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SUPREME COURT, STATE OF COLORADO

2 East 14th Avenue
Denver, CO 80203

Original Proceeding
Adams County District Court No. 22CR1524
Court of Appeals No. 22CA2062

In re:

PLAINTIFF:
PEOPLE OF THE STATE OF COLORADO

DEFENDANT:
JERRELLE SMITH

Attorneys for *Amici Curiae* CCDB and ADC:

Antony Noble, Reg. No. 33910
Taylor Ivy, Reg. No. 50122
THE NOBLE LAW FIRM, LLC
215 Union Boulevard, Suite 305
Lakewood, CO 80228
Tel: (303) 232-5160
Fax: (303) 232-5162
Email: taylor@noble-law.com

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Case No. 23SA2

BRIEF OF *AMICI CURIAE* COLORADO CRIMINAL DEFENSE BAR AND OFFICE OF ALTERNATE DEFENSE COUNSEL IN SUPPORT OF DEFENDANT JERRELLE SMITH

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this amicus brief complies with C.A.R. 29, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that the amicus brief complies with the applicable word limit set forth in C.A.R. 29(d). It does not exceed 4,750 words.

The amicus brief complies with the content and form requirements set forth in C.A.R. 29(c).

The undersigned acknowledges that the brief may be stricken if it fails to comply with any of the requirements C.A.R. 29, and C.A.R. 32.

s/ Taylor Ivy

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STATEMENT OF THE ISSUES

Whether following the repeal of the death penalty in Colorado, a class 1 felony related to conduct occurring on or after July 1, 2020, constitutes a "capital offense," and whether those charged with class 1 felonies related to conduct occurring on or after July 1, 2020, have a right to bail.

AMICI CURIAE'S STATEMENT OF INTEREST

The Colorado Criminal Defense Bar (CCDB) is dedicated to representing those accused of crimes in Colorado and safeguarding fairness and individual rights in criminal proceedings in the state. The CCDB promotes a fair judicial system through advancement of trial advocacy skills, high ethical standards, and professionalism. The CCDB maintains a membership of about 900 practitioners. Since it was founded in 1979, the CCDB has been active in protecting the rights of the accused.

The Office of Alternate Defense Counsel (ADC) was established under section 21-2-101, C.R.S. (1997), *et seq.* as an independent governmental agency of the Colorado Judicial Branch. ADC is funded to provide legal representation for indigent persons in criminal and delinquency cases in which the Office of the State Public Defender has a conflict of interest. § 21-2-103(1)(a), C.R.S. (2021). ADC provides representation by contracting with licensed attorneys, § 21-2-103(4), and

is mandated to provide to indigent persons "legal services that are commensurate with those available to nonindigents." § 21-2-101(1), C.R.S. (2021).

Criminal defense attorneys who are members of the CCDB and/or contractors with ADC routinely litigate issues related to bail in criminal cases and routinely represent individuals accused of class 1 felonies. The CCDB and ADC submit this amicus brief pursuant to this court's request and believe that the court will benefit from their perspective.

ARGUMENT

Following the repeal of the death penalty in Colorado, a class 1 felony related to conduct occurring on or after July 1, 2020, does not constitute a "capital offense" and those charged with class 1 felonies have a right to bail.

For more than a century, Article II, Section 19 of the Colorado Constitution simply mandated that "all persons shall be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great."

This section of the constitution was repealed and reenacted in 1983 to include provisions permitting bail to be denied in certain non-capital cases, then amended in 1995 to include provisions related to bail following a conviction. *See* 1982 Colo. Sess. Laws 685-86; 1994 Colo. Sess. Laws 2853-55. The relevant statute has evolved to mirror the language of the constitution. *See* § 16-4-101,

C.R.S. (2022). But despite these and other substantive changes to the laws related to bail in Colorado, neither the constitution nor the statute has ever been amended to alter the language concerning the capital offenses exception to bail.

The term "capital offense" is not defined in the Colorado Constitution or by the relevant statute. However, the word "capital" appears in other statutes—namely, those related to the imposition of the death penalty. *See, e.g.,* § 18-1.3-1201(7)(b), C.R.S. (2020) ("…except that, if the prosecutor informs the trial court that, in the opinion of the prosecutor, capital punishment would no longer be in the interest of justice…"); § 18-1.4-102(7)(b), C.R.S. (2018) (same). The common meaning of the word "capital," "[s]ince at least the late 1400s," has been "'[a]ffecting, or involving loss of, the head or life,' or '[p]unishable by death.'" *State v. Ameer*, 458 P.3d 390, 392 (N.M. 2018) (citing *The Oxford English Dictionary* vol. II (2d ed. 1989); *Black's Law Dictionary* (10th ed. 2014) (defining "capital" as '[p]unishable by execution; involving the death penalty")). Consistently, "[Colorado] case law has defined 'capital case' to mean a case in which a sentence of death is potentially available under the statutes applicable to the offense…" *People v. Reynolds*, 159 P.3d 684, 688 (Colo. App. 2006) (citing *Tribe v. District Court*, 593 P.2d 1369 (Colo. 1979); *People ex rel. Dunbar v. District Court*, 500 P.2d 358 (Colo. 1972)).

Following the repeal of the death penalty in Colorado pursuant to the enactment of SB20-100, there is no case in which a sentence of death is potentially available under the statutes applicable to offenses charged on or after July 1, 2020. Even for defendants convicted of class 1 felonies, "the death penalty is not a sentencing option." § 16-11-901, C.R.S. (2022).

The repeal of the death penalty in Colorado means that a class 1 felony related to conduct occurring on or after July 1, 2020, does not constitute a "capital offense" because "capital offenses" are offenses for which death is a punishment. The capital offenses exception to bail does not apply to individuals charged with class 1 felonies related to conduct occurring on or after July 1, 2020.

(1) "Capital offenses" are offenses for which death is a punishment.

"A capital offense, within the meaning of constitutional and statutory provisions relating to bail, is one that may be punished by death." 8 C.J.S. Bail § 35 (2023). As mentioned above, this has been the plain meaning of the term "capital offense" for centuries, particularly as it is used in constitutional and statutory provisions relating to bail.

(a) Historically, in federal and state law concerning the right to bail, the term "capital offenses" has been understood and interpreted to mean offenses punishable by death.

Long before Colorado became a state, federal law setting forth the right to bail identified "capital offenses" as the singular exception to the right to bail and defined "capital offenses" as offenses for which death is a punishment. When the First Congress passed the Judiciary Act of 1789, it defined the right to bail for federal crimes in relevant part as follows:

> [U]pon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death…"

When the judiciary later adopted the Federal Rules of Criminal Procedure, Rule 46(a)(1) contained similar language, which was consistently interpreted "as 'command[ing] allowance of bail for one under charge of any offense not punishable by death.'" Matthew J. Hegreness, *America's Fundamental and Vanishing Right to Bail*, 55 Ariz. L. Rev. 909, 949 (2013) (quoting *Stack v. Boyle*, 342 U.S. 1, 8 (1951) (Jackson, J., concurring)).

In the meantime, nearly every state had begun to include a right to bail provision in its state constitution. Of the 37 states that joined the Union after 1789, 33 states—among them, Colorado—included the right to bail in their constitutions. *See id*., at 925.

State constitutional bail provisions generally included a capital offenses exception providing that "all persons shall be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great," modeled after the bail provision in the Pennsylvania Frame of Government of 1682. *See* June Carbone, *Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 Syracuse L. Rev. 517, 532 (1983). States consistently interpreted the term "capital offenses" to mean offenses punishable by death. *See, e.g., Adams v. State*, 48 So. 219, 224 (Fla. 1908) ("The crime of murder in the second degree is punished by imprisonment in the state prison for life, and is not a capital crime."); *Caesar v. State*, 57 S.E. 66, 67 (Ga. 1907) ("If under no circumstances the death penalty can be inflicted, the offense is not capital."); *State v. Christensen*, 195 P.2d 592, 596 (Kan. 1948) ("'Capital crime, felony or offense' ... do[es] not include an offense in which death in no event can be inflicted."); *Commonwealth v. Ibrahim*, 68 N.E. 231, 232 (Mass. 1903) ("A capital crime is one punishable with the death of the offender.").

Colorado drafted Article II, Section 19 of its constitution in accordance with the Pennsylvania provision, and like other states, has historically interpreted the term "capital offenses" to mean offenses punishable by death. This court's earliest opinion concerning the right to bail, *In re Losasso*, 24 P. 1080 (Colo. 1890), is

illustrative. In *Losasso*, this court considered "whether or not one charged with murder of the first degree, the punishment for which offense is death, may be admitted to bail after indictment and prior to trial." *Losasso*, 24 P. at 1080. Noting that the terms of Colorado's constitutional right to bail did not exclude "a felony, or…a particular kind of felony," and were "broad enough to include persons accused of *any crime whatever*, after as well as before indictment"—indeed, that "[t]he only exception expressly made has reference to capital offenses," and "every indictment for murder in the first degree includes several lesser offenses…which are *unquestionably bailable*"—this court reasoned that "[h]ad the framers of the constitution intended to provide that the indictment should be conclusive [against admission to bail] in capital cases, they would, in all probability, have said so." *Id.* at 1081-82 (emphasis added).

Had the framers of the constitution intended that "capital offenses" should mean anything other than offenses punishable by death, they would, in all probability, have said so, and this court would not have interpreted Article II, Section 19 to mean that "any crime whatever" not punishable by death—such as the lesser-included offense of second-degree murder or manslaughter—was "unquestionably bailable." In Colorado's constitutional bail provision, as in the federal law that preceded it and the state law that developed alongside it, the term

"capital offenses" has historically been understood and interpreted to mean offenses punishable by death.

(b) This court's holding in *People ex rel. Dunbar v. District Court*, 500 P.2d 358 (Colo. 1972), did not change the meaning of the term "capital offenses."

In *People ex rel. Dunbar v. District Court*, 500 P.2d 358 (Colo. 1972), this court considered "whether [*Furman v. Georgia*, 408 U.S. 238 (1972)], deprive[d] Article II, Section 19 of the Colorado Constitution of vitality." *Dunbar*, 500 P.2d at 358-59.

This court acknowledged that "[b]ail, as a matter of right…has been recognized in Colorado since our Constitution was adopted," but the constitution also "defined a class of crimes which permit the denial of bail." *Id.*, at 359. This court explained that because the defendants were charged with crimes within that class—"murder in the first degree by arson," which at the time, "*in the judgment of our Legislature, permitted the imposition of the death penalty*" and therefore "was a capital offense…"—the defendants in *Dunbar* were still subject to the capital offenses exception to bail. *Id.*, at 358-59 (emphasis added).

Seven years later, in *Tribe v. District Court*, 593 P.2d 1369 (Colo. 1979), this court was considering a different issue: whether the jury should be sequestered in accordance with Crim. P. 24(f) where, at the time the defendant was charged

with first-degree murder, first-degree murder could be punished by death, but because the death penalty statute was again held to be unconstitutional, the death penalty could not be imposed. *Tribe*, 593 P.2d at 1370. Discussing the decision in *Dunbar,* this court stated that it "adopted the 'classification' theory when dealing with the question of what constitutes a capital offense with respect to bail." *Tribe*, 593 P.2d at 1370.

The court then compared the application of the classification theory in two other cases: *People v. Haines*, 549 P.2d 786 (Colo. App. 1976), and *People v. Hines*, 572 P.2d 467 (Colo. 1977), both concerning whether a case was "capital" for the purpose of determining the number of peremptory challenges a defendant should be afforded. The court explained why the classification theory produced different results in the two cases:

- In *Haines*, the defendant was entitled to the peremptory challenges afforded in a "capital" case because the offense charged was punishable by death even though the death penalty could not be imposed.
- In *Hines*, the defendant was not entitled to the peremptory challenges afforded in a "capital" case because the offense charged was not punishable by death— "the pertinent [s]tatute itself provided that no

death penalty could be administered under the facts alleged in the charge."

Tribe, 593 P.2d at 1371. The court concluded that because the circumstances in *Tribe* were more akin to the circumstances in *Haines*—the defendant was charged with an offense punishable by death even though the death penalty could not be imposed—the case at issue in *Tribe* was "capital" and the jury should be sequestered in accordance with Crim. P. 24(f). *Id*.

Clearly, the classification theory adopted in *Dunbar* did not change the meaning of the term "capital offenses." Just as "[b]ail, as a matter of right…has been recognized in Colorado since our Constitution was adopted," *see Dunbar*, 500 P.2d at 359, "Colorado has had a death penalty statute in effect since 1861, with the exception of a brief interruption between 1897 and 1901." *People v. District Court*, 834 P.2d 181, 185 (Colo. 1992). "Capital offenses," the "class of crimes" defined in the constitution which permit the denial of bail, are and have always been defined as offenses punishable by death.

(2) The capital offenses exception to bail does not apply to individuals charged with class 1 felonies related to conduct occurring on or after July 1, 2020.

Since the legislature abolished the death penalty, there is no case in Colorado in which a sentence of death is potentially available under the statutes

applicable to offenses charged on or after July 1, 2020. Even for defendants convicted of class 1 felonies, "the death penalty is not a sentencing option." § 16-11-901. No offenses are "capital offenses." Neither Article II, Section 19 of the Colorado Constitution nor the relevant statute, § 16-4-101, has ever been amended to alter the language concerning the capital offenses exception to bail, and the exception therefore does not apply to individuals charged with conduct occurring on or after July 1, 2020.

(a) No state has ever allowed for an offense to be classified as a "capital offense" after legislative abolition of the death penalty in the absence of an amendment to its constitutional provisions related to bail.

In every state that abolished the death penalty prior to 1950, unless the constitutional right to bail was amended to include additional exceptions, the capital offenses exception was understood to be inapplicable: "all offenses were bailable since no offenses were capital." *See* Hegreness, at 941 n.114 (summarizing state responses to abolition of the death penalty pre-1950); *see also, e.g., In re Perry*, 19 Wis. 676, 676 (1865) ("[S]ince the abolition of capital punishment in this state, persons charged with murder are in all cases bailable.").

This response was consistent over the next several decades as more states amended the capital offenses exception in their constitutional provisions related to

bail after legislative abolition of the death penalty, the United States Supreme Court's decision in *Furman,* or state courts' judicial determinations that rendered death penalty statutes unenforceable. For example:

- Pennsylvania added an exception "for offenses for which the maximum sentence is life imprisonment…" *See Ameer*, 458 P.3d at 393 (citing Pa. Const. art. I, § 14).
- Nevada added "the category of 'murders punishable by life imprisonment without possibility of parole' as nonbailable." *See id.*, at 398 (citing Nev. Const. art. I, § 7).
- Washington added an exception "'for offenses punishable by the possibility of life in prison…'" *See id.*, at 401 (citing Wash. Const. art. I, § 20).

However, even in states that have relied on the classification theory this court adopted in *Dunbar* to apply the capital offenses exception to bail in cases where an offense could be punishable by death even though the death penalty could not be imposed, none have ever "permitted the legislature to abolish capital punishment for an offense while calling the crime capital for purposes of denying an express constitutional guarantee of pretrial release in noncapital cases." *Id.*, at 397.

As the New Mexico supreme court recognized in *State v. Ameer*—specifically citing this court's decision in *Tribe*—there is "no case in any jurisdiction [holding that the capital offense exception to bail] will permit bail to be denied after a *legislative* abolition of capital punishment for an offense." *Id.*, at 395 (emphasis in original). No state has ever allowed for an offense to be classified as a "capital offense" after legislative abolition of the death penalty in the absence of an amendment to its constitutional provisions related to bail. In Colorado, following the repeal of the death penalty, no offenses are "capital offenses."

(b) Colorado has amended other provisions related to capital cases and the right to bail but has never altered the constitutional or statutory provisions concerning the capital offenses exception to bail.

As discussed above, Article II, Section 19 was repealed and reenacted in 1983 to include provisions permitting bail to be denied in certain non-capital cases, then amended in 1995 to include provisions related to bail following a conviction. Colorado's bail statutes were later amended in 2013 to promote the use of risk-assessment over monetary conditions and amended again in 2021 to reform the bonding process. *See* HB13-1236; HB21-1280. No amendments have ever altered the capital offenses exception to bail.

Provisions related to capital cases have been amended as well—perhaps most notably, the language in Crim. P. 24(d)(1) concerning peremptory challenges in a capital case was amended to state that "[f]or purposes of Rule 24, a capital case is a case in which a class 1 felony is charged." Although this change was clearly made in response to the classification theory confusion created by the *Haines* and *Hines* cases discussed above, no comparable change was ever made to the constitutional or statutory provisions concerning the capital offenses exception to bail.

Finally, although the bill enacted in 2020 to repeal the death penalty provided for amendments to several statutes, such as those governing the procedures for pleas of not guilty by reason of insanity, *see, e.g.,* § 16-8-103.6(1)(a), (2)(a), C.R.S. (2021), no draft of SB20-100 contained any proposed amendments related to bail generally or the capital offenses exception specifically.

When the General Assembly was considering a bill to repeal the death penalty in 2017, just three years before the passage of SB20-100, the bill included proposed amendments to the bail statute which would have replaced the term "capital offenses" with "class 1 felonies," as depicted below:

16-4-101. Bailable offenses - definitions. (1) All persons shall be bailable by sufficient sureties except:

(a) For ~~capital offenses~~ CLASS 1 FELONIES when proof is evident or presumption is great…

See SB17-095.

Colorado has had the ability and the opportunity to change the capital offenses exception in any number of ways but has never chosen to do so. In particular, the absence of the proposed amendments to the bail statute in SB20-100 just three years after the legislature considered SB17-095 cannot be unintentional. Because neither Article II, Section 19 of the Colorado Constitution nor the relevant statute, § 16-4-101, has ever been amended to alter the language concerning the capital offenses exception to bail, the exception does not apply to individuals charged with conduct occurring on or after July 1, 2020.

(3) Protecting the constitutional right to bail for those charged with class 1 felonies safeguards related fundamental constitutional rights.

Considering the history, the plain language, and the clear intent of the legislature, the capital offenses exception to bail does not apply to individuals charged with class 1 felonies related to conduct occurring on or after July 1, 2020. Moreover, this court should recognize and affirm the importance of protecting the constitutional right to bail for those charged with class 1 felonies.

In addition to the role that the right to bail plays in preserving the

presumption of innocence for those accused of crimes, the right to bail safeguards related fundamental constitutional rights. The Supreme Court recognized that "[f]rom the passage of the Judiciary Act of 1789…to the present…[t]his traditional right to freedom before conviction permits the unhampered preparation of a defense and serves to prevent the infliction of punishment prior to conviction." *Stack*, 342 U.S. at 4. Without the right to bail, "even those wrongly accused are punished by a period of imprisonment while awaiting trial and are handicapped in consulting with counsel, searching for evidence and witnesses, and preparing a defense." *Id.*, at 8 (Jackson, J., concurring). In other words, the right to bail is integral to a defendant's constitutional rights to due process and a fair trial. The right to bail is inextricably connected to a defendant's constitutional right to the effective assistance of counsel. Protecting the right to bail for those facing class 1 felonies better ensures the protection of these fundamental constitutional rights for those facing the most serious charges.

Protecting the constitutional right to bail for individuals charged with class 1 felonies is also crucial to the integrity of the criminal justice system. Research has shown that defendants who are detained pretrial are convicted more frequently "not necessarily because they are guilty, but often simply because they were imprisoned before trial." Ariana Lindermayer, *What the Right Hand Gives: Prohibitive*

Interpretations of the State Constitutional Right to Bail, 78 Fordham L. Rev. 267, 308 (2009). Defendants who are detained pretrial are more likely to feel coerced during plea negotiations, and more likely to plead guilty "to escape poor confinement conditions, keep their job, or hold their family together." Nick Petersen, *Do Detainees Plead Guilty Faster? A Survival Analysis of Pretrial Detention and the Timing of Guilty Pleas*, Crim. Justice Policy Rev. Vol. 31(7), 1015-16 (2020). These outcomes are fundamentally at odds with basic principles of our criminal justice system.

In sum, "[b]ail and conditional release are designed to ensure that the accused appears at trial and does not threaten the public safety in the meantime," and "[h]istorically, the only reason to treat capital defendants differently than others was the greater risk they posed of defeating the purposes of bail." Lindermayer, at 307. Colorado's constitutional and statutory bail provisions can accomplish the purposes of bail for those charged with class 1 felonies without the capital offenses exception.

CONCLUSION

The CCDB and ADC request that the court consider the legal and policy arguments in this amicus brief and ensure that its decision in this case preserves and protects the constitutional right to bail.

Respectfully submitted,
THE NOBLE LAW FIRM, LLC

s/ Taylor Ivy

_____
Antony Noble, Reg. No. 33910
Taylor Ivy, Reg. No. 50122
Attorneys for *Amici Curiae*

CERTIFICATE OF SERVICE

I certify that on the 9th day of February 2023, this **BRIEF OF AMICI CURIAE COLORADO CRIMINAL DEFENSE BAR AND OFFICE OF ALTERNATE DEFENSE COUNSEL IN SUPPORT OF PETITIONER** was served via Colorado Courts E-filing on all parties to this case.

s/ Taylor Ivy