ADVANCE SHEET HEADNOTE
June 20, 2023

2023 CO 40

No. 23SA2, *In re People v. Smith*—Constitutional Interpretation—Right to Bail—Capital Offenses Exception.

In this original proceeding pursuant to C.A.R. 21, the supreme court reviews a district court's order treating a criminal defendant's charge of first degree murder as a capital offense for purposes of article II, section 19(1)(a) of the Colorado Constitution ("section 19(1)(a)"), which authorizes a district court to deny bail if proof is evident and presumption is great that a capital offense has been committed.

Because (1) the term "capital offenses," as it appears in section 19(1)(a), plainly and unambiguously refers to offenses for which a statute authorizes the imposition of the death penalty; and (2) the General Assembly has statutorily abolished the death penalty as a punishment for offenses (like the one here) charged on or after July 1, 2020, *see* § 16-11-901, C.R.S. (2022), the court concludes

that the district court abused its discretion when it treated the charge of first degree murder as a capital offense and then denied the defendant's request for bail.

Accordingly, the court makes its rule to show cause absolute.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2023 CO 40

Supreme Court Case No. 23SA2
Original Proceeding Pursuant to C.A.R. 21
Adams County District Court Case No. 22CR1524
Honorable Robert W. Kiesnowski, Jr., Judge

In Re
Plaintiff:

The People of the State of Colorado,

v.

Defendant:

Jerrelle Aireine Smith.

Rule Made Absolute
en banc
June 20, 2023

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JUSTICE GABRIEL delivered the Opinion of the Court, in which **CHIEF JUSTICE BOATRIGHT**, **JUSTICE MÁRQUEZ**, **JUSTICE HOOD**, **JUSTICE HART**, **JUSTICE SAMOUR**, and **JUSTICE BERKENKOTTER** joined. **JUSTICE SAMOUR** specially concurred.

JUSTICE GABRIEL delivered the Opinion of the Court.

¶1 In this original proceeding pursuant to C.A.R. 21, we review the district court's order treating Jerrelle Aireine Smith's charge of first degree murder as a capital offense for purposes of article II, section 19(1)(a) of the Colorado Constitution ("section 19(1)(a)"), which authorizes a district court to deny bail if proof is evident and presumption is great that a capital offense has been committed.

¶2 Because (1) the term "capital offenses," as it appears in section 19(1)(a), plainly and unambiguously refers to offenses for which a statute authorizes the imposition of the death penalty; and (2) the General Assembly has statutorily abolished the death penalty as a punishment for offenses (like Smith's alleged offense here) charged on or after July 1, 2020, *see* § 16-11-901, C.R.S. (2022), we conclude that the district court abused its discretion when it treated Smith's charge of first degree murder as a capital offense and then denied Smith's request for bail. In light of this determination, we need not address the propriety of the court of appeals division's order dismissing Smith's appeal below.

¶3 Accordingly, we make our rule to show cause absolute.

I. Facts and Procedural History

¶4 In May 2022, the People charged Smith by complaint and information with one count of first degree murder, a class 1 felony, for an offense that he allegedly

committed in October 2021. Contemporaneously therewith, the People asked the district court to issue an arrest warrant, and, later that day, an Adams County district court magistrate did so, finding that (1) there was probable cause for the warrant, (2) the warrant was to issue with no bond until seen by a judge, and (3) Smith did not qualify for a 48-hour bond hearing. Ultimately, law enforcement arrested Smith on the warrant, and he has remained in custody without bail since his arrest.

¶5 Several months after Smith's arrest, the district court held a preliminary hearing, during which the People requested, among other things, that the court order Smith held without bail for the pendency of the case. Smith's counsel responded that Smith was entitled to bail notwithstanding section 19(1)(a) and its statutory analogue, section 16-4-101(1)(a), C.R.S. (2022), which provide, in pertinent part, that all persons shall be bailable by sufficient sureties except "[f]or capital offenses when proof is evident or presumption is great." Counsel reasoned that Smith is "not subject to the death penalty, which is the definition of a capital offense," and that "[c]apital offenses no longer exist in the state of Colorado, since the death penalty was repealed in March of 2020." Thus, counsel argued, Smith "should be entitled to have a bond set without even—with the Court not even getting to the fact that this case doesn't have proof evident or presumption great."

¶6 When asked to reply to Smith's argument, the People cited *People ex rel. Dunbar v. District Court*, 500 P.2d 358, 359 (Colo. 1972), in which this court stated, "Our Constitution has defined a class of crimes which permit the denial of bail. Murder is within that class of crimes." According to the People, that sentiment in *Dunbar* "was elaborated on in subsequent case law," which showed "that there is a classification theory as to what constitutes a capital offense." The People thus asserted, "Essentially first-degree murder is a capital offense based on classification, not based on penalty."

¶7 After further discussion among the district court and the parties regarding the pertinent case law, the district court took the issue under advisement, requesting that the court and the parties revisit the issue later in the week.

¶8 Two days later, the district court convened another hearing. At this hearing, the court observed that Smith's argument regarding the inapplicability of the capital offense exception following the abolition of the death penalty "not only ha[d] historical support but it ha[d] logical support too if you look at definitions." Nonetheless, the court opined that unless and until either this court or the court of appeals concluded otherwise, the district court was required to apply the classification theory, which the court characterized as the "minority rule." Accordingly, in the court's view, murder was still classified as a capital offense "notwithstanding that we don't have the death penalty."

¶9 Having thus construed first degree murder as a capital offense, the court proceeded to consider whether proof was evident or presumption was great. Finding that it was, the court denied Smith's request for bail.

¶10 Thereafter, Smith filed in the court of appeals a "Petition for Review of District Court's Denial of Bail Pursuant to C.R.S. § 16-4-204 [(2022)]." In support of this petition, Smith argued that the district court had abused its discretion and violated Smith's constitutional right to bail by refusing to set bail. Smith then proceeded to reiterate much of what he had argued before the district court, including that "[t]he Colorado General Assembly's 2020 repeal of the death penalty had the butterfly effect of rendering obsolete the 'capital offense' exception to the constitutional right to bail."

¶11 The People responded by arguing that section 16-4-204 did not confer on the court of appeals jurisdiction to review the district court's order denying bail because "[t]he 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." Alternatively, the People argued that even if the division had jurisdiction to review Smith's petition, Smith's substantive claim was contrary to this court's precedent, which the division was required to follow. The People thus requested that the division deny Smith's petition for review and remand the matter to the district court for further proceedings.

¶12 A little over a week later, the division issued a single-sentence order, stating, in full, "Upon consideration of the Petition for Review of District Court's Bail Decision Filed Pursuant to C.R.S. § 16-4-204, and the People's response, the Court DISMISSES the petition." The division provided no reasoning for its decision.

¶13 Smith then filed a C.A.R. 21 petition in this court, seeking immediate relief from both the district court's order refusing to set bail and the division's order dismissing his appeal. We issued a rule to show cause.

II. Analysis

¶14 We begin by discussing our jurisdiction to hear this matter pursuant to C.A.R. 21. Next, we set forth the applicable standard of review and principles of constitutional interpretation. We then proceed to review the meaning of "capital offenses," as used in section 19(1)(a) of our state constitution, and we apply that definition to the matter before us.

A. Original Jurisdiction

¶15 The exercise of this court's original jurisdiction under C.A.R. 21 is a matter entirely within our discretion. *People v. Jones*, 2015 CO 20, ¶ 6, 346 P.3d 44, 46. We have deemed it appropriate to exercise our jurisdiction under C.A.R. 21 to correct a district court's abuse of discretion or ruling in excess of its jurisdiction when no other adequate appellate remedy exists. *Id.* In particular, we have accepted jurisdiction under C.A.R. 21 to address a district court's ruling regarding a

criminal defendant's right to release pending trial because review of such a ruling "can generally serve a useful purpose only if it is permitted immediately, without awaiting a final judgment in the case." *Id.*

¶16 Here, the district court's order denying Smith's request for bail directly implicated Smith's right to release pending trial. Moreover, because the issue of pre-trial release will be moot after trial, *see People v. Velasquez*, 641 P.2d 943, 945 n.5 (Colo. 1982), and because the division below dismissed Smith's petition pursuant to section 16-4-204, Smith has no other adequate appellate remedy.

¶17 Accordingly, we deem it appropriate to exercise our discretion under C.A.R. 21 to hear this matter.

B. Standard of Review and Principles of Construction

¶18 We generally review a district court's bail determination for an abuse of discretion. *People v. Blagg*, 2015 CO 2, ¶ 11, 340 P.3d 1137, 1140. "A trial court abuses its discretion when its ruling is manifestly arbitrary, unreasonable, or unfair, or when it misapplies the law." *People v. Johnson*, 2021 CO 35, ¶ 16, 486 P.3d 1154, 1158 (citation omitted).

¶19 When, however, as here, the district court's bail determination hinges on the interpretation of a constitutional provision, we review that determination de novo. *See Kulmann v. Salazar*, 2022 CO 58, ¶ 15, 521 P.3d 649, 653 ("Constitutional and statutory interpretation present questions of law that we review de novo.").

¶20 In interpreting a constitutional provision, our goal is to prevent the evasion of the constitution's legitimate operation and to effectuate the intent of the framers of our constitution and of the people of this state. *Markwell v. Cooke*, 2021 CO 17, ¶ 33, 482 P.3d 422, 429. To do so, we start with the plain language of the provision, giving its terms their ordinary and popular meanings. *Id.* To discern such meanings, we may consult dictionary definitions. *Id.*

¶21 If the language of the provision is clear and unambiguous, then we must enforce it as written, and we need not turn to other tools of construction. *See Colo. Ethics Watch v. Senate Majority Fund, LLC*, 2012 CO 12, ¶ 20, 269 P.3d 1248, 1254. If, however, the provision's language is reasonably susceptible of multiple interpretations, then the provision is ambiguous, and we will construe it "in light of the objective sought to be achieved and the mischief to be avoided." *Id.* (quoting *Zaner v. City of Brighton*, 917 P.2d 280, 283 (Colo. 1996)).

C. The Capital Offenses Exception

¶22 Section 19(1)(a) provides, in pertinent part, "All persons shall be bailable by sufficient sureties pending disposition of charges except . . . [f]or capital offenses when proof is evident or presumption is great[.]" The question before us is whether this capital offenses exception to the constitutional right to bail continues to apply to offenses charged on or after July 1, 2020 that were punishable by death before that date, despite the fact that the General Assembly has since statutorily

abolished the death penalty for such offenses. *See* § 16-11-901. For several reasons, we conclude that it does not.

¶23 First and foremost, the phrase "capital offenses" plainly and unambiguously refers to offenses for which the General Assembly has statutorily authorized the imposition of the death penalty. As Smith contends, "capital" has long been understood to mean "punishable by death." *See State v. Ameer*, 458 P.3d 390, 392 (N.M. 2018) ("Since at least the late 1400s, the term 'capital' has meant '[a]ffecting, or involving loss of, the head or life,' or '[p]unishable by death.'") (alterations in original; quoting *Capital*, 2 Oxford English Dictionary (2d ed. 1989)); *see also Capital*, Black's Law Dictionary (11th ed. 2019) (defining "capital" as "[p]unishable by execution; involving the death penalty <a capital offense>"); Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/*capital* [https://perma.cc/6CZF-SKMC] (defining "capital" as "punishable by death" or "involving execution"). Thus, if the death penalty is not statutorily authorized for an offense, then, by definition, the offense is not a capital offense.

¶24 In light of the foregoing, most states across the country have concluded, in cases like the one before us, that an offense is a non-bailable capital offense "only if it may be punished by imposition of the death penalty." *Ameer*, 458 P.3d at 393–94 (collecting cases from state courts in Alaska, Arizona, Arkansas, Connecticut, Florida, Georgia, Idaho, Illinois, Kansas, Kentucky, Maine,

Maryland, Massachusetts, Minnesota, Missouri, Ohio, Pennsylvania, South Dakota, Tennessee, Texas, Wisconsin, and Wyoming); *see also Ex parte Dennis*, 334 So. 2d 369, 373 (Miss. 1976) (concluding that "the legislature had no authority to amend the constitution by redefining the term 'capital offenses,'" which the court had previously defined "as one which permitted the death penalty"); *State v. Konigsberg*, 164 A.2d 740, 742 (N.J. 1960) ("Now the courts are under a mandate to allow bail in all criminal cases, including capital offenses, i.e., *those for which the death penalty may be imposed*, excluding only those instances of capital offenses 'when the proof is evident or presumption great.'") (emphasis added; citation omitted), *modified and overruled on other grounds by State v. Engel*, 493 A.2d 1217, 1228 (N.J. 1985).

¶25 In line with this prevailing view, for more than a century, we have recognized that the purpose for denying pre-trial release for capital offenses is because of the greater temptation to avoid trial when the defendant's life is at stake. *See In re Losasso*, 24 P. 1080, 1082 (Colo. 1890) ("*When life is suspended in the balance*, the temptation to avoid trial is, in most instances, peculiarly great; and a release upon bail should not be permitted, unless the court feels clear that the constitutional exception does not apply.") (emphasis added); *see also People v. Spinuzzi*, 369 P.2d 427, 430 (Colo. 1962) ("The historical reason for denying bail in a capital case is because temptation for the defendant to leave the jurisdiction of

the court and thus avoid trial is particularly great in such case."), *overruled on other grounds by People v. Kirkland*, 483 P.2d 1349, 1350 (Colo. 1971).

¶26 Accordingly, the plain language of section 19(1)(a) indicates that the phrase "capital offenses" refers, as it always has, to offenses statutorily punishable by death.

¶27 Second, we can perceive no basis for concluding that the phrase "capital offenses," as it is used in section 19(1)(a), means the same thing as "first degree murder," as the People assert. To the contrary, the text of our constitution demonstrates that the constitutional framers recognized a distinction between the two phrases.

¶28 Specifically, as noted above, section 19(1)(a) establishes an absolute right to bail prior to trial except when a person is charged with a capital offense and "proof is evident or presumption is great." Colo. Const. art. II, § 19(1)(a). Article II, section 19(2.5)(a)(I) of the Colorado Constitution ("section 19(2.5)(a)(I)"), in turn, provides, in pertinent part, that the district court "may grant bail after a person is convicted, pending sentencing or appeal, only as provided by statute as enacted by the general assembly; except that no bail is allowed for persons convicted of . . . *[m]urder*." (Emphasis added.) The framers' use of the word "murder" in section 19(2.5)(a)(I) suggests to us that when the framers intended to say "murder," as opposed to "capital offenses," they knew how to do so.

¶29 Third, we deem it significant that other exceptions to the absolute right to bail codified in Colorado's Constitution, including those for certain noncapital crimes of violence, *see* Colo. Const. art II, § 19(1)(b)(I)–(III), were added to the constitution by way of a constitutional amendment, *see* H. Con. Res. No. 1001, sec. 1, 53d Gen. Assemb., 2d Sess., 1982 Colo. Sess. Laws 685, 685–86. As the New Mexico Supreme Court recently opined in *Ameer*, 458 P.3d at 396–97, if, as the People here assert, the legislature were free to create constitutional capital offenses simply by categorizing crimes not punishable by death as capital, then no such constitutional amendments would have been necessary.

¶30 Our legislature fully understood this. Thus, when it wished to extend the bail exceptions to crimes other than offenses that statutorily authorized the imposition of the death penalty, it submitted to the voters a constitutional amendment "adding to the historical capital offenses exception a list of other offenses for which bail could be denied." *Id.* at 398 (discussing Colorado's constitutional amendment). Like the court in *Ameer*, we view the legislature's decision to proceed in this way as reflecting the legislature's understanding of the limited and historic meaning of the capital offenses exception.

¶31 For these reasons, we conclude that the phrase "capital offenses," as it appears in section 19(1)(a), plainly and unambiguously refers to offenses for which the General Assembly has statutorily authorized the imposition of the death

penalty. As a result, the capital offenses exception does not apply to offenses for which the General Assembly has statutorily abolished the death penalty.

¶32 In so concluding, we are not persuaded by the People's contention that the General Assembly's decision not to amend section 16-4-101 in the wake of its abolition of the death penalty reflects a legislative determination that the capital offenses exception would continue to apply to all first degree murder charges despite the death penalty's abolition. The People base this argument on their view that a contrary interpretation would render the capital offenses exception meaningless or superfluous. But this is incorrect. As section 16-11-901 makes clear, the death penalty remains statutorily authorized for first degree murder offenses charged *prior* to July 1, 2020. Thus, although the death penalty no longer applies to offenses charged on or after July 1, 2020, it can apply to offenses charged before that date, and the unamended capital offenses exception in section 16-4-101(1)(a) is neither meaningless nor superfluous.

¶33 We are also unpersuaded by the People's argument that principles of stare decisis settle the matter before us today. "Stare decisis is a judge-made doctrine that requires courts to follow preexisting rules of law." *Love v. Klosky*, 2018 CO 20, ¶ 14, 413 P.3d 1267, 1270. Although courts are reluctant to undo settled law, they may still do so "where sound reasons exist to do so." *Id.* at ¶¶ 14–15, 413 P.3d at 1270. Accordingly, we will depart from our existing law when we are clearly

convinced that "(1) the rule was originally erroneous or is no longer sound because of changing conditions and (2) more good than harm will come from departing from precedent." *Id.* at ¶ 15, 413 P.3d at 1270. For several reasons, we reject the People's premise that principles of stare decisis are implicated here.

¶34 First, our prior precedent did not, in fact, adopt the far-reaching "classification theory" that the People posit. As the People note, we first referred to what the People call the "classification theory" in *Dunbar*, 500 P.2d at 359. There, the issue before us was whether the Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam), "deprive[d] Article II, Section 19 of the Colorado Constitution of vitality." *Dunbar*, 500 P.2d at 358–59. We concluded that it did not. *Id.* at 359.

¶35 In *Furman*, 408 U.S. at 239–40, the Supreme Court had concluded, in a per curiam opinion, that the carrying out of the death penalty in the cases there before the Court would constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. In *Dunbar*, 500 P.2d at 359, we struggled to determine the reach of *Furman*, ultimately concluding that that case precluded the imposition of the death penalty only under the circumstances existing in the cases there at issue. Given this limited view of *Furman*'s reach, we were unwilling to say that *Furman* rendered unconstitutional our capital offenses exception. *Id.*

¶36 In so concluding, our analysis was brief. We acknowledged, "Bail, as a matter of right, for all but the most heinous crimes, has been recognized in Colorado since our Constitution was adopted." *Id.* We then said, "Our Constitution has defined a class of crimes which permit the denial of bail. Murder is within that class of crimes." *Id.* In support of this proposition, we observed that the same rationale had been expressed by the California Supreme Court in *People v. Anderson*, 493 P.2d 880, 899 n.45 (Cal. 1972). But our reliance on *Anderson* was questionable at best.

¶37 As pertinent here, the court in *Anderson* had determined (in a footnote) that even though it had held earlier in its opinion that California's death penalty statutes were unconstitutional, "[t]he underlying gravity" of the offenses for which the death penalty could be imposed "endure[d] and the determination of their gravity for the purpose of bail continue[d] unaffected by [the court's] decision." *Id.* The court thus concluded, "*subject to [its] future consideration of this issue in an appropriate proceeding*," that offenses previously punishable by death "remain[ed] as offenses for which bail should be denied in conformity with [California's capital offenses bail exception] when the proof of guilt is evident or the presumption thereof great." *Id.* (emphasis added).

¶38 That court's "future consideration" did not take long. Shortly after *Anderson* was announced, California's legislature enacted a statute restoring capital

punishment for certain crimes. *See In re Boyle*, 520 P.2d 723, 725 (Cal. 1974). This, in turn, led the California Supreme Court to revisit *Anderson*. *Id.* In doing so, the court clarified, "Nothing [that the court had] said in footnote 45 [of *Anderson*] was intended to govern a situation in which the Legislature acts to declare a new and different class of 'capital offenses.'" *Id.* Because that was exactly what California's legislature had done, and because under the legislature's new classification, the petitioners in *Boyle* were "not charged with a crime which would have been a 'capital offense' under the new statute," the court concluded that petitioners were entitled to bail as a matter of right. *Id.* at 725–26. In short, the California Supreme Court itself appears to have recognized that whether a crime was a capital offense turned on whether the legislature had authorized the death penalty for such an offense, and because *Dunbar* principally relied on this authority, it should be read with that same limitation.

¶39 Second, and related to our first point, although we have cited *Dunbar* with approval even after the California Supreme Court clarified its decision in *Anderson*, *see, e.g.*, *Tribe v. Dist. Ct.*, 593 P.2d 1369, 1370–71 (Colo. 1979) ("We adhere to *Dunbar* . . . and the 'classification' theory adopted there[.]"); *see also Blagg*, ¶ 12, 340 P.3d at 1140 ("First degree murder is a capital offense, even in a case where the death penalty is not at issue.") (citing *Tribe*, 593 P.2d at 1370–71), the cases in which

we did so (and *Dunbar* itself) are readily distinguishable from the case before us today.

¶40 Specifically, in both *Dunbar*, 500 P.2d at 359, and *Tribe*, 593 P.2d at 1370, we considered the meaning of "capital offenses" following *judicial* invalidations of the death penalty. In each of those cases, although case precedent precluded the imposition of the death penalty, the death penalty was still statutorily authorized. Here, in contrast, we are tasked with interpreting the meaning of the phrase "capital offenses" following a *legislative* abolition of the death penalty, that is, a circumstance in which the death penalty is no longer statutorily authorized. This distinction is significant because no case, in either this court or in any other jurisdiction of which we are aware, "has held that a constitutional provision guaranteeing bail in all but 'capital offenses' will permit bail to be denied after a *legislative* abolition of capital punishment for an offense." *Ameer*, 458 P.3d at 395.

¶41 *Blagg*, too, is distinguishable. In *Blagg*, ¶¶ 1–2, 340 P.3d at 1139, we considered, among other things, whether the trial court had erred when it granted Blagg a new trial and then set bail at exactly what it had been prior to his first trial. We determined that a new trial "does not automatically entitle the defendant to restoration of the bond that existed at the time of the first trial" and, thus, our statutory framework required that Blagg, who was charged with first degree murder, be held without bail until he requested that the court set it. *Id.* at ¶¶ 15–16,

340 P.3d at 1141. At the time we decided *Blagg*, however, first degree murder was still an offense for which the death penalty could be imposed. In fact, capital punishment was neither judicially invalidated nor legislatively abolished. Accordingly, *Blagg* did not implicate any "classification theory" jurisprudence.

¶42 In sum, in reaching our determination today, we are in no way departing from any of our prior precedent. That precedent simply does not apply to the different scenario now before us, namely, where the legislature has statutorily abolished the death penalty.

¶43 Finally, we are unpersuaded by the People's various arguments as to why more harm than good will come from our decision today, including that (1) setting bail carries a possibility that the accused will not appear to answer the charge, (2) this court's interpretation of "capital offenses" may call into question the continued viability of procedural protections afforded in first degree murder cases, (3) adopting Smith's position would immediately afford bail to the hundreds of other defendants awaiting adjudication on first degree murder charges, and (4) the legislature and the ballot box are the better forums to decide the question presented.

¶44 Beside the fact that these contentions are irrelevant given our view that this case does not implicate principles of stare decisis, each of these contentions fails to recognize that our state constitution affords criminal defendants an absolute right

to bail, subject only to expressly stated and narrow exceptions. Contrary to the People's assertions, in affording the exception at issue its plain and unambiguous meaning, our decision today effectuates the will of our constitution's framers and of the people of this state. *See Markwell*, ¶ 33, 482 P.3d at 429. To the extent that Coloradans or the General Assembly wish to change what the constitution provides, they, of course, may seek to amend the constitution, as they have done before.

III. Conclusion

¶45 For these reasons, we conclude that the term "capital offenses," as it appears in section 19(1)(a), plainly and unambiguously refers to offenses for which the General Assembly has statutorily authorized the imposition of the death penalty. Because the General Assembly has statutorily abolished the death penalty as a punishment for offenses (like Smith's alleged offense here) charged on or after July 1, 2020, we further conclude that the district court abused its discretion when it treated Smith's charge of first degree murder as a capital offense and then denied Smith's request for bail.

¶46 Accordingly, we make our rule to show cause absolute, and we remand this case to the district court for further proceedings consistent with this opinion. In light of our foregoing determination, we need not address Smith's request for relief from the court of appeals division's order dismissing his appeal.

JUSTICE SAMOUR specially concurred.

JUSTICE SAMOUR, specially concurring.

¶47 I concur fully with the majority's opinion. I write separately, however, for two reasons. First, to flag for the legislature that it may wish to review any statutory provisions that reference "capital offenses" or an iteration of that term. Second, to alert judges and lawyers to the potential ramifications of today's decision beyond an accused's right to bail.

¶48 While we cabin our analysis to article II, section 19(1)(a) of our state constitution, we give the term "capital offenses" its clear, unambiguous, ordinary, and popular meaning. Maj. op. ¶¶ 20–21, 23, 26. Because that term, or an iteration of it, appears in multiple statutory provisions, today's decision may impact various areas of Colorado law.

¶49 By way of example, section 16-10-104(1), C.R.S. (2022), provides that in "capital cases" involving one defendant, each party is "entitled to ten peremptory challenges" instead of the standard "five peremptory challenges."[1] Until today, Colorado state courts—trial courts and appellate courts alike—have understood this statutory provision as entitling each party in a first degree murder case involving a single defendant to ten peremptory challenges because "a sentence of

[1] If a case involves more than one defendant, each side is entitled to additional peremptory challenges. § 16-10-104(1).

death is potentially available . . . , regardless of the constitutional availability of the death penalty." *People v. Reynolds*, 159 P.3d 684, 688 (Colo. App. 2006). Under today's decision, however, first degree murders are not "capital offenses," as that term is used in section 19(1)(a), because they are not offenses "statutorily punishable by death." Maj. op. ¶ 26; *see also id.* at ¶ 31 (concluding "that the phrase 'capital offenses,' as it appears in section 19(1)(a), plainly and unambiguously refers to offenses for which the General Assembly has statutorily authorized the imposition of the death penalty," which means that the term does not include "offenses for which the General Assembly has statutorily abolished the death penalty").

¶50 I agree with the majority's opinion in its entirety. But I wanted to call attention to the matters I have discussed in this special concurrence.