Testimony Submitted to the Colorado Senate

Senate Judiciary Committee

Hearings on SB 64 – Non-unanimous Juries in Capital Sentencing

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INTRODUCTON

Madam Chair, Members of the Committee: I want to thank the Committee and particularly Senator Merrifield for inviting me to testify regarding Senate Bill 64 concerning non-unanimous juries in capital sentencing.

My name is Richard Dieter. Since 1992, I have been representing the Death Penalty Information Center[1] in Washington, DC. For 23 years I served as the organization's Executive Director and currently serve as the Senior Program Director. The Center is a non-profit organization that conducts research and publishes reports on issues related to capital punishment in the U.S. I am also an attorney and have served as an adjunct professor for 14 years at the Catholic University Law School in Washington.

The Center's role is not to advocate for particular legislation. We act as a resource to all those interested in capital punishment. Our website, which has been chosen by the Library of Congress as part of its archive on this issue, is one of the most widely used portals on the death penalty. Last year the site had well over 300 million hits. In my testimony, I will offer a national perspective on how death sentences are determined around the country, and point out some potential problems with the relevant bill under consideration by this Committee. I would be happy to answer any questions that members may have at any time, either today or by later correspondence.

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DEATH SENTENCING IN THE U.S.

As this Committee is probably aware, death sentencing in the U.S. has been in sharp decline for about 15 years. In 1996, there were 315 death sentences in the country. Last year, 2015, there were 49, the lowest number in the past 40 years. In 2015, only 14 out of the 32 states with the death penalty sentenced anyone to death. Texas, which has served as a bellwether of death penalty activity in the country, only had two death sentences. Many key death-penalty states such as Georgia, North Carolina, South Carolina, and Virginia, had none.[2]

Nevertheless, the process for sentencing an inmate to death remains controversial. In *Hurst v. Florida,*[3] the U.S. Supreme Court recently struck down Florida's scheme for capital sentencing, which had been in place for 43 years. The Court held that Florida's process violated the Sixth Amendment because Florida delegated a key fact-finding step to the judge, rather than to the jury. The finding of at least one aggravating factor in a capital case is necessary for a defendant to be eligible for the most severe sentence—the death penalty—and hence this determination is part of the jury's responsibility to find such facts beyond a reasonable doubt. Every other death penalty state already allocated this role to the jury, rendering Florida a distinct outlier in this regard.

Another aspect of Florida's sentencing scheme was challenged in *Hurst* (and is relevant here), but not yet decided by the Court. Florida is one of only three states in the

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[2] . See "The Death Penalty in 2015: Year End Report," Death Penalty Information Center (DPIC) (2015), available at < http://www.deathpenaltyinfo.org/YearEnd2015>.

[3] . Hurst v. Florida, 135 S. Ct. 1531 (2016).

country that allows a jury to make a non-unanimous recommendation of a death sentence to the judge, who then makes the final decision. (Two other states, Nebraska and Montana, allow a judge or judges to determine the defendant's sentence in a capital case without a jury recommendation, once the jury has found the existence of at least one aggravating factor.)

Constitutionality of the Proposed Statute

Both of these issues—the jury's determination of aggravating factors and the role of the jury in the ultimate sentence--are relevant to this Committee's consideration of SB 64. As proposed, the bill states:

> (II) The jury shall not render a verdict of death unless, BY THE AGREEMENT OF AT LEAST NINE JURORS, it ~~unanimously~~ finds and specifies in writing that:
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> (A) At least one aggravating factor has been proved;[4]

This wording would appear to violate the Supreme Court's recent ruling in *Hurst.* The bill allows determination of eligibility for the death penalty to be made by the jury if at least 9 of the 12 members agree on at least one aggravating factor. However, the Court in *Hurst* held that this finding is an area protected by the Sixth Amendment's right to a jury, which includes a determination of proof "beyond a reasonable doubt."[5] Although the Court has allowed some flexibility outside of the death penalty context on the question of whether unanimity of jurors is required,[6] it would be hard for Colorado to argue that the negative vote of three jurors did not constitute reasonable doubt about the existence of an aggravating factor. This is

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[4] . Col. Senate Bill 16-064, Sec. 1, Second Regular Session, Seventieth General Assembly (2016).

[5]. See In re Winship, 397 U.S.358, 368 (1970).

[6] . See, e.g., Apodaca v.Oregon, 406 U.S. 404 (1972).

especially true since the state requires unanimity for other determinations requiring the beyond-a-reasonable-doubt standard. Moreover, the Colorado Supreme Court has held that the state's constitution protecting the right to a jury "means an impartial trial and *a unanimous verdict by a jury* on the issue of the penalty to be imposed."[7] Hence, SB 64 may be unconstitutional on its face.

Unanimity

Assuming the issue of aggravating factors is properly addressed in any subsequent version of SB 64, there remains the question of whether a jury in a capital case should be allowed to determine a death sentence by a 9-3 vote. If that process was adopted by the legislature and signed into law, it would make Colorado a distinct outlier in death sentencing. No other state in the country allows a jury to determine a death sentence by less than a unanimous vote. It is true that Florida, Alabama, and Delaware allow the jury to make a *recommendation of death* to the judge without unanimity, but in those states the judge does the final weighing of factors, whereas in Colorado it would be a non-unanimous jury.

From a constitutional perspective, why should it matter that a state chooses a unique form of death sentencing, given the broad range of death penalty laws around the country? The core of this concern rests more with the Eighth Amendment to the Constitution than with the Sixth. The Eighth Amendment forbids "cruel and unusual punishments," and the Supreme Court has repeatedly held that its judgment regarding a punishment in question is subject to "the evolving standards of decency that mark the

[7] . See Wharton v. Colorado, 104 Colo. 260, 266 (1939) (emphasis added).

progress of a maturing society."[8] In practice, this means that the Court first turns to the judgment of state legislatures in testing the standards prevailing in the country. For example, the Court counted 30 states that forbid the execution of juvenile offenders in 2005 and hence rendered the practice unconstitutional in *Roper v. Simmons.*[9] The Court has used a similar state counting process in a long line of death penalty decisions. Most recently, the Court found Florida's process for determining whether a defendant had intellectual disabilities making him ineligible for the death penalty in part because Florida was virtually alone among the states in its outlier practice of making an IQ of more than 70 an automatic disqualification for relief.[10]

When Colorado's new law becomes the subject of federal review, the courts would almost certainly take notice of the state's unusual practice in this regard. Both Florida and Delaware have essentially suspended their practice of capital punishment as they consider the ramifications of the Supreme Court's decision in *Hurst*. Florida certainly had ample warning that this case was brewing in the federal courts and that their outlier practice made them vulnerable. The same might be said if Colorado adopted SB 64.

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[8] . Trop v. Dulles, 356 U.S. 86, 101 (1958).

[9] . 543 U.S. 551 (2005).

[10] . See Hall v. Florida, 134 S. Ct. 1986 (2014).

OTHER ISSUES WITH NON-UNANIMOUS JURIES

More Death Sentences

The most obvious rationale for loosening the requirements for a death sentence would be to increase the number of such sentences. That may occur--with additional costs to the state--since more juries might impose a death sentence if only nine jurors were required rather than twelve.[11] However, it is not clear that these additional sentences would be ones the state can have confidence in. The disadvantage of a non-unanimous determination is that it does not take every juror's position into account. It deprives the verdict of the power of a unanimous sanction from the community, and it implies that a life-and-death decision is of lesser importance than guilt-and-innocence, which requires unanimity. If after further deliberation one or more jurors stand firm in their counter-majoritarian position, that might well indicate a flaw in the case for death.

Moreover, changing the law subjects future death sentences (and possibly existing ones) to legal challenges, leaving the ultimate outcome uncertain. Colorado has changed its death penalty law in the past only to see a reversal of death sentences later on.[12]

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[11] . However, it is hard to predict how many additional sentences would occur. A multi-state study of jurors indicated that juries that deliberate longer when they are not unanimous often arrive at the same conclusion towards which they were leaning. S. Sundby, "War And Peace In The Jury Room: How Capital Juries Reach Unanimity," 62 Hastings L.J. ___ (2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1604572, at 5.

[12] . See People v. Young, 814 P.2d 834 (Colo. 1991) (a simple weighing of aggravators and mitigators by the jury was insufficient); Woldt v. People, 64 P.3d 256 (Colo. 2003) (death sentences arrived at with state's new process were not in conformity with *Ring v. Arizona*).

Lingering Doubt

When juries return a verdict that is less than unanimous on a death sentence they may be sending a message that they continue to harbor lingering doubts about the defendant's guilt. Although the jury has voted unanimously, beyond a reasonable doubt, on the defendant's guilt, they are very aware that new evidence might emerge later proving their judgment wrong. The Capital Jury Project, a multi-state study funded in part by the National Science Foundation, found that 63% of jurors who said lingering doubt about guilt was a factor in their case believed it was very important in making their punishment decision. It was greater than the importance of other factors like mental retardation, youth, or childhood abuse present in the case.[13]

Jurors are wise to be concerned about such hesitations. Since 1973, 156 people have been exonerated from death row, almost all of them after a unanimous determination of guilt by a jury. Florida, one of the few states that allows non-unanimous jury recommendations of death, leads the country in capital exonerations with 26. In 90% of those mistakes in which sufficient information is available, the jury's vote at sentencing was not unanimous for death, and in seven the vote for death was 9-3.[14] If the jury's warning signs had been heeded through a process that denied a death sentence unless it was unanimous, many of these cases would not have risked the lives of innocent defendants. The requirement of a unanimous jury verdict on sentencing

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[13] . W. Bowers et al., "Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making," 83 Cornell Law Review 1476, 1534 (1998).

[14] . A. Phillips, "How the nation's lowest bar for the death penalty has shaped death row," Tampa Bay Times, Jan. 31, 2016 (and accompanying data, available from DPIC).

provides an additional but important level of scrutiny to ensure that innocent defendants are not executed.

Minority Views

One area of deep concern to the Supreme Court regarding the death penalty has been racial bias in jury selection. The Court has repeatedly overturned death sentences where blacks were struck from potential jury service for proffered reasons that amounted to a pretext for discrimination.[15] Another decision in that line of cases will be handed down soon.

As a result of this scrutiny, the all-white jury deciding the fate of a black defendant has become at a least reason for inquiry in capital cases. This is not only a question of fairness for the defendant. Diverse juries have also been found to be more deliberative and open to various points of view in the jury room.[16] Requiring a unanimous jury insures that the minority voices on a jury are not only present, but actually taken into account. If a death verdict can be rendered by a vote of 9-3, or even 11-1, the effect could be the same as if the vote was 12-0 but minorities were excluded at the outset.

Due Process

Finally, there are concerns of elementary fairness and equal protection in allowing a person's life or death to be decided by a less than unanimous vote, while

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[15] . See, e.g., Miller-El v. Dretke, 545 U.S. 231 (2005).

[16] . See S. Dewan, "Study Finds Blacks Blocked From Southern Juries," N.Y. Times, June 1, 2010.

guilt for even minor offenses requires unanimity. The Supreme Court has consistently maintained that "death is different"[17] when it comes to the procedures for sentencing someone to death. This means that extra scrutiny and careful review are in order, compared to other sentences for lesser crimes. SB 64 appears to turn that proposition on its head, providing *less* scrutiny in the most important part of the criminal process.

In the Court's opinion guaranteeing the right to a jury determination of death-eligibility in capital cases, Justice Ginsburg emphasized that Sixth Amendment protections should not be lessened in capital cases. Rather, she said, "We see no reason to differentiate capital crimes from all others in this regard."[18]

CONCLUSION

Around the country, the death penalty is being subjected to greater scrutiny, in part because of the serious errors that have been exposed with wrongful convictions, racial bias, and arbitrary application. Juries are returning far fewer death sentences than before, prosecutors are limiting their option to seek death in the first place, and the Supreme Court has imposed a series of restrictions limiting the application of the death penalty.

In this climate, a proposal to lower the scrutiny applied in death sentencing would likely incur very close review by state and federal courts. Colorado would be opening itself up to future constitutional challenges that could invalidate any sentences

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[17] . See Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

[18] . Ring v. Arizona, 536 U.S. 584, 587 (2002).

handed down in the interim. It is unclear whether the state would benefit from such relaxation of its process, and it is apparent that there would be collateral risks in the areas of innocence, racial diversity, and elementary due process.

I would be happy to provide this body with more extensive information on the points I have raised.