Response to Nathan Dunlap's Petition for Executive Clemency
May 10, 2013

When one person kills another, there is an immediate revulsion at the nature of the crime.

But in a time so short as to seem indecent to the members of the personal family, the dead person ceases to exist as an identifiable figure.

To those individuals in the community of goodwill and empathy, warmth and compassion, only one of the key actors in the drama remains with whom to commiserate, and that is always the criminal.

The dead person ceases to be part of everyday reality, ceases to exist, he is only a figure in an historic event.

And we inevitably turn away from the past towards the ongoing reality, and the ongoing reality is the criminal.

Willard Gaylin, M.D.
Author, *"The Killing of Bonnie Garland"*

Governor Hickenlooper,

The District Attoney's Office has received Nathan Dunlap's petition for exceutive clemency. We appreciate your time and consideration of this response to the defendant's petition.

The defense petition for clemency alleges several "reasons" for granting clemency for the defendant, Nathan Dunlap, who committed four execution-style murders of three teenage children and a 50 year-old wife and mother of two children in December of 1993. A brief recounting of the murders is necessary, as it appears that almost twenty years have erased the memory of the victims from some minds. The focus has moved further and further away from those whose lives were stolen and has fixated upon the man who said "their life wasn't nothing," the man who bragged about killing them.

> ***"It is the horror of the crime itself that looms large . . . . Dunlap killed four people and seriously wounded a fifth. He did it without provocation or cause, but rather with a brutal contempt for human life." "The evidence overwhelmingly supports Dunlap's guilt."*** ~
>
> Justice Rebecca Kourlis
> *People v. Dunlap*,
> 975 P.2d 723, 765
> (Colo. 1999).

Sylvia Crowell (19 years old) – the defendant shot her in the back of the head. She was unaware he was there and was completely helpless and defenseless.

Ben Grant (17 years old) – the defendant shot him in the left eye. Ben saw Dunlap approach, but did not fight him; he did not threaten him. He was unarmed, unthreatening, and also defenseless.

Colleen O'Connor (17 years old) – she too knew her killer was upon her. She dropped to her knees and begged for her young life to be spared, telling him she would not tell. Nathan Dunlap shot her in the top of the head as she begged.

Margaret Kohlberg (50 years old) – she looked up and asked if she could help Dunlap; he responded by ordering her to open the safe. After she did, he shot her in the ear. Noticing she was still alive, he shot her in her other ear.

For the defendant to seek again to manipulate the system by claiming mental illness contributed to his actions is predictable. For his lawyers to facilitate this charade in the name of "justice" is unfortunately also expected. For the defense lawyers to infer the defendant's race played a role in the DA's decision as a decoy to minimize the brutality of the defendant's conduct is shameful, but expected as well.

But when our state's leaders are asked to accept as "objective" evidence the conclusions of the anti-death penalty movement's "best and brightest" experts, and to ignore their obvious collaborative biases, to disregard their abandonment of professional ethics, and rely upon their convenient "scientific" epiphanies with respect to Nathan Dunlap's brain and behavior, it is then that we must say "enough is enough."

When "the movement" takes over the process and asks the elected Governor of the State of Colorado to forget the victims and see the killer as a victim, then we must ask ourselves "how can we tolerate this perverted view of justice?"

The death penalty is the law in the State of Colorado. The Governor's decision with regard to clemency should not be based on whether the death penalty is legal or moral, as those issues: 1) have already been decided by the legislature, 2) have been reviewed by all state and federal courts, 3) are supported by a majority of our citizens, and 4) in *this* case, as to *this* defendant, those issues were already painstakingly debated and decided by **the jury.**

In Colorado, ample judicial review is built into the death penalty scheme: "[T]he court may not uphold a death sentence if the court determines that it was imposed under the influence of passion or prejudice or any other arbitrary factor, or that the evidence presented does not support the finding of statutory aggravating circumstances."[1]

The jury trial in this case was fair and the defendant's convictions and his representation was tested, scrutinized, and upheld. Not just by the trial court, but by Colorado's highest Court, and then by our country's highest Court.

In short, to commute Nathan Dunlap's death sentence after almost twenty years would be a cruel and unjust slap in the face to those family members who have been waiting so long for justice, and it would disregard the facts of the case and the law of the land.

The proposed reasons for granting executive clemency

I. Nathan Dunlap accepts responsibility for his crimes. He is deeply remorseful.
II. Nathan Dunlap grew up in a home filled with chaos and abuse.
III. Nathan Dunlap's jury knew nothing about his mental illness or its role in his conduct. Since the Department of Corrections finally began treating Mr. Dunlap's bipolar disorder in 2006, his mental health has been stable and his behavior exemplary.
IV. Recent neuroimaging confirms that Mr. Dunlap has brain damage that further helps explain his behavior.
V. Nathan Dunlap has matured, and he is not dangerous.
VI. Nathan Dunlap's case reflects all that is wrong with Colorado's broken death-penalty system.
VII. Widespread support exists for Mr. Dunlap's clemency request.

I. Nathan Dunlap's "offer to plead guilty" does not mean he accepts responsibility for his crimes. Offers to plead guilty are a typical strategy in death penalty cases. Nathan Dunlap is not truly "deeply remorseful." Nathan Dunlap has exhausted his appeals and seeks to avoid a death sentence. His "remorse" is a product of his desperation and nothing else.

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[1] *People v. Dunlap*, 975 P.2d 723, 764 (Colo. 1999); C.R.S. 18-1.3-1201(6)(b) (formerly 16-11-103(6)(b))

That the defendant offered to plead guilty to Murder in the First Degree is meaningless in the context of a death penalty case. It is a common strategy for capital defense lawyers to have their clients "offer" to plead guilty. Such offers are not expected to be accepted in most cases (especially when there is no significant mitigation as in the instant case), and the offer itself can be used as mitigation evidence in the penalty phase of the case by counsel. One could easily surmise that a defendant who actually did enter such a plea would subsequently seek to appeal that plea on the basis of a lack of voluntariness and ineffective assistance of counsel.

To the extent the defendant takes responsibility for his crimes *after* having been convicted of them and already sentenced to death, that should be looked at with similar skepticism and dismissed as irrelevant.

The defendant's actions on December 14, 1993 speak loudly as to his remorse as well as his mental state. As stated by the trial judge, John J. Leopold, in his 368-page order after sixty-one days of post-conviction hearings, "Mr. Dunlap's preparation for, execution of and actions after the killings were well thought-out:

(a) Defendant played basketball with some friends several hours before he went to Chuck E. Cheese. He told the other players that he was intent on murder;
(b) Immediately after the murders, he heard an early media account and told a friend that he was the perpetrator;
(c) He effectively disposed of the murder weapon; it never was recovered.
(d) He arranged for another person to wash the White Sox jacket which he had worn during the murders;
(e) He took the money to Ms. Lechman's. After engaging in sexual intercourse with Ms. Lechman, he persuaded her to help him hide the money he had stolen;
(f) He had placed a different gun in a gym bag and had placed it either before the murders or shortly thereafter. He led the Aurora Police Department to the duffel bag and engaged in game-playing with them."[2]

> ***"[T]he evidence indicates that he showed no remorse or compassion for his victims either immediately after the offense or at any time thereafter."*** ~
>
> *People v. Dunlap*, 975 P.2d 723, 765 (Colo. 1999).

In finding "the State's aggravating evidence was substantial and overwhelming," the trial judge stated, "Defendant had no remorse for his crimes or for his victims. He repeatedly admitted his culpability and was boastful about the murders."[3]

The existence of any genuine remorse is contradicted by the facts showing Dunlap's complete lack of empathy, as well as his own bragging about the crimes. While narcissism, threatening and profane outbursts, and passive aggressive traits were observed by many professionals at the state hospital, unsurprisingly, compassion was a trait that was completely lacking.

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[2] Judge Leopold's July 7, 2004 Order (hereon *Order*, p. 363.).
[3] *Order, p.* 362-63.

The defense may argue that the witnesses to this behavior themselves are biased against the defendant. Luckily, and beneficial to the Governor's review, the *defendant himself* decided to give an interview with news reporter Paula Woodward in 1996. The defendant puts to rest any notions of compassion, accountability, lack of dangerousness as well as any notions that he was suffering from any mental illness that was causing or contributing to his conduct.

Understandably, the defense does not address the comments made by the defendant, because like the facts of the case themselves, they cannot be explained away and they are wholly inconsistent with any theory that the defendant's mental faculties were at all compromised.

The determination of the defendant's petition should rest in the facts of December 14, 1993, as told by the evidence, including the defendant's subsequent statements about what happened that night at Chuck E. Cheese's. One must not get lost in batteries of testing and battling experts years after the murders when the undeniable evidence is staring one right in the face. What better evidence exists about a quadruple murderer's remorse, about his thought processes, about his actions, than a cool recitation of the details by the murderer himself, including a statement of how he felt when he killed and why he chose to kill? There simply is no better evidence.

Nathan Dunlap's comments to Paula Woodward, Channel 9 News, 1996

Dunlap: When I saw the last couple at the counter getting their little prizes and stuff, I went to the men's room.

Woodward: You go into the men's room, and you look in the mirror.

Dunlap: Right. I was still, I was still kind of iffy on it, and then you know, and, cause like I said, I kinda hyped myself up, came out and started shooting. . .

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Woodward: Did [Sylvia] see you?

Dunlap: No. It was like she had a glow around her, so to speak.

Woodward: So you just held the gun up, and fired but looked the other way?

Dunlap: I knew where she looked, I knew where she was standing, I knew she didn't see me, and I, in my head, I seen the target, so to speak, and I placed the gun there, and I know she got shot

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Dunlap: [W]alked straight out of the bathroom, shot Sylvia and once that happened it was all over.

Woodward: Does it bother you that they are dead, Nathan?

Dunlap: No.

Woodward: Why?

Dunlap: I guess cause for me death ain't nothing. I'm not afraid of death.

Woodward: And you didn't take the time to think that their life was important...

Dunlap: ...important to somebody else, right.

Woodward: *So you walk out of the bathroom, you've decided what?*

Dunlap: *People have to die.*

Woodward: *These people have to die.*

Dunlap: *Are about to die.*

Woodward: *These people are about to die.*

Dunlap: When the first shot went off, everybody jumped, including me, and like I said, I mean, it happened so quick, before Sylvia even hit the ground cause I heard her fall, I'd already shot what's his name.

Woodward: Ben?

Dunlap: Yah.

Woodward: How far away from him were you?

Dunlap: Probably closer, probably closer than we, we are now. I remember the sound went off, and when he jumped, I jumped cause it scared me, I shot him and that spun him back the same way he was coming around, it spun the other, back around the same way and that was the last thing I saw and I never saw him in the ground or nothing, and then you know, I was already turned around going toward uh, Colleen.

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Woodward: And Colleen saw you were coming.

Dunlap: Yeah, I don't, I don't understand why she sat there and watched. I was expecting her to run, but she didn't run. That's why I turned around so quick, but she didn't run. She stayed right there and just watched.

Woodward: And what would have happened if she had run?

Dunlap: I would have shot her.

Woodward: Did you ever have ah, have eye contact with Colleen?

Dunlap: Oh yeah, that's what brought me kinda down.

Woodward: Did Colleen say anything?

Dunlap: She's like no. She's like, she just shook her head like no.

Woodward: She did say no.

Dunlap: Yeah, she said no, that's it. She didn't, she didn't beg for her life or nothing like that.

Woodward: What if she had, Nathan?

Dunlap: When she said no, she sort of begged, you know. She, you know, sort of begged, and it pissed me off because I just, it kinda like bothers, people don't say I don't have compassion, but I know, I got compassion, and it brought this compassion out. I'm like, you know, why are you doing this to me? You know, why are you trying to make me like you? You know, it's easy to shoot you when I don't like you and it was like, you know, why you trying to make me like you?

Woodward: *Why did you kill them?*

Dunlap: *They were witnesses to a crime. That's why.*

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Woodward: Did you have any feeling?

Dunlap: I had no feelings at all.

Woodward: Excitement?

Dunlap: No excitement. No nothing.

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Dunlap: Went to the office and Margaret looked up and say can I help you or something and she saw the gun and uh, that's when I heard Bobby get up and run out. Had her open up the safe and I shot her.

Woodward: And Margaret was still alive.

Dunlap: I didn't want her to suffer or nothin', that's why I shot her a second time, I didn't shoot her cause she was going to identify me or something, I knew she was messed up already and I didn't want her, she sounded like she was in pain, so that's why I shot her, again.

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Woodward: What happens when you, you say that you believe in life ever after, you believe in heaven, you believe that you'll go to heaven. What happens when you see Sylvia and Ben and Colleen and Mrs. Kohlberg in heaven?

Dunlap: Hopefully they'll forgive me, but I got to keep going on, if they don't, I got to keep going on. I'm not going to let them bring me down

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Dunlap: Hard to believe, four people died and basically to me their lives were only worth uh, bout $300 to $400, a piece.

Woodward: Should anybody care about you?

Dunlap: I really don't care if they do or not.

Woodward: Let me ask it this way, why should anybody care about you?

Dunlap: I don't care, you don't understand, I don't care about nobody, I don't care, I don't care about anybody watching, I don't care. The only people I care about is my family, my friends, that's all I care about. I don't care about nobody else

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Dunlap: I wanted them dead and they're dead. Come kill me then, if you think, if you think you can take my life, come do it. I'm gonna take yours before you take mine.

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Governor, why are we here? After watching this interview or reading the transcript alone, some questions must be asked:

> Is there really any question that the man who calmly uttered the words "I wanted them dead and they're dead" actually *wanted* to kill, and *chose* to kill, the witnesses to his crime?
>
> Is there really any validity to the "bipolar, brain damaged, psychotic killer" profile championed by the defense, when the same man discusses his struggle with feeling anger and compassion because a begging victim was *trying to make him like her* before choosing to shoot her in the top of the head?
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> Even assuming that the defendant has a mental illness (which cannot be conceded), is there any question that Nathan Dunlap's actions on December 14, 1993 were volitional, planned, and intended?
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> Are we to believe that the person who gave that interview was operating under some form of bipolar manic episode which caused him to appear cold-blooded, when in fact he wasn't?
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> The answer to all of these questions is obvious, and the fact that they scream against clemency for Nathan Dunlap does not make the answer any less conclusive.

Finally, to the extent the defense alleges that once Dunlap received proper medication for his illness in 2006 he miraculously "became remorseful," and became compliant overall, this defies logic. To allege that Mr. Dunlap was in the throes of some form of bipolar mania, and therefore unable to feel remorse or control his behavior until 2006 is not supported by the evidence and has never been asserted by any medical or psychiatric expert. Mr. Dunlap sat through months of hearings from 2002 through 2004 – during the hearings he demonstrated none of the destructive, agitated, bizarre, or delusional behaviors the defense infers were rampant from 1996 through 2006.[4] This is relevant, as it shows the defense claims regarding Dunlap's medication, behavior, and by inference, his illness, to be misleading.

Defense attachment 6-02 is a partial transcript of a September 29, 2010 deposition of ex-prison warden Larry Reid. In this deposition, Mr. Dunlap's counsel refers to the defendant serving eight years in the Colorado State Penitentiary (CSP) "without a code of penal discipline charge."

More compelling evidence of the defense's deception in their petition to the Governor comes in attachment 6-03, an interview with Daniel Miell, who worked in DOC's Central Transport Unit (CTU) from 2001 to 2006. To allege, as the defense does, that Dunlap's behavior up to 2006 was replete with disciplinary problems is irreconcilable with the statements made *to the defense* by Mr. Miell. In the June 4, 2010 interview, Meill states that he transported Dunlap to Arapahoe County court frequently in 2001 and possibly beyond that. In light of Dunlap often being

[4] In the defendant's clemency petition he claims that from 1996 – 2006 his behavior in DOC was "characterized by cycles of bizarre, agitated, destructive and delusional behavior and frequent disciplinary problems." Meill's 6/4/2010 interview with defense investigator is found attached to defendant's clemency application under Tab 6.

transported alone, he would have more one-on-one contact with him during transport and in court. When asked about the defendant's behavior, Meill responds without reservation that when he would pick up Dunlap at CSP he was "always cooperative, always did what he was told, and never caused any problems." Further, he said the defendant was "respectful and was never a management problem."[5] Dunlap was always compliant in court and never had any outbursts. Meill discussed what he thought was the reason for Dunlap's good behavior when he was dealing with him – he suggested that many long term inmates "get mellower with age" and he suspected that might be the source of the defendant's behavior from 2001 on.

One must look skeptically at the mischaracterization of the defendant's prison behavior by the defense. Clearly, Mr. Meill's statements were *intended* to show that the defendant has been a model prisoner, and to that extent his statements, if true, provide evidence on that issue. However, his statements clearly show the defense statement, "[f]rom 1996 to 2006, Mr. Dunlap's behavior in prison was characterized by cycles of bizarre, agitated, destructive and delusional behavior and frequent disciplinary problems" to be **untrue**. This overreaching by the defense is endemic in the application itself and in the expert opinions offered in support of it. Plainly put, that the defendant somehow "strikingly" changed from a disciplinary problem to a model prisoner in 2006 due to "a daily dose of lithium" is not accurate.

II. Nathan Dunlap's chaotic and abusive childhood is unfortunate, if true, but does not rise to the level of mitigation that should compel the Governor to undo the jury's decision.

The defense petition discusses the defendant's familial history of mental illness: the "Jones Curse" they call it. Unfortunately, given the type of evidence the defense has been willing to offer to support their claims in this case, everything that has not been tested in court should be carefully scrutinized.

> ***"[T]he nature of the killings, the number of victims, and Dunlap's lack of remorse or compassion are chilling indications of his character that effectively overcome Dunlap's mitigation evidence."*** ~
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> *People v. Dunlap*, 975 P.2d 723, 765 (Colo. 1999).

Even were the claims all true, we should consider this mitigation against the unfathomable facts of December 14, 1993. Is Nathan Dunlap's upbringing responsible for his crimes? What in his unfortunate home life caused him to plan a robbery and make a specific choice to execute all of the witnesses to his crime? What part of his family dynamic caused him to brag about the murders, and even years later, show no remorse for any of the victims?

While a troubled childhood can be traumatic, the type of behavior Dunlap exhibited on December 14, 1993 (and before and after that) was a product of an antisocial and sociopathic mind, not a diseased one. While we as a society do not condone any form of abuse of our children, we also do not condone excuses based on such factors when considering the

[5] Defendant's petition for executive clemency (hereon, *Defendant's petition*), Tab 6-03.

commission of multiple murders, including child victims. We must also remember that Mr. Dunlap had the opportunity to offer mitigation at trial and did so.

In providing the required statutory judicial review of the death sentence, the Colorado Supreme Court discussed the defense mitigation case and found the sentence was nonetheless just:

> "Dunlap's mitigating evidence centered on the existence of three mitigating factors: his age, his cooperation with the police, and his abusive home environment. With regard to the first two factors, Dunlap introduced evidence indicating that he was nineteen years old at the time he committed the murder and suggesting that out of concern for his girlfriend, his family, and the community, he offered to plead guilty in exchange for four life sentences. Dunlap also presented testimony indicating that his step-father physically abused him, even at his school and place of work. Moreover, Dunlap put on evidence that his mother, who suffered from bipolar disorder and was prone to experiencing disruptive "episodes" of mental illness, mentally abused him and refused to cooperate with the juvenile court system's early attempts to rehabilitate him. Finally, the testimony of one of Dunlap's witnesses suggested that Dunlap was aware that his step-father had sexually abused his sister."[6]

The jury weighed the mitigation above and concluded the death penalty was the appropriate sentence. Whether they found the evidence of his childhood trauma and family history incredible or just not substantial enough when compared to the crimes, they nonetheless considered it and rejected a life sentence.

III. Nathan Dunlap's trial lawyers made a sound tactical decision not to admit any evidence of alleged mental illness. The overwhelming evidence of the defendant's malingering and antisocial behaviors would have negatively impacted the defendant at trial. No mental illnesses contributed to the defendant's murders in 1993. The defense experts' collaborative bias is obvious and their opinions are outcome-determinative. The defense experts' conclusions are irreconcilable with the objective experts, as well as the known and admitted facts and are therefore incredible.

Governor, we are asking that when making any determinations about the existence or extent of any alleged mental illnesses you consider only the *objective* evidence submitted. We are asking you to weigh heavily the conclusions of the trial court in its July 7, 2004 post-conviction order, which is based on a full review of the expert testimony presented over the course of sixty-one days of hearings from 2002 through 2004. The trial court's order squarely addresses most of the claims made by Mr. Dunlap and gives invaluable insight on the experts relied upon by the defense. You will see that the trial court does not reject wholesale the conclusions of any of the experts, but instead carefully considers each in the proper context. There have been many objective assessments of Mr. Dunlap; based on his observed behavior, based on testing, and based on his own very illuminating statements, and we ask that you give that evidence its proper weight.

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[6] *Dunlap*, at 764-65.

Mr. Dunlap asks you to look beyond his own statements leading up to the crime, statements made immediately after the crime, and statements made soon after the trial, to come to a conclusion that mania or brain damage (or a combination thereof) caused his cold-blooded behavior. He requests you to accept the conclusions of several mental health professionals with at least one thing in common: they are part of an obvious collaborative effort to reach the desired result of a commutation of Nathan Dunlap's death sentence. The lack of objectivity in their testimony and written opinions is apparent. This "team effort" was recognized by the trial court during the post-conviction hearings in 2002:

> "Post-conviction counsel have argued that defense counsel who work on capital cases have access to a core group of professional witnesses who travel the country in support of defendants who either are charged with first degree murder and are facing the potential of a death sentence or who have already been sentenced and are before the court on post-conviction review. **The evidence presented at this hearing supports that proposition.**"[7]

While any individual is of course entitled to their own personal view of the death penalty, when a group of doctors with similar anti-death penalty views are brought in to consult on such a case and offer opinions many years after a crime, the potential for incomplete and inaccurate conclusions increases exponentially. To put it plainly: the defense experts in this case had - and have - an agenda, and that agenda is inconsistent with objective professional methodology and reliable conclusions.

> ***"A reasonable inference can be drawn that Drs. Opsahl, Poch and Lewis have worked together on a variety of cases and that they share a common disdain for the death penalty."*** ~
>
> Judge John Leopold

Mr. Dunlap asks you to believe that some members of the jury, who heard all of the horrifying evidence during trial, would have come to a different conclusion had they heard about his bipolar condition. Mr. Dunlap provides you with affidavits from a few of these jurors toward that end. The obvious concern with the statements of these jurors is that they have been made privy only to the defense expert conclusions regarding Nathan Dunlap having "bipolar disorder with psychotic features," and were asked if that may have changed their mind. Clearly, the jury would not have heard that information in a vacuum; in fact, as the trial court - and later, the Supreme Court – recognized, there was significant peril that would have come with the introduction of such testimony. In addition to cross examination of the defense experts, the jury would have heard the objective testimony of the state's forensic psychiatrists regarding Dunlap's malingering and antisocial behaviors. The jury would have also heard chilling testimony from CMHIP nurses and other staff regarding threats and aggressive behavior by the defendant. The jury would also have been provided the shockingly cruel and hateful statements made by the defendant about his victims to Dr. Barkhorn. Such information would have been devastating and revealed the real Dunlap.

[7] *Order*, p.250 (emphasis added).

Dunlap's seasoned trial counsel, Forrest Lewis, was adamant that the jury know nothing about his alleged mental illness:

> "The last thing I wanted, the very last thing, was for Nathan to go to the state hospital . . . . I was fighting to keep him in the jail, medical ward or otherwise . . . (W)hat I feared greatly is what came to pass when he went to the state hospital and so I was fighting to get the judge to first let me conduct my independent evaluation in the hopes that Mr. Dunlap would come around. This would be a confidential evaluation . . . . I felt reasonably sure that the opinion would be one of malingering versus any mental disease or defect and I felt that . . . any independent evaluation of Mr. Dunlap which might be helpful to us would be seriously undermined by a lengthy stay at the state hospital which would generate a lot of negative material."[8]

To have admitted any information regarding the defendant's mental health would have permitted a successful attack on the mental health evidence and would have permitted the jurors to see Nathan Dunlap's actual behavior (the "negative material") at the state hospital. This evidence of clear malingering and antisocial personality traits and behaviors would have had a significant *negative* impact on the defendant.

The evidence that Nathan Dunlap malingered symptoms is overwhelming. Any expert opinion that Nathan Dunlap was manic at the time of the murders strains credulity and evidences a level of bias that is unfortunately consistent with expert testimony in death penalty litigation. Any expert opinion that Nathan Dunlap's alleged brain damage contributed to his conduct of executing four people is similarly incredible and stems from a clearly biased viewpoint and tainted methodology. The trial court was in the best position to carefully evaluate the defendant's claims regarding mental illness and the impact such evidence would have had on the jury. The trial court did so and the Colorado Supreme Court upheld the decision.

The objective evidence in this case reveals that Nathan Dunlap presents similar to many other prolific criminals: his personality is composed of arrogance, narcissism, other antisocial personality traits, and sociopathic and violent tendencies. This constellation of traits is often associated with antisocial personality disorder.[9] This disorder does not excuse or even begin to mitigate the crimes Nathan Dunlap committed or the sentence he received.

The most objective evidence in this case comes from Colorado's state hospital doctors at two different junctures in the case. Dr. David Johnson (staff psychiatrist in the maximum security forensic unit) met with Nathan Dunlap within a few months of the murders in early 1994 to assess his competency. In 2002, Dr. Rose Manguso (psychology and forensic neuropsychology at the state hospital) reviewed the defense experts' reports in which those experts found that the defendant suffered from brain damage, and was delusional and psychotic.

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[8] *Order*, p.206

[9] *Antisocial Personality Disorder* is defined as "A pattern of disregard for and violation of the rights of others." DSM IV-TR.

Dr. David Johnson – Colorado Mental Health Institute at Pueblo

Nathan Dunlap had begun acting out at the jail soon after he was arrested, so an evaluation was ordered by the trial court. Doctor Johnson's position at CMHIP entails dealing with the exact issues that surround persons charged with crimes who are alleging mental deficiency. While he conducts different types of examinations, he must always call on his *observational* experience in forensically assessing criminal defendants. While it stands to reason that a criminal defendant who is facing a death sentence is likely to feign symptoms of mental illness, Dr. Johnson uses the day-to-day observations of trained ward staff, as well as testing to support his conclusions.

Dr. Johnson testified that shortly after his arrival, Dunlap was "very angry, also defecating, throwing food, struck out at staff, threatening staff, (and) flashing gang signs."[10] Throughout his stay at CMHIP, Defendant's behaviors varied greatly. Dr. Johnson felt that this inconsistency was not indicative of a major mental illness.[11] In a March 17, 1994 ward note, Dr. Johnson noted:

> "Mr. Dunlap continues to present an inconsistent picture of out-of-control behavior with facial grimaces, odd gestures, excessive profanity, intermixed with short periods of lucidity. He still makes eye contact with people, appears to be gauging the reactions he is evoking in others. I see nothing psychotic about his verbal or behavioral productions."

Dr. Johnson did carefully consider the possibility of bipolar disorder and psychosis. He looked into the family history and found that while Dunlap's mother alleged bipolar disorder, the symptoms she described were "not diagnostic of bipolar disorder."[12] Even though she stated that she was hospitalized four separate times for her mental illness, she said she "was advised not to release [her] own records" to the doctor. She told Dr. Johnson that bipolar "ran in her family" and that her father and a brother had been so diagnosed. She was unaware, however, of their symptoms or any treatment they may have received. In light of the inconsistencies in symptoms and an unwillingness to verify something easily verifiable, Johnson reasonably concluded that the "family history" of bipolar was unsubstantiated.

At a later time, Ms. Dunlap's records were turned over, including two diagnoses of bipolar disorder. Dr. Johnson maintained his skepticism as to the family history of bipolar disorder, but more importantly, maintained his belief that Mr. Dunlap was not exhibiting manic behaviors even under extensive cross examination at the post-convictions hearings in 2003. Almost all of the defendant's unusual behaviors were determined by Johnson to be volitional and indicative of malingering, as opposed to being symptomatic of any major mental illness.

The trial court noted and found relevant Dr. Johnson's testimony that the defendant was observed by "many of the doctors at the state hospital during this review of seclusion and restraint, multiple doctors from various divisions, including forensic. At no time did any one of

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[10] *Order*, p. 295-96.
[11] *Order*, p. 296.
[12] June 8, 1994 report by Dr. David Johnson, CMHIP (hereon, *Johnson report*), p. 3.

these doctors . . . ever make a suggestion . . . that Mr. Dunlap had a mental illness and needed to be treated."[13]

Dr. Johnson considered multiple sources of information in carefully reaching his conclusions.[14] Dr. Johnson also considered neurological and medical tests, including a CT (Computed Tomography) scan which was administered on April 13, 1994 and a May 11, 1994 EEG (Electroencephalogram); the results of those tests were "normal."

In his June 8, 1994 report,[15] Dr. Johnson catalogues significant behaviors that were reported while the defendant was an inmate at the Arapahoe County jail. Up until 2/14/94, Dunlap was observed as completely "normal, with no disturbance in behavior, sleep, appetite, hygiene, gait, or activity level." But after an attorney[16] visit, his behavior suddenly changed: Dunlap began screeching at night, yelling and hollering constantly, using profanity and making verbal threats, making animal noises, taking off his clothes, having fecal and urinary incontinence (yet avoided stepping in his own mess). Dunlap would count from 1 to 4 repeatedly and then engage in hysterical laughter, he would kneel and stand still in one spot. He maintained his unusual behavior for 10 minutes at a time and altered his behavior depending on whether he had an audience. Dr. Johnson interviewed another inmate at the jail who told him that while acting abnormally, Dunlap said to him "you know what I'm doing" and winked at him.[17]

"Axis I: No mental disorder; (V Code: Malingering)

Axis II: Personality Disorder, not otherwise specified, with significant, narcissistic, antisocial and passive aggressive features." ~

Dr. David Johnson – June 8, 1994

After months of observation, interviews, and testing, Dr. Johnson concluded that Dunlap was not psychotic and was malingering a number of symptoms through inconsistent behavioral outbursts, and abnormalities.

Some of Dr. Johnson relevant opinions (from his June 8th report):

1. There is no evidence which would lead me to believe he has a major mental illness or is psychotic.

2. Dunlap believes it to be in his own interests to avoid going to trial for as long as possible and his irrational and inconsistent [volitional] behavior is his way of avoiding trial.

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[13] *Johnson report*, p. 3.

[14] According to the report, Johnson reviewed several hundred pages of police reports, reviewed jail records; interviewed Dunlap's mother; reviewed reports regarding other family member interviews; spoke to several jail deputies; prior criminal history and related reports; school records; the hospital record, including staff progress notes, other evaluations, order sheets; and repeated face-to-face contact with Dunlap (exceeding ten hours).

[15] Johnson's June 8th report is attached as *Attachment A*.

[16] Dr. Johnson later agreed that the jail records showed it was a staff doctor not an attorney who visited Dunlap.

[17] *Johnson report*, p. 3.

3. There is no indication from neurological or psychiatric testing of any organic mental or psychiatric disorder.

4. Bipolar disorder which is presenting in a manic phase is a "distinctly unlikely possibility," as Dunlap did not meet the manic syndrome criteria required for such a diagnosis.

5. Dunlap is neither schizophrenic nor presenting with catatonia.

Dr. Rose Manguso – Colorado Mental Health Institute at Pueblo

Dr. Rose Manguso, a forensic neuropsychologist at the state hospital, reviewed the defense experts' reports in 2002,[18] and testified for the prosecution in 2003. In these reports, defense expert Dr. Dorothy Lewis diagnosed the defendant with "Bipolar mood disorder with psychotic features;" Dr. Charles Opsahl diagnosed the defendant with "left hemisphere frontal neuropsychological deficit" and a "paranoid psychotic condition;" and Dr. Todd Poch diagnosed the defendant with "Bipolar Disorder, Most Recent Episode Depressed, Severe with Psychotic Features," and other ancillary diagnoses.

According to the trial court, "Dr. Rose Marie Manguso was one of the most impressive expert witnesses in this case."[19] Contrary to the findings regarding most of the defense witnesses, the trial court was clear about the lack of any bias while Manguso testified, pointing out that she has testified for both the prosecution and the defense in her career. Plainly speaking, Dr. Manguso has no dog in the fight and has an impeccable reputation as a forensic neuropsychologist.

Dr. Manguso's October 22, 2002 report[20] and her testimony during the post-conviction hearings can be fairly characterized as scathing toward the opinions of the two main defense experts, Dr. Charles Opsahl and Dr. Dorothy Lewis. In her review of Dr. Opsahl's methods and conclusions, Manguso found that there were many significant problems, including the lack of adequate validity testing. Dr. Opsahl chose to use an inadequate and outdated validity measure that had been shown to be "relatively insensitive to malingering" as demonstrated by multiple peer-reviewed research studies.

Manguso found additional problems throughout Opsahl's testing, including gross errors in the reporting of the defendant's IQ test results; misreporting findings and using bad data; misleading by reporting results as his own when he was actually reporting another doctor's findings and inaccurately interpreting test data.

Based on her thorough review, and Dr. Opsahl's shoddy and biased work in interpreting variability in verbal and performance IQ scores, Dr. Manguso concluded - and the trial court agreed – that "Dr. Opsahl's opinion about left (brain) hemisphere damage is not supported by the

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[18] Dr. Manguso was requested to do a record review as well as give a second opinion on the scoring and interpretation of Dr. Opsahl's neuropsychological test data.
[19] *Order*, p. 285.
[20] Dr. Manguso's report is attached as *Attachment B*.

WAIS-3 test. The difference between the verbal and performance IQs does not lead to such a conclusion."[21]

Ultimately, Dr. Manguso's opinion was that the tests of the defendant showed no indication of left front hemisphere brain damage. This conclusion was devastating to the defense position, as the trial court agreed with Manguso given her thoroughness, lack of bias, and credibility.

The trial judge also agreed with another state expert, Dr. William Hansen, that Dr. Opsahl violated his professional ethical requirements in the administration of psychological diagnostic tests in this case. The trial court notably accepted both Dr. Hansen and Dr. Manguso's testimony in finding Dr. Opsahl's testimony unpersuasive. Noting concerns with confirmatory bias, credibility, and professional ethics, Dr. Opsahl was thoroughly discredited in the eyes of the trial court.

Opsahl's "opinion concerning left frontal lobe damage was not persuasive."

****

"Dr. Opsahl's testimony had minimal value and would not have been persuasive at the sentencing trial." ~

Judge John Leopold

It is concerning that the defense would offer Dr. Opsahl's conclusions, whose credibility was destroyed in post-conviction hearings, as serious evidence for the Governor to consider in this profoundly important matter.

Dr. Manguso then addressed the methods and opinions of Dr. Dorothy Lewis. Among the multitude of problems highlighted by Dr. Manguso, she found that Lewis did not accurately report the record of hospitalization and left out important information regarding the defendant's inconsistent behaviors which were supportive of volitional behavior (malingering).[22] As such, Manguso found that Dr. Lewis was wrong when she said "there was absolutely nothing in Nathan's record suggestive of malingering."

Manguso's review of the CMHIP record showed it was replete with evidence of the defendant feigning symptoms while at CMHIP:

1. One minute he was unable to walk, the next minute he was standing and washing himself in the shower without assistance;

2. One minute his speech was unintelligible, the next he was logical and coherent;

3. He admitted he was "playing games" to the staff;

4. He admitted that he was "gonna play crazy as long as he could;"

All of these actions were consistent with, and examples of, malingering, Manguso said.

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[21] *Order*, p. 286.

[22] In the CMHIP record, which Lewis was presumed to have reviewed, Manguso found no less than twenty different professional notes from 2/19/94 to 5/30/94 supporting conduct suggestive of malingering.

Additionally, Lewis misrepresented other doctors' efforts and made logical errors which resulted in her opinion that the defendant was psychotic. Additional errors included the misinterpretation of results of another doctor's (Dr. Lee) psychological evaluation, specifically the MMPI-2 personality test. Manguso, citing an apparent lack of understanding by Lewis of MMPI-2 interpretation, pointed out that Lewis' correlation of a raw score to a *per se* finding of manic symptoms was incorrect. In fact, Dr. Lee and Dr. Manguso both correctly interpreted the test results to show Dunlap was within *normal* limits on the scale accurately assessing mania.

> ***"Although the presentations of other witnesses can be questioned, there was no other testimony that struck the Court as being so completely biased and of little value in this case as that of Dr. Lewis."*** ~
>
> Judge John Leopold

While Dr. Manguso indicated that it was proper to evaluate the possibility of bipolar disorder based on the records she saw, she questioned Dr. Lewis' ability to find that Dunlap was suffering from bipolar condition in 1993 to 1996 based on her evaluation "years after the event she is attempting to interpret." Manguso stated, "[Y]ears later, to attempt to construct a new diagnosis in this manner is a process that is fraught with a significant potential for misinterpretation, speculation, and error." [23]

Again, it is worrisome that the thrust of the defense's argument that the defendant was in a manic state at the time of the murders[24] seems to be based on an expert that was found to be "completely biased" and of less value than *any other witness* in the case.

Even the defense experts who the trial court found to be more credible were unable and unwilling to say that the defendant was manic on the date of the offense. Dr. Todd Poch, whom the trial court found frequently testified with Drs. Opsahl and Lewis and was a death penalty opponent, testified that his examination of Dunlap showed he was bipolar. The trial court found Dr. Poch's testimony generally credible. However, Dr. Poch admitted that he intentionally avoided determining whether Dunlap's mental problems had any role in murders. He further testified that most people who have the mental health problems he thought Dunlap had did not commit serious crimes, let alone multiple murders.[25]

In1996, defense expert, Dr. Rebecca Barkhorn described Nathan Dunlap as the most pathological narcissistic person she had ever met. Dunlap made chilling statements to her about the murders. In 1996, she did not believe that Dunlap had an Axis I Bipolar Disorder. Years later she was provided the CMHIP records and her opinion changed. She testified at the post-conviction hearing that, had the defense provided her with all of Dunlap's mental health and incarceration records, she would have diagnosed him as being bipolar and psychotic. The trial

> **Question:** ***Wld you do thgs differently?***
>
> **Dunlap:** ***Yes.***
>
> **Question:** ***What?***
>
> **Dunlap:** ***Wldn't have missed. Wldn't have gone home.***
>
> Notes of Dr. Rebecca Barkhorn ~ 3/16/95

[23] *Order*, p. 289.
[24] *See* Defendant's clemency application, p. 11.
[25] Post-conviction transcript, 93CR2071, 11/6/02, p.198-200.

court generally found her testimony credible, although it noted that, like Dr. Poch, she testified that people who are bipolar can function well in society, and are not typically violent.

Barkhorn admitted she could not find any evidence to date to support the position that Dunlap was in a manic state when he committed the Chuck E. Cheese's murders. Based on Dr. Barkhorn's testimony the court found that the "State therefore established the implication that Defendant was not in a manic, hypomanic or psychotic state when he was committing his juvenile and adult crimes." [26]

> **Dunlap:** ***"The other four should have reacted differently 1st person shot. They should have run. Only strongest survive and they were stupids. All victims are stupid."***
>
> Notes of Dr. Rebecca Barkhorn ~ 6/28/95

Finally, the defendant shed some light on his own view of his mental condition at the time of the murders. During his face-to-face meetings with Dunlap, Dr. Opsahl asked him "Is it possible that you were in a manic episode during the alleged incident (the murders)?" Dunlap responded, "It's possible, but I don't think it happened. For the most part, I recalled everything I did." While the doctor's methods in asking such a leading question were suspect,[27] and the defendant may not have understood what a "manic episode" was, the answer gives us some evidence of Dunlap's condition when he executed four people, and tried to kill a fifth.

It is telling that the Court, after hearing all of the mental health experts and other evidence in the case and post-conviction hearings, was far from convinced that the defendant was suffering from Bipolar Disorder:

> "There [*sic*] prospects that Defendant manipulated all of his actions at CMHIP are at least equal to the chances that he was suffering from a bipolar episode"[28]

> ***"The State therefore established the implication that Defendant was not in a manic, hypomanic or psychotic state when he was committing his juvenile and adult crimes."***
>
> Judge John Leopold

IV. Dr. Gur's and McIntyre's conclusions based on PET scans and MRIs must be viewed with skepticism. Recent images of Dunlap's brain cannot be read in a vacuum and cannot explain his past behavior.

The defense has presented a report written by Dr. Ruben Gur, which they contend supports the defendant's brain damage and mitigates his responsibility. In a report dated April 2, 2013, Dr. Gur concludes the results of recent neuropsychological testing (all done by other defense-hired doctors) show "abnormalities including brain damage," which have "direct

[26] *Order*, p.271.
[27] *Order*, p. 239 (The trial court referred to the question as curious, dubious and indicative of confirmatory bias).
[28] *Order*, p. 364.

implications as to Mr. Dunlap's moral culpability" when combined with an alleged bipolar condition.

This consultation and the opinion given by Dr. Gur was strategically withheld from the prosecution or broader peer review, so that the District Attorney would not have time to have the doctor's methods and opinions tested. This secretive approach makes good sense however in the case of Dr. Gur, as his credibility has been destroyed in the 18th Judicial District as recently as February of 2013.

Dr. Gur, much like the experts who testified at the post-conviction hearing in 2002 through 2004, is a defense expert whose methodologies are suspect and are clearly driven by confirmatory bias. He offers helpful opinions to criminal defendants nationwide, many of whom are facing death sentences.[29] His opinions often belie common sense and are extremely biased toward the defense.

Some examples of his lack of reliability and suspect methodology include:

1. *United States v. Montgomery*, 635 F.3d 1074 (8th Cir. 2011), where the Court affirmed the lower court's exclusion of Dr. Gur's testimony because it was scientifically unreliable, had minimal probative value, prosecution witnesses could not replicate his calculations, and he had not provided the original data on which he based his calculations.

2. *Walton v. Johnson*, 440 F.3d 160, 164-165 (4th Cir. 2006), where the Court rejected Dr. Gur's testimony that the defendant was not competent to be executed.

3. *United States v. Hammer*, 404 F. Supp.2d 676, 725 (M.D. Pa. 2005), where the Court found that Dr. Gur's conclusions were not credible.

Luckily, even though the District Attorney had very little time to consider and respond to Dr. Gur's findings, he has stayed true to form and has come to similar unsupported conclusions as he has in the past. As such, we can relatively easily dismantle the doctor's opinions as overreaching and irrelevant to the issues before you, Governor.

Using PET (Positron Emission Tomography) scans and MRIs (Magnetic Resonance Imaging), the doctor attempts to draw several types of conclusions without considering the facts of the crimes his "patient" has committed (or is charged with, depending on the case). His methodology is inherently flawed as a result. Using visually impressive images and graphic depictions of brain activity and volume, Dr. Gur interprets not only whether the brain is damaged, but the cause of the damage, and the impact of the brain damage on the patient. When Dr. Gur is feeling especially ambitious, he will offer opinions about the patient's mental state *at the time of a particular crime,* regardless of the time that has passed.

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[29] In addition to *People v. Montour* referenced herein, Gur has also testified in *People v. Robert Ray*, 06 CR 697, another 18th Judicial District death penalty case.

The problems with this approach were best stated in a recent hearing in Douglas County, Colorado. In *People v. Montour*,[30] a death penalty case, Dr. Gur used PET and MRI images to come to conclusions regarding the defendant's brain damage and his past behavior and mental abilities, including the type of brain injury he had (traumatic brain injury), and what type of behaviors that injury would have caused at pertinent periods during the litigation of his case.[31]

Dr. Hal Wortzel, a state forensic neuropsychiatrist who works with the Veteran's Administration, the Colorado Mental Health Institute at Pueblo, and the University of Colorado, testified for the prosecution in the *Montour* case. Wortzel did not mince words in opining on the unreliability of the methodology used by Gur.[32]

> "[P]ET scans are good at detecting abnormalities, not necessarily good at telling us what the nature of abnormalities are, particularly when we're taking about psychiatric conditions or where there's multiple psychiatric conditions potentially at play. Beyond that, I mean, what's particularly problematic here is that we're talking about a PET scan that was conducted a decade after the relevant period of time, which can't really tell us anything about his functional brain activity, you know, 10, 12 years ago."

When asked to elaborate on why the PET scan could not be of assistance in the manner Gur suggested, Wortzel was unambiguous:

> "Because it's a picture of brain function. Part of the limitations of PET scanning more generally is that if you take my PET scan today and take it a week again later, it could potentially look different depending on what kind of mental state I was in. If I was well rested and had been sleeping, if I was under a lot of stress it might look different, you know. Any number of factors could potentially influence a person's PET scan over relatively small periods of time by which I mean, you know, days to week, let alone years . . . so the notion that, you know, going back 10 years in that picture that was captured in 2012 is representative of a brain a decade ago is just not an accurate assumption."[33]

Dr. Wortzel discussed the problems with Gur's findings on multiple levels. He pointed out some basic limitations of interpretation of the scans, including the problem with appropriate baselines for comparison. Wortzel discussed the many factors that might influence what a person's brain might look like and the inability to extrapolate because of the variations inherent in brain appearances.

> "PET scanning is very nonspecific. An individual -- we have no idea what people who have been residing in a correctional facility in a cell by themselves 23 of 24 hours a day as a normative database, what that brain

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[30] *People v. Montour*, 02CR783 (defendant charged with murdering a prison guard).
[31] *Montour* transcript, 2/22/13, p. 192; attached as *Attachment E.*
[32] *Montour* transcript, p. 190.
[33] *Montour* transcript, p. 190-91.

looks like; **that we captured any sort of traumatic brain injury or anything else on Mr. Montour's PET scan is not clear."**[34]

Ultimately, Dr. Wortzel found that one could not merely look at a PET scan and conclude traumatic brain injury was present.

> ***"[T]he notion that someone can look at that PET scan say, "this is a traumatic brain injury, is fundamentally an error. That can't be done."***
>
> Dr. Hal Worztel

Perhaps the largest problem Gur's methodology presented was the manner in which he would disregard - or fail to review- the objective contemporaneous records and would instead accept self-reports from a defendant in a murder case. Wortzel noted that doctor Gur seemed to accept and twist his diagnosis to support the murderer when discussing the effects of his non-existent brain damage:

> "If we talk about traumatic brain injury and its relationship to aggression, TBI -- it does have a relationship to aggressive behaviors, but those aggressive behaviors tend to be impulsive and non-instrumental."[35]

Wortzel looked to the objective facts in the case and found that the defendant's actions were not impulsive, and in fact appeared to be planned. Dr. Wortzel concluded Dr. Gur's opinions in *Montour* were "simply and entirely without merit."

In *People v. Robert Ray*, another death penalty case in which Gur testified for the defense (06 CR 697), Dr. Wortzel explained the methodology used by Dr. Gur (specifically, drawing a conclusion about the way in which someone's brain functioning might affect their behavior from looking solely at a brain scan and neuropsychological data) is insufficient. Dr. Wortzel points out there are seldom, if ever, cases where it's appropriate to base an opinion as to brain functionality based on a small subset of data to draw the radical conclusions Dr. Gur suggests about a person's behaviors and motivations at a period of time removed by years.

Similar to his methodology in *Montour* and *Ray*, in his April 2, 2013 report Dr. Gur never discusses the day-to-day functioning, educational records, medical records, or specific actions of Dunlap, all of which are necessary to form a helpful and accurate scientific opinion.

Dr. Gur's opinions are of little use in this case as he clearly abandoned his role as an objective and disinterested scientist, and instead offered unsupported opinions based on brain scans with no normative baseline and no objective contemporaneous evidence of Dunlap's behavior.

Dr. Robert McIntyre is of similar ilk to the team of biased experts working for the defense. Not only does McIntyre rely on Gur's report, but he also relies on Dr. Opsahl's neuropsychological evaluation. From his sources, which again inexplicably exclude the easily obtainable facts

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[34] *Montour* transcript, p. 193-94 (emphasis added).
[35] *Montour* transcript, p. 194.

surrounding the defendant's murderous behavior, McIntyre impossibly concludes that Dunlap's "brain-based impairments for moral reasoning and impulse control are long-standing." For his grand finale, Dr. McIntyre, clearly recognizing the need to show the Governor some connection to Dunlap in 1993, extrapolates from Dunlap's current presentation back to when he was 19 years of age by considering the "biological immaturity" of his brain development. Thus, McIntyre remarkably concludes, since the literature clearly shows that 19 year olds have poorer impulse control and decision making than 39 year old people, "Nathan's brain-based impairments with moral reasoning and impulse control abilities were substantially worse than they are now."

McIntyre and Gur's sleight of hand requires little scientific rebuttal as there is little scientific method being applied. Again, the defense experts' desire to overreach and make the science fit their desired result defeats their credibility.

> ***"The jury found that his conduct was truly evil and worthy of the ultimate penalty. Mr. Dunlap did nothing to help himself and his attorneys and a great deal to help the prosecution."***
>
> Judge John Leopold

V. Nathan Dunlap's track record as a "model prisoner" should not be confused for a lack of dangerousness.

"He told Ms. Snook he had been "playing games" with staff and was "doing this on purpose. He told staff that he had killed and could kill again."[36] These were the words of the trial judge as he listed the aggravating conduct that made the sentence of death one which could not be disturbed. But the words uttered by Nathan Dunlap should not be considered in a vacuum. And his threats most certainly should not be considered to be idle; not with his track record.

Nathan Dunlap's criminal history does not begin and end with the murders of four and attempted murder of a fifth. The defendant has a long, violent criminal history. As a juvenile, the defendant had two adjudications, both for the crime of Aggravated Robbery. He was convicted as a Violent Juvenile Offender. As an adult, the defendant was convicted of multiple counts of Aggravated Robbery associated with the robbery of an Aurora Burger King restaurant. In addition, there were numerous other instances of violent and dangerous conduct.

- September 13, 1993 – Dunlap and an accomplice held up the Papa Nick's Pizzeria located at 13310 East Mississippi Avenue in Aurora. Both used handguns to threaten and intimidate owner Abdul Chaudhry and employee Igbal Ahmed. The cash drawer containing approximately $190.00 in United States currency was taken.

- October 8, 1993 – Dunlap and an accomplice robbed the Skipper's restaurant located at 2295 South Peoria in Aurora. Both used handguns to threaten and intimidate employees Robert Arnold and Vernon Simmons. The accomplice fired a shot into the cash register. Approximately $1400.00 in United States Currency and personal checks were stolen.

[36] *Order*, p. 363.

- November 10, 1993 – Dunlap fired several shots at Isaiah Thomas and Rodney Jones as they were walking in the area of 1128 South Racine Street in Aurora. Soon after, the defendant drove to the Thomas' residence at 941 Oakland Avenue in Aurora and fired numerous shots into the first floor of the home.

- November 17, 1993 – Dunlap robbed the Oriental Star Café at 12203 East Iliff in Aurora. The defendant used a handgun to threaten employees and robbed the business of approximately $200.00 in United States Currency.

- End of November, 1993 – Dunlap had a vendetta against Torano Stewart for allegedly telling the police Dunlap had committed robberies at the United Cleaners and Mane Station businesses in Aurora. Dunlap told an associate that Mr. Stewart "might catch a slug" and would not live long enough to leave town prior to entering the military.

- 1992 through 1993 - Dunlap was dealing cocaine.

Even after being arrested for the murders, Dunlap's dangerous conduct continued while he was incarcerated.

- January, 1994 – Dunlap is overheard on a jail telephone attempting to solicit someone outside the jail to kill a witness.

- November, 1994 – Dunlap and an associate attempted to escape from the Arapahoe County Jail.

- January, 1995 – Dunlap is observed with a new tattoo on his left forearm – a smoking gun with the words "By Any Means Necessary".

- March, 1995 – Dunlap wrote a letter to an associate asking him to change his testimony and threatening another unless he did likewise.

- August, 1995 – Dunlap threatened a fellow inmate that if he testified against Dunlap, he wouldn't come out of prison. Dunlap motioned with his index finger across his neck to indicate that the inmate would be killed if he did testify against him.

Governor, the defense has asserted Mr. Dunlap has changed; that since he is currently (since 2006), a model prisoner while incarcerated on death row he should not have his sentence carried out. The defendant's behavior on death row in recent years can't be a reason to commute the death sentence that put him there in the first place. The notion turns the system on its head and defies logic.

That the defendant has learned to modify his conduct while in DOC is not based upon some change in his character or some miraculous reaction to medication. We know that the defendant has been well-behaved while on death row for many years contrary to the defense contention that he had a behavioral breakthrough in 2006. Therefore, the evidence indicates that the defendant consciously has adapted his behavior to his surroundings to accommodate his needs.

While past conduct tends to be the greatest predictor of future behavior, particularly with regard to criminality, to consider the defendant's good behavior while on death row as his "past" is illogical. To the extent that anything is predictable, to predict that Nathan Dunlap's behavior while on death row will carry over to his incarceration in general population is naïve at best.

But ultimately, this line of argument misses the point. It is not relevant that the defendant may or may not be a model prisoner now or after his sentence is commuted. The jury heard ample evidence of both mitigation and rebuttal to that mitigation at trial. The defendant has not been sentenced to death for his current behavior, so to argue that he is a changed man and no longer deserves to be executed ignores the offenses for which he was sentenced in the first place.

The defendant took four wonderful lives and nearly took a fifth on December 14, 1993 – the impact of his conduct on the victims, their families, and society as a whole is what he has been sentenced for. That he has not had any disciplinary infractions while incarcerated awaiting his sentence is of no significance. He has not yet been punished for the murders he committed nearly twenty years ago.

Mr. Dunlap's lawyers have already indicated they will file additional motions asking Judge Sylvester to find the death penalty unconstitutional *per se* and find cruel and unusual the execution of their client twenty years after the murders. We are asking you to permit the process to continue, allowing the defense to make any additional legal arguments and the judge to rule on the issues in a court of law.

VI. Colorado's death-penalty system is not "broken" – it is the most protective death penalty scheme in the United States, and safeguards against the "arbitrary" imposition of death. The death penalty in Colorado – and in Nathan Dunlap's case - is not sought or imposed because of race, youth or geography. The death penalty in this case was sought because it was and is the only appropriate sentence.

Governor Hickenlooper, in the death penalty case before you justice was and is truly blind.

Nathan Dunlap happens to be an African-American male. Nathan Dunlap's victims happened to be Caucasian. Had Nathan Dunlap been Caucasian and executed four African-American victims, he would still be on death row. We know this to be true. We know that Arapahoe County has unfortunately suffered some of the most shocking homicides in the State over the years. The race of the perpetrators and the victims were beyond the District Attorney's control. We know that the District Attorney's decision in other pending pre- and post-conviction cases involved Caucasian and African-American defendants and victims.

The defense petition cites a recent University of Denver study which, using incomplete statistics and oversimplification, comes to untenable conclusions. The District Attorney's Office with assistance from the Attorney General's Office, has already rebutted the arguments lodged in the

DU study[37] and has proven them to be without merit. As the District Attorney explained previously, the DA's response demonstrates that contrary to the DU Study's conclusions, the death penalty scheme in Colorado, first through its statutory three-tiered "eligibility" requirement, then through its "selection" phase, and finally through the trial court and state appellate review process (without even discussing the layers of federal scrutiny), not only constitutionally narrows the class of offenders for which death can be sought and imposed, but also requires judicial review of each particular offender, his crime, and the trial process.

Pursuant to Colorado's death penalty statute, a *life sentence shall be imposed* if there is a failure to unanimously prove an aggravating factor beyond a reasonable doubt; if mitigation is found to outweigh aggravation; or, even if the defendant has been deemed eligible, if any one of the jurors decides that a death sentence is not the appropriate punishment. Plainly stated, there is simply no more stringent death penalty eligibility requirement in the United States.

As allegations of racial bias are always worthy of close scrutiny, especially in the context of our criminal justice system, an excerpt from the District Attorney's response to the DU study is worthy of publication here:

"The database the defense attorneys directed the professors to use is seriously flawed and unrepresentative of the death penalty in Colorado. By utilizing dates from January 1, 1999 to December 31, 2010, the database excludes the following data from the appellate cases in just the two years leading up to that date where the death penalty was sought:

1997-1998 Data Excluded by DU Study

Name / Year	*Race of defendant*	*Race of victim(s)*	*Judicial District*	*Outcome*
Randy Canister 1998	*Black*	*Black (2) Bi-racial (1)*	*18th*	*Judge sentence unconstitutional*
William Neal 1998	*White*	*White (3)*	*1st*	*Death sentence - reversed by Ring v. Az.*
Danny Martinez 1998	*Hispanic*	*Hispanic*	*1st*	*Life*
George Woldt 1997	*White*	*White*	*4th*	*Death sentence – reversed by Ring v. Az.*
Lucas Salmon 1997	*White*	*White*	*4th*	*Life*
Francisco Martinez	*Hispanic*	*Hispanic*	*1st*	*Death sentence – reversed by Ring v.*

[37] The complete District Attorney response (hereon, *DA's response*) to the DU Study is attached as *Attachment C* to this response for ease of reference.

1997				*Az.*

In just those two years from the appellate reported cases the death penalty was sought against three Whites, two Hispanics, and one Black. Since 1980 according to the appellate reported cases, the death penalty was sought against 12 Whites, 7 Blacks, and 9 Hispanics.

In just those two years the death penalty was sought in the 1st, 4th, and 18th Judicial Districts. Since 1978, the death penalty was sought in the 1st, 2nd, 4th, 9th, 10th, 17th, 18th, 19th, and 21st Judicial Districts. The above statistics regarding race and location would seem to be important when addressing the "risk of arbitrariness and discrimination," but inexplicably these cases are just outside the parameters of the DU Study."[38]

The above excerpt merely gives a flavor of the selective statistics the anti-death penalty lobby will offer to mischaracterize the application of the law in Colorado. For the defense to create or cite statistics that are clearly incomplete and tainted by confirmatory bias is inexplicable, yet that has been the defense formula throughout the post-conviction process. Quite frankly, the defense team's moral and philosophical objections to the death penalty color all aspects of their presentation, and as a result the validity of their arguments is routinely undercut by the facts.

The District Attorney does not make a sociological or socioeconomic argument here regarding the over-representation of young men of color in the criminal justice system; not because that is not a real issue, but because it is not relevant to your determination of *Mr. Dunlap's* petition for clemency. Unless and until it is shown (and it never will be) that the death penalty was inappropriately sought *against Nathan Dunlap*, because of race or any other constitutionally infirm reason, arguments about race are simply without merit. In a petition for clemency the Governor is not being asked, nor should he be, about the validity, legality, morality of the death penalty in Colorado. If the death penalty is immoral or illegal, or for any reason invalid in Colorado, the legislature or the high courts must make that decision and seek to abolish it. To attempt to justify commutation of the death penalty *for Mr. Dunlap* with spurious mental health testimony, invented racial bias, and/or an "evolving standard of decency" argument is inappropriate at the clemency phase. All of these are legal issues and all have been – or will be – litigated and decided in the courts.

In short, to commute Mr. Dunlap's sentence because of a moral objection to the death penalty as a whole is not a decision about Mr. Dunlap, it is a decision about the law, and such a decision has no place in a consideration of Mr. Dunlap's sentence as contemplated by the clemency statute.

Defense arguments regarding the costs of prosecution are insulting. If the death penalty is too costly to the state, then the legislature should repeal it. Recent events make it clear that at present the legislature is unwilling or unable to repeal the death penalty in Colorado. To allege the financial impact on the state in support on Mr. Dunlap's petition places a monetary price on justice for Sylvia Crowell, Ben Grant, Colleen O'Connor, and Margaret Kohlberg. The District Attorney is unwilling to speak in terms of money when the only legitimate cost at issue is the impact of these stolen lives on the families and our community.

[38] *DA's response*, p. 14-15.

Similarly offensive is the notion that the defense is concerned with the impact of executions on Department of Corrections employees who may have to take part in the execution. The defense points out that "the costs of carrying out a death sentence are not measured only in dollars."[39] The District Attorney counters with a simple question:

> What is the "cost" of having your child, mother, brother, or sister executed, then waiting two years for the trial, then enduring another two months of trial, then seeing the killer receive a sentence of death, only to wait seventeen years to have that sentence discarded?

Neither the constitutionality nor the cost of Colorado's death penalty system is before you Governor Hickenlooper. We ask only that you consider Nathan Dunlap and the crimes he perpetrated against the victims in 1993, as it is he that you are to consider, not the law that brings him before you.

VII. Widespread support exists for Mr. Dunlap's execution, from citizens who were directly impacted by the crime to those who understand that death sentences cannot be overturned based on the moral or philosophical beliefs residing in the State's highest office at any given moment in history.

Dunlap's lawyers write that there are many reasons to spare Dunlap and no principled reason to execute him. They assert that he has been "safely housed" in prison and presents no danger to others. They claim that his execution will have no deterrent effect. They repeat the vile, offensive, and false accusation that his case involves the same "problems of racial bias, arbitrariness, and geographical disparity" that have led to calls for the repeal or reform of the death penalty.

There is no reason to spare Dunlap and there are many reasons to deny clemency to him.

The Colorado death penalty procedures do not provide a reason for sparing Dunlap

The citizens of Colorado, for whom the Governor and all other state officials work, have repeatedly and clearly found that capital punishment is an appropriate and necessary part of Colorado's criminal justice system. Each time the citizens have been asked to vote, they have approved capital punishment almost 2 to 1.

Our elected state legislators have established a jury decision-making process by which the citizens of the state, not the Governor, shall determine whether a killer must receive the death penalty. Colorado and federal courts have approved this process.

After finding that the killer was eligible for the death penalty, Dunlap's jury was then required to reach a "profoundly moral" decision, considering all of the facts and circumstances of the killer, his background, his mitigation, as well as his crimes, as to whether death was the only

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[39] *Defendant's petition*, p. 19.

appropriate penalty beyond a reasonable doubt. The jury unanimously found that death was the only appropriate penalty for this killer.

For twenty years following the citizen and legislatively mandated process that resulted in the killer's death sentence, the competency of his lawyers, the fairness of his trial, and the appropriateness of his sentence have been scrutinized by the Colorado District Court, the Colorado Supreme Court, the U.S. District Court, the U.S. 10th Circuit Court of Appeals, and the U.S. Supreme Court (four times.) Without a single dissenting vote, every judge and justice has found that the killer was competently represented, fairly tried, and duly sentenced.

It is not true that Dunlap has been "safely housed" or that he presents no danger to others and, even if true, that would not be a reason to spare him

Dunlap's execution is necessary, not just because he continues to present, and will always present, a danger to other prisoners and staff, but because of the very nature of his crimes, regardless of how "safely" he is being housed.

Because Dunlap is on death row, he has been housed under the tightest security procedures, called Ad Seg (Administrative Segregation) but he still has contact with prison staff. If he is no longer a death sentenced prisoner, he would not be required to remain in Ad Seg. Under DOC's Quality of Life Program, a non-death row prisoner in Ad Seg can and will be returned to general population if he is compliant with DOC rules and regulations.

As noted by the killer's lawyers, Dunlap has been compliant and has not been a management problem. It is therefore certain that, if the death penalty is commuted, he will be taken out of Ad Seg and returned to general population under much fewer restrictions that have been imposed.

In recent years, two DOC staff members have been murdered and others seriously injured by prisoners in general population and other prisoners have been seriously injured or killed. Dunlap has shown that he is a remorseless mass killer. Without question, he does present a danger to others and, if his death sentence is commuted, would present a much greater danger.

It is not true that Dunlap's execution will have no deterrent effect. Even if true, that would not be a reason to spare him

If Dunlap is executed, he will not kill again and he will not add to his total of four victims. That is a certainty. Whether that is called "deterrence" or "incapacitation" makes no practical difference. If he is executed, no Governor will ever be required to explain to the family of a prison guard or inmate why this four-time killer was still able to kill again.

Of course, fear of capital punishment will not deter all murders. Murders carried out in a heat of passion will not be deterred by fear of capital punishment. But some murders, such as those committed by Dunlap and by Robert Ray and Sir Mario Owens, are planned out ahead of time by killers who conduct a rough "risk-benefit" analysis – whether they should leave a potential witness alive and risk conviction for their current crime or murder the victim, thereby possibly avoiding conviction.

Dunlap stated very calmly that the reason he murdered Ben, Sylvia, Colleen, and Margaret was because they were witnesses to his crime. Owens and Ray discussed killing Javad Marshall-Fields to prevent his testimony for a previous murder. If there is no viable death penalty for which witness killing can make a killer death penalty eligible, it certainly removes that risk from the analysis.

There are no "problems of racial bias, arbitrariness, and geographical disparity" that present a reason to spare Dunlap

Because all three current death row inmates are African-American and were convicted in Arapahoe County (and were apparently all from the same high school), the anti-death penalty advocates claim that the prosecutors elected in Arapahoe County and the citizens of Arapahoe County and El Paso County over the last twenty years must be blood thirsty racists who use the death penalty only against African-Americans.

Question: ***Anything you regret? Would change.***

Dunlap: ***"All things I did molded me so I can be who I am today bad, cool dude. Let nothing bother me."***

Notes of Dr. Rebecca Barkhorn ~ 5/16/95

It is a vile, disgusting, and offensive argument that says more about the proponent of the argument than about the ones at whom it is aimed.

Robert R. Gallagher, Jr. was the elected DA of Arapahoe County in 1993. The killer Dunlap did not consult with Gallagher as to where he should murder his victims. DA Gallagher would certainly have preferred that Dunlap's murders occur in a different jurisdiction. Dunlap chose the "geographical" area in which to kill Ben, Sylvia, Colleen, and Margaret.

Carol Chambers was the elected DA of Arapahoe County twelve years later when the killers Owens and Ray decided when and where they would murder Javad Marshall-Fields and his fiancé, Vivian Wolfe. Ray and Owens did not consult with DA Chambers. She surely would have preferred that their murders be committed in some other jurisdiction. Ray and Owens chose the "geographical" area in which to kill. Dunlap's lawyers should ask Ray and Owens why they chose the same "geographical" area for their murders as Dunlap chose for his murders.

Dunlap's lawyers claim that because both cases occurred in Arapahoe County that is "evidence" of some sort of "geographical disparity" involved in the death penalty. This is utter nonsense.

Governor, if you accept the defense claim that racism is involved in these three cases, you are branding and condemning the citizens of Arapahoe County and El Paso County and the three juries who answered the call of their government to serve as jurors as the worst sort of racists. It is unimaginable that a Governor of Colorado could even listen to such an argument from a killer's lawyers without revulsion.

There are many principled reasons to execute Dunlap which are described in the statutory aggravating factors the jurors found to be proven. However, in many ways the most serious aggravator that provides a principled reason for requiring the death penalty is:

> That Dunlap committed the murders for the purpose of avoiding or preventing a lawful arrest – that he killed to silence witnesses against him.

The killing of a witness strikes at the very heart of our criminal justice system and demands the ultimate punishment.

Our criminal justice system is the last line of defense, the final barrier between us and those who choose to prey upon us. Between our families and those who choose to rape, rob, and murder. The killing of a witness, a citizen witness to a crime, strikes a deadly blow aimed at the heart of our criminal justice system.

Our criminal justice system only works when a large number of different players are able and willing to perform their duties – police officers, detectives, prosecutors, judges, defense lawyers, and jurors. But the most important role is that of the citizen witness, who is absolutely indispensable and irreplaceable.

If a criminal wants to avoid apprehension and conviction, it does him no good to kill the police officer or the DA or the judge. They will all be replaced. But if he kills the citizen-witness, the only one who can tell the police what they saw, what they heard, and who committed the crime - if he kills the only one who can come into a court room and tell a jury what happened, he not only will prevent his own conviction but also, by putting the fear of death in other witnesses so they won't come forward, cause irreparable harm to our criminal justice system. There would be no arrests, no trials, no punishments, and no justice.

Witnesses should not look at receiving a subpoena in the mail as if it were a death warrant. Those who would consider killing witnesses must be made aware that they will pay the ultimate penalty if they do so.

Commuting the sentence of a self-confessed, unrepentant, four-time witness-killer such as Dunlap will clearly not be a deterrent to any other criminal contemplating killing his witnesses. Rather, it will be an incentive to the Dunlaps, the Rays, and the Owens of all races, in all "geographical" areas to kill their victims rather than allow them to testify against them.

* * * * * * *

Governor Hickenlooper, attached are the pleas of many Colorado citizens,[40] some you have met and some you haven't. These citizens feel strongly about the death sentence being carried out in this case. It is not because they are barbaric or not "enlightened." You'll see that some of them have been directly impacted by Dunlap's actions and some less directly. All of them however, feel it is necessary that death be imposed in the case of *this defendant*. These are not members of a pro-death penalty movement who are pushing an agenda; they merely want to see justice done

[40] Letters from supporters of the death sentence for Nathan Dunlap are attached as *Attachment D*.

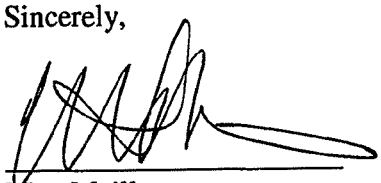
after almost twenty years. Their arguments are persuasive and we hope you will read each and every letter.

Conclusion

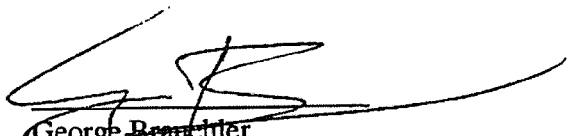
Governor Hickenlooper, the District Attorney asks you to permit the sentence that has been morally and legally decided and upheld after close judicial scrutiny to be finally carried out. There have been calls from the anti-death penalty movement for you to be "courageous." There are as many definitions of "courage" as there are people who choose to define it. Perhaps the most common trait we associate with courage is a person's ability to stand up for what is right in difficult situations.

As Governor, you make many impactful decisions every day. This decision is now upon you and courage is in fact required. Some citizens may believe that the Governor must "sign the death warrant" for Mr. Dunlap before the execution can take place. We of course know that not to be the case. While you must make a choice now that the defendant's petition is before you, you need not take any action for justice to be served. Mr. Dunlap has already been sentenced by a jury for the quadruple homicide at Chuck E Cheese's on December 14, 1993. We ask you to take the courageous step of not granting his petition for executive clemency, as Mr. Dunlap and his lawyers have presented you with nothing that should cause you to believe his punishment is not just when balanced against the gravity of his crimes. He took the lives of four Colorado citizens and justice requires he now pays with his own.

Sincerely,



Matt Maillaro
Sr. Chief Deputy District Attorney
18th Judicial District



George Brauchler
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