Colorado State Public Defender Office Fact Sheet
House Bill 16 -1233
Concerning Modifying the Procedure for Sentencing in Class 1 Felonies When the Death Penalty is Sought
Sponsored by Rep. Ransom

- **The proposed legislation violates the Cruel and Unusual Punishment and Due Process Clauses of the Colorado Constitution (article II, sections 20 & 25) because it eliminates "step four" of Colorado's capital sentencing scheme.**

  → Under Colorado's current scheme, jurors are required to determine whether aggravating and mitigating factors exist, and to weigh those factors against each other. As a final "fourth step" of assurance, the jury is required to separately determine, regardless of the outcome of the weighing process, whether death is the appropriate punishment beyond a reasonable doubt. In *People v. Young*, 814 P.2d 834, 844 (Colo. 1991), the Colorado Supreme Court found that the fourth step was required by article II, section 20 & 25 of the Colorado Constitution to ensure a certain and reliable verdict. Subsection (5) of HB 1233 eliminates that step, and is therefore in direct violation of *Young* and the state constitution.

- **House Bill 1233 unconstitutionally alters the standard of proof and distorts step three of Colorado's capital sentencing scheme.**

  → Subsection (5) of the proposed legislation fundamentally alters and distorts the jury's weighing calculus. Under our current scheme, the jury's task is to determine whether it is convinced beyond a reasonable doubt that mitigation *does not outweigh* aggravation. In other words, if the jurors have a doubt about the outcome of the weighing process, or if jurors conclude that mitigation outweighs aggravation even by the slightest of margins, the process ends in a life sentence. The proposed bill changes step three by affirmatively requiring mitigating circumstances to be "sufficiently substantial" to call for leniency. Thus, under either of the two scenarios just described, the proposed bill would require a sentence of death rather than life, in violation of *People v. Tenneson*, 788 P.2d 786, 796-97 (Colo. 1990) and article II, sections 20 & 25 of the Colorado Constitution.

  → The bill also unconstitutionally alters the standard of proof at step three by eliminating the requirement that the jury must be certain of the outcome of the weighing process "beyond a reasonable doubt," and by requiring the jury to "impose a sentence of death" if it finds one or more of the enumerated aggravating circumstances, and then determines that "there are no mitigating circumstances sufficiently substantial to call for leniency." The bill does not specify by what standard of proof the jury is to determine this issue, or what "sufficiently substantial" means. Thus, not only does the proposed bill unconstitutionally eliminate the "beyond a reasonable doubt" standard of proof in direct violation of *Tenneson*, but the

proposed language "sufficiently substantial" would also be susceptible to a vagueness challenge under the state and/or federal constitutions.

- **Currently, under Colorado law, there is a *de facto* presumption of life in a capital sentencing proceeding. House Bill 1233 turns that presumption of life on its head, and instead imposes an unconstitutional presumption of death.**

  → The Colorado Supreme Court has recognized that under the current statute, there is effectively a presumption favoring life imprisonment. *See People v. Tenneson*, 788 P.2d 786, 796-97 (Colo. 1990) ("Because we hold that the jury must be convinced beyond a reasonable doubt that any mitigating factors do not outweigh the proven statutory aggravating factors, there is in some sense a presumption that the mitigators do outweigh the proven statutory aggravators and therefore a presumption favoring a sentence of life imprisonment."). HB 1233 proposes language that changes this presumption of life to a presumption of death, stating in subsection (5) that the jury "shall impose a sentence of death" if the jury "finds one or more of the aggravating circumstances enumerated in subsection (6) of this section and then determines that there are no mitigating circumstances sufficiently substantial to call for leniency."

  → This presumption of death is unconstitutional under the state constitution as interpreted by *Tenneson* and *Young*. Requiring the sentencer to presume that death is the appropriate sentence unless there are mitigating circumstances that are sufficiently substantial to call for leniency is fundamentally at odds with the constitutionally indispensable requirements of the fourth step – that the jury cannot impose the death penalty unless it is unanimously convinced that death is the appropriate sentence beyond a reasonable doubt. There is also a viable argument that the bill would violate the Eighth and Fourteenth Amendments.

- **The proposed legislation unconstitutionally places the burden of proof on the defense to prove mitigating factors by a preponderance of the evidence, and to establish that the mitigating factors are sufficiently substantial to call for leniency.**

  → Colorado's current capital sentencing scheme states that there "shall be no burden of proof as to proving or disproving mitigating factors." C.R.S. § 1-1.3-1201(1)(d). Subsection (3) of the proposed legislation alters this scheme by placing the burden of proving mitigating circumstances on the defense by a preponderance of the evidence. It is unlikely that this provision would survive constitutional scrutiny, because it would impermissibly limit the jury's consideration of relevant mitigating evidence. Moreover, a statute demanding that the defense prove mitigating factors by a preponderance of the evidence undermines the reliability of the jury's verdict in violation of article II, sections 20 & 25 of the Colorado Constitution. It creates a risk that a death sentence will be based on an incomplete "moral evaluation of the defendant's character and crime" because the jury would be forced to disregard any mitigating evidence that did not meet the requisite standard of proof. *See Young*, 814 P.2d at 844 fn. 8.

- **HB 1233 is in irreconcilable conflict with the Colorado Supreme Court's interpretation of our State's capital sentencing scheme in *People v. Dunlap*, 975 P.2d 723, 737 (Colo. 1999).**

  → United States Supreme Court constitutional jurisprudence divides death penalty decision-making into two stages. First, there must be a process for determining death-eligibility to ensure that the jury's discretion is suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action. Once eligibility has been established, there must be a selection of punishment process based on an individualized inquiry that allows the sentencing authority to give full consideration and effect to mitigating evidence.

  → In *People v. Dunlap*, 975 P.2d 723, 737 (Colo. 1999), the Colorado Supreme Court held that eligibility of the death penalty is established at steps one through three. Selection takes place only at step four. The Court further held that the prosecution was prohibited from "rebutting" mitigation that the defense did not introduce during steps one through three, or the eligibility phase of the process. The proposed bill is inconsistent with *Dunlap* because it allows for the injection of non-statutory aggravation, or rebuttal of mitigating factors not raised by the defense, into the weighing process. *Dunlap* flatly prohibits this, because it interprets the weighing process as part of death-eligibility, and holds that injection of non-statutory aggravation into eligibility would render the death penalty arbitrary and capricious.

- **There are numerous state and federal issues with the re-trial provisions in the proposed legislation, which allow for up to three different juries to deliberate over sentencing issues.**

  → Subsection (16) of the proposed bill instead provides that if the jury is unable to reach a unanimous verdict on any of the alleged aggravating circumstances and the jury has not found that at least one of the alleged aggravating circumstances has been proven, the court "shall dismiss the jury and shall impanel a new jury." Likewise, subsection (17) of the bill provides that if the jury is unable to reach a verdict at the "penalty phase," the court shall dismiss the jury and shall impanel a new jury.

  → A death sentence returned by a second jury because the first jury could not unanimously agree that death is the appropriate sentence beyond a reasonable doubt would violate the Colorado Constitution because the first jury's moral evaluation of the appropriate penalty has "yielded inconclusive results." *People v. Young*, 814 P.2d 834, 845 (Colo. 1991). As *Young* makes abundantly clear, "A death sentence imposed in such circumstances violates requirements of certainty and reliability and is arbitrary and capricious in contravention of basic constitutional principles." *Id.*

  → Moreover, there is nothing about employing a second jury to reconsider the issue of punishment that *enhances* the reliability of a death sentence. To the contrary, the second jury's ability to fully perform its duties and obligations at step four of Colorado's capital sentencing process would be hamstrung. Its members would be

unable to conduct a complete and thorough moral evaluation of the defendant's character and crime without the ability to watch the guilt-phase evidence play out in real time.

→ Additionally, there is an argument under the state and federal constitutions that evolving standards of decency prohibit the practice of penalty phase re-trials. A national consensus has developed against the practice of giving the state repeated opportunities to obtain a death sentence after one or more jurors has rejected such a sentence. The only states that currently allow for such an opportunity are California, Arizona, Nevada and Kentucky.

→ Aside from the legal arguments, there are several policy reasons to reject a capital sentencing scheme that allows for penalty phase re-trials. This bill is likely to be very expensive, as the anecdotal evidence we have gathered is that there is often lengthy litigation in between the first penalty phase and the re-trial, and jury selection and the presentation of evidence takes just as long the second time around, if not longer. The re-trial provision can cause years of additional delays, leaving all involved in a state of limbo.

→ Moreover, empirical research based on the work of the Capital Jury Project shows that the impending threat of a re-trial can even influence the original jury's decision-making. When jurors are aware that their inability to reach a verdict will result in a retrial, this leads to changes in their decision-making processes. Jurors in the majority for death tend to pressure and isolate jurors with minority viewpoints for life in an effort to reach a verdict.

- **The proposed bill allows the State to inject non-statutory aggravation into the weighing process that does not comport with the rules of evidence.**

→ The proposed bill specifies that the rules of evidence do not apply at all to the prosecution's introduction of evidence rebutting mitigation and/or of non-statutory aggravation. This change conflicts with the Colorado Supreme Court's holding in *People v. Dunlap*, 975 P.2d 723, 739-42 (Colo. 1999), which held that such evidence is subject to Rules 401 and 403. If HB 1233 became law, non-statutory aggravating circumstance evidence would not even need to meet the basic requirement of relevance, nor would it be excluded even if its probative value "was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." C.R.E. 403. This would further undermine the reliability of any resulting death sentences, in violation of article II, sections 20 & 25 of the Colorado Constitution.