COLORADO SUPREME COURT 2 EAST 14TH AVENUE DENVER, COLORADO 80203 Certiorari to the Court of Appeals Case No. 2020CA1921 Opinion by Jones, J. Pawar, J. concurs Yun, J., concurs City and County of Denver District Court Honorable Karen L. Brody, Judge Case No. 1992CR997	DATE FILED: March 5, 2024 6:11 PM FILING ID: F7C98D1BAADAB CASE NUMBER: 2023SC328 COURT USE ONLY
Petitioner: DAVID L. WARD **v.** **Respondent:** THE PEOPLE OF THE STATE OF COLORADO	
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AMICUS BRIEF OF ACLU OF COLORADO IN SUPPORT OF PETITIONER DAVID L. WARD

CERTIFICATE OF COMPLIANCE

I hereby certify that this amicus brief complies with all requirements of C.A.R. 21, 28(a)(2), 28(a)(3), 29(c), and 32. The undersigned specifically certifies that:

This brief complies with the applicable word limit set forth in C.A.R. 28(g) and 29(d). It contains 3040 words. I acknowledge this brief may be stricken if it fails to comply with any requirement of the foregoing rules.

/s/ *Emma Mclean-Riggs*
Emma Mclean-Riggs

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IDENTITY AND INTEREST OF AMICUS CURIAE

The ACLU is a nationwide, non-partisan, non-profit organization with almost 2 million members, dedicated to safeguarding the principles of civil liberties enshrined in the federal and state constitutions for all Americans. The ACLU of Colorado, with over 45,000 members and supporters, is a state affiliate of the ACLU. As the largest and oldest civil rights organization in the state, the ACLU of Colorado is committed to safeguarding the independent individual-liberty guarantees in the Colorado Constitution. Because it is dedicated to the constitutional rights and civil liberties of all Coloradans, the ACLU of Colorado has a unique interest in ensuring that the state constitutional protection against cruel and unusual punishments is properly interpreted.

INTRODUCTION

This Court recognized the broad protections provided by article II, section 20 in *Wells-Yates v. People*, 2019 CO 90M, when it considered Colorado-specific factors in conducting an individual proportionality review. Because the *Wells-Yates* analysis differed so markedly from federal courts' individual proportionality reviews in the Eighth Amendment context, the decision is best understood as an application of article II, section 20 of the Colorado Constitution.

In this case, the Court should clearly hold that Colorado's constitutional prohibition on cruel and unusual punishments provides broader protection than its Eighth Amendment counterpart. The generalized language of article II, section 20 and its applicability to criminal law, an area where state courts have unique expertise, support a state-specific analysis.

The ACLU of Colorado agrees with Petitioner that *Wells-Yates* announced a new, substantive rule of constitutional law that applies retroactively, and submits this Amicus Curiae brief to urge the Court to clarify that its opinion in *Wells-Yates* was interpreting article II, section 20.

ARGUMENT

I. Article II, Section 20 of the Colorado Constitution Provides Greater Protections Than the Eighth Amendment.

"State constitutions . . . are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law." *People v. McKnight*, 2019 CO 36, ¶ 38 (quoting William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 491 (1977)).

Like the Eighth Amendment to the U.S. Constitution, article II, section 20 of the Colorado Constitution prohibits cruel and unusual punishments. Colo. Const. art. II, § 20 ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). While the Colorado provision shares the same text as its federal counterpart, it binds a different sovereign and carries its own independent meaning. *See People v. Young*, 814 P.2d 834, 842 (Colo. 1991) ("[T]he Colorado Constitution provides more protection for our citizens than do similarly or identically worded provisions of the United States Constitution."); *McKnight*, ¶ 39 (There is no reason to assume that highly generalized protections must have "just one meaning over a range of differently situated sovereigns." (quoting Jeffrey S.

Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* 174 (2018))). Specifically, article II, section 20 provides greater protections than the Eighth Amendment in that it requires punishments to be analyzed against factors specific to Colorado.

A. Individual Proportionality Review Under the Eighth Amendment Is Narrow.

Federal courts' individual proportionality review of sentences to imprisonment under the Eighth Amendment is typically perfunctory and ill-defined. *Harmelin v. Michigan*, 501 U.S. 957, 1018 (1991) (White, J., dissenting). When reviewing prison sentences less than life without parole for proportionality under the Eighth Amendment, also referred to as individual or "as-applied proportionality review," a court first makes a threshold comparison of the crime committed and the sentence to be imposed and determines whether the comparison leads to an inference of "gross disproportionality." *Harmelin,* 501 U.S. at 1005. In the "rare case" where the court finds such an inference, the court will conduct interjurisdictional review and intrajurisdictional review. *Id.* Interjurisdictional review requires the court to compare the sentence to the penalties imposed for the same crime in other states, and intrajurisdictional review requires the court to

compare the sentence to sentences imposed in the same state for more serious offenses. *Id.* at 1004.

Commentators have noted that as-applied proportionality review fails to prohibit even obviously excessive sentences. *See, e.g.*, G. David Hackney, *A Trunk Full of Trouble: Harmelin v. Michigan, 111 S.Ct. 2680 (1991)*, 27 Harv. C.R.C.L. L. Rev. 262, 262 (1992). The U.S. Supreme Court's as-applied proportionality review under the Eighth Amendment does not account for evolving standards of decency, legislative changes among the states, or broader social and professional consensus, as it does in the categorical proportionality analysis applied in the context of capital punishment or life without parole. *See* Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 Mich. L. Rev. 1145, 1155 (2009).

The result of the high bar required to reach any comparative analysis and the restricted universe of considerations within that comparative analysis under the Eighth Amendment has been a series of decisions that should come out differently if they were decided under the Colorado Constitution. For example, William Rummel was sentenced to life in prison

after he accepted approximately $120 to repair an air conditioner and never did the repairs. *Rummel v. Estelle*, 445 U.S. 263, 282 (1980) (Powell, J., dissenting). He was charged with the felony offense of obtaining money under false pretenses. *Id.* But he had been convicted of two previous felonies: presenting a credit card with the intent to defraud another of about $80 and passing a forged check for about $28. *Id.* Mr. Rummel was thus sentenced under Texas's habitual offender law, which mandated a life sentence for any person convicted of three felonies. *Id.* at 286. The U.S. Supreme Court reasoned that at least two other states had equally harsh recidivist schemes, that others had schemes that were nearly as harsh as Texas's, and that some had similar schemes but allowed judicial discretion in imposing life. *Id.* at 282-83. Ultimately, the Court held that Mr. Rummel's life sentence for theft of less than $200 was not cruel and unusual. *Id.* at 283.

Terrell Hutto was sentenced to forty years in prison for selling marijuana. *Hutto v. Davis*, 454 U.S. 370, 381 (1982) (Brennan, J., dissenting). After police raided Mr. Hutto's house and seized six ounces of marijuana, he was convicted of possession with intent to distribute and distribution of marijuana in a Virginia state court. *Id.* He was sentenced to twenty years in prison on each count, to run consecutively. *Id.* The U.S. Supreme Court

disposed of Mr. Hutto's case without oral argument or briefing, upholding the 40-year sentence. *Id*. at 381 (Brennan, J., dissenting).

Leandro Andrade was sentenced to two consecutive life terms of 25 years to life for two instances of shoplifting, involving a total retail value of about $150. *Lockyer v. Andrade,* 538 U.S. 63, 66, 68 (2003). After stealing five VHS tapes of children's movies, Mr. Andrade was stopped by a security guard at the door of the store. *Id.* at 66. Two weeks later, he stole four more tapes from a different store, and was once again stopped at the door. *Id.* He was subsequently arrested by police. *Id.* Mr. Andrade struggled with heroin addiction, and his criminal history primarily consisted of theft and burglary. *Id.* at 66-67. He had never committed a violent crime. *Id.* But Mr. Andrade was sentenced under California's three-strikes law, under which any felony can constitute a third strike, subjecting a defendant to a sentence of 25 years to life. The U.S. Supreme Court upheld Mr. Andrade's three-strikes sentences, concluding they were not clearly cruel and unusual. *Id.* at 77.

Life sentences for theft of under $200 or a sentence of forty years for selling a relatively small amount of an illegal substance should be seen as cruel and unusual, and unthinkably harsh, particularly in Colorado given the state's legalization of marijuana and significantly lower penalties for

theft of comparable amounts. Fortunately, this Court, assuming its "responsibility to engage in an independent analysis [of its] own state constitutional provision in resolving a state constitutional question," *Rocky Mountain Gun Owners v. Polis*, 2022 CO 66, ¶ 34, has interpreted the Colorado Constitution to protect Coloradans from sentences that are grossly disproportionate to their offenses. *Wells-Yates*, ¶ 76. Mr. Ward's sentence is unconstitutionally disproportionate even under the narrower Eighth Amendment standard; his sentence surely cannot satisfy the more robust analysis required under article II, section 20.

B. Individual Proportionality Review Under Article II, Section 20 Is Broader and More Robust than Under the Eighth Amendment.

When interpreting the Colorado Constitution, this Court has the responsibility to protect the fundamental rights of its people in accordance with its own history, tradition, geography, and legal landscape. *See McKnight*, ¶ 40 (finding that the legalization of marijuana use, possession, and growth under certain circumstances was "a local development," suggesting independent interpretation of Colorado's constitutional protection against unlawful searches was proper); *People v. Schafer*, 946 P.2d 938, 942 (Colo. 1997) (considering the historical and present use of tents as

habitation in Colorado and the West in determining whether there was a reasonable expectation of privacy in one's tent); *see also State v. Wilson,* 2024 WL 466105, at *15 No. SCAP-22-0000561 (Haw. Feb. 7, 2024) (finding that Hawai'i's traditions around deadly weapons, dating back to its precolonization government and immortalized in "the law of the splintered paddle" supported an independent interpretation of its Second Amendment analog). The geographic features, histories, and demographics of Colorado all bear on what harm occurs, what residents perceive as harm, and what harm residents perceive to be occurring.

This Court has recognized the relevance of such factors in interpreting article II, section 20. In holding that the Colorado death penalty sentencing statute violated article II, sections 20 and 25, this Court noted that the Colorado Constitution was "written to address the concerns of our own citizens and tailored to our unique regional location" and is thus "a source of protection for individual rights that is independent of and supplemental to the protections provided by the United States Constitution." *Young*, 814 P.2d at 843.

This is in keeping with the notion that "highly generalized" protections do not have "'just one meaning over a range of differently situated sovereigns.'" *McKnight*, ¶ 39 (quoting Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* 174 (2018)). The Eighth Amendment and article II, section 20 protect against "Cruel and unusual punishments," a broad, highly generalized category. Given the vast array of punishments that could theoretically be considered "cruel and unusual," there is no reason to assume that the sovereign state of Colorado and federal courts are fully aligned on which punishments are unconstitutional.

Indeed, article II, section 20 is even more generalized than article II, section 7, which this Court has found to be "highly generalized." *Id.* Article II, section 7 does not merely state that people shall be secure from unreasonable searches and seizures. It includes a list of categories that shall be secure from unreasonable searches: "persons, papers, homes, and effects." Colo. Const. art. II, § 7. It further specifies that warrants may only issue if they describe "the place to be searched, or the person or thing to be seized, as near as may be," and provide a written affirmation that the search is supported by probable cause. *Id.* Article II, section 20 provides no such

examples or procedural guidance. It does not list punishments that are cruel and unusual or provide any guidance in its text on how to determine whether a punishment is cruel or unusual. Article II, section 20 requires significantly more interpretative work to be applied. There is, therefore, even more reason to believe that article II, section 20 might have a different meaning than its federal counterpart.

Independent analysis of state constitutional provisions limiting punishment is not unique to Colorado. A year after the U.S. Supreme Court decided *Harmelin*, the Michigan Supreme Court determined that its own prohibition on "cruel or unusual" punishment required the opposite result and struck down a sentence of life without parole for possession of more than 650 grams of cocaine. *People v. Bullock*, 485 N.W.2d 866 (Mich. 1992); *Cf. Harmelin*, 501 U.S. at 955 (holding that a sentence under the same Michigan statute was constitutional under the Eighth Amendment). State supreme courts across the country have interpreted their state constitutional provisions limiting punishment as having meaning independent of and broader than the Eighth Amendment. *See, e.g.*, *State v. Sweet*, 879 N.W.2d 811 (Iowa 2016) (holding the Iowa constitutional provision prohibiting "cruel and unusual punishment" rendered life without parole an unconstitutional

sentence as applied to children); *State v. Kelliher*, 381 NC 558 (2022) (holding that the prohibition on "cruel or unusual punishment" in the North Carolina Constitution is broader than the Eighth Amendment, and a minimum 40-year sentence is *de facto* life without parole); *State v. Comer*, 249 N.J. 359 (2022) (finding a sentence to a minimum of 30 years before parole eligibility was unconstitutional as applied to children under the state constitution); *Commonwealth v. Mattis*, 224 N.E.3d 410 (Mass. 2024) (finding a sentence to life without parole unconstitutional under the state constitution when imposed on people between eighteen and twenty years old); *People v. Parks*, 987 N.W.2d 161 (Mich. 2022) (finding a mandatory sentence to life without parole unconstitutional under the state constitution when imposed on an eighteen year-old); *In re Monschke*, 482 P.3d 276 (Wash. 2021) (holding mandatory life without parole sentences imposed on people between eighteen and twenty years old unconstitutional under the state constitution). In *Wells-Yates*, rather than adopting the U.S. Supreme Court's narrow approach to individual proportionality review under the Eighth Amendment, this Court made clear that "the evolving standards of decency in Colorado" are relevant to determining the seriousness of the offense in the context of individual proportionality review. *Wells-Yates*, ¶ 47. The Court

looked primarily to state statute in assessing evolving standards of decency in Colorado, drawing on its unique expertise in Colorado criminal law. *See McKnight*, ¶ 39 ("Criminal law has traditionally been considered best left to the expertise of the state courts as the vast majority of criminal prosecutions take place in state, rather than federal court."). Noting that "the clearest and most reliable objective evidence of […] evolving standards is the legislation enacted by the country's legislatures," this Court paid close attention to the legislative history of Wells-Yates's triggering and predicate offenses, possession with intent to sell or distribute, marking the consistent reduction in penalties year-over-year. *Wells-Yates*, ¶¶ 41-43, 46. The changes it catalogued were relatively granular, such as changes to how the amount of drugs a person possessed impacted their criminal exposure as well as changes to the maximum sentence that could be imposed. *Id.* ¶¶ 41-43. *Wells-Yates* also considered the eligibility of charges for Habitual Criminal Act sentencing over time, a complex analysis of interlocking sentencing statutes. As-applied proportionality review under the Eighth Amendment does not contemplate such an analysis; courts are directed to look at sentences for more serious crimes within their jurisdictions and for the same crimes outside of them. The complexities of sentencing under a state scheme are

not as well-known to federal courts and they are less likely to be able to chart "sea chang[es] in [state legislative bodies'] philosophies," especially rapid ones. *Id.* ¶ 47. *Wells-Yates*'s statutory analysis is an expression of state court expertise, possible only in a local context. And its divergence from Eighth Amendment precedent strongly suggests that the Court's holding was based on article II, section 20 of the Colorado Constitution.

While there are federal cases cited in *Wells-Yates* on the evolving standards issue, they are exclusively categorical proportionality cases, dealing with specific punishments applied to specific groups or offenses. *Id.*[1] As part of the Eighth Amendment proportionality analysis conducted in the context of assessing a category of punishment (such as life without parole for people convicted as children or execution of the profoundly disabled), the U.S. Supreme Court asks whether the penalty as applied to a specific group of people or a specific set of charges comports with "the evolving

[1] See *Graham v. Florida*, 560 U.S. 48 (2010) (concluding that the Eighth Amendment prohibits sentencing a minor who committed a nonhomicide offense to life without parole); *Roper v. Simmons*, 543 U.S. 551 (2004) (holding that executing people who committed their crimes as minors violates the Eighth Amendment); *Atkins v. Virgina*, 536 U.S. 304 (2002) (finding execution of profoundly mentally disabled people cruel and unusual under the Eighth Amendment).

standards of decency that mark the progress of a maturing society." *Roper v. Simmons*, 543 U.S. 551, 561 (2005) (quoting *Trop v. Dulles*, 356 U.S. 56, 101 (1958)). The Court's approach to assessing evolving standards in that context is well defined and includes considering the number of states that impose the penalty for the offense or to the group in question, and "broader social and professional consensus," including polling data, the positions of various organizations, and the opinions of the "world community." *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002). But the U.S. Supreme Court rejects consideration of these same broader factors in individual proportionality review.

Unlike Colorado jurisprudence, Eighth Amendment jurisprudence does not recognize habitual offender statutes as particularly fraught. *See Rummel*, 445 U.S. at 284 (analyzing a sentence imposed under Texas's habitual offender statute without discussion of any additional risk of disproportionality). *Wells-Yates,* however, recognized that sentences imposed under habitual offender statutes present a "unique possibility" of disproportionate sentences because of their formulaic nature, increasing maximum penalties exponentially and stripping sentencing judges of

discretion. *Wells-Yates*, ¶ 20. This recognition of increased risk is Colorado-specific and does not stem from the Eighth Amendment.

This Court has thus recognized that Coloradans have heightened protections from cruel and unusual punishments under the Colorado Constitution. Those protections must apply to Mr. Ward, and to other Coloradans whose sentences are unjust under evolving standards in Colorado.

CONCLUSION

Individual proportionality review under article II, section 20, is distinct from as-applied proportionality review under the Eighth Amendment. It is also more protective, providing meaningful individual proportionality review of nonlife sentences to incarceration. The enhanced protections under *Wells-Yates* should be applied retroactively to Coloradans who were sentenced in ways that fail to comport with Colorado's evolving standards of decency.

Respectfully submitted this 5th day of March, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that, on March 5, 2024, a true and correct copy of this pleading was served via the Colorado Courts E-Filing, which serves notification of such filing to all counsel of record.

/s/ Mahima Chaudhary
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