

Good Afternoon:

My name is Justin Marceau. I am a Professor at the University of Denver, Sturm College of Law. I received my law degree from Harvard Law School. I have been teaching and writing in the areas of capital punishment, criminal law, and constitutional law for almost a decade. I am a co-author of the leading textbook on capital punishment in the country, as well as several articles on criminal justice issues that have been published in the most highly regarded legal journals in the country, including the Yale Law Journal and the Columbia Law Review.

Along with Hollis Whitson who will testify after me, I am here to briefly summarize some of the empirical data about the death penalty nationally, and in Colorado. In particular, we will highlight the findings of research I have been involved with here in Colorado that calls into question that utility, cost effectiveness, and fairness of Colorado's death penalty.

First, let me just say something about deterrence. Any claims that the death penalty deters crime are, at this point entirely based on speculation. The National Academy of Sciences published a report in 2012 that found that NONE of the existing studies proved that the death penalty was serving a deterrent function. As the Denver Post put it in 2013, "Texas, which executes a dozen inmates a year, [has] a higher murder rate than Colorado, which has executed one murderer in more than four decades." It is also the case that rates of violent crime are lower in Canada than in the United States, and many sociologists link increases in crime to other variables, such as the age of the population, rather than the presence or absence of the death penalty.

The second source of data that I will briefly discuss is a study that I conducted, along with other professors, which examined the functioning of Colorado's capital sentencing system. We

have now studied every murder case filed and completed in Colorado between January 1, 1999 and December 31, 2015.

I am happy to go into more detail and have done so in published writings. But gist of our study is easy to understand: Colorado's death penalty does a shockingly poor job of limiting its application to the "worst of the worst." At the stage of legislative definition – that is based on the Colorado statutes alone, prosecutors are left with vast discretion, almost unrivalled anywhere in the country. For the lawyers in the room, you will recall that Justice Potter Stewart famously remarked that the constitution prohibits infrequent or random applications of the death penalty when the death penalty system does not limit the application by statute. Paraphrasing Justice Stewart, the death penalty in Colorado is cruel and unusual in the way that being struck by lightning is cruel and unusual. The point is not that the prosecutors use the death penalty too infrequently. The problem in Colorado in 2017 (just as the US Supreme Court identified in 1972 nationally) is that the death penalty is available for a large number of offenders by virtue of the "legislative definition" (Zant v. Stephens).

To date, Colorado trial judges have not accepted these conclusions. But not a single appellate court has yet reviewed the data. And there are political reasons and realities that litigators are all too familiar with that suggest many state trial judges would not take the bold step of striking down the state's death penalty. They will wait instead, for this body or for an appellate court to correct the problem. But I am here to tell you, that as an expert in the death penalty nationally, Colorado's death penalty is constitutionally suspect. There are district attorneys and prosecutors who will testify to the contrary. But the consensus among constitutional experts – those who have looked at our study – is that we have identified a real,

concrete problem with Colorado's death penalty. Either this body or an appellate court is going to have to wrestle with this reality soon enough.

I will close by just noting a couple of the factors that conspire to leave Colorado's death penalty almost exclusively in the discretion of prosecutors and juries – the very problem that the Supreme Court identified in 1972:

- 1) The definition of first-degree murder is among the broadest in the country – it allows for persons to be convicted of first-degree murder if they unintentionally kill another person “under circumstances evidencing an attitude of universal malice manifesting extreme indifference to the value of human life generally” Only 8 other states have similar provisions in their first-degree murder statutes: Alabama, Georgia, Kentucky, Maine, New Mexico, North Dakota, Utah, and Washington. Of those 8 states, only Alabama, Georgia, Kentucky, Utah, and Washington still have the death penalty. (<http://www.deathpenaltyinfo.org/states-and-without-death-penalty>). It is also possible to be sentenced to death for felony murder, and there is no class two felony murder.
- 2) The list of aggravating factors is among the longest and most capacious in the country— very few states have more aggravators, or aggravators defined at a higher level of generality.