to be Made on the Record (D-80) at 2, People v. Holmes, No. 12CR1522 (Arapahoe Dist. Ct. June 27, 2013) [hereinafter Order D-80] (initially estimating that 5,000 jury summonses would be necessary); Faith Mangan et al., *Largest Jury Pool in US History Gathered as Colo. Movie Gunman James Holmes' Trial Begins*, FOX NEWS (Jan. 20, 2015), http://www.foxnews.com/us/2015/01/20/jury-selection-to-begin-in-colorado-theater-shooting-trial/.

ternational media coverage, and the court realized that almost all of the prospective jurors would have some information about the case. Second, the defendant's plea of not guilty by reason of insanity meant that the court would need to screen prospective jurors who had education in or experience with mental health issues. Third, the prosecution's decision to seek the death penalty required the court to look for jurors who, in the event of a sentencing hearing, could conscientiously follow the law and fairly and impartially decide whether the appropriate sentence was life imprisonment without the possibility of parole or death. Fourth, the court and the parties estimated that the guilt portion of the trial and any possible sentencing hearing would take four to five months, so the court needed to find jurors who were willing and able to make a significant time commitment. Fifth, given the ubiquitous media coverage the court and the parties anticipated during the guilt portion of the trial and any sentencing hearing, as well as the expected length of the proceedings, the court selected twelve alternate jurors, one for each deliberating juror. Lastly, the decision to order such an enormous jury pool reflected the court's awareness of the defense's pending motion for a change of venue, which asserted that the defendant could not receive a fair trial in Arapahoe County with Arapahoe County jurors.[11]

As expected, jury selection focused on sentencing. The court utilized an extensive jury selection process to achieve the following objectives: (1) learn about prospective jurors' thoughts, beliefs, biases, and prejudices related to the potential penalties of life imprisonment without the possibility of parole and death; (2) educate prospective jurors on the law in Colorado regarding capital sentencing hearings and the two potential penalties; and (3) screen prospective jurors after such education to ensure that those selected would apply the law conscientiously and would be fair and impartial.

Colorado jurisprudence on capital sentencing requires that the jury make certain sequential determinations before it may consider whether the appropriate sentence is a life sentence without the possibility of parole or a death sentence.[12] Based on its decision at each step of the process, the jury may either move on to the next step, or it must return a sentencing verdict of life imprisonment without the possibility of parole.[13] Significantly, the rules governing the admissibility of evidence, the purpose or purposes for which evidence previously admitted may be

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11. *See* Motion for Change of Venue [D-206] at 1–2, People v. Holmes, No. 12CR1522 (Arapahoe Dist. Ct. Apr. 4, 2014) [hereinafter Motion D-206]. The court denied the defendant's motion to transfer the case to another Colorado county after twenty-four jurors (including twelve alternates) were selected approximately two months ahead of schedule. Order Regarding Defendant's Motion to Supplement Motion for Change of Venue and Reply in Support of Motion for Change of Venue (D-206a) at 2, People v. Holmes, No. 12CR1522 (Arapahoe Dist. Ct. Apr. 23, 2015).

12. COLO. REV. STAT. § 18-1.3-1201(2).

13. *Id.*

considered, the burden of proof (if any), and the degree of certainty that may be required in the decisions the jury is asked to make vary depending on the step of the sentencing hearing involved.[14] As a result, and given the complexities inherent in the affirmative defense of not guilty by reason of insanity, which are exacerbated in a capital sentencing hearing, the court ruled that the sentencing hearing would be trifurcated.[15] Accordingly, the jury was required to deliberate at each step of the process before it could move on to the next step, although, as explained later, the court condensed the four steps outlined by the Colorado Supreme Court into three steps.[16]

In this Article, I first review the law on capital sentencing. I then discuss the process followed in the capital sentencing hearing held in *Holmes* in an effort to minimize the risk of confusing the jury, to guide counsel as they presented evidence and arguments, and to allow the court to maintain optimal control over the proceedings.[17]

II. LAW REGARDING CAPITAL SENTENCING

A. The Eighth Amendment and Relevant U.S. Supreme Court Precedent

Before discussing Colorado's capital sentencing scheme, it is important to review the Eighth Amendment to the U.S. Constitution and the U.S. Supreme Court's cases interpreting and applying the Amendment. This authority is important because it forms the foundation for Colorado's capital sentencing scheme.[18]

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[19] In 1976, the U.S. Supreme Court held in *Gregg v.*

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14. *Id.* § 18-1.3-1201(1)–(2); People v. Dunlap (*Dunlap I*), 975 P.2d 723, 735–36 (Colo. 1999).

15. *See* Order D-269, *supra* note 3, at Attachment 3, at 4–10; Order Regarding Defendant's Motion for Defense and Prosecution to Have Same Number of Closing Arguments at Any Sentencing Trial (D-142) at 4–5, People v. Holmes, No. 12CR1522 (Arapahoe Dist. Ct. Mar. 14, 2014) [hereinafter Order D-142].

16. Order D-269, *supra* note 3, at Attachment 3, at 4–10; *see also* Jury Instructions—Phase Three of Sentencing Hearing, People v. Holmes, No. 12CR1522 (Arapahoe Dist. Ct. Aug. 6, 2015) [hereinafter Phase Three Instructions]; Jury Instructions—Phase Two of Sentencing Hearing, People v. Holmes, No. 12CR1522 (Arapahoe Dist. Ct. July 30, 2015) [hereinafter Phase Two Instructions]; Jury Instructions—Phase One of Sentencing Hearing, People v. Holmes, No. 12CR1522 (Arapahoe Dist. Ct. July 22, 2015) [hereinafter Phase One Instructions]; *Dunlap I*, 975 P.2d at 735–36.

17. *See, e.g.*, Order D-142, *supra* note 15, at 5.

18. People v. Tenneson, 788 P.2d 786, 790 (Colo. 1990) ("The [Colorado] death penalty statute . . . was enacted against a background of decisions of the United States Supreme Court . . . considering whether the death penalty statutes of other states violated the eighth amendment's proscription of 'cruel and unusual punishments' as that proscription is made applicable to the states through the fourteenth amendment." (citation omitted) (quoting U.S. CONST. amend. VIII)).

19. U.S. CONST. amend. VIII.

Georgia[20] that imposition of the death penalty does not constitute "cruel and unusual punishment" in violation of the Eighth Amendment.[21]

However, the Eighth Amendment requires that the death penalty be "imposed fairly, and with reasonable consistency, or not at all."[22] Consequently, where a sentencing body is given discretion "on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."[23] The Court, in *Gregg*, concluded that "these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information."[24] For purposes of addressing Eighth Amendment concerns in capital proceedings, the United States Supreme Court divides the decision-making process into two stages: the eligibility decision and the selection decision.[25]

The eligibility stage narrows the class of convicted murderers who may be sentenced to death.[26] "[T]here is a required threshold below which the death penalty cannot be imposed."[27] The states have adopted two methods to narrow the class of defendants who are eligible to receive a death sentence: (1) a "weighing" method, and (2) a "non-weighing" method.[28] Under both methods, a defendant must be convicted of murder in the first degree before he may be eligible for a death sentence.[29] In addition, in order for a defendant to be eligible for a death sentence, both methods require the trier of fact to find at least one aggravating factor, or its equivalent, during either the guilt or penalty portion of the proceedings.[30]

From there, the process diverges, depending on whether a state is a weighing or non-weighing jurisdiction. In weighing jurisdictions, once a jury has found that at least one aggravating factor exists, it must weigh the aggravating factor or factors against all mitigating evidence to decide if the defendant is death-eligible.[31] On the other hand, in non-weighing jurisdictions, a finding of an aggravating factor automatically makes the defendant eligible to receive a death sentence.[32]

20. 428 U.S. 153 (1976).
21. *Id.* at 183–86, 188.
22. Eddings v. Oklahoma, 455 U.S. 104, 112 (1982).
23. *Gregg*, 428 U.S. at 189.
24. *Id.* at 195.
25. *Dunlap I*, 975 P.2d 723, 735 (Colo. 1999).
26. *Id.* at 735–36.
27. McCleskey v. Kemp, 481 U.S. 279, 305 (1987).
28. *Dunlap I*, 975 P.2d at 735.
29. *Id.* at 736.
30. *Id.* at 735 (citing Tuilaepa v. California, 512 U.S. 967, 972 (1994)).
31. *Id.*
32. *Id.*; *see also* Woldt v.People, 64 P.3d 256, 263 (Colo. 2003).

In both weighing and non-weighing jurisdictions, if the jury determines that the defendant is death-eligible, the process moves to the selection stage, where the jury decides whether the death-eligible defendant should, in fact, receive a death sentence.[33] During the selection stage, the jury is called to make "an *individualized* determination on the basis of the [defendant's] character . . . and the circumstances of [his] crime."[34] Because the jury is required to assess the culpability of the individual defendant, the selection determination in both weighing and non-weighing jurisdictions "requires the admission of all relevant evidence."[35]

In a weighing state, the defendant is sentenced to either death or life imprisonment "based on all relevant information about the individual defendant."[36] "By contrast, in a non-weighing state, 'aggravating factors as such have no specific function in the jury's decision whether a defendant who has been found to be eligible for the death penalty should receive it.'"[37] Indeed, "[i]n a non-weighing state, no special significance is given to statutory" aggravating factors or statutory mitigating factors in the selection stage; rather, the jury considers all the evidence presented in deciding whether to impose a life sentence or the death penalty.[38]

B. Colorado's Capital Sentencing Scheme

Fourteen years after *Gregg*, in 1990, the Colorado Supreme Court upheld the constitutionality of the death penalty statute in effect in Colorado at that time.[39] The Colorado Supreme Court has since upheld death sentences.[40]

In 1995, the Colorado General Assembly amended the death penalty statute by substituting "a three-judge panel in place of the jury" during the sentencing hearing.[41] The legislature did so based on a U.S. Supreme Court decision, *Walton v. Arizona*,[42] that was later overturned in *Ring v. Arizona*.[43] Based on the decision in *Ring*, the Colorado Supreme Court declared the three-judge panel capital sentencing statute unconstitutional on its face.[44] In 2002, the Colorado General Assembly reenacted the provisions of the capital sentencing statute in effect before the 1995 amend-

33. *Dunlap I*, 975 P.2d at 735–36.
34. *Id.* at 736 (quoting *Tuilaepa*, 512 U.S. at 972).
35. *Id.*; *Woldt*, 64 P.3d at 263–64.
36. *Woldt*, 64 P.3d at 264.
37. *Dunlap I*, 975 P.2d at 735 (quoting Stringer v. Black, 503 U.S. 222, 229–30 (1992)).
38. *Woldt*, 64 P.3d at 264 (citing *Dunlap I*, 975 P.2d at 736).
39. People v. Davis, 794 P.2d 159, 170–72 (Colo. 1990), *overruled on other grounds by* People v. Miller, 113 P.3d 743 (Colo. 2005).
40. *See, e.g.*, People v. Harlan, 8 P.3d 448, 483 (Colo. 2000), *overruled on other grounds by* People v. Miller, 113 P.3d 743 (Colo. 2005); *Dunlap I*, 975 P.2d at 735.
41. *Woldt*, 64 P.3d at 258.
42. 497 U.S. 639 (1990).
43. *Woldt*, 64 P.3d at 258.
44. *Id.* at 259.

ment, again making the jury responsible for both the guilt and penalty determinations in a capital case.[45]

Under current Colorado law, in a capital case in which the defendant is found guilty of Murder in the First Degree, the same jury that determined guilt must determine the sentence as soon as practicable by following the statutory sentencing scheme.[46] The Colorado Supreme Court has analyzed the death penalty statute presently in effect in this State on multiple occasions and has found that Colorado's capital sentencing scheme consists of four steps: finding aggravating factors, finding mitigating factors, weighing the aggravating factors proven against the mitigating factors that exist, and determining whether a life sentence without the possibility of parole or a death sentence is the appropriate sentence.[47]

During the first step, the jury must determine whether the prosecution has alleged and proven the existence of at least one of the statutorily specified aggravating factors beyond a reasonable doubt.[48] The Colorado Supreme Court has observed that the use of aggravating factors "is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion."[49] If the jury unanimously finds that the prosecution has proven beyond a reasonable doubt at least one of the alleged aggravating factors, the sentencing hearing moves on to step two.[50] Otherwise, "the jury shall render a verdict of life imprisonment" without the possibility of parole.[51]

During the second step, the jury must decide whether any mitigating factors exist.[52] A mitigating factor is a fact or circumstance which does not constitute justification or excuse for the crime, but which, in fairness or mercy, the jury considers as extenuating or reducing the degree of the defendant's moral culpability.[53] Like aggravating factors, mitigating factors in Colorado are listed in a statute; however, that list is not inclusive, as it contains a catchall category: "[a]ny other evidence which in the court's opinion bears on the question of mitigation."[54] If the defendant presents mitigating factors, the prosecution has an opportunity to present evidence offered to rebut those mitigating factors.[55] Each juror must then individually determine whether one or more mitigating factors exist;

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45. *See id.*
46. COLO. REV. STAT. § 18-1.3-1201(1)(a) (2016).
47. People v. Montour, 157 P.3d 489, 496 (Colo. 2007).
48. COLO. REV. STAT. § 18-1.3-1201(2)(a)(I); *Dunlap I*, 975 P.2d 723, 736 (Colo. 1999).
49. People v. Tenneson, 788 P.2d 786, 790 (Colo. 1990) (quoting Lowenfield v. Phelps, 484 U.S. 231, 244 (1988)).
50. COLO. REV. STAT. § 18-1.3-1201(1)(d), (2)(b)(II).
51. *Id.* § 18-1.3-1201(2)(b)(I).
52. *Id.* § 18-1.3-1201(2)(a)(II); *Dunlap I*, 975 P.2d at 736.
53. People v. White, 870 P.2d 424, 454 (Colo. 1994).
54. *Id.* § 18-1.3-1201(4).
55. *Dunlap I*, 975 P.2d at 739.

however, jurors need not unanimously agree that mitigating factors exist or that the same mitigating factors exist.[56]

During the third step, the final step of the eligibility stage, the jury must assess whether the mitigating factors that exist outweigh any aggravating factor or factors proven by the prosecution beyond a reasonable doubt.[57] In order to make the required determination, each juror must first decide what weight to assign to each mitigating factor and then must individually weigh the mitigating factors that exist and the aggravating factors proven by the prosecution.[58] If the jury unanimously finds, beyond a reasonable doubt, that the mitigating factors that exist are not sufficient to outweigh the proven aggravating factors, the defendant is eligible for a death sentence and the jury moves on to the fourth and final step of the process, the selection stage, to determine whether the defendant should be sentenced to life imprisonment without the possibility of parole or death.[59]

During the fourth and final step, the jury must decide what sentence is appropriate: life imprisonment without the possibility of parole or death.[60] "[T]he question whether death is the appropriate sentence requires a profoundly moral evaluation of the defendant's character and crime."[61] In order to return a sentence of death, the jury must be unanimously convinced, beyond a reasonable doubt, that death is the appropriate sentence.[62]

At the fourth step, both parties may introduce evidence that is relevant to the nature of the crime, and the character, background, and history of the defendant.[63] In this step, all relevant, admissible evidence is generally permissible, and it may be presented by both the prosecution and the defense.[64] Indeed, the admissibility of evidence at step four "is constrained only by familiar evidentiary principles concerning the relevance of the evidence and the potential for that evidence to inflame the passion or prejudice of the jury."[65] Thus, the prosecution may present evidence relating to any of the statutory aggravating factors, as well as evidence of aggravating circumstances, which should not be confused with statutory aggravating factors.[66] Additionally, the prosecution may

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56. People v. Tenneson, 788 P.2d 786, 789 (Colo. 1990).
57. COLO. REV. STAT. § 18-1.3-1201(2)(a)(II); *Dunlap I*, 975 P.2d at 736.
58. *Tenneson*, 788 P.2d at 791–92.
59. COLO. REV. STAT. § 18-1.3-1201(2)(a)(III); *Dunlap I*, 975 P.2d at 736.
60. *Dunlap I*, 975 P.2d at 741.
61. *Tenneson*, 788 P.2d at 791 (quoting Satterwhite v. Texas, 486 U.S. 249, 261 (1988) (Marshall, J., concurring)).
62. *Id.* at 796.
63. COLO. REV. STAT. §18-1.3-1201(1)(b); *Dunlap I*, 975 P.2d at 740.
64. *Dunlap I*, 975 P.2d at 739.
65. *Id.* at 741.
66. *Id.* at 739–40. The Colorado Supreme Court has explained that there is a constitutional distinction between statutory aggravators and other aggravating evidence. *Id.* at 739. "Statutory aggravators are those factors the General Assembly has identified as weighing in favor of imposition

present evidence known as "victim impact evidence," which is evidence "relating to the personal characteristics of the victim and the impact of the crimes on the victim's family."[67] On the other hand, the defense may present more evidence of mitigation.

This stands in stark contrast to steps one through three, where "the jury may [only] consider the following: (1) evidence related to statutory aggravating factors; (2) . . . mitigating evidence; and (3) prosecution evidence offered to rebut mitigating factors raised by the defendant."[68] Other evidence, including, for example, evidence that purportedly contradicts statutory mitigating factors not raised by the defense, is irrelevant during those steps.[69] To hold otherwise would have "the net effect of introducing evidence relating to aggravating circumstances—not aggravating factors—at the eligibility stage," which, in turn, would risk having the jury "find a statutory aggravator on the basis of aggravating circumstance evidence."[70] Aggravating circumstance evidence is not admissible during the first three steps of a capital sentencing hearing because such evidence "fails to conform to the strict requirement that eligibility stage evidence 'minimiz[e] the risk of wholly arbitrary and capricious action.'"[71]

At any step of the sentencing hearing, a party may generally rely on evidence previously introduced, either in the guilt portion of the trial or in the sentencing hearing.[72] Therefore, during the sentencing hearing, a party need not reintroduce evidence previously admitted.[73]

However, during the sentencing hearing, certain evidence previously admitted may be considered only for a limited purpose or, if previously admitted for a limited purpose, only for a different limited purpose. Moreover, consideration of previously admitted evidence is circumscribed by the rules governing each phase of the sentencing hearing. For example, in an insanity case, "evidence acquired . . . for the first time from a communication derived from the defendant's mental processes during the course of a court-ordered [sanity] examination . . . is admissible only" for the limited purpose of considering "the issues raised by the defendant's plea of not guilty by reason of insanity."[74] Such evidence may be considered only in the second, third, and fourth steps of the sen-

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of the death penalty," while "[o]ther aggravating evidence is evidence that is unfavorable to the defendant, but that does not relate to a statutory aggravator." *Id.*

67. COLO. REV. STAT. §18-1.3-1201(1)(b); *see also Payne v. Tennessee*, 501 U.S. 808, 825 (1991).

68. *Dunlap I*, 975 P.2d at 739.

69. *Id.*

70. *Id.*

71. *Id.* (alteration in original) (quoting Zant v. Stephens, 462 U.S. 862, 874 (1983)).

72. COLO. REV. STAT. § 18-1.3-1201(1)(b).

73. *See id.*

74. *Id.* § 16-8-107(1.5)(a).

tencing hearing, and only for a different limited purpose: to determine "the existence or absence of any mitigating factor."[75]

The steps of a capital sentencing hearing may also differ in the burden of proof, if any, and the level of certainty that may be required in the decisions the jury is called upon to make. Although the prosecution bears the burden of proof at step one—it must prove beyond a reasonable doubt at least one of the statutory aggravating factors it has alleged—neither party has a burden of proof during the remaining three steps. Nevertheless, in step three, "a capital sentencer, in order to deliver a certain and reliable sentence, must be convinced beyond a reasonable doubt that any mitigating factors do not outweigh proven statutory aggravating factors."[76] Similarly, in step four, the jury may not return a sentencing verdict of death unless each juror is "convinced beyond a reasonable doubt that the defendant should be sentenced to death."[77] The purpose of the "beyond a reasonable doubt" standard in steps three and four "is not to fulfill the traditional function of providing guidance in fact-finding but is to communicate to the jurors the degree of confidence they must have in the correctness of their ultimate conclusion before they can return a verdict of death."[78]

At the end of the sentencing hearing, if the jury returns a sentencing verdict of death, it is binding on the trial court "unless the court determines, and sets forth in writing the basis and reasons for such determination, that the verdict of the jury is clearly erroneous as contrary to the weight of the evidence, in which case the court shall sentence the defendant to life imprisonment."[79] If the jury is unable to reach a unanimous sentencing verdict as to the appropriate sentence, the trial court must discharge the jury and sentence the defendant to life imprisonment without the possibility of parole.[80]

In sum, the first three steps of Colorado's capital sentencing process resemble a weighing state.[81] However, the fourth step, during "which the jury [must] consider[] all relevant evidence without necessarily giving special consideration to [the statutory aggravating factors or mitigating factors], resembles the selection stage of a non-weighing state."[82] This four-step statutory structure satisfies Eighth Amendment requirements because the first three steps "constitutionally narrow the class of murderers to those who are eligible for imposition of the death penalty, and the

75. *Id.* § 16-8-107(1.5)(b).
76. People v. White, 870 P.2d 424, 456 (Colo. 1994).
77. *Id.* (quoting People v. Tenneson, 788 P.2d 786, 797 (Colo. 1990)).
78. *Id.* (quoting *Tenneson*, 788 P.2d at 796).
79. COLO. REV. STAT. § 18-1.3-1201(2)(c).
80. *Id.* § 18-1.3-1201(2)(d).
81. *Dunlap I*, 975 P.2d 723, 736 (Colo. 1999).
82. *Id.*

fourth step affords the sentencing body unlimited discretion to sentence the defendant to life imprisonment instead of death."[83]

III. THE CAPITAL SENTENCING HEARING IN *PEOPLE V. HOLMES*

In a pretrial order in the *Holmes* case, the court ruled that, in the event a sentencing hearing was necessary, it would be trifurcated.[84] During jury selection, the court informed prospective jurors about this ruling and provided detailed instructions related to the three phases into which it intended to divide any capital sentencing hearing.[85] Consistent with its trifurcation ruling and its concomitant jury selection instructions, at the end of the guilt portion of the trial, following the jury's guilty verdicts on all of the Murder in the First Degree counts, the court broke up the sentencing hearing into three distinct phases: Phase One, which consisted of step one; Phase Two, which consisted of steps two and three; and Phase Three, which consisted of step four.[86] To avoid confusion, the court did not discuss with prospective jurors or seated jurors the four steps outlined in the case law in Colorado. Instead, the court consistently referred to the three phases of a sentencing hearing.[87]

The sentencing hearing was divided in this manner for various reasons. First, the court was concerned that, given the particular circumstances of the case, requiring the jury to conduct the entire analysis all at once would make it difficult to follow the process and to comply with all of the court's instructions.[88] Second, by splitting up the sentencing hearing, the court provided guidance to counsel in terms of the evidence that could be presented, the purpose for which it could be presented, and the arguments that could be advanced at each juncture of the sentencing hearing.[89] Third, the procedure employed allowed the court to exert better control over the sentencing hearing because everyone understood the rules that applied at each phase.[90]

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83. Woldt v. People, 64 P.3d 256, 265 (Colo. 2003).

84. *See* Order D-142, *supra* note 15, at 4. Neither party raised an objection to trifurcation of the sentencing hearing.

85. *See* Order D-269, *supra* note 3, at Attachment 3, at 5–8.

86. Order D-142, *supra* note 15, at 4–5.

87. The court consolidated steps two and three into Phase Two because the jury's determination in step two will necessarily be reflected in its determination in step three. Stated differently, the jury's finding as to whether any mitigating factors exist will always be a component of the jury's determination regarding whether it is unanimously convinced beyond a reasonable doubt that the mitigating factors do not weigh more heavily in the balance than the proven aggravating factors. Notably, the death penalty statute states that the jury's sentencing verdict must be based on three considerations: (1) whether at least one aggravating factor has been proven by the prosecution; (2) "whether sufficient mitigating factors exist which outweigh any aggravating factor or factors found to exist;" and (3) based on factors (1) and (2), "whether the defendant should be sentenced to death or life imprisonment" without the possibility of parole. COLO. REV. STAT. § 18-1.3-1201(2)(a) (2016).

88. *See* Order D-142, *supra* note 15, at 5.

89. *Id.*

90. *Id.*

Phase One included step one exclusively. Because the jury could consider evidence presented during the guilt portion of the trial,[91] the prosecution chose not to present any evidence in Phase One. In light of the prosecution's decision, and considering that the prosecution had the burden of proof, the defense did not present any evidence in Phase One either.[92] After the court read the Phase One instructions to the jury, the prosecution made a closing argument. Since the defense elected not to make a closing argument, the prosecution did not have an opportunity to make a rebuttal closing argument.[93] Immediately thereafter, the court asked the jury to deliberate and to determine whether the prosecution had proven beyond a reasonable doubt the existence of at least one of the aggravating factors alleged.[94]

One of the instructions informed the jury that, in reaching its Phase One sentencing verdicts, it could consider any evidence presented in the guilt portion of the trial with one exception: it was not allowed to consider any evidence acquired for the first time from a communication derived from the defendant's mental processes during the course of a court-ordered sanity examination.[95] The court reminded the jury that such evidence had been admitted during the guilt portion of the trial for the limited purpose of considering the issues raised by the defendant's plea of not guilty by reason of insanity.[96] The court then explained that the issue of the defendant's sanity was no longer in dispute, as the jury had rejected the insanity defense and had found the defendant guilty on all the murder counts.

On each murder count, the jury unanimously found that the prosecution had proven, beyond a reasonable doubt, the following four statutory aggravating factors alleged: (1) that the defendant intentionally, knowingly, or with universal malice manifesting extreme indifference to the value of human life generally killed two or more persons during the commission of the same criminal episode; (2) that the defendant, in the commission of the offense of Murder in the First Degree, knowingly created a grave risk of death to another person in addition to the twelve victims of the crimes of Murder in the First Degree; (3) that the defendant committed the offense of Murder in the First Degree in an especially

91. *See* COLO. REV. STAT. § 18-1.3-1201(1)(b).

92. Since no evidence was presented, neither party was allowed to make an opening statement. However, before the parties' closing arguments, the court did provide some introductory instructions to the jury. *See* Phase One Instructions, *supra* note 16, at 11–13.

93. Pursuant to a pretrial order, the prosecution had the first closing argument and the ability to make a rebuttal argument in the event the defense elected to make a closing argument. *See* Order D-142, *supra* note 15, at 5. The court reasoned that the prosecution was entitled to make the first closing argument and a rebuttal closing argument because it had the burden of proof in this phase of the sentencing hearing. *Id.*; *see also* COLO. REV. STAT. § 18-1.3-1201(1)(d).

94. *See* Verdict Forms, People v. Holmes, No. 12CR1522 (Arapahoe Dist. Ct. July 27, 2015) [hereinafter Phase One Verdict Forms].

95. Phase One Instructions, *supra* note 16, at No. 7.

96. *Id.*

heinous, cruel, or depraved manner; and (4) that the defendant committed the offense of Murder in the First Degree while lying in wait or from ambush.[97] The only statutory aggravating factor alleged by the prosecution that the jury found was not proven beyond a reasonable doubt was that the defendant intentionally killed a child who had not yet attained twelve years of age.[98] Given the sentencing hearing Phase One verdicts, the sentencing hearing continued to Phase Two on all the murder counts.

During Phase Two, which, as indicated, consisted of steps two and three, each party gave a brief opening statement followed by the defense's presentation of mitigation evidence.[99] The defense relied on evidence, presented during both the guilt portion of the trial and the sentencing hearing, of the following statutory mitigating factors:

> (1) The age of the defendant at the time of the crime;
>
> (2) [That] [t]he defendant's capacity to appreciate [the] wrongfulness of [his] conduct or to conform [his] conduct to the requirements of [the] law was significantly impaired, but not so impaired as to constitute a defense to [the] prosecution [of the crimes];
>
> (3) The emotional state of the defendant at the time [of] the crime[s] . . . ;
>
> (4) The absence of any significant prior conviction;
>
> (5) The extent of the defendant's cooperation with law enforcement . . . or agencies; and
>
> (6) [The catchall category relating to] [a]ny other evidence introduced . . . bear[ing] on the question of mitigation.[100]

Additionally, relying on the catchall category in the statute, the defense submitted an extensive twenty-one page, sixty-two paragraph theory of mitigation instruction, urging jurors to find additional mitigating factors in the evidence introduced during the guilt portion of the trial and the sentencing hearing, as summarized in that instruction.[101]

The prosecution had an opportunity to present additional evidence to rebut the mitigating factors presented by the defendant but chose not to do so. Instead, in its closing argument, the prosecution relied on the evidence introduced during the guilt portion of the trial to rebut the defense's mitigation. Pursuant to a pretrial order, after the court read the Phase Two instructions to the jury, the defense made its closing argu-

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97. Phase One Verdict Forms, *supra* note 94.

98. *Id.*

99. Before the parties' opening statements, the court gave the jury Phase Two introductory instructions. *See* Phase Two Instructions, *supra* note 16, at Nos. 1–3.

100. *Id.* at No. 3.

101. *See id.* at No. 4.

ment, which was followed by the prosecution's closing argument; neither party was allowed a rebuttal closing argument.[102] The court then asked the jury to deliberate.

Under the court's instructions, during deliberations, the jurors were required to first individually determine whether one or more mitigating factors existed (step two). Each juror was then directed to individually determine what weight to give each mitigating factor and to then weigh the mitigating factors that existed and the aggravating factors proven by the prosecution (step three).

One of the instructions informed the jury that, in reaching its Phase Two sentencing verdicts, it could consider all of the evidence admitted during the guilt portion of the trial and the sentencing hearing with the following caveat: evidence acquired for the first time from a communication derived from the defendant's mental processes during the course of a court-ordered sanity examination could only be considered for the limited purpose of determining the existence, or absence, of any mitigating factors.[103] This was consistent with a contemporaneous limiting instruction the court provided multiple times during Phase Two of the sentencing hearing. The court cautioned the jury that such evidence could not be considered as evidence of aggravation or for any other purpose.[104] Thus, the jury was instructed that evidence that had been admitted during the guilt portion of the trial for the limited purpose of considering the issues raised by the defendant's plea of not guilty by reason of insanity, which the jury was prohibited from considering during its Phase One deliberations, could be considered now but for a different limited purpose.

The Phase Two verdict form for each murder count contained a YES or NO verdict question: "Does the jury unanimously find beyond a reasonable doubt that the mitigating factors that exist do not outweigh the aggravating factors proven by the prosecution in Phase [One] of the sentencing hearing?"[105] The jury answered "YES" to this verdict question on each of the murder counts.[106]

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102. Because neither party had a burden of proof in Phase Two or Phase Three, the court ruled that the defense would make the first closing argument, followed by the prosecution's closing argument, at the end of Phase Two, while the prosecution would make the first closing argument, followed by the defense's closing argument, at the end of Phase Three. *See* Order D-142, *supra* note 15, at 5–6. The court also decided that at the end of Phase Three, each side would be allowed one rebuttal closing argument. *Id.* at 6.

103. Phase Two Instructions, *supra* note 16, at No. 16.

104. *Id.*

105. Phase Two Sentencing Verdict Forms, People v. Holmes, No. 12CR1522 (Arapahoe Dist. Ct. Aug. 7, 2015) [hereinafter Phase Two Verdict Forms].

106. The court informed the jury that if it answered "NO" on a verdict form, the sentencing hearing would end with respect to that count and the court would be required to sentence the defendant to life imprisonment without the possibility of parole on that count. *See* Phase Two Verdict Forms, *supra* note 105. Because the jury answered all of the Phase Two verdict questions in the affirmative, the sentencing hearing proceeded to Phase Three on all of the murder counts. *See id.*

Following the jury's determination at the end of Phase Two, which rendered the defendant eligible to receive a death sentence, the sentencing hearing moved to Phase Three, the selection stage in Colorado's capital sentencing scheme. At the beginning of Phase Three, each party gave a brief opening statement.[107] Consistent with certain parameters established by the court, the prosecution presented a limited amount of victim impact evidence through thirteen witnesses and some exhibits. The defense chose not to present additional evidence. After reading the Phase Three instructions to the jury, each side, starting with the prosecution, made a closing argument. Because the prosecution elected not to make a rebuttal closing argument, the defense did not have an opportunity to make a rebuttal closing argument. Therefore, following the defense's closing argument, the court asked the jury to deliberate one final time to determine the appropriate punishment for the defendant on each murder count: life imprisonment without the possibility of parole or death.

The final verdict forms gave the jury three options on each murder count:

> I. We, the jury, are unanimously convinced beyond a reasonable doubt that the appropriate sentence for the defendant, James Eagan Holmes, on this count is a DEATH SENTENCE.
>
> . . .
>
> II. We, the jury, are not unanimously convinced beyond a reasonable doubt that the appropriate sentence for the defendant, James Eagan Holmes, on this count is a death sentence, and we, the jury, unanimously agree that the defendant should be sentenced to LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE on this count.
>
> . . .
>
> III. We, the jury, DO NOT HAVE A UNANIMOUS FINAL SENTENCING VERDICT on this count, and, we, the jury, understand that, as a result, the Court will impose a sentence of LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE on this count.[108]

The jury chose the last option on all the verdict forms, indicating that it was unable to reach a unanimous verdict on any of the murder counts in Phase Three of the sentencing hearing. Following the reading of the verdicts, the jury was discharged. Approximately two weeks later, in accordance with section 18-1.3-1201(2)(d), the court held a three-day final

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107. Before the parties' opening statements, the court gave the jury Phase Three introductory instructions. *See* Phase Three Instructions, *supra* note 16.

108. Final Sentencing Verdict Forms, *supra* note 9.

sentencing hearing to afford all of the victims an opportunity to be heard. On August 26, 2015, the court sentenced the defendant on the twenty-four First Degree Murder counts to twelve consecutive life sentences without the possibility of parole, one for each deceased victim. The court then imposed a total of 3,318 years in the Department of Corrections and five years of mandatory parole on the remaining counts, to be served consecutive to the twelve life sentences without the possibility of parole.[109]

IV. CONCLUSION

There is no direct authority in Colorado on how this State's four-part capital sentencing scheme should be given effect during a capital sentencing hearing. When the court decided that any sentencing hearing in the *Holmes* case would be trifurcated, it did so, not because either party requested it—neither did—but because it concluded that it was the most prudent course of action under the specific circumstances involved.[110] Of course, when the court made this decision, there was no way to know, with any degree of certainty, whether its assessment of the potential perils was well-founded. Nor could the Court predict with any precision whether trifurcation of the sentencing hearing would allay its concerns.

Now that the proceedings in *Holmes* have been completed, I am convinced that, under the circumstances present in the case, dividing the sentencing hearing into three separate phases, and requiring the jury to deliberate at the end of each phase, was the wisest approach. While such trifurcation created more work for the attorneys, the jury, and the court, and likely extended the length of the proceedings, it was clearly the most suitable procedure to minimize the risk of confusing the jury. Had the sentencing hearing not been trifurcated in the *Holmes* case, the jury would have received the myriad sentencing rules and instructions all at once and would have been left to its own devices to navigate through the capital sentencing labyrinth as it determined whether the defendant should be sentenced to life imprisonment without the possibility of parole or death.

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109. Colorado requires a life sentence without the possibility of parole for any conviction for Murder in the First Degree. *See* COLO. REV. STAT. § 18-1.3-401(1)(a)(V)(A) (2016).

110. *See* Order D-142, *supra* note 15, at 5.