



Overview of Capital Punishment Under State and Federal Law

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This memorandum provides information concerning the use of capital punishment in Colorado and across the country. The memorandum provides a brief history of Colorado's death penalty scheme and information on recent U.S. Supreme Court decisions concerning the constitutionality of the death penalty. It also explains the current death penalty scheme in Colorado, including procedures used in sentencing and required review by trial courts and the Colorado Supreme Court. Lastly, this memorandum provides an overview of capital punishment in other states and federal death penalty laws.

The death penalty has been a sentencing option in the United States since the country's founding: the first Congress made treason, piracy, murder within federal enclaves, as well as forgery and counterfeiting of federal certificates and public securities, punishable by death.¹ Even prior to achieving independence, every colony punished at least some crimes by execution — laws that were carried into the new nation. The first state to abolish the death penalty was Michigan, which did so in 1846 for all crimes, except treason. Near the beginning of the twentieth century, many states abolished the death penalty, though most reinstated it later. Today, 31 states authorize the use of capital punishment; the federal government has always had a death penalty.

Peak execution rates in the U.S. occurred during the 1930s, with 199 people executed in 1935. In the modern era, executions peaked in 1999, when there were 98 executions, the most of any year since 1976. Since then, the number of executions nationwide has decreased almost every year; in 2016 there were a total of 20 executions, the fewest since 1991. Similarly, there were only 20 death sentences issued in 2016, the fewest in more than four decades. Recent concerns over lethal injection drug availability have caused some states to increase the number of executions carried out before such drugs expire.

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¹Charles Doyle, Congressional Research Service, *Federal Capital Offenses*, Nov. 17, 2011. This interested persons memorandum uses the terms "death penalty" and "capital punishment" interchangeably.

Section 1: History of the Death Penalty in Colorado

Colorado's experience with capital punishment began before statehood. In 1859, John Stoefel was executed as punishment for his commission of the first recorded murder in the new settlement of Denver, then a part of the Kansas Territory.² After the Colorado Territory was formed, the first territorial legislature enacted the legislation authorizing the death penalty.³ Colorado was granted statehood in 1876, and its First General Assembly enacted laws authorizing the use of capital punishment against those convicted of murder.⁴ At this time, the death penalty was carried out by counties as a public hanging. In 1883, the General Assembly first introduced degrees of murder, with death serving as punishment for first degree murder.⁵ Six years later, executions were moved away from public view in various counties, to a single private location inside the state penitentiary in Cañon City.⁶ In 1896, Colorado executed three codefendants for the murder of a Trinidad police officer. These were the final executions prior to Colorado's repeal of capital punishment.⁷

Abolition of capital punishment, 1897-1901, and reinstatement. Twice during the 1890s, the state Senate approved of measures to repeal the death penalty in Colorado that were defeated in the House of Representatives. After those failed efforts, capital punishment was finally abolished in 1897.⁸ Four years later, in 1901, the death penalty was reinstated as a punishment, after the General Assembly passed a bill, and the Governor allowed it to become law without his signature.⁹ Between reinstatement and 1933, executions in Colorado were carried out by hanging. Beginning in 1934, Colorado utilized asphyxiation, via gas chamber, to carry out death sentences.¹⁰

There were many efforts in the 1950s and 1960s to repeal Colorado's death penalty. For example, bills to affect such change were introduced and defeated in 1955, 1956, 1959, and 1961. In 1964, two bills, one a permanent repeal and another that was a five-year moratorium on capital punishment, were similarly defeated. In 1965, a bill was adopted that referred to Colorado voters a ballot question to permanently repeal the capital punishment. After passage of the bill, Governor John Love announced a moratorium on the death penalty until citizens voted on the measure. In the 1966 election, the referendum failed by a wide margin, and the Governor lifted the moratorium on executions.¹¹

The final execution by asphyxiation in Colorado took place on June 2, 1967, when an offender was executed for committing murder. That would turn out to be the final execution in Colorado for 30 years, and because of federal court decisions, the last one in the United States for nearly a decade.¹²

²Radelet, Michael, *Capital Punishment in Colorado: 1859-1972*, 74 U. Colo. L. Rev. 885, 885 (2003).

³1861 Colo. Terr. Sess. Laws 290, 293.

⁴Colo. Gen. Laws. Ch. XXVI, §§ 20 and 268 (1877).

⁵1883 Colo. Sess. Laws 150. First degree murder included all murder perpetrated "by means of willful, deliberate and premeditated killing; or which is committed in the perpetration or attempt to perpetrate any arson, rape, robbery, mayhem or burglary; or perpetrated from a deliberate and premeditated design, unlawfully and maliciously to effect the death of any human being other than him who is killed; or perpetrated by any act greatly dangerous to the lives of others, and indicating a depraved mind regardless of human life," all other murder was murder in the second degree, which was punishable by imprisonment for 10 years to life.

⁶1889 Colo. Sess. Laws 118.

⁷Radelet, *Capital Punishment in Colorado*, at 907.

⁸Ch. 35, 1897 Colo. Sess. Laws 135.

⁹Ch. 64, 1901 Colo. Sess. Laws 153-54. Radelet, *Capital Punishment in Colorado*, at 912.

¹⁰Ch. 61, 1933 Colo. Sess. Laws, 420-22

¹¹Radelet, *Capital Punishment in Colorado*, at 923-30.

¹²Radelet, *Capital Punishment in Colorado*, at 922.

Section 2: Constitutionality of Capital Punishment

The U.S. Supreme Court addressed the constitutionality of capital punishment in 1972. That year, in *Furman v. Georgia*, the Court held that the manner in which the death penalty was being applied in the three specific cases before it violated the Eighth Amendment to the U.S. Constitution.¹³ The Court's unsigned *per curiam* opinion provided no reasoning, though each of the nine justices wrote separate concurring or dissenting opinions.

States generally took two approaches in response to *Furman*. The first approach was to remove arbitrary application of the death penalty by making it mandatory in certain cases. The Supreme Court rejected this approach, holding that mandatory death sentence statutes violate the Eighth and Fourteenth Amendments.¹⁴ The second approach was to make the punishment apply in a more narrow set of cases, and provide rules that would guide jury discretion determining whether to sentence a defendant to death. Colorado took this second approach, rewriting its law to require the finding of at least one aggravating factor in order to impose capital punishment, and providing a list of mitigating factors to be considered when determining an offender's sentence. Under that Colorado law, a finding of any mitigating factor would prohibit a death sentence.¹⁵

In 1976's *Gregg v. Georgia*, the U.S. Supreme Court approved of the second approach, upholding as constitutional Georgia's capital punishment scheme that it described as focusing the jury's attention on the specific crime committed and particular defendant. The Court also approved of the Georgia law's provisions that "channeled" the jury's discretion by requiring it to find an aggravating offense as a condition of sentencing a person to death and permitting jurors to consider mitigating circumstances; and required review by the Georgia Supreme Court.¹⁶

Since *Gregg*, the federal government and the states have been permitted, under the U.S. Constitution, to enact capital punishment schemes that conform to the guidance offered by the U.S. Supreme Court. Legal challenges continue to be brought concerning a number of issues relating to the imposition of capital punishment. The following sections discuss court decisions and Colorado law concerning how certain judgments relating to death sentencing are made, who may be sentenced to death, and the methods of execution that may be used.

Court decisions and Colorado law concerning determining facts that result in capital punishment. Until 1995, Colorado law required a jury to perform sentencing in death penalty cases, unless there was no jury, in which case a judge could impose a death sentence. In 1995, the law was amended to have a three-judge panel make sentencing determinations. The

Summary of Capital Punishment in the United States, 1967-77

1967: Colorado executes final prisoner in the U.S. prior to the decision by the U.S. Supreme Court invalidating the practice.

1972: In Furman v. Georgia, the Court finds the death penalty unconstitutional as applied to the three cases before it, effectively ending the practice nationwide.

1972-76: States enact new capital sentencing schemes in an effort to comport with the U.S. Constitution.

1976: The Court approves of Georgia's capital sentencing scheme in Gregg v. Georgia.

1977: Executions resume in the United States when Utah puts an offender to death by firing squad.

¹³*Furman v. Georgia*, 408 U.S. 238 (1972). As it is relevant to death penalty cases, the Eighth Amendment prohibits the infliction of cruel and unusual punishment.

¹⁴*Woodson v. North Carolina*, 428 U.S. 280 (1976).

¹⁵Ch. 52, 1974 Colo. Sess. Laws 240. The list of mitigating factors includes that the defendant is a juvenile or that his or her capacity to appreciate the wrongfulness of his or her conduct or conform to the law was significantly impaired.

¹⁶*Gregg v. Georgia*, 428 U.S. 153, 206-07 (1976).

law required the panel of judges to reach a unanimous verdict on sentencing; otherwise, the court was required to sentence the defendant to life in prison.¹⁷ This was Colorado law at the time of the U.S. Supreme Court's 2002 decision in *Ring v. Arizona*, in which the Court ruled that the Sixth Amendment to the U.S. Constitution requires that aggravating circumstances necessary for imposition of the death penalty be found by a jury, not a judge.¹⁸ This ruling prompted states, including Colorado, to change their laws to require that a jury make sentencing decisions in death penalty cases.

Following the *Ring* decision, Colorado Governor Bill Owens called a special legislative session.¹⁹ The General Assembly convened on July 8, 2002, and amended Colorado law to again require the trial jury to perform sentencing.²⁰ Under this law, when the jury cannot reach a unanimous sentencing decision, the court is required to sentence the defendant to life in prison. This remains current Colorado law.

In 2016, the Court reaffirmed *Ring*, and overturned Florida's death penalty sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance necessary to impose a death penalty.²¹

Court decisions and Colorado law concerning minors and persons with mental disabilities. In addition to cases involving death penalty sentencing procedures, the U.S. Supreme Court also hears cases that consider the application of the death penalty. In 2005, the Court held that the U.S. Constitution prohibits the execution of offenders who were sentenced to death for a crime committed while the offender was under the age of 18.²² In 2002, the Court held that the U.S. Constitution restricts states' power to sentence an intellectually disabled offender to death.²³

Under current Colorado law, an offender convicted as an adult of a class 1 felony that was committed while the offender was a juvenile, or an offender convicted of a class 1 felony who is determined to be "mentally retarded," is not subject to the death penalty, and is instead sentenced to life imprisonment with the possibility of parole after 40 years.²⁴

Recent issues concerning lethal injection. Each jurisdiction that permits capital punishment, including Colorado, uses lethal injection as its primary method of carrying out the death penalty.²⁵ The U.S. Supreme Court has heard challenges to the procedures used for lethal injection. In 2008, the Court upheld the use of lethal injection as a means of execution in *Baze v. Rees*.²⁶ In *Baze*, the Court specifically upheld Kentucky's use of lethal injection against claims that the procedure could cause severe pain to the executed offender if administered improperly. The Court found that the first drug in a three-drug combination used for injection, sodium thiopental, was sufficient to mitigate the pain suffered by the offender.

¹⁷Section 16-11-103 (2)(d), C.R.S. (1995).

¹⁸*Ring v. Arizona*, 536 U.S. 584 (2002).

¹⁹Channel 7, "Special Session Set for Death Penalty, Fires," June 27, 2002, <http://www.thedenverchannel.com/news/special-session-set-for-death-penalty-fires>, retrieved February 21, 2017.

²⁰During the special session, the General Assembly enacted House Bill 02S-1005, which amended Section 16-11-103 (2)(d), C.R.S. (2001), effective July 12, 2002. On October 1, 2002, that amended section was relocated to Section 18-1.3-1201 (2)(d), C.R.S. (2002) in accordance with a bill passed during the 2002 regular session. Section 12 of HB 02S-1005 stated the General Assembly's intent that there be no hiatus in the imposition of the death penalty as a result of the decision in *Ring v. Arizona*.

²¹*Hurst v. Florida*, 136 S.Ct. 616 (2016). Colorado law permits a defendant to waive the right to a jury and have guilt and sentencing decisions made by a judge. These provisions have not been reviewed by a court in light of the U.S. Supreme Court's *Hurst* decision.

²²*Roper v. Simmons*, 543 U.S. 551, 578 (2005).

²³*Atkins v. Virginia*, 536, U.S. 304, 321 (2002), *internal quotations omitted*. A later case, *Hall v. Florida*, 134 S. Ct. 1986 (2014), explored the constitutionality of Florida's method to determine when an offender should be considered intellectually disabled.

²⁴Section 18-1.3-401 (4)(b), C.R.S. (juveniles); Section 18-1.3-1103, C.R.S. ("mentally retarded" defendants).

²⁵Information on state and federal methods of execution is available in Appendix D. Colorado adopted lethal injection as the means for execution in 1988.

²⁶*Baze v. Rees*, 553 U.S. 35 (2008).

After the Court's *Baze* decision, sodium thiopental became increasingly unavailable. Consequently, some states have turned to a different drug, midazolam, in order to limit pain in executions. Complications have occurred in executions where midazolam was used, which prompted offenders sentenced to death in Oklahoma to challenge the state's use of the drug. In 2015's *Glossip v. Gross* decision, the Court upheld Oklahoma's use of midazolam in part because it was not established "that any risk of harm was substantial when compared to a known and available alternative method of execution."²⁷

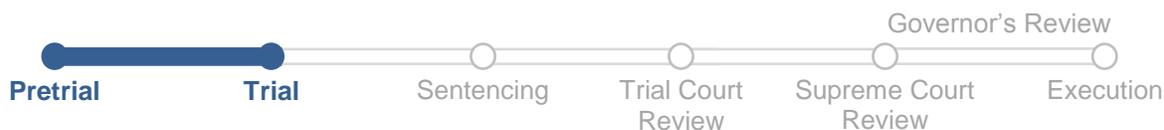
Although the U.S. Supreme Court has never overturned a state's method of execution as cruel and unusual punishment, a number of states have determined secondary methods in case a court finds its primary method unconstitutional.²⁸ For example, Wyoming uses lethal injection as its primary method for imposing the death penalty, but if a court holds that method unconstitutional, then lethal gas would be used. Oklahoma provides four methods of execution: lethal injection, asphyxiation, electrocution, and firing squad; prioritized in that order, to be used in case the method before it is found unconstitutional. Colorado law requires capital punishment to be carried out by lethal injection, and does not provide for alternative methods under any circumstances. However, while the law mentions the use of sodium thiopental, any other equally or more effective substance may be used.²⁹ Methods of execution authorized by each state are listed in Appendix D.

Section 3: Death Penalty in Colorado

Trial and Sentencing

Under Colorado law, adult offenders convicted of class 1 felonies are subject to be sentenced to death.³⁰ An offender convicted as an adult of a class 1 felony that was committed while the offender was a juvenile, or an offender convicted of a class 1 felony who is determined to be "mentally retarded," is not subject to the death penalty, and is instead sentenced to life imprisonment with the possibility of parole after 40 years.³¹

Prior to seeking the death penalty in a case, the prosecutor must notify the defendant that he or she will seek such punishment. Then, the defendant's guilt is determined in a trial. Following conviction, the sentencing phase of the trial is conducted before the trial jury to determine whether the defendant should be sentenced to death or life imprisonment.



Pretrial notification and trial. Prosecutors in Colorado have the discretion to determine whether to seek the death penalty in a class 1 felony case. Under court rules, if the prosecuting attorney wishes to seek the death penalty in a case, he or she must file a written statement of intention to seek the death penalty to the court and defendant within nine weeks of the defendant's arraignment.³²

²⁷ *Glossip v. Gross*, 135 S. Ct. 2726 (2015).

²⁸ *Ibid.* at 2732 ("[The U.S. Supreme] Court has never invalidated a State's chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment," quoting *Baze*).

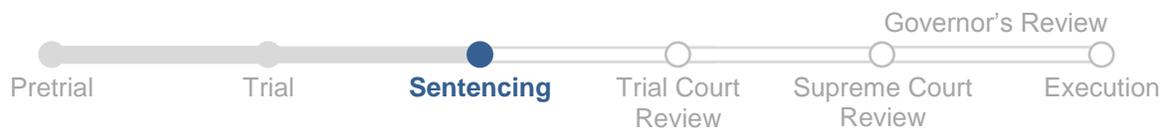
²⁹ Wyo. Stat. § 7-13-904; Okla. Stat. Ann. tit. 22, § 1014; Section 18-1.3-1202, C.R.S.

³⁰ Section 18-1.3-401, C.R.S.

³¹ Section 18-1.3-401 (4)(b), C.R.S. (juveniles); Section 18-1.3-1103, C.R.S. ("mentally retarded" defendants).

³² Colo. R. Crim. P. 32.1 (b).

Except for when a defendant pleads guilty to a crime, guilt is determined when he or she is tried before a jury. Like any other defendants, those accused of committing an offense for which the death penalty is sought have the right to a jury trial. Unlike defendants accused of other crimes, Colorado law prohibits defendants accused of class 1 felonies from waiving that right.³³ Defendants in class 1 felony cases must have a jury of twelve, and cannot elect to have fewer jurors empaneled.³⁴ Generally, the same procedures are used during the trial to determine guilt in a capital punishment case as are used in any other trial.



Capital sentencing procedures under Colorado law. Following a conviction for a class 1 felony, the sentencing phase begins “as soon as practicable” to the conclusion of the trial.³⁵ The sentencing hearing is held before the trial judge and trial jury, including alternate jurors.³⁶ In order to sentence a person to death, the jury must unanimously find and specify in writing that at least one aggravating factor has been proved and that there are no mitigating factors that sufficiently outweigh the aggravating factors. If the jury does not find that an aggravating factor has been proven beyond a reasonable doubt or that mitigating factors outweigh any aggravating factors, it must sentence the defendant to life imprisonment. Similarly, if the jury’s decision to impose the death penalty is not unanimous, the offender is sentenced to life imprisonment.³⁷

Aggravating and mitigating factors. As stated above, Colorado law requires that a jury find at least one aggravating factor in order to impose the death penalty. Aggravating factors that the jury may consider include: that the defendant has a prior conviction for a class 1 or 2 felony; the defendant committed the offense while lying in wait, from ambush, or by use of an explosive or incendiary device or a chemical, biological, or radiological weapon; the defendant killed two or more people in the same criminal episode or more than one person in more than one criminal episode; the victim was younger than 12 years old; the offense was committed against the victim because of the victim’s race, color, ancestry, religion, or national origin; or that the defendant committed the offense in an especially heinous, cruel, or depraved manner. A complete list of aggravating factors can be found in Appendix A.

State law also permits an offender to present mitigating factors to outweigh proven aggravating factors. Mitigating factors include: the defendant’s age at the time of the offense; the emotional state of the defendant at the time of the offense; the absence of a prior conviction; the defendant’s cooperation with law enforcement; that the defendant is not a continuing threat to society; and any other evidence that bears on the question of mitigation. A complete list of mitigating factors can be found in Appendix B.

Scheduling execution and stay. If the jury does find at least one aggravating factor and no mitigating factors, and it reaches its decision unanimously, it may sentence an offender to death. If the jury does so, the trial court must set a week of execution, the end of which is between 91 and 126 days from the sentencing.³⁸ The court must also stay the execution and immediately notify the Colorado Supreme Court of the judgment.

³³U.S. Const. amend. VI; Colo. Const. art. 2, § 23; Section 16-10-101, C.R.S. [right to trial]; Section 18-1-406 (2), C.R.S. [waiver].

³⁴Section 18-1-406, C.R.S.

³⁵Part 12 of Title 1.3 of Article 18, C.R.S., covers sentencing in class 1 felony cases. Colorado Rule of Criminal Procedure 32.1 relates to death penalty sentencing hearings.

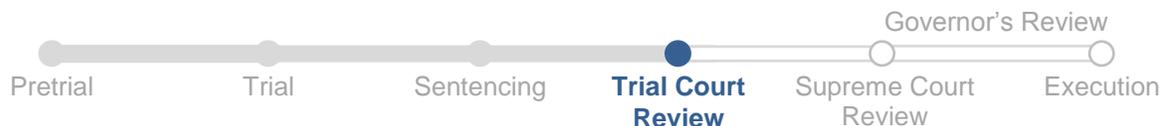
³⁶Section 18-1.6-1201 (1)(a), C.R.S., permits sentencing to be performed before the trial judge if the defendant has waived a jury trial or has plead guilty. However, under Colorado law, defendants in class 1 felony cases cannot waive a jury trial. Similarly, Section 18-1.3-1201 (2.5), C.R.S., sets forth procedures for a judge to sentence an offender to the death penalty when the trial was before a judge and not a jury. This provision has not been utilized or reviewed by a court in light of recent U.S. Supreme Court decisions requiring juries to make certain determinations regarding a death sentence.

³⁷Section 18-1.3-1201 (2), C.R.S.

³⁸Section 16-12-204 (1), C.R.S.; Section 18-1.3-1205, C.R.S.

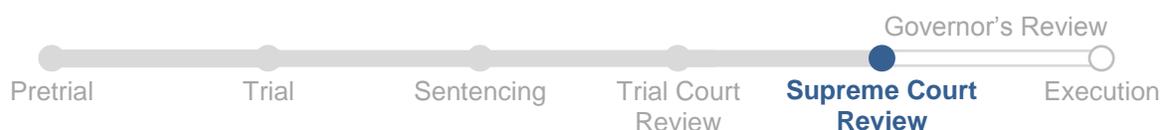
Review of Death Sentences in Colorado

Colorado law provides for an expedited system of unitary review in death penalty cases, which is the only review available for death penalty sentences.³⁹ This system provides for postconviction review by the trial court of certain specified issues, and appellate review by the Colorado Supreme Court of any issues raised during the plea, pre-trial, trial, penalty, and new trial motion phases of the proceedings, as well as the trial court's postconviction review.



Postconviction review by the trial court. Colorado law authorizes the trial court to provide postconviction review of capital punishment determinations. At a hearing following the imposition of a death sentence, trial courts are required to advise the defendant of the nature of court review prescribed by state law, the right to counsel on direct appeal to the Colorado Supreme Court, and the availability of review of ineffective assistance of counsel claims. At the same hearing, the court must determine whether the defendant intends to pursue postconviction review and, if so, whether he or she intends to proceed without counsel.⁴⁰ A defendant may continue to use his or her trial counsel, or obtain new counsel for postconviction review. The court may appoint new counsel for postconviction review for indigent defendants.⁴¹

A motion for postconviction review may only raise issues permitted by Colorado law. Defendants may seek review on whether there is evidence, not previously presented, that requires that the conviction or the death sentence be vacated in the interests of justice, but only if the defendant or his or her attorney could not have known or learned of the facts, with the exercise of reasonable diligence, prior to sentencing. Defendants may also raise issues related to whether the defendant was convicted for constitutionally protected conduct, and the constitutionality of the conviction, sentence, or statute under which the defendant was convicted. Colorado law also permits postconviction review of whether the trial court had jurisdiction over the defendant or subject matter of the case; whether trial counsel rendered ineffective assistance; and for any other grounds that may properly be the basis for an attempt to overturn the criminal judgment during another proceeding.⁴²



Colorado Supreme Court review. Defendants who choose to appeal death sentences do so directly to the Colorado Supreme Court, bypassing review by the Colorado Court of Appeals. The Supreme Court also directly hears appeals of the trial court's postconviction review. A defendant must file a notice of appeal with the Colorado Supreme Court within seven days of the trial court's order on postconviction review motions. If no postconviction review motions are filed, the defendant must file the notice of appeal within seven days of the deadline for filing postconviction review motions.⁴³

³⁹Section 16-12-202 (1), C.R.S. Generally, reviewing courts are limited to issues before it in the reviewed case. Unitary review allows for a reviewing court to make determinations on issues that may be the basis for an attempt to overturn the criminal judgment during another proceeding.

⁴⁰Section 16-12-204 (2), C.R.S.

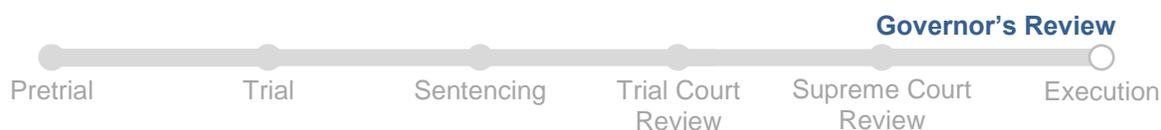
⁴¹Section 16-12-205, C.R.S.

⁴²Section 16-12-206 (1)(c), C.R.S.

⁴³Colo. R. Crim. P. 32.2 (c).

Any appeals by the defendant, both direct appeals and those of postconviction review, to the Supreme Court are consolidated into one proceeding before the court. The prosecution may appeal to the Supreme Court trial court rulings granting a motion for a new trial, postconviction relief, or other relief; or a ruling that any statute is inoperative or unconstitutional.⁴⁴ Further, the General Assembly has stated its intent that the Supreme Court give priority to death penalty appeals over all other cases before the court, and it urges the court to render decisions in such cases expeditiously.⁴⁵

Colorado law permits the Supreme Court to overturn a death sentence if it was imposed under the influence of passion, prejudice, or any other arbitrary factor, or that the evidence presented does not support the finding of an aggravating circumstance. If the Supreme Court finds that the evidence in a case does not support finding an aggravated factor, the court may still uphold the death sentence by determining that the jury would have sentenced the defendant to death without that aggravating factor or reweighing any remaining aggravating factor or factors and all mitigating factors, and then determining whether death is the appropriate punishment in the case. If the jury considered an aggravating factor in an impermissibly broad manner, the court may also uphold the sentence if it determines that the jury would have sentenced the defendant to death had the factor been properly considered.⁴⁶



Governor's review. The Colorado Constitution empowers the Governor to grant reprieves, commutations, and pardons for all offenses, except treason and impeachment.⁴⁷ A reprieve is a temporary suspension of a sentence. Commutation and pardon are two types of clemency. State law authorizes the Governor to commute the sentence in a capital case to imprisonment for life or a minimum 20 years at hard labor, and provides the procedures by which a convicted offender may seek commutation.⁴⁸ A pardon issued by the Governor waives all “collateral consequences” associated with a conviction, including any penalties, prohibitions, bars, disadvantages, or disqualifications imposed based on the conviction.⁴⁹

Enforcement of Capital Punishment in Colorado

Colorado law requires that lethal injection be used to carry out the death penalty. The law specifies a “continuous intravenous injection of a lethal quantity of sodium thiopental or equally or more effective substance to cause death.” Death sentences are carried out at the Department of Corrections (DOC) facility at Cañon City by a person trained to administer intravenous injections. Death is pronounced by a licensed physician or coroner. As explained above, the trial court sets the week of execution, which is immediately stayed. The day and hour of the execution is set by the DOC’s executive director, or his or her designee. That person, along with a physician, guards, attendants, and any other person necessary to carry out the execution may be present. The DOC executive director may permit up to 18 witnesses to attend as well. Prior to the execution, the Judicial Branch is required collect and test a biological sample from the convicted offender to determine his or her genetic markers. The DOC is required to collect and maintain certain records concerning the execution.⁵⁰

⁴⁴Section 16-12-207, C.R.S.

⁴⁵Section 16-12-208 (5), C.R.S.

⁴⁶Section 18-1.3-1201 (6) and (8), C.R.S.

⁴⁷Colo. Const. art. IV, § 7.

⁴⁸Section 16-17-101, C.R.S. (Governor’s authority); Section 16-17-102, C.R.S. (procedures).

⁴⁹Section 16-17-103, C.R.S.

⁵⁰Section 18-1.3-1202, *et seq.*, C.R.S.

Current gubernatorial moratorium. In May 2013, Governor John Hickenlooper, by executive order, granted a reprieve to Nathan Dunlap, the only inmate on death row who has exhausted all available court procedures. By its terms, the order remains in effect until rescinded by another executive order of the Governor. In the order, Governor Hickenlooper's stated reasons for granting the reprieve include the inconsistent application of the death penalty in Colorado, the "finality" of the sentence, religious views that are contrary to capital punishment, that the state "is not immediately equipped to carry out a death sentence," and that the death penalty is not a deterrent.⁵¹ Because of Governor Hickenlooper's reasoning, and because the order may be in force indefinitely, the order has been called a moratorium on the death penalty in Colorado. This moratorium is based on Governor Hickenlooper's decision to grant a reprieve to an offender subject to the penalty, and may be lifted at his discretion, or that of subsequent Governors.

Execution in Colorado. Since the death penalty was reinstated in 1976, Colorado has executed one man who was sentenced to death. Gary Lee Davis was executed in 1997 following his convictions on charges of first-degree murder, felony murder, conspiracy to commit murder in the first degree, second-degree kidnapping, and conspiracy to commit second-degree kidnapping. As of June 2017, three inmates are on Colorado's death row, including Mr. Dunlap, who was granted a reprieve, and two other convicted offenders whose sentences are stayed pending ongoing legal appeals.

Colorado Legislation Concerning Capital Punishment

Since 1976, the Colorado General Assembly has undertaken death penalty reform efforts on many occasions. Appendix C provides information on death penalty legislation since 1976. Recently, the legislature has considered a number of bills that would affect or repeal the death penalty.

Recent legislation to reform capital punishment procedures. Since 2014, the General Assembly has considered four bills that would have affected procedures or review for death penalty cases; none of those bills was adopted. In 2016, the General Assembly rejected two bills concerning death penalty sentencing procedures. House Bill 16-1233 would have split the sentencing phase of a death penalty trial into two distinct phases: an aggravating phase and a mitigating phase. Senate Bill 16-064 would have required only nine jurors to agree to the imposition of the death penalty. Both bills failed to pass out of committee.

The General Assembly considered bills relating to review of death sentences during the 2014 legislative session. House Bill 14-1197 would have limited the Governor to a single reprieve to an offender sentenced to death, granted for cause. Senate Bill 14-069 would have set specific deadlines for the Colorado Supreme Court to hear appeals in death penalty cases. Both of these bills failed to pass out of committee.

Efforts to repeal the death penalty in Colorado. Since 2013, the General Assembly has considered three bills to repeal the death penalty. House Bill 13-1264 and Senate Bill 17-095 would have repealed the death penalty. House Bill 13-1270 would have repealed the death penalty, contingent upon passage of a statewide ballot measure in the November 2014 general election. All three bills failed to pass out of committee.

⁵¹Office of the Governor, State of Colorado, "Death Sentence Reprieve," Exec. Order D 2013-006 (May 22, 2013).

the 2016 general election, Nebraska's voters chose to defeat the legislature's action and keep the death penalty as a punishment for first degree murder in the state.⁵⁴

In addition to Nebraska, voters in two other states acted on ballot questions concerning capital punishment during the 2016 general election. California voters rejected Proposition 62, which would have abolished the death penalty. In the same election, voters approved Proposition 66, which sought to shorten the time spent on legal challenges to death sentences. In Oklahoma, State Question 776 passed, adding to the state constitution a declaration that the death penalty is not cruel and unusual punishment.

In Delaware, capital punishment was repealed by judicial decision. In August 2016, the Delaware Supreme Court held that the state's death penalty scheme was unconstitutional because it violated the Sixth Amendment to the U.S. Constitution by permitting judges, not juries, to find certain facts necessary to impose a death sentence.⁵⁵ In December 2016, the Delaware Supreme Court held that its ruling applied retroactively, so the remaining offenders sentenced to death would instead receive sentences of life imprisonment without parole, probation, or any other reduction.⁵⁶

Federal Capital Offenses

Federal capital cases are governed by the Federal Death Penalty Act. Under federal law, the death penalty may apply in cases of treason, espionage, homicide, and certain drug offenses.⁵⁷ In federal death penalty-eligible cases, the U.S. Attorney General determines whether to seek the death penalty.⁵⁸ There is no statute of limitations for federal capital offenses.⁵⁹ Pregnant women; a person who is "mentally retarded," or a person who, as a result of mental disability, lacks the mental capacity to understand the death penalty and why it was imposed; a person who committed the capital offense while under the age of 18; and certain Native Americans are not subject to the federal death penalty.⁶⁰

Federal capital sentencing and review. In federal cases, when the prosecutor provides notice of intent to seek the death penalty, a sentencing phase follows a conviction for a death penalty-eligible offense. In order for the offender to be sentenced to death, the prosecution must prove at least one aggravating factor, and the proved aggravating factors must sufficiently outweigh any mitigating factors to justify imposing a death sentence.⁶¹ In cases of homicide, certain intent must also be proved.⁶² Offenders sentenced to death are entitled to appellate review of their sentences.⁶³

Imposition of the federal death penalty. If the sentence is upheld, the U.S. Marshals Service supervises the implementation of the death sentence in accordance with the law of the state in which the sentence is imposed, or, if that state does not permit capital punishment, pursuant to the laws of another state, as determined by a court.⁶⁴ The U.S. Marshals Service is permitted to use state and local facilities and personnel to carry out the sentence.⁶⁵

⁵⁴Nebraska Referendum 426, Nebraska Secretary of State, *Revised Official Report of the Board of State Canvassers*, p. 60, available at: <http://www.sos.ne.gov/elec/2016/pdf/2016-canvass-book.pdf>.

⁵⁵*Rauf v. State*, 145 A.3d 430 (Del. 2016).

⁵⁶*Powell v. State*, 153 A.3d 69 (Del. 2016).

⁵⁷18 U.S.C. § 3591 (a).

⁵⁸U.S. Dept. of Justice, *United States Attorney Manual*, §§ 9-10.050 (Apr. 2014) and 9-10.160 (Jan. 2017), available at: <https://www.justice.gov/usam/united-states-attorneys-manual>.

⁵⁹18 U.S.C. § 3281.

⁶⁰18 U.S.C. § 3591 [under 18 at the time of offense]; 18 U.S.C. § 3596 (b) [pregnant women]; 18 U.S.C. § 3596 (c) ["mentally retarded" persons]; and 18 U.S.C. § 3598 [Native Americans in certain circumstances].

⁶¹18 U.S.C. § 3593 (e). Aggravating and mitigating factors may be found in 18 U.S.C. § 3592.

⁶²18 U.S.C. § 3591 (a)(2).

⁶³18 U.S.C. § 3595 (a).

⁶⁴18 U.S.C. § 3596.

⁶⁵18 U.S.C. § 3597.

Federal execution. Since the 1988 adoption of the Federal Death Penalty Act, 76 defendants have been sentenced to death. Of those 76 sentenced, 11 have been removed from death row, and 3 have been executed. The remaining 62 prisoners are on federal death row.⁶⁶ Each of the prisoners on death row was convicted of crime involving homicide, some of which were drug-related; none involves espionage or treason. The prisoners who have been removed from death row have either been resentenced after appeal to life in prison, had their sentences commuted to life in prison, or have died while on death row. Of the three executions since 1988, two were carried out in June 2001, and the most recent federal execution occurred in March 2003.⁶⁷

⁶⁶The 62 inmates on death row includes those who have received a death sentence from a jury, but have not been formally sentenced by a judge; those who may still have appeals pending or available, which may affect the death sentence; and those who may have had their death sentences reversed, but prosecutors either have appealed the reversal or can still seek the death penalty in a resentencing hearing.

⁶⁷Death Penalty Information Center, *Federal Death Row Prisoners*, (updated Feb. 9, 2017), <http://deathpenaltyinfo.org/federal-death-row-prisoners>.

Appendix A
Aggravating Factors Under Section 18-1.3-1201 (5), C.R.S.

The following are aggravating factors under Colorado law:

- the offense was committed by a person under sentence of imprisonment for a class 1, 2, or 3 felony, or for a crime committed against another state or the United States which would constitute a class 1, 2, or 3 felony;
- the defendant was previously convicted in Colorado or any other state of a class 1 or 2 felony involving violence, as defined by Colorado law;
- the defendant intentionally killed any of the following persons while the person was engaged in the course of the performance of the person's official duties, and the defendant knew or reasonably should have known that the victim was a person engaged in the performance of the person's official duties, or the victim was intentionally killed in retaliation for the performance of the victim's official duties:
 - a peace officer or former peace officer;
 - a firefighter;
 - an emergency medical service provider;
 - a judge, referee, or former judge or referee of any court of record in the state or federal system or in any other state court system or a judge or former judge in any municipal court in this state or in any other state;
 - an elected state, county, or municipal official; or
 - a federal law enforcement officer or agent or former federal law enforcement officer or agent;
- the defendant intentionally killed a person kidnapped or being held as a hostage by the defendant or by anyone associated with the defendant;
- the defendant has been a party to an agreement to kill another person in furtherance of which a person has been intentionally killed;
- the defendant committed the offense while lying in wait, from ambush, or by use of an explosive or incendiary device or a chemical, biological, or radiological weapon;
- the defendant committed a class 1, 2, or 3 felony and, in the course of or in furtherance of such or immediate flight therefrom, the defendant intentionally caused the death of a person other than one of the participants in the crime;
- the offense was committed for pecuniary gain;
- in the commission of the offense, the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense;
- the defendant committed the offense in an especially heinous, cruel, or depraved manner;
- the offense was committed for the purpose of avoiding or preventing a lawful arrest or prosecution or effecting an escape from custody, including the intentional killing of a witness to a criminal offense;
- the defendant unlawfully and 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;
- the defendant intentionally killed a child younger than 12 years old;
- the defendant committed the class 1 felony against the victim because of the victim's race, color, ancestry, religion, or national origin;
- the defendant's possession of the weapon used to commit the class 1 felony constituted a felony offense under Colorado or U.S. law;
- the defendant intentionally killed more than one person in more than one criminal episode; or
- the victim was a pregnant woman, and the defendant intentionally killed the victim, knowing she was pregnant.

Appendix B
Mitigating Factors Under Section 18-1.3-1201 (4), C.R.S.

The following are mitigating factors under Colorado law:

- the defendant's age at the time of the crime;
- the defendant's capacity to appreciate wrongfulness of his or her conduct or to conform his or her conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution;
- the defendant was under unusual and substantial duress, although not such duress as to constitute a defense to prosecution;
- the defendant was a principal in the offense which was committed by another, but the defendant's participation was relatively minor, although not so minor as to constitute a defense to prosecution;
- the defendant could not reasonably have foreseen that his or her conduct in the course of the commission of the offense for which he or she was convicted would cause, or would create a grave risk of causing, death to another person;
- the emotional state of the defendant at the time the crime was committed;
- the absence of any significant prior conviction;
- the extent of the defendant's cooperation with law enforcement officers or agencies and with the office of the prosecuting district attorney;
- the influence of drugs or alcohol;
- the good faith, although mistaken, belief by the defendant that circumstances existed which constituted a moral justification for his or her conduct;
- the defendant is not a continuing threat to society; or
- any other evidence which in the court's opinion bears on the question of mitigation.

Appendix C
Colorado Death Penalty Legislation, 1976 to 2017

Year	Bill Number	Subject	Disposition
1976	HB 76-1111	Criminal Sentencing	Signed
1987	HB 87-1357	Death Penalty for Class 1 Felonies	Postponed Indefinitely
1988	SB 88-078	Death Penalty Procedures	Signed
	HB 88-1042	Death Penalty Procedures	Signed
1990	SB 90-117	Aggravating Factors	Signed
1991	SB 91-119	Imposition of Death Sentence	Postponed Indefinitely
1992	SB 92-055	Death Penalty Imposed on Retarded Inmates	Lost
	SB 92-124	Imposition of Death Penalty	Postponed Indefinitely
1993	SB 93-138	Prohibit Death Penalty for Mentally Retarded Inmates	Signed
	HB 93-1088	Prosecution of Criminal Laws	Signed
1994	SB 94-136	Aggravating Factors for Death Penalty Cases	Signed
	SB 94-204	Expedite Review of Death Penalty Cases	Signed
	HB 94-1144	Death Penalty Imposed on Cases Involving Multiple Killings	Signed
1995	SB 95-054	Death Penalty	Signed
	HCR 95-1001	Amend Colorado Constitution Death Penalty Provisions	Lost
1996	HB 96-1002	Death Penalty: Sentencing Rehearing	Postponed Indefinitely
1997	HB 97-1077	Substantive Changes to Criminal Statutes	Signed
	HB 97-1225	Unitary Death Penalty Review	Signed
1998	HB 98-1088	Procedural Criminal Statutes	Signed
	HB 98-1160	Substantive Changes to Criminal Statutes	Signed
2000	SB 00-028	Imposition of Death Penalty by Jury	Lost
	SB 00-070	Imposition of Death Penalty	Postponed Indefinitely
	HB 00-1234	Aggravating Factors for Imposition of Death Penalty	Signed
	HB 00-1299	Trial Judge to Impose Death Penalty	Lost
2001	SB 01-207	Trial Judge to Impose Death Penalty	Postponed Indefinitely
	SR 01-020	Death Penalty Study	Deemed Lost
2002	SB 02-077	One Judge to Determine Death Penalty Sentence	Postponed Indefinitely
2002S*	SB 02S-002	Imposition of Death Penalty by Unanimous Jury	Postponed Indefinitely
	SB 02S-003	Sentencing in Capital Offense Cases	Postponed Indefinitely
	SB 02S-005	Sentencing in Capital Offense Cases	Postponed Indefinitely
	SB 02S-006	10 Juror Majority to Impose Death Penalty	Postponed Indefinitely
	SB 02S-008	Eliminate Death Penalty Postponed Indefinitely	Postponed Indefinitely
	HB 02S-1003	Sentencing Procedures in Capital Offense Cases	Postponed Indefinitely
	HB 02S-1005	Imposition of Death Penalty by Unanimous Jury	Signed
	HB 02S-1007	Sentencing in Capital Offense Cases	Postponed Indefinitely
HB 02S-1008	Imposition of Death Penalty	Postponed Indefinitely	
2003	HB 03-1297	Death Penalty Aggravating Factors	Signed
2005	HB 05-1014	Substantive Changes to Criminal Statutes	Became Law
2007	HB 07-1094	Repeal Death Penalty to Establish Cold Case Unit	Lost
2008	SB 08-195	Death Penalty Imposed for Cases of Sexual Assault on Children Younger than 12	Postponed Indefinitely
2009	HB 09-1274	Repeal Death Penalty	Lost
2013	HB 13-1264	Repeal of the Death Penalty	Postponed Indefinitely
	HB 13-1270	Refer Repeal of Death Penalty to Citizen Vote	Postponed Indefinitely
2014	SB 14-069	Swift Justice Act	Postponed Indefinitely
	HB 14-1197	Governor's Authority to Grant Reprieve	Postponed Indefinitely
2016	SB 16-064	Death Penalty Jury Decision	Postponed Indefinitely
	HB 16-1233	Changes to Death Penalty Trials	Postponed Indefinitely
2017	SB 17-095	Repeal the Death Penalty	Postponed Indefinitely

Source: Legislative Council Staff.

*In 2002, the Governor called a special session to address sentencing in death penalty cases.

Appendix D Methods of Execution, by Jurisdiction

State	Citation	Primary Method	Secondary Methods	Use of Secondary Method
Alabama	Ala. Code § 15-18-82.1.	Lethal Injection	Electrocution	Choice of offender
Arizona	Ariz. Rev. Stat. § 13-757.	Lethal Injection	Lethal Gas	Choice of offender, if offense occurred prior to November 23, 1992
Arkansas	Ark. Code. § 5-4-617.	Lethal Injection	Electrocution	If execution by lethal injection under this section is invalidated by a final and unappealable court order
California	Cal Pen Code § 3604; 1992 Cal Stats. ch. 558.	Lethal Injection	Lethal gas	Choice of offender, if sentenced prior to August, 27, 1992, or if lethal injection is held invalid
Colorado	Section 18-1.3-1202, C.R.S.	Lethal Injection		
Florida	Fla. Stat. § 922.105.	Lethal Injection	Electrocution	Electrocution by choice of offender; if both lethal injection and electrocution are found unconstitutional, then any constitutional method may be used
Georgia	Ga. Code Ann. § 17-10-38.	Lethal Injection		
Idaho	Idaho Code Ann. § 19-2716.	Lethal Injection		
Indiana	Ind. Code § 35-38-6-1.	Lethal Injection		
Kansas	Kan. Stat. Ann. § 22-4001.	Lethal Injection		
Kentucky	Ky. Rev. Stat. §§ 431.220 and 431.223; 1998 Ky. Acts 220.	Lethal Injection	Electrocution	Choice of offender, if sentenced prior to March 1, 1998; or if lethal injection is found unconstitutional
Louisiana	La. Rev. Stat. Ann. § 15:569.	Lethal Injection		
Mississippi	Miss. Code Ann. § 99-19-51.*	Lethal Injection	Asphyxiation, Electrocution, Firing Squad	Methods are used in listed order when the method before is found unconstitutional
Missouri	Mo. Rev. Stat. § 546.720.	Lethal Injection, Lethal Gas		Statute is ambiguous concerning the determination of execution method
Montana	Mont. Code Ann. § 46-19-103.	Lethal Injection		
Nebraska	Neb. Rev. Stat. § 83-964.	Lethal Injection		
Nevada	Nev. Rev. Stat. § 176.355.	Lethal Injection		
New Hampshire	N.H. Rev. Stat. Ann. § 630:5.	Lethal Injection	Hanging	If lethal injection is impractical for any reason
New Mexico**		Lethal Injection		
North Carolina	N.C. Gen. Stat. § 15-188.	Lethal Injection		
Ohio	Ohio Rev. Code. § 2949.22.	Lethal Injection		
Oklahoma	Okla. Stat. Ann. tit. 22, § 1014.	Lethal Injection	Asphyxiation, Electrocution, Firing Squad	Methods are used in listed order when the method before is found unconstitutional
Oregon	Or. Rev. Stat. § 137.473.	Lethal Injection		
Pennsylvania	61 Pa. Cons. Stat. § 4304.	Lethal Injection		
South Carolina	S.C. Code Ann. § 24-3-530.	Lethal Injection	Electrocution	Choice of offender; or if lethal injection is found unconstitutional
South Dakota	S.D. Codified Laws § 23A-27A-32.	Lethal Injection		
Tennessee	Tenn. Code Ann. § 40-23-114.	Lethal Injection	Electrocution	Choice of offender, if sentenced prior to 1999; or if lethal injection drugs are unavailable or if lethal injection is found unconstitutional
Texas	Tex. Code Crim. Proc. § 43.14.	Lethal Injection		
Utah	Utah Code § 77-18-5.5.	Lethal Injection	Firing Squad	Choice of offender, if sentenced prior to May 3, 2004; or if lethal injection is found unconstitutional or drugs are unavailable
Virginia	Va. Code Ann. § 53.1-234.	Lethal Injection	Electrocution	Choice of offender
Washington	Wash. Rev. Code § 10.95.180.	Lethal Injection	Hanging	Choice of offender
Wyoming	Wyo. Stat. § 7-13-904.	Lethal Injection	Lethal Gas	If lethal injection is found unconstitutional
Federal	28 C.F.R. § 26.3.	Lethal Injection		

Source: Legislative Council Staff; National Conference of State Legislatures.

*As amended by Mississippi House Bill 683 (2017), signed into law on April 5, 2017.

**New Mexico repealed the death penalty, but not retroactively, so two previously sentenced offenders are still subject to capital punishment.

Appendix E
Executions by State, 1977 through July 7, 2017

State	Executions
Alabama	60
Arizona	37
Arkansas	31
California	13
Colorado	1
Connecticut*	1
Delaware*	16
Florida	92
Georgia	70
Idaho	3
Illinois*	12
Indiana	20
Kansas	0
Kentucky	3
Louisiana	28
Maryland*	5
Mississippi	21
Missouri	88
Montana	3
Nebraska	3
Nevada	12
New Hampshire	0
New Mexico*	1
North Carolina	43
Ohio	54
Oklahoma	112
Oregon	2
Pennsylvania	3
South Carolina	43
South Dakota	3
Tennessee	6
Texas	542
Utah	7
Virginia	113
Washington	5
Wyoming	1
Federal	3

Source: Death Penalty Information Center.

Includes all states that have permitted capital punishment during any period since 1976, including those that have repealed the death penalty. States marked with an asterisk () do not currently sentence offenders to death.