SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	DATE FILED: February 24, 2023 1:47 PM FILING ID: 2A29B55C988EA CASE NUMBER: 2023SA2
Original Proceeding 17th Judicial District Court Case No. 22CR1524 Hon. Robert Kiesnowski	
In Re: **Plaintiff** **THE PEOPLE OF THE STATE OF COLORADO** **v.** **Defendant** **JERRELLE AIREINE SMITH**	▲COURT USE ONLY▲
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RESPONSE TO RULE TO SHOW CAUSE	

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ISSUES PRESENTED

Did the trial court properly deny bond to the defendant in accordance with this Court's long-standing precedent?

Are the circumstances raised by the defendant sufficiently compelling to depart from over fifty years of established precedent?

Does C.R.S. § 16-4-204, which provides for appellate review of the terms and conditions of bond, also authorize appellate review of a court's decision to deny bail?

FACTS AND PROCEDURAL HISTORY

The defendant is charged with Murder in the First Degree, C.R.S. § 18-3-102 (1)(a), in connection with the murder of Ryan Dillard on October 20, 2021. *Appendix A*; TR 10/10/22 p. 64:21-22. According to testimony and evidence presented at the preliminary hearing, the defendant, along with multiple associates, orchestrated the murder of Mr. Dillard in connection with an ongoing wage theft scheme involving thousands of dollars. TR 10/10/22, pp. 223:24-226:5; 238:14-25.[1] On

[1] The defendant is also charged with violating the Colorado Organized

October 10, 2022, the district court found probable cause as to all counts against the defendant including, as relevant here, Murder in the First Degree. TR 10/10/22, p.254:21-23.

The defendant argued that Colorado's repeal of the death penalty in 2020 meant that the defendant could not be exposed to capital punishment and, accordingly, he was entitled to bail. TR 10/10/22, p.256:7-15. Two days later, after further briefing, the trial court addressed the defendant's argument in support of setting bail. Relying principally on this Court's pronouncements in *People v. Blagg*, 340 P.3d 1137 (Colo.2015) and cases cited therein, the district court found that, notwithstanding the repeal of the death penalty in Colorado, Murder in the First Degree remained a capital offense, at least for purposes of bail eligibility. TR 10/12/22 pp.4:3-5:16; *Appendix B*. The district court further found that proof was evident and presumption great that the defendant committed Murder in the First Degree and denied bail accordingly. TR 10/12/22 p.11:14-19.

Crime Control Act, C.R.S. § 18-17-104(3) and felony theft for his involvement in the wage theft scheme. TR 10/10/22, p.226:4-5.

The defendant petitioned for review of the district court's decision pursuant to C.R.S. § 16-4-204, which was denied by a division of the Court of Appeals. *See People v. Smith*, 22CA2062; *Appendix C*. The defendant then filed his petition in this matter pursuant to C.A.R. 21. On January 6, 2023, this Court issued a rule to show cause why the district court did not err in denying bail.

SUMMARY OF THE ARGUMENT

The Colorado Constitution and its statutory counterpart provides that bail is not available to those accused of a capital offense where proof is evident and presumption great. Colo. Const. Art. II, § 19; C.R.S. § 16-4-101. Interpretation of the phrase "capital offense" has historically fallen into two camps. The "penalty theory" characterizes a capital offense as one for which the death penalty may be imposed. The "classification theory," by contrast, posits that some crimes are of sufficient severity that they may be designated "capital offenses," even if the death penalty may not be imposed under a given set of circumstances. For over fifty years, this Court has consistently applied the latter classification theory, holding that Murder in the First Degree

constitutes a "capital offense" regardless of whether the death penalty may be imposed. This interpretation has endured on multiple occasions and in different contexts, even where imposition of the death penalty was unequivocally impossible.

The defendant's argument impliedly asks this Court to abandon over half a century of established jurisprudence and instead adopt the penalty theory of capital offenses. In support thereof, the defendant relies almost exclusively on another jurisdiction's adoption of the penalty theory in a single case—a case which has yet to find approval or express adoption elsewhere.

Principles of stare decisis compel adherence to this Court's previous precedents, however. The defendant does not contend that Colorado's adoption of the classification theory was originally erroneous. Furthermore, the legislature's repeal of the death penalty does not constitute a change in circumstance justifying departure from previous rulings, since this Court's adherence to the classification theory has survived irrespective of Colorado's ability or inability to impose the death penalty at any given moment in history.

Even if this Court were to consider the repeal of the death penalty to be a sufficient change in circumstance, more harm than good will come from departing from this Court's established precedent, and the defendant does not address how the collateral consequences of his argument should be resolved. The implications of authorizing bail for those accused of the most severe crime in this state are of sufficient gravity and public concern that any proposed changes are best addressed by the legislature through constitutional and statutory amendment, not through judicial decree. The defendant urges that adoption of the penalty theory is a necessary corollary to the legislature's repeal of the death penalty. However, this Court should not assume the legislature intended such a result—if the legislature intended such a change, it could have amended C.R.S. § 16-4-101 or proposed to amend our Constitution, along with several other statutes in SB20-100, but it did not. The defendant's argument would further require the Court to interpret our Constitution in such a manner as to render parts of it meaningless, violating established principles of constitutional interpretation.

In short, as this Court has recently observed, "if it is not necessary to decide more, it is necessary not to decide more." *Hogsett v. Neale*, 478 P.3d 713, 729 (Colo.2021) (Boatright, CJ, concurring in the judgment) *quoting PDK Lab'ys Inc. v. U.S. Drug Enf't Admin.*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J. concurring part and concurring in the judgment). This Court has treated Murder in the First Degree as a capital offense for over half a century—that the General Assembly saw fit to repeal the death penalty in 2020 does not abrogate the Court's precedents. The collateral consequences of that decision should similarly be resolved by the General Assembly and at the ballot box. To resolve that question here would require this Court to dispense with over half a century of established precedent, ignore principles of constitutional interpretation, and do more harm than good.

To the extent this Court feels it necessary to define the scope of review authorized by C.R.S. § 16-4-204, the statute expressly limits itself to review of orders entered pursuant to C.R.S. §§ 16-4-104, 16-4-109 and 16-4-201. These sections, in turn, deal exclusively with the

terms and conditions of bond imposed by a court in a given case, *not* the predicate question of whether a defendant is entitled to bond in the first place. That predicate question is governed by C.R.S. § 16-4-101 and Colo. Const. Art. II, § 19. Because C.R.S. § 16-4-204 expressly limits itself to review of bond *conditions*, it does not authorize review of whether a defendant is entitled to bail in the first place. This Court's rule to show cause should accordingly be discharged.

ARGUMENT

I. STARE DECISIS REQUIRES ADHERENCE TO THIS COURT'S PRECEDENTS

A. STANDARD OF REVIEW

The People agree that, while the setting of bail is generally reviewed for an abuse of discretion, the issue raised by the defendant is reviewed de novo in this context. *Blagg*, 340 P.3d 1137, 1140 (Colo.2015); *People v. Baez-Lopez*, 322 P.3d 924, 927 (Colo.2014).

B. CAPITAL OFFENSE JURISPRUDENCE IN COLORADO

The term "capital offense" has never been defined by the Colorado legislature or this Court. However, this Court has applied the phrase in a consistent manner for over fifty years. Colorado's interpretation of

the phrase "capital offense" began in *Corbett v. Patterson,* 272 F.Supp. 602 (D. Colo. 1967).[2] At that time, C.R.S. § 42-2-3 (1953) prohibited the imposition of the death penalty in cases based solely on circumstantial evidence. The defendant argued that "once the prosecution conceded that they probably did not have the direct evidence necessary to seek the death penalty, then at that point petitioner ceased to be charged with a 'capital' offense and was entitled to bail as a matter of right." *Id.* at 608.

Patterson, however, rejected the notion that the unavailability of the death penalty meant the offense was no longer "capital" within the meaning of Art. II, § 19 of the Colorado Constitution. As the United States Federal Court for the District of Colorado noted, "[t]raditionally,

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[2] As amicus for the defendant points out, *In re Losasso* 24 P. 1080 (Colo.1890) indeed considered the issue of bail for a capital offense (Murder in the First Degree). However, *Losasso* only resolved the question of whether an indictment was sufficient to deny bail or whether a further hearing was required to determine whether proof was evident and presumption great. *Losasso* resolved a split among courts in this state and established the necessity of what is now known as a "proof evident hearing" before considering whether bail may be denied. *Id.* at 1083. This Court has never relied on *Losasso* for anything more than this limited principle, which is not at issue in this case. *See People v. Dist. Ct. In & For Adams Cnty.,* 529 P.2d 1335, 1336 (1974).

there are offenses of a nature as to which a state properly may refuse to make provision for a right to bail. Certainly, first-degree murder…is such an offense." *Id.* at 607. In rejecting the defendant's argument, the court stated further, "[t]he offense with which he was charged was still a capital one, even if it should later develop that the type of evidence adduced did not support a verdict imposing the death penalty." *Id.*

Nearly five years later, the United States Supreme Court held the imposition of the death penalty unconstitutional in *Furman v. Georgia*, 408 U.S. 238 (1972), effectively prohibiting the imposition of the death penalty in the United States. Immediately thereafter, this Court was asked to address the same fundamental question that the defendant raises in his petition now—whether the unavailability of the death penalty confers a right to bail upon a defendant charged with Murder in the First Degree. In *People ex rel. Dunbar v. District Court of Eighteenth Judicial Dist.,* 500 P.2d 358 (Colo.1972), this Court ruled that the unavailability of the death penalty had no effect on the capital nature of a crime for purposes of bail when it unequivocally stated,

"Our Constitution has defined a class of crimes which permit the denial of bail. Murder is within that class of crimes." 500 P.2d at 359.

In the fifty years since *Dunbar,* this Court has not strayed from its adherence to the classification theory, even as diverging philosophies on the issue further crystalized. *See People v. Haines,* 549 P.2d 786, 790 (Colo.App.1976), overruled on other grounds by *People v. Deason*, 670 P.2d 792 (Colo.1983) (describing difference between classification and penalty theories).

Nevertheless, seven years later, this Court reaffirmed its adherence to the classification theory in *Tribe v. District Court In and For Larimer County*, 593 P.2d 1369 (Colo. 1979). In *Tribe*, the defendant argued that because the death penalty could not have been imposed for Murder in the First Degree in his case,[3] he was not charged with a "capital offense" and that jury sequestration was not

[3] The death penalty was unavailable in *Tribe* due to this Court's ruling in *People v. District Court*, 586 P.2d 31 (Colo.1978). That case held that the General Assembly's attempt to codify a post-*Furman* death penalty statute, C.R.S. § 16-11-103 (1976 Supp.) was unconstitutional in light of subsequent United States Supreme Court decisions clarifying *Furman*.

mandatory under a former version of Colo. R. Crim.P. 24(f). *Id.* at 1370.

Again, this Court disagreed that the unavailability of the death penalty had the "butterfly effect"[4] of rendering Murder in the First Degree a non-capital offense. Citing *Dunbar*, this Court reaffirmed that it had "adopted the 'classification' theory when dealing with the question of what constitutes a capital offense with respect to bail" and that "murder remained a capital offense despite the unconstitutionality of the death penalty…" 593 P.2d at 1370. Accordingly, this Court ruled that Crim. P. 24(f) required jury sequestration in First-Degree Murder cases, even where the death penalty was not at issue. [5]

In its decision, this Court also approved of the court of appeals' decision in *Haines*, which reasoned that, in accordance with the

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[4] *See* Petition for Rule to Show Cause, p. 19.

[5] Amicus asserts that *Tribe* and *Dunbar* did not change the "meaning" of the term capital offenses. *Brief of Amici Curiae*, p. 10. This assertion misses the more fundamental point—that the ultimate outcome in both *Tribe* and *Dunbar* was to deny bail in a murder case even where the death penalty could not be imposed. Had this Court adopted the penalty theory advocated by amicus and the defendant, the result in those cases would have been different.

classification theory, a defendant charged with Murder in the First Degree was entitled to the fifteen peremptory challenges afforded in capital cases, "even though the death penalty could not at that time be constitutionally exacted in this state." *Id.* at 1371.[6]

Most recently, this Court has reaffirmed its adherence to the classification theory in *Blagg*, stating unambiguously that "First degree murder is a capital offense, even in a case where the death penalty is not at issue." 340 P.3d at 1140.

In short, although class 1 felonies are no longer punishable by the death penalty in Colorado, the fact remains that this Court has, for the past half-century, uniformly held that the *particular* class 1 felony for which the defendant is charged here (Murder in the First Degree)

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[6] The distinction mentioned in *Tribe* between *Haines* and *People v. Hines*, 572 P.2d 467 (Colo.1977) cannot be explained by the mere unavailability of the death penalty as amicus for the defendant suggests, *see Brief of Amici Curiae*, p. 10, since the death penalty could not be imposed in either case (the former for reasons of judicial decree, the latter due to legislative declaration). Rather, *Haines* involved a defendant charged with murder, which historically had been classified as "capital" by this Court. 593 P.2d at 1371 citing *Dunbar*, 500 P.2d at 359. *Hines,* by contrast, involved a defendant charged with kidnapping, which has not historically been treated as a "capital" offense by this Court, despite being a class 1 felony.

constitutes a capital offense, regardless of the availability of the death penalty. Indeed, in *Tribe* and *Dunbar*, this Court specifically affirmed Murder in the First Degree as a "capital offense" *despite* the impossibility of imposing the death penalty in both cases. *See Tribe*, 593 P.2d at 1370; *Dunbar, supra*.

C. PRINCIPLES OF STARE DECISIS

"Under the judge-made doctrine of 'stare decisis,' a Latin term meaning 'to stand by things decided,' courts are required to 'follow earlier judicial decisions when the same points arise again in litigation.'" *People v. Kembel*, 2023 CO 5 ¶ 43, quoting *Stare Decisis*, Black's Law Dictionary (11th ed. 2019). This principle is rooted in the idea of judicial restraint and "promotes uniformity, certainty, and stability of the law. It requires a court to follow the rule of law it has established in earlier cases unless 'sound reasons exist.'" *People v. LaRosa*, 293 P.3d 567, 574 (Colo.2013) (citations omitted) quoting *People v. Blehm*, 983 P.2d 779, 789 (Colo.1999). Although the doctrine is not an "immutable law or inexorable command," *People v. Novotny*, 320 P.3d 1194, 1202 (Colo.2014), it is nevertheless a principle held in

the highest regard, and its application is "most compelling" in cases of statutory and constitutional construction, as is the case here. *See Hilton v. S.C. Pub. Railways Comm'n*, 502 U.S. 197, 198 (1991) ("The issue in this case...is a pure question of statutory construction, where the stare decisis doctrine is most compelling."); *see also Garnet Ditch & Reservoir Co. v. Sampson*, 110 P. 1136, 1138 (Colo.1910) (Campbell, J. dissenting) ("stare decisis is a salutary principle not to be lightly disregarded.").

For this reason, "[u]nder the doctrine of stare decisis courts are very reluctant to undo settled law." *Creacy v. Indus. Comm'n*, 366 P.2d 384, 386 (Colo.1961). Thus, this Court has only departed from the principle "[w]here we are convinced that the precedent was originally erroneous or is no longer sound given changed conditions, and more good than harm will come from departing from it…" *People v. Porter*, 348 P.3d 922, 927 (Colo.2015).

D. THIS COURT'S PRECEDENT WAS NOT ORIGINALLY ERRONEOUS AND CONDITIONS HAVE NOT SUBSTANTIVELY CHANGED

The defendant does not assert that *Dunbar*, *Tribe,* or any of the

cases affirming this Court's adoption of the classification theory were incorrectly decided. Indeed, this Court has never suggested as much, so far as the People are aware. Thus, the only remaining circumstance in which this Court may depart from its prior decisions is where circumstances have significantly changed, and this Court is clearly convinced that more good than harm will come from doing so. *Porter*, 348 P.3d at 927.

Although the defendant does not address stare decisis and therefore does not couch his argument in these terms, his petition may reasonably be read to imply that the passage of SB20-100 and repeal of the death penalty represents that change in circumstance. *Petition,* pp. 19, 22. True, the repeal of the death penalty represents a substantial change in criminal law in this state. However, as a practical matter, the result is simply that the death penalty is not available as a punishment. Thus, the current situation is fundamentally no different than those periods in this state's history over the last fifty-plus years where the death penalty was likewise unavailable, albeit due to judicial (rather than legislative) action. *See*

Furman supra; District Court 586 P.2d 31. Nevertheless, this Court's treatment of Murder in the First Degree as a capital offense endured then, as it must now.

Ultimately, the death penalty was entirely foreclosed in *Dunbar*, *Tribe*, and other cases cited *supra*, and yet this Court continued to define Murder in the First Degree as a capital offense for purposes of Article II, § 19 and C.R.S. § 16-4-101. The defendant is in the same substantive position here—he is accused of Murder in the First Degree, and the death penalty may not be imposed. It cannot be said that the differing reasons for which the death penalty may not be imposed are germane to the analysis, as the end result—the unavailability of the death penalty—is the same. It is a distinction without a meaningful difference in this context.[7] Furthermore, the defendant does not

[7] The dicta in *People v. Reynolds*, 159 P.3d 684 (Colo.App.2006) suffers from the same fallacy. 159 P.3d at 688 (defining "capital case to mean a case in which a sentence of death is potentially available under the statutes applicable to the offense, regardless of the constitutional availability of the death penalty."). The division did not address why the mere existence of an unenforceable legislative declaration provided a meaningful distinction. In any event, this Court is not bound by a statement of dicta made by a lower court, particularly where the division engaged in no substantive analysis of the issue.

address why this Court should depart from its historical precedents in this situation. Thus, principles of stare decisis dictate that the result should be consistent with this Court's prior pronouncements, and the rule to show cause should be discharged.

i. THE NATURE AND CIRCUMSTANCES OF THIS CASE COUNSEL AGAINST ABANDONING PRECEDENT

Even if this Court were to determine that the repeal of the death penalty represented a substantial change in circumstance sufficient to overcome the preference for stare decisis, the Court must still consider whether more good than harm will come from departing therefrom. *See Love v. Klosky,* 413 P.3d 1267, 1273-1274 (Colo.2018). Considering the surrounding facts and circumstances, more harm than good will result if this court overturns its precedents here.

To be sure, considerations of bail are a fundamental component to our system of justice. U.S. Const. Amend. VIII; Colo. Const. Art II, § 19. However, as this Court has previously stated:

> "'[w]hile it is inherent in our American concept of liberty that a right to bail shall generally exist, this has never been held to mean that a state must make every criminal offense subject to such a right or that the right provided as to offenses

> made subject to bail must be so administered that every accused will always be able to secure his liberty pending trial. Traditionally and acceptedly, there are offenses of a nature as to which a state properly may refuse to make provision for a right to bail.'"

Dist. Ct. In & For Adams Cnty., 529 P.2d at 1336 quoting *Mastrian v. Hedman*, 326 F.2d 708, 710 (8th Cir. 1964). Thus, although our Constitution may fairly be said to confer a general right to bail in most cases, this right is not absolute and has historically depended, at least in part, on the nature and severity of the offense. *Patterson*, 272 F. Supp. at 607 ("It is definitely beyond cavil that the right to bail is not absolute."). The defendant does not describe why more good than harm will come from his implicit request that this Court abandon its prior precedents. By contrast, several unresolved questions arise if this Court abandons its precedent here.

First, the act of setting bail necessarily carries the possibility that the accused will fail to appear to answer the charge. This is of particular concern where the charges involve a violent crime, and the accused is facing life in prison. The People have a compelling interest in ensuring that those accused of the most severe crime in our state be

held to account for the same in an expeditious manner, a purpose which may legitimately be frustrated by granting bail in this circumstance.

Second, to abandon the classification theory at this time calls into question the continued validity of procedural protections afforded in cases of Murder in the First Degree. For example, abandonment of the classification theory here begs the question of whether a defendant may be admitted to bail *after* conviction for Murder in the First Degree. *See* C.R.S. § 16-4-201 (1)(a) (bail after conviction not permitted for "capital offenses"). Elsewhere, this Court has explicitly defined "capital offense" as any class 1 felony in the context of jurors and peremptory challenges. Colo. R. Crim. P. 24(d)(1). If this Court were to adopt the penalty theory as the defendant suggests, its definition of "capital offense" in Crim. P. 24 would arguably no longer be tenable, calling into question the continued validity of the rule.

Third, the questions raised by the enactment of SB20-100 are of such consequence that they are best left to the legislature to answer. Questions of bail necessarily involve assessment of the risks to

community safety implicated in the release of an individual accused of a crime. C.R.S. 16-4-103(3)(a); In cases of Murder in the First Degree specifically, that assessment is further informed by considerations attendant to a hearing where a court evaluates whether proof is evident and presumption great that the defendant committed the crime. In other words, the question of whether to deny bail is (properly) determined after further inquiry into the nature of the conduct and the relative strength of the evidence against the defendant.

Adopting the defendant's position at this time and in this fashion would immediately afford bail to the hundreds of other defendants awaiting adjudication on charges of Murder in the First Degree in Colorado. There exists a real and substantial risk to the community that those accused of the most severe of violent crimes may fail to appear for court—or worse, re-offend after posting bail. The community safety risk implicated by adoption of the defendant's position at this time is simply too great to be considered by any means other than the voice of that same community.

The legislature apparently understood that collateral issues may arise from the repeal of the death penalty when it undertook to amend not just C.R.S. § 18-3-102, but several other related statutes as well in SB20-100. C.R.S. § 16-4-101 was *not* among those amended statutes, however, as amicus for the defendant notes. *Brief of Amici Curiae*, p. 15. "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992). "And where, as here, there is no express intent to repeal or abrogate existing law…we do not presume that the legislature meant to do so. Actually, in such a situation, we presume that the legislature 'accepted and ratified [our] prior judicial construction[.]'" *Sullivan v. People*, 465 P.3d 25, 29–30 (Colo.2020) (citations omitted). Thus, it may not be inferred that the legislature intended to confer a right to bail upon those accused of Murder in the First Degree by the passage of SB20-100, and this Court should not abandon its precedent on such an assumption.

The matter is of such serious import that this Court should not substitute its own resolution of an arguable issue for the express will of

the People which may be more readily ascertained through constitutional amendment.[8] As this Court has previously said, "A court can often resolve a dispute, but so too can the legislature, and safeguarding each institution's integrity requires the judiciary to refrain from answering those questions better addressed by another branch of government."[9] *City of Arvada ex rel. Arvada Police Dep't v. Denver Health & Hosp. Auth.*, 403 P.3d 609, 613 (Colo.2017), As Justice Powell observed in *Davis v. Passman*, 442 U.S. 228 (1979), "Among those policies that a court certainly should consider in deciding whether to imply a constitutional right of action is that of comity toward an equal and coordinate branch of government." 442 U.S. at 253 (Powell, J. dissenting). Furthermore, this Court need not engage in a

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[8] The States of Nevada, for example, has followed this course, amending their state constitution to deny bail for those accused of murders punishable by life imprisonment. *See* N.R.S. Const. Art. 1, § 7 (amended 1980). Colorado similarly amended its constitution to expand pre-trial detention without bail in 1995, and nothing prevents further amendment in light of SB20-100.

[9] Indeed, the separation of powers doctrine exists to caution judicial bodies against becoming "so preoccupied with whether or not they *could* that they [don't] stop to think if they *should*." *See Jurassic Park* (Universal Pictures, 1993).

constitutional interpretation of the phrase "capital offense" where stare decisis settles the matter, and thus the matter may properly be left to the General Assembly to amend the constitution if and as it sees fit. *Cf. Markwell v. Cooke*, 482 P.3d 422, 428 (Colo.2021) (citation omitted) quoting *People ex rel. Tate v. Prevost*, 134 P. 123, 133 (Colo.1913) (issue of constitutional interpretation is within "the province of the judiciary.").

The better forum in which to resolve the issues raised by the defendant is the halls of the General Assembly and the ballot box. The People of the State of Colorado, through their duly elected representatives, saw fit to repeal the death penalty in 2020. Where repeal of the death penalty has been achieved through legislative action, the associated question of whether those accused of Murder in the First Degree ought to receive a corresponding right to bail should be resolved in the same manner.

Ultimately, in order to justify departure from this Court's precedents, it must be "clearly convinced" that more good than harm will result. *Klosky*, 413 P.3d at 1270. The defendant does not address

whether or why this is the case, and several concerns arise if this Court were to abandon its precedent. Even assuming the repeal of the death penalty constitutes a sufficient change in circumstance, it is not clear that more good than harm will result by adoption of the defendant's position, and so this Court should adhere to its prior precedents by discharging the rule to show cause.

E. THERE IS NO COMPELLING REASON TO ADOPT THE RATIONALE OF *STATE V. AMEER*

The principal support for the defendant's position derives almost exclusively from the New Mexico Supreme Court's adoption of the penalty theory in *State v. Ameer*, 458 P.3d 390 (N.M. 2018). However, several considerations limit the applicability of *Ameer* to the issue before this Court such that there is no compelling reason to adopt *Ameer*'s analysis.

First, and most obviously, *Ameer* represents the opinion of another jurisdiction. Opinions of other jurisdictions *may* carry persuasive authority, but this authority is not binding. *People v. Weiss*, 133 P.3d 1180, 1187 (Colo.2006). The People are unaware of any other jurisdiction expressly adopting (or even approving) *Ameer*'s

precedent. Thus, the defendant effectively asks this Court to adopt the rationale of another state where no other jurisdiction appears to have done so, and to summarily dispose of fifty years of jurisprudence for good measure. However, as Justice Coats observed, "While the choice of other jurisdictions may be some cause for the appropriate branch of this state's government to carefully examine the wisdom of its public policy, it most certainly is not a ground, in itself, for overturning our own established precedent." *Friedland v. Travelers Indem. Co.*, 105 P.3d 639, 652 (Colo.2005) (Coats, J. dissenting).

Second, whatever criticisms the New Mexico Supreme Court may have levied against the classification theory, *Ameer* itself noted that New Mexico never adopted the theory in response to issues of bail in capital cases. 458 P.3d at 403. Colorado expressly did so, however. *Ameer* understandably does not address the impact of stare decisis because the New Mexico Supreme Court had no need to consider it in reaching its conclusion. In other words, the *Ameer* court was not confronted with a request to dispense with decades of settled jurisprudence, and there is no way to know to what extent that would

have affected the rationale in *Ameer*.

Third, the *Ameer* court's criticism of the classification theory rested heavily on the idea that cases approving the classification theory "dealt only with the consequences of judicial determinations that capital punishment statutes could not be enforced, not with legislative abolition of capital punishment for an offense." 458 P.3d at 403. The New Mexico Supreme Court did not, however, explain why this was a germane distinction. *See supra*, p. 16. *Ameer*'s overview of Colorado's history focused on the actions of the General Assembly post-*Furman*, noting that it never moved to expressly classify murder as a capital offense in support of its contention that a legislature cannot define a constitutional term. 458 P.3d at 397. The present case, however, does not concern any legislative attempt to define "capital offense"—indeed, the legislature has never *attempted* to do so, as far as the People are aware. Rather, this issue deals with this Court's historical treatment of the phrase in a *judicial* context, which *Ameer* does not address. As mentioned previously, this Court has consistently held that Murder in the First Degree is a capital offense for purposes of bail, even in

situations where the death penalty could not be imposed. No principled reason exists for the analysis to change because the unavailability of the death penalty comes as the result of legislation instead of judicial determination.

In short, the defendant relies almost entirely on the authority of another jurisdiction which does not have the established precedent of this state, does not address the arguments the People advance here, and whose rationale has yet to be explicitly approved (much less adopted) elsewhere. There is simply "no compelling reason to overturn more than fifty years of precedent" in this case. *See Warne v. Hall*, 373 P.3d 588, 601 (Colo.2016) (Gabriel, J. dissenting).

F. THE DEFENDANT'S PROPOSAL VIOLATES PRINCIPLES OF CONSTITUTIONAL INTERPRETATION

In addition to disposing of half a century of established guidance, the defendant's argument requires this Court to disregard recognized principles of statutory and constitutional interpretation. "In giving effect to a constitutional provision, we employ the same set of construction rules applicable to statutes[.]" *Danielson v. Dennis*, 139 P.3d 688, 691 (Colo.2006). "In construing a statute, we strive to give

effect to the intent of the legislature and adopt the construction that best carries out the provisions and purposes of the act." *Huber v. Colorado Mining Ass'n*, 264 P.3d 884, 889 (Colo.2011). This must be achieved by "[giving] meaning to all portions of the statute, and [avoiding] a construction rendering any language meaningless." *Well Augmentation Subdistrict of Cent. Colorado Water Conservancy Dist. v. City of Aurora*, 221 P.3d 399, 420 (Colo.2009). With respect to constitutional provisions specifically, this Court's obligation is to "prevent an evasion of [the constitution's] legitimate operation" and to effectuate "the intentions of the framers of our constitution and the people of the State of Colorado." *Markwell* 482 P.3d at 429 quoting *Colorado Common Cause v. Bledsoe*, 810 P.2d 201, 206-207 (Colo.1991).

The defendant's position implies (if not outright concludes) that the passage of SB20-100 entirely moots the provisions of Article 2, § 19 and C.R.S. § 16-4-101. The necessary inference is that wherever the term "capital offense" appears in our laws, it no longer applies because the death penalty may no longer be imposed because capital offenses no longer exist.

This Court's directives are clear. "Courts should attempt to give effect to all parts of a statute, and constructions that would render meaningless a part of the statute should be avoided." *People v. Terry*, 791 P.2d 374, 376 (Colo. 1990). In other words, although the legislature has abolished the imposition of the death penalty, this Court should nevertheless strive to interpret the capital offense portions of Article 2, § 19 and C.R.S. § 16-4-101 in a manner that gives them effect. The defendant's rationale, however, renders entire sections of Article 2, § 19 and C.R.S. § 16-4-101 meaningless, stripping them of any operative effect and reducing them to mere historical relics. Such interpretations are expressly disfavored and must be avoided. *Huber,* 264 P.3d at 889.

The classification theory affirmed by this Court in the past, however, comports with principles of statutory and constitutional interpretation. By continuing to classify Murder in the First Degree as a "capital offense" for purposes of bail, this Court gives operative effect to the language of Article 2, § 19 and C.R.S. § 16-4-101. Thus, when presented with these two alternative interpretations, this Court should

adopt the interpretation that gives meaning to all parts of the statute and constitutional provision, especially where to do so would also adhere to this Court's prior decisions. *See Chavez v. People*, 359 P.3d 1040, 1044 (Colo.2015) (avoiding interpretation of C.R.S. § 18-1.3-1004 which would "drain 18-3-405.4(4) of all meaning and nullify…other substantive sex offenses.").

The defendant nevertheless argues that to continue to deny bail in cases where the death penalty may not be imposed amounts to a de facto constitutional amendment, which this Court may not implement. *Petition* p. 23. The defendant focuses primarily on the fact that Article II § 19 and C.R.S. § 16-4-101 specifically uses the term "capital offense" rather than specifying crimes such as "murder" or a classification of offenses. In making this argument, however, the defendant wholly ignores that this Court and lower courts consistently *have* treated Murder in the First Degree as a "capital offense" for over half a century. *See, e.g.*, *Blagg,* 340 P.3d at 1140; *District Court*, 529 P.2d at 1336; *Tribe*, 593 P.2d at 1370; *Dunbar*, 500 P.2d at 359; *Haines*, 549 P.2d at 790.

Moreover, Court's obligation with respect to constitutional provisions requires it to interpret them in a way that gives effect to the intent of the framers at the time our Constitution was enacted. *Markwell* 482 P.3d at 429. Here, this obligation is best discharged by adhering to this Court's prior precedent and discharging the rule to show cause.

When Colorado enacted its Constitution in 1876, murder was punishable by death—in fact, Colorado has never executed an individual for a crime *other* than murder. *See* Michael L. Radelet, The History of the Death Penalty in Colorado, p. 7-8 (2017); *see also Losasso*, *supra*. Thus, while not expressly stated, the intent of the General Assembly in denying bail to those accused of "capital offenses" in Article II, § 19 necessarily encompassed denial of bond to those accused of murder. The continued denial of bail for those accused of Murder in the First Degree therefore does not constitute a judicial amendment of our Constitution—rather, it gives effect to the intent of those who drafted the amendment originally. *Markwell*, 482 P.3d at 429.

In sum, the gravamen of the defendant's argument asks this Court to adopt the penalty theory of capital punishment when it has held otherwise since first confronting the issue. In doing so, the defendant implicitly asks this Court to turn its back on over half a century of established jurisprudence in favor of the pronouncements of another jurisdiction—pronouncements which have yet to find express affirmation or adoption elsewhere.

The offense for which the defendant was denied bail in this case (Murder in the First Degree) has consistently been treated as a capital offense by this Court for purposes of bail for over fifty years. This treatment has steadfastly endured even during those periods in which imposition of the death penalty was a legal impossibility. The repeal of the death penalty as a punishment therefore does not demonstrate a change in circumstance sufficient to justify departing from stare decisis.

Even if it did, the defendant does not address how more good than harm will come from ignoring such a fundamental judicial doctrine which exists to promote uniformity, predictability, and stability in our

laws. In addition, adoption of the defendant's position violates established principles of constitutional interpretation. In light of the foregoing, the district court properly denied bond to the defendant. The rule to show cause should be discharged.

II. C.R.S. § 16-4-204 DOES NOT CONFER JURISDICTION TO REVIEW THE DISTRICT COURT'S ORDER DENYING BOND

A. STANDARD OF REVIEW

Where the underlying relevant facts are not in dispute, as is the case here, "the determination of a court's subject matter jurisdiction presents a question of law which is reviewed de novo." *Tulips Invs., LLC v. State ex rel. Suthers*, 340 P.3d 1126, 1131 (Colo.2015). Similarly, legal questions turning on matters of statutory interpretation are reviewed by the same standard. *Baez-Lopez*, 322 P.3d at 927.

B. SCOPE OF C.R.S. § 16-4-204

As discussed *supra*, while bail is generally available in most circumstances, there are those situations in which bail may properly be denied. Thus, when addressing the issue of bond, the first inquiry is whether the accused is entitled to bond at all. Only when the accused

does not fall into one of the categories defined in Article. II, § 19 does a court move on to address the types and conditions of bond appropriate for a given case.

Subject to constitutional limitations, "matters concerning the types and conditions of both pretrial and post-conviction bail bonds…and the review of such settings or modifications" are governed by statute. *People v. Jones*, 346 P.3d 44, 47 (Colo. 2015). Indeed, C.R.S. § 16-4-204 provides the "exclusive method of appellate review" by which a defendant may seek review of the terms and conditions of pre-trial bond once set pursuant to C.R.S. §§ 16-4-104 and 16-4-109.[10] Those sections, in turn, outline the criteria by which bond is to be determined, the various types of bonds and conditions of release that a court may impose, and provide a mechanism for modifying bond before final adjudication of a charge.

"In interpreting a statute, we give words and phrases their plain and ordinary meaning, read them in context, and construe them

[10] The statute also provides for review of post-conviction bail subject to C.R.S. § 16-4-201, which is not pertinent to this case.

according to the rules of grammar and common usage…Statutes should be applied as written, and we do not add or subtract words." *People v. Brown*, 442 P.3d 428, 432 (Colo. 2019). "[I]n interpreting a statute, we must accept the General Assembly's choice of language and not add or imply words that simply are not there." *People v. Diaz*, 347 P.3d 621, 625 (Colo. 2015) (*quoting People v. Benavidez*, 222 P.3d 391, 394 (Colo.App.2009)). The reference to both statutes in C.R.S. § 16-4-204 is significant in determining the scope of review that the statute permits. The plain language of the statute does not provide for appellate review of the predicate question of whether a defendant is entitled to bond in the first instance. "If an order [setting bond] has been entered pursuant to section 16-4-104 [or] 16-4-109…the petition shall be the exclusive method of review." C.R.S. § 16-4-204(1).

By expressly limiting itself to statutes concerned with the type, conditions, and modifications of pre-trial bond, the legislature confined appellate review under C.R.S. § 16-4-204 to these matters alone, *not* the predicate question of whether bond was appropriately denied in the first place under C.R.S. § 16-4-101. *See Jones*, 346 P.3d at 47 (statute

provides for "early determination of the *type* of bond and *conditions* of release for all *bailable* defendants.") (emphasis added); *People v. Fallis*, 353 P.3d 934 (Colo.App.2015) ("this court does have jurisdiction to review *the conditions* of petitioner's bond.") (emphasis added). Simply put, if the legislature had intended to expand section 204 to permit review of the denial of bond, rather than just the terms and conditions of a bond, it could have included a reference to C.R.S. § 16-4-101 as well, but it did not. *See, e.g. In re People In Interest of A.C.*, 517 P.3d 1228, 1240 (Colo.2022) (declining to require certain competency procedures not found in juvenile competency statute); *People v. Cortes-Gonzalez*, 506 P.3d 835, 844 (Colo.2022) ("Had the legislature intended to make the statutory waiver discretionary, it presumably would have said so."); *Pueblo Bancorporation v. Lindoe, Inc.*, 63 P.3d 353, 362 (Colo.2003) ("We conclude that if the General Assembly intended a dissenter to receive the fair market value for his shares, it would have said so.").

C. THE STATUTE DOES NOT AUTHORIZE REVIEW OF THE DISTRICT COURT'S DECISION

Here, rather than entering an order defining the terms and

conditions of bond, the trial court determined that the defendant was not eligible to have bond set in the first instance upon finding that proof of a capital offense was evident, and presumption great. *Petition, Appendix B*. Therefore, the court did not—and could not—move on to setting terms and conditions of bond, which is a predicate requirement for review under C.R.S. § 16-4-204. Because no order setting bond was entered pursuant to the relevant statutes, appellate review of the lower court's decision is not available under C.R.S. § 16-4-204.

While this Court discussed its jurisdiction to review the setting of bond in *Jones*, that case did not answer the question presented here, to wit, whether C.R.S 16-4-204 is the appropriate avenue under which to consider the denial of bail in the first place. In *Jones*, the defendant was initially arrested and admitted to bail before the trial court revoked the bond upon a finding that the defendant had committed a felony while at liberty on bond. 346 P.3d at 46.

A division of the court of appeals initially determined it lacked jurisdiction to hear the matter because the trial court's revocation of bond was not entered pursuant to the statutes mentioned in C.R.S. §

16-4-204, but pursuant to a related statute, C.R.S. § 16-4-105(3). This Court took a broader view, however, determining that C.R.S. § 16-5-105(3) was sufficiently similar in nature and purpose to C.R.S. § 16-4-109 such that review of the trial court's order was reviewable under C.R.S. § 16-4-204. *Id.* at 51 ("Because the language of section 105(3) can be reasonably understood to describe one particular ground for effecting a change in bond conditions as authorized by section 109…an order premised on the evidentiary rule announced in section 105(3) is, at one and the same time, necessarily an order pursuant to section 109.").

However, *Jones* concerned an order modifying a bond for a defendant who was constitutionally eligible therefor, and the decision explicitly limits itself to the question of whether types and conditions of bond were appropriately reviewable for a defendant who was otherwise constitutionally entitled to bond. *See* 346 P.3d at 52 ("While the defendant in this case may be constitutionally entitled to pretrial bail bond, the district court's discretion to change any condition of his bond must be exercised in light of these purposes and the condition imposed

at section 16–4–105(3)[.]").

The present case is fundamentally different in that no order setting bond has been entered pursuant to statute. *Jones* did not address the matter at issue here—whether C.R.S. § 16-4-204 provided an avenue for appellate review of the denial of bond under C.R.S. § 16-4-101.

The plain language of C.R.S. § 16-4-204 limits appellate review of the types and conditions of bond set in a given case, not whether a defendant is entitled to bond in the first place. Thus, the statute does not confer jurisdiction on a reviewing court to review a lower court's denial of bail upon a finding that a defendant is not entitled to bail.

CONCLUSION

For the foregoing reasons and authority, the rule to show cause should be discharged, and the matter should be remanded back to the district court for further proceedings.

Respectfully submitted,

/s/ Todd Bluth
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Senior Deputy District Attorney

CERTIFICATE OF SERVICE

I certify that on this 24th day of February 2023, a true and correct copy of the foregoing Opening Brief was served via CO Courts E-Filing on all parties who appear of record and have entered their appearances herein according to CO Courts E-Filing.

/s/ Todd Bluth