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<tr><td>SUPREME COURT, STATE OF COLORADO
1560 Broadway 1820,
Denver, CO 80202</td><td rowspan="3">▲ COURT USE ONLY ▲</td></tr>
<tr><td>Original Proceeding

17th Judicial District Court
Case Number 22CR1524
Honorable Robert Kiesnowski

Court of Appeals
Honorable Judges Harris, Brown, Kuhn
Case Number 22CA2062</td></tr>
<tr><td>In Re:

THE PEOPLE OF THE STATE OF COLORADO.
Respondent

vs.

JERRELLE SMITH,
Petitioner</td></tr>
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<tr><td colspan="2" align="center">In Re Smith, Jerrelle v. People of the State of Colorado

REPLY BRIEF</td></tr>
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all relevant requirements of C.A.R. 21, 28, and 32, including all formatting requirements set forth in the rules. The reply brief contains 3720 words.

Respectfully submitted this 17th day of March, 2023.

/s/*Adrienne R. Teodorovic*__________
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TABLE OF CONTENTS

TABLE OF AUTHORITIES 5

ARGUMENTS IN REPLY 7

A. **This Court need not abandon, modify, abrogate, or overrule precedent to resolve the issues presented, but must simply apply the plain meaning of "capital offense".** *7*

1. "Capital offense" means an offense for which the legislature has fixed death as a penalty. 7

2. By legislative act, no criminal offense committed on or after July 1, 2020, in Colorado is punishable by death, and therefore, no offense committed on or after July 1, 2020, constitutes a "capital offense". 11

3. Offenses committed before July 1, 2020, are still punishable by death; hence why the legislature left "capital offense" in the statutes and why "capital offense" still has meaning in both the constitution and statutes. 11

4. Dunbar remains good law and supports the conclusion that offenses committed on or after July 1, 2020, no longer fall within the constitution-created class of "capital offense". 13

a) The prosecution's interpretation of Dunbar would lead to absurd results. *14*

b) The district court's interpretation of Dunbar requires ignoring the plain language of "capital offense". *17*

5. The penalty theory need not be considered to resolve the issues presented as correct application of the plain meaning of "capital offense" and the Dunbar classification theory suffices to resolve the issues. 20

6. The prosecution's worries for public safety should this Court determine that class 1 felonies committed on or after July 1, 2020, no

longer fall within the class of crimes which permit the denial of bail are misplaced. 21

B. **The Court of Appeals had jurisdiction to consider Smith's petition brought under C.R.S. § 16-4-204 and erred in dismissing the same following review of the prosecution's response.** *23*

CONCLUSION 24

CERTIFICATE OF SERVICE 25

TABLE OF AUTHORITIES

Cases

Colorado Ass'n of Public Employees v. Lamm, 677 P.2d 1350 (Colo. 1984) 8

Great Outdoors Colorado Trust Fund, 913 P.2d 533 (Colo. 1996).... 8, 17, 18

Olinyk v. People, 642 P.2d 490 (Colo. 1982) 14, 15

People ex rel. Dunbar v. District Court, 500 P.2d 358 (Colo. 1972)....passim

People v. Arellano, 524 P.2d 305 (Colo. 1974).. 15, 18

People v. Blagg, 340 P.3d 1137 (Colo. 2015).. 16, 17

People v. Haines, 549 P.2d 786 (Colo. App. 1976)....................................20

People v. Hines, 572 P.2d 467 (Colo. 1977)..20

People v. Reynolds, 159 P.3d 684 (Colo. App. 2006).................................. 9

Tribe v. District Court, 593 P.2d 1369 (Colo. 1979)............................ 16, 20

U.S. v. Evans, 333 U.S. 483 (1948) 14

Statutes

C.R.S. § 16-11-901 .... 11, 12

C.R.S. § 16-4-101... 12

C.R.S. § 18-1.3-401(1)(a)(V.5)(A) 12

Other Authorities

SB20-100..11, 15

Constitutional Provisions

Colo. Const. art. II, § 19 .... 12, 18

Colo. Const. art. V, § 1 18

ARGUMENTS IN REPLY

A. This Court need not abandon, modify, abrogate, or overrule precedent to resolve the issues presented, but must simply apply the plain meaning of "capital offense".

The prosecution warns of stare decisis. But, stare decisis is inapposite. Fifty years of precedent need not be undone to resolve the issues presented in this case. Likewise, this Court need neither abandon nor modify the *Dunbar* classification theory as the district court proposes to make a rule.

The plain meaning of "capital offense" controls the issues. And, *People ex rel. Dunbar v. District Court*, 500 P.2d 358 (Colo. 1972) remains good law following the repeal. Therefore, the creation of a functional rule following the July 1, 2020 repeal of the death penalty should proceed as follows:

1. "Capital offense" means an offense for which the legislature has fixed death as a penalty.

Nothing in Colorado's legislative or judicial history suggests that "capital offense" refers to anything other than an offense for which the legislature has fixed death as a penalty. (OB pp. 20-21); (Amicus pp. 5-8). The prosecution disagrees and believes this Court defined "capital offense" to mean murder in the first degree. But, as discussed *infra* A.4.a), that

interpretation misconstrues *Dunbar* and its progeny and leads to absurd results.

This Court should clarify, once and for all, that "capital offense" means what it has historically meant—an offense for which the legislature has fixed death as a penalty. Defining the term to mean something other than its plain meaning would be problematic for three reasons:

First, "[w]hen the language of [the constitution] is plain, its meaning clear, and no absurdity involved, constitutional provisions must be declared and enforced as written." *Great Outdoors Colorado Trust Fund*, 913 P.2d 533, 538 (Colo. 1996) (citing *Colorado Ass'n of Public Employees v. Lamm*, 677 P.2d 1350, 1353 (Colo. 1984)). Therefore, by tenants of constitutional construction this Court cannot stray from the plain meaning of "capital offense."

Second, while no case or legislation has held that "capital offense" includes offenses for which the legislature has *not* fixed death as a penalty, several cases have implicitly or explicitly held that "capital offense" means an offense for which the legislature has fixed death as a penalty. (OB pp. 20-21); (Amicus pp. 5-10) (exploring consistency in interpretation of "capital offense" in Colorado and other states); (Bluth p. 16 n.7) (conceding

that the court of appeals has interpreted “capital offense” to mean an offense “in which a sentence of death is potentially available under the statutes applicable to the offense”) (citing *People v. Reynolds*, 159 P.3d 684 (Colo. App. 2006)). And, this state has never treated offenses for which the legislature has not fixed death as a penalty as “capital offenses”—e.g. class 2 felonies are unquestionably bailable. Therefore, this Court would legitimately encounter issues with stare decisis were it to decide that “capital offense” now includes offenses for which the legislature has not fixed death as a penalty because such a rule would impliedly overrule over fifty years of this Court’s precedent that other courts have relied upon to hold to the contrary. *See* (Bluth pp. 13-14, 16 n.7) (exploring principles of stare decisis) (demonstrating the common understanding of this Court’s precedent by lower courts).

Third, straying from the plain meaning of capital offense, would create a constitutional issue. *See* (OB p. 23). The judiciary lacks the power to redefine constitutional terms, especially when the voting public depended on the common understanding of the term “capital offense” in approving of its inclusion in the bail amendment. *See* (*Id.*) (string cite to constitution and case law supporting same). Notably, the meaning of

"capital offense" is historic. (*Id.* at p. 20). Also, the framers could have used the words "class 1 felony" or "murder," but did not. And, as the district court points out, the legislation involving murder evolved to separate murder by degrees. *See* (Kotlarczyk p. 19). Some degrees of murder are no longer subject to death as a penalty. Those offenses are treated as constitutionally bailable. Yet, our voting public has not sought to amend the constitution to include "murder" generally but has adhered to the term "capital offense" even knowing that these offenses that had once been punished by death, thus included in the scope of "capital offense," were no longer so included. Therefore, resolving now, after years of public reliance on "capital offense" meaning an offense for which the legislature has fixed death as a penalty, to change, by judicial decree, that meaning to include "class 1 felonies" or "murder" would constitute judicial amendment of the constitution.

Accordingly, this Court should keep it simple and clarify that the plain meaning of "capital offense" is an offense for which the legislature has fixed death as a penalty. That's step one.

2. By legislative act, no criminal offense committed on or after July 1, 2020, in Colorado is punishable by death, and therefore, no offense committed on or after July 1, 2020, constitutes a "capital offense".

Next, this Court should acknowledge that pursuant to SB20-100, which created C.R.S. § 16-11-901: "For offenses charged on or after July 1, 2020, the death penalty is not a sentencing option for a defendant convicted of a class 1 felony in the state of Colorado." Stated another way, the legislature has fixed a penalty *other than* death for all offenses committed in Colorado after July 1, 2020. Therefore, by applying the plain meaning of "capital offense," no offense committed on or after July 1, 2020, constitutes a "capital offense." This Court should hold the same.

3. Offenses committed *before* July 1, 2020, are still punishable by death; hence why the legislature left "capital offense" in the statutes and why "capital offense" still has meaning in both the constitution and statutes.

Both the prosecution and district court raise concerns regarding the legislature mysteriously neglecting to remove "capital offense" from the bail statute and how this term will now sit as a meaningless "historical relic[]" within our statutory scheme and constitution. (Kotlarczyk pp. 13-14, 19); (Bluth pp. 21, 28-29). But there is no mystery to solve here. As the legislature made clear at the time of the repeal: "Nothing in this section

commutes or alters the sentence of a defendant convicted of an offense charged prior to July 1, 2020." C.R.S. § 16-11-901; C.R.S. § 18-1.3-401(1)(a)(V.5)(A) (defining scope of repeal to include only persons "sentenced for a felony for an offense *committed* on or after July 1, 2020")[1]. Therefore, class 1 felonies committed prior to July 1, 2020, *still* constitute capital offenses because the legislature has deliberately chosen to retain death as a penalty for those offenses. Again, this is a simple application of the plain meaning of "capital offense."

Accordingly, the legislature could not remove "capital offense" from the statutory scheme because a capital offense could still conceivably be charged in Colorado for an offense committed prior to July 1, 2020—i.e. cold cases. Those offenses would remain unbailable per Article II, section 19 of the Colorado Constitution and C.R.S. § 16-4-101.

By the same analysis, resolving the issues presented here will not render portions of the constitution or statutory scheme meaningless. Those terms still retain meaning and apply to offenses committed before July 1, 2020. Therefore, this Court need not spend time mulling over these

[1] The legislature used the word "charged" in C.R.S. § 16-11-901, but the legislative intent to repeal the death penalty only as to offenses *committed* on or after July 1, 2020, is clear from the revision to the penalty statute.

concerns. However, the concerns are a good reminder that there are limitations to the scope of the rule Smith seeks for this Court to make, and this Court should acknowledge the same to the degree it deems appropriate in creating a rule.

4. ***Dunbar* remains good law and supports the conclusion that offenses committed on or after July 1, 2020, no longer fall within the constitution-created class of "capital offense".**

The *Dunbar* classification theory is far less complicated than either the prosecution or district court perceive. This Court, in *Dunbar*, held that, long ago, the framers of the constitution created a class of offenses excepted from bail—"capital offenses." *See Dunbar*, 500 P.2d at 359 ("Bail, as a matter of right, for all but the most heinous crimes, has been recognized in Colorado since our Constitution was adopted. Our Constitution has defined a class of crimes which permit the denial of bail."). This Court then held that the *legislature* filled that class by fixing death as a maximum penalty for certain criminal offenses, which, at the time, included murder in the first degree. *See id.* at 358 ("[Murder in the first degree], in the judgment of our Legislature, permits imposition of the death penalty.").

Both the prosecution and district court grossly misconstrue the *Dunbar* classification theory in urging this Court to continue to hold

murder in the first degree committed on or after July 1, 2020, to be a capital offense. And, for this Court to adopt either one of their interpretations would be problematic.

a) The prosecution's interpretation of* Dunbar *would lead to absurd results.

The prosecution insists that *Dunbar* and its progeny bestowed upon this Court the power to classify a particular class 1 felony—murder in the first degree—as a "capital offense." (Bluth p. 12-13). But, this Court, in *Dunbar*, merely adopted and applied the classification theory. It did not and could not, by court decree, forever classify murder in the first degree as a "capital offense." *See Dunbar*, 500 P.2d at 359.

Indeed, this Court lacks the power to "classify" murder in the first degree (or any offense) as a capital offense. That power is reserved exclusively to the legislature. *See U.S. v. Evans*, 333 U.S. 483, 486 (1948); *Olinyk v. People*, 642 P.2d 490, 493 (Colo. 1982). Notably, "defining crimes and fixing penalties are legislative, not judicial, functions." *Evans*, 333 U.S. at 486. In our system of government,

> [i]t is fundamental that the legislature has the inherent authority to define crimes and to prescribe punishment for criminal violations. This is a part of the sovereign power of the state to maintain social order. Just as the legislature may initially prescribe a penalty for a criminal violation, *it may also, in its*

wisdom, from time to time change and adjust penalties as social necessities may mandate.

People v. Arellano, 524 P.2d 305, 306-07 (Colo. 1974) (emphasis added). Thus, this Court is not at liberty to "imply a penalty where the legislature did not expressly include one" or where the legislature deliberately excluded one as the same would violate separation of powers. *Olinyk*, 642 P.2d at 493.

As of July 1, 2020, the General Assembly eliminated death as a penalty for class 1 felonies, including murder in the first degree. SB20-100. Thus, in applying the plain meaning of "capital offense," murder in the first degree committed on or after July 1, 2020, no longer constitutes a capital offense. *See supra* A.1, A.2. Therefore, for this Court to persist in "classifying" murder in the first degree as a capital offense for offenses committed on or after July 1, 2020, would necessarily require this Court to imply a penalty—death—where the General Assembly deliberately excluded that penalty. A clear violation of separation of powers. *Olinyk*, 642 P.2d at 493.

Accordingly, to read *Dunbar* the way the prosecution insists would lead to absurd results. The judiciary has no power to classify offenses as capital offenses. Thus, this Court, in *Dunbar*, could not have meant in its

statement that "[o]ur Constitution has defined a class of crimes which permit the denial of bail, [and] [m]urder is within that class" that this Court was forever classifying murder as a capital offense. *See Dunbar*, 500 P.2d at 359. Instead, to avoid a separation of powers issue, the statement must be read as shorthand for the holding that murder constituted an offense that "in the judgment of our Legislature, permitted the imposition of the death penalty," and therefore, was included in the constitution-created class of "capital offenses." *See id.* That reading comports with the plain meaning of "capital offense" and avoids a constitutional powers problem.

The same analysis can be applied with respect to this Court's statement in *Blagg*: "First degree murder is a capital offense, even in a case where the death penalty is not at issue." *People v. Blagg*, 340 P.3d 1137, 1140 (Colo. 2015). In that case, when read in context, this Court merely referenced the shorthand version of the *Dunbar* classification theory—that offenses for which the legislature fixed death as a penalty constitute capital offenses even when death cannot actually be imposed due to a judicial act rendering the death penalty unconstitutional. *See id.* (citing *Tribe v. District Court*, 593 P.2d 1369, 1370-71 (Colo. 1979) (determining *Dunbar* to be the seminal case on the classification theory and discussing other cases

that have correctly applied the *Dunbar* rule based on whether the legislature had fixed death as a penalty to the crime charged)). This is apparent from this Court's citation to *Tribe*. *Id*.

This Court should reject the prosecution's reading of *Dunbar* and its progeny.

b) *The district court's interpretation of* Dunbar *requires ignoring the plain language of "capital offense".*

The district court insists that it was the Colorado "Constitution [that] classified first-degree murder as a capital offense." (Kotlarczyk pp. 12-13). But, this Court, in *Dunbar*, did not hold that the Colorado Constitution classified class 1 felonies or murder in the first degree as capital offenses. Indeed, that reading of the constitution would require ignoring the plain language of the constitution given that neither "class 1 felony" nor "murder" appear anywhere in the relevant section of the amendment.

As discussed *supra* the plain meaning of "capital offense" is an offense for which the legislature fixed death as a penalty. And, this Court must apply the plain meaning of constitution terms. *Great Outdoors*, 913 P.2d at 538. Beyond establishing the class of offenses that are excepted

from bail—"capital offenses"—the constitution is silent as to which specific offenses fill that class. *See* Colo. Const. art. II, § 19(1)(a).

Our constitution remaining silent as to the specific offenses that fill the class is no accident. The constitution bestows upon the legislature the task of creating offenses and fixing penalties. *See* Colo. Const. art. V, § 1 ("[t]he legislative power of the state shall be vested in the general assembly"); *Arellano*, 524 P.2d at 306-07 (the legislature has the exclusive authority to define crimes and fix punishment).

Therefore, the district court, in urging this Court to view *Dunbar* as holding that the *constitution* classifies murder in the first degree as a capital offense, commits two oversights. First, the plain language of the constitution speaks for itself and does not include "murder," "murder in the first degree," "class 1 felony," or any other specific offense. This Court must adhere to the plain language. *Great Outdoors*, 913 P.2d at 538.

Second, classification of offenses as "capital offenses" pursuant to the *Dunbar* classification theory is a legislative power. *See supra* A.4.a). And, this Court lacks the power to read into the word "capital offense" anything more than it's plain meaning because to do so would constitute judicial amendment of the constitution. *See* (OB p. 23).

Along the same lines, the district court's urging this Court to modify the classification theory to allow the legislature to remove murder as a capital offense from the constitution, respectfully, makes no sense. *See* (Kotlarczyk pp. 17-19). Under *Dunbar* classification theory and the constitution, the legislature already controls which offenses fill the constitution-created class of "capital offenses." Therefore, in removing death as a penalty for class 1 felonies committed on or after July 1, 2020, the legislature has already removed the same offenses from the constitution-created class. It did not need this Court's permission to do so.

This Court should reject the district court's position that the constitution dictates which offenses constitute "capital offenses." While the constitution created the class of offenses, it did not fill that class. The legislature did. And, the plain meaning of "capital offense" is not class 1 felonies or murder. The plain meaning is an offense for which the legislature has fixed death as a penalty. *See Dunbar*, 500 P.2d 358-59; *supra* A.1., A.2.

5. The penalty theory need not be considered to resolve the issues presented as correct application of the plain meaning of "capital offense" and the *Dunbar* classification theory suffices to resolve the issues.

The prosecution and district court struggle to clearly define the difference between the penalty theory and *Dunbar* classification theory. As is clear from *Dunbar* and its progeny, the *Dunbar* classification theory is the theory that offenses for which the legislature fixed death as a penalty constitute capital offenses even when death cannot actually be imposed due to a judicial act rendering the death penalty unconstitutional. *See Tribe*, 593 P.2d at 1370-71. *Compare People v. Haines*, 549 P.2d 786 (Colo. App. 1976) (applying *Dunbar* to conclude that offense remained capital offense as classified by the legislature even though judicial act had rendered death penalty unconstitutional, thus unavailable in fact) *with People v. Hines*, 572 P.2d 467 (Colo. 1977) (not a capital offense per evaluation of legislature's fixing penalty for the offense that did not include death).

The penalty theory rejects that an offense for which the legislature has assigned death as a penalty persists as a capital offense when the death penalty becomes functionally unavailable due to judicial act or otherwise. *See Ameer*, 458 P.3d at 394. Stated otherwise, "crimes are nonbailable capital offenses only when they carry the possibility of imposition of the

death penalty on conviction." *Id*. This is so because when the death penalty is no longer possible upon conviction, like when the death penalty has been held to be unconstitutional, the "temptation for the defendant to leave the jurisdiction of the court and thus avoid trial" dissipates. *People v. Spinuzzi*, 369 P.2d 427, 430 (Colo. 1962); *see Ameer*, 458 P.3d at 394.

Based on *Dunbar* and its progeny, it is not true, as the district court asserts, that the plain language of the constitution may only be given effect by adherence to the penalty theory. (Kotlarczyk p. 16). The plain language of the constitution *must* be given effect under the *Dunbar* classification theory. And, as discussed *supra*, this Court can resolve the issues presented by adherence to the plain meaning of "capital offense" and to the *Dunbar* classification theory. There is no need to consider the penalty theory any further.

6. The prosecution's worries for public safety should this Court determine that class 1 felonies committed on or after July 1, 2020, no longer fall within the class of crimes that permit the denial of bail are misplaced.

The prosecution spews a collection of public safety concerns to argue that this Court should not create a rule that would render class 1 felonies bailable. (Bluth pp. 18-20). But, these concerns exist for any violent offense, and that has not stopped those offenses from being bailable—e.g. someone

released on bail for a second degree murder or attempted first degree murder could reoffend while on bail or fail to appear. Regardless, the primary policy concern of this appeal is honoring the right to bail and, thus, the presumption of innocence. (OB p. 18-19). And, Smith is not asking for this Court to dispense with the entire bail system. Notably, trial courts must still exercise discretion in setting types, amounts, and conditions of bond. *See* C.R.S. § 16-4-103. Smith seeks for bail to be set per his constitutional right, he does not seek to be released willy nilly.

Additionally, the prosecution's argument that we should leave this to the legislature or allow the issue to go to a public vote makes no sense. *See* (Bluth pp. 19, 20, 21-23). The voting public already decided, long ago, that one exception to bail shall be "capital offenses." And, the legislature has spoken—class 1 felonies committed on or after July 1, 2020 no longer fall in the "capital offense" class.

As discussed *supra*, this Court can resolve the issues presented by reference to the plain meaning of "capital offense" and the *Dunbar* classification theory. Issuing a rule that class 1 felonies committed on or after July 1, 2020, do not constitute "capital offenses" honors the plain meaning of "capital offense" and the *Dunbar* classification theory.

Sure, the public can vote, as some states have, to include more nonbailable offenses in the constitution. *See* (Amicus p. 12). But, that process has nothing to do with this process. This Court need not wait for the public to vote to resolve the issues presented. Therefore, the prosecution's argument for this Court to refer this matter to a public vote is misplaced.

This Court should not be misled by the prosecution's concerns.

B. The Court of Appeals had jurisdiction to consider Smith's petition brought under C.R.S. § 16-4-204 and erred in dismissing the same following review of the prosecution's response.

The court of appeals argues that it reviewed the petition on the merits and dismissed because it agreed with the district court's resolution of the issue. (Kotlarczyk p. 21). But that is not clear from the court's one sentence response to the filings. Certainly, a novel issue such as the one presented that involves a momentous change in the law would be one that the court of appeals would, in considering it on the merits, issue more than a one-sentence opinion for its rejection of the petition, whether it be for a lack of jurisdiction or a lack of merit.

CONCLUSION

Regardless of the court of appeal's reason for dismissing the petition and whether that court should have addressed the petition, the issues presented herein have not yet been decided, but need to be. Smith agrees with the district court that all parties "have an interest in *this* Court announcing a clear, easily administrable rule for what constitutes a 'capital offense' for bail purposes in light of SB20-100." (Kotlarczyk p. 13) (emphasis added). Smith has provided a pathway to resolution of the issues presented that honors precedent and the plain language of constitutional terms. This Court should follow that path, make the rule absolute, and remand the case to the district court for setting of bond forthwith.

Respectfully submitted this 17th day of March, 2023.

*/s/Adrienne R. Teodorovic*__________
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