

**Becca Kinikin**

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**From:** districtattorney  
**Sent:** Wednesday, February 15, 2017 9:18 AM  
**To:** 'jbcookelaw@hotmail.com'; 'senbobgardner@comcast.net';  
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'Senatordanielkagan@gmail.com'  
**Subject:** SB 17-95: Repeal of Death Penalty

Dear Senators,

I understand that you have been sent the following email from George Brauchler. I have had an opportunity to read this email and wish to sign on to the thoughts expressed in it. I agree and support the position on the death penalty as stated in George Brauchler's email to you.

Please accept this written submission in support of the OPPOSITION to this bill. While I intend to appear tomorrow to testify, I recognize that time is limited. It is my intention that this email and attachment will facilitate shorter testimony on my part.

Once again, an off-election year bill has been introduced asking the legislature to repeal Colorado's long-standing death penalty.

People of good will can and do disagree on a number of legitimate issues related to Colorado's death penalty. However, the stated reasons in Section 2, paragraphs a-j, which purport to be the justification for repealing our state's long-standing death penalty, are not those legitimate issues. They are inaccurate, incomplete, and misleading statements.

I respectfully write to you today to address those inaccuracies and incompletions.

- (a) "Modern society possesses the means to protect itself without permanently denying criminals the chance at reform." Aside from the unproven claim that we have perfected our ability to protect ourselves from incarcerated criminals, protection of society and rehabilitation are only two of the justifications for sentencing a convicted criminal. Punishment and deterrence are others. Inmates continue to injure each other and occasionally injure and even murder our dedicated prison guards. One particular current capital case in rural Colorado involves an inmate who nearly decapitated a prison guard and then bragged about the manner in which he murdered her. In the absence of a sanction greater than continued incarceration, what possible message could Colorado hope to send to those prisoners who would murder inmates or guards while serving their rightfully earned sentences? "Don't kill in prison, or...you'll have to go back to your cell."
- (b) There will always be a risk that our system makes a mistake in convicting and sentencing someone. That is true of every single sentence, including life in prison. However, that risk of is nowhere lower than it is in capital cases, and in particular, capital cases in Colorado. The amount of scrutiny and the quantity of appellate review make wrongful execution extremely unlikely, albeit not risk free. As well, Colorado prosecutors do not seek capital punishment in "whodunit" cases, in which the identity of the murderer is at issue. The references to what has taken place in other states outside of Colorado are irrelevant to a discussion of our state's death penalty, which is the toughest to achieve of any in the U.S.—including at the Federal level.
  - a. **The claim that two Colorado death row inmates have been recently exonerated for crimes they did not commit is false.** No person who has earned their way to death row in Colorado in the modern era—going back more than 40 years—has been exonerated for "crimes they did not commit." It is unclear why such a misstatement was used in this proposed legislation. Additionally, the nine convicted cold-

blooded murderers whose sentences were “reversed for procedural fairness” were spared the death sentences they earned only due to a first-of-its kind U.S. Supreme Court decision that prevented Colorado’s then-three judge panels from imposing a death sentence. There was no risk of wrongful execution of those convicted killers.

- (c) **The country is not moving away from employing the death penalty.** If the bill proponents are encouraging our state to follow others, the most relevant measure of what is taking place nationally is to examine the most recent events involving the death penalty.
- a. **Federal:** The U.S. Department of Justice under President Obama regularly and repeatedly sought the death penalty in numerous cases across the country, including vigorously and justly pursuing the death penalty for the Boston Marathon bomber and, within the past two months, against the hate-based mass murderer of church-goers in Charleston, SC.
  - b. **Nebraska (our neighbor):** in May 2015, the unicameral legislature forced its will on the citizens Nebraska by repealing the death penalty over the veto of the Governor. In response, Nebraskans reinstated the death penalty at the ballot just two months ago by an overwhelming 61-39 percent vote.
  - c. **Oklahoma (our neighbor):** also in November 2016—just a couple of months ago—Oklahomans voted by a 2-1 margin to constitutionalize the state legislature's power to adopt any execution method not prohibited by the U.S. Constitution and to prevent Oklahoma's state courts from declaring the death penalty cruel and unusual punishment.
  - d. **California:** yes, even California. In the same state election in which the Democratic Party nominee for President won 61% of the vote, California’s voters rejected an initiative to abolish the death penalty and, at the same time, approved a competing ballot initiative, which limited state court death penalty appeals and expedites executions.
- (d) This is an attack on the unnecessarily narrow method of execution CO currently has. The shortage of lethal injection drugs is a direct result of the targeted efforts of the life-for-murderers lobby. While we have not run into that issue in CO, it is worth discussing whether CO should look to our neighbor Oklahoma’s method of changing the law to permit exploration of alternative means of execution.
- (e) Victims are an integral part of any analysis of capital cases. They are not a monolithic group and they can speak for themselves.
- (f) **The death penalty in CO is not unfairly applied.**
- a. No Colorado court has supported that outrageous claim.
  - b. Recent attempts (a “study” created by unqualified law professors without licenses to practice law in our state who were hired by defense attorneys to spare the life of their twice-convicted murderer client) to call into question the fairness of Colorado’s death penalty and its application have been rejected by every court in which such arguments have been raised. One of the courts—in Denver—found “it is clear it was not an unbiased study, but one designed to provide support for a particular position and designed to reach an anticipated conclusion.”
  - c. Geography does impact the decision to seek the death penalty, but only in as much as the legislature has permitted the creation of a significant funding disparity between local prosecutors and the state public defenders office, who routinely defends against the death penalty. The lack of recent death penalty cases is not the product of a different philosophy or lack of will to seek it, as much as it is a lack of resources to pursue it.
    - i. Our system has allowed the cost of litigating capital cases to unnecessarily increase to an extraordinary level.
    - ii. The Public Defenders Office can—and does—spend its state-funded resources to overwhelm the locally-funded prosecutors in less-populated parts of our state.
    - iii. Locally-controlled and elected prosecutors are funded by the counties within their jurisdictions. The appointed Public Defenders are funded by you, the legislature. The resulting budgetary disparity is striking.

1. Over the past 5 years, the budget of the Public Defenders Office has exploded by XX%
  2. Over that same period of time, the budgets of rural DA's offices have grown at a much smaller rate. Even in my office, which enjoys the support of a thriving metro area tax base, has seen our budget grown by only 13% over the past 5 years.
  3. Large, adequately-funded DAs offices have the ability to match the massive state resources available to the Public Defenders Office. Smaller DAs offices have their community's interests in seeking the death penalty blunted by the overwhelming state tax dollars available to come in and crush them.
- iv. The claim that the "ethnicity and gender of the homicide victim and the accused person influence charging decisions" is also contradicted by the facts. I have attached an article from the most recent University of Denver Law Review, which addresses these unsupported claims. It is noteworthy that two of Colorado's three current death row inmates were convicted of murdering African Americans—a courageous witness to another murder and his fiancé. The most recent death penalty case I pursued at trial was against a white guy from a privileged upbringing.
- (g) Cost is not a morally defensible measure of justice. It is inconceivable that the proponents of this legislation would argue that—if incarceration became more expensive—the death penalty would be justified because it is cheaper than prison. The cost of a death penalty trial is only slightly more than a non-capital murder trial. Common sense and facts dictate that the "savings" from abolishing the death penalty in Colorado would be negligible. Here's an example: if Colorado did not have a death penalty on July 20, 2012, does anyone believe that the mass murderer—represented by the Public Defender—would have walked into court and pleaded guilty and sent himself to prison forever? Not a chance. That's not how Public Defenders work. They offer to plead guilty in capital cases to avoid the possibility of death for their killer-clients. With no death penalty available, there would be no incentive for them to plead guilty. Thus, in the Aurora Theater Massacre trial, we would have had the exact same trial over a slightly shorter period of time in my jurisdiction. Cost savings would have been negligible.
- a. The true waste of money in the prosecution of that mass murderer was the unchecked and uncheckable hundreds of thousands of taxpayer dollars spent by the Public Defenders office to support a claim of insanity after two separate and independent court-appointed forensic psychiatrists found that their client was sane. That unsubstantiated defense cost our taxpayers a ton—but we'll never know how much, because they won't tell us. Even without the death penalty, the same costly defense would have been pursued.
  - b. There have been numerous cases considered as potential capital cases in which the Public Defenders pleaded guilty to avoid the chance of a death sentence. Those guilty pleas saved the local community and Colorado enormous tax dollars. In a Colorado without the death penalty, all of those cases would go to trial, forcing victims and child witnesses to testify and at greater expense to local communities.
- (h) Incapacitation of a murderer is not the sole purpose of sentencing in our criminal justice system. Likewise, we have escapes from our prisons—even recent ones. They lead to "manhunts" and to the public and law enforcement being put in danger. Incapacitation is probable, but not guaranteed.
- (i) What other Western countries do or do not do with their legal systems is irrelevant to how we govern ourselves here in Colorado and in the U.S. We decide for ourselves how we will define and pursue justice. Other Western countries do not provide a protection against forced self-incrimination. We do. Others Western countries do not guarantee a right to a jury trial. We do. Other countries (and some states) do not guarantee local control of prosecutors by electing them. We do. No other state in the U.S. has term limits for District Attorneys. We do.

#### Repeal will jeopardize existing death sentences

If the legislature repeals to the death penalty it will be used by the current convicted murderers on death row to avoid the sentences they earned. For example, in the 2015 case of *Connecticut vs. Santiago*, 318 Conn. 1 (2015), the

Connecticut Supreme Court overturned a prior death penalty sentence from a 2000 capital murder, because the legislature's act of prospectively repealing the death penalty was evidence that the death penalty "no longer comported with contemporary standards of decency and, thus, violated state constitutional ban on excessive and disproportionate punishment."

It is presumable that the same attack would be levied by Colorado's remaining death row inmates, if this legislature repeals our death penalty. It is also presumable that the Supreme Court would come to the same conclusion. **A vote to repeal Colorado's death penalty, no matter how prospective in its terms, will likely wipe out the death sentences for mass murderer Nathan Dunlap and Sir Mario Owens and Robert Ray.**

Repeal is a matter for Coloradans directly

Finally, and importantly, **Governor Hickenlooper has stated that the repeal of the death penalty is not a matter to be determined by the legislature.** Instead, he has stated that Coloradans themselves should make such a decision at the ballot box. This legislation is contrary to that admonition and deprives Coloradans of the ability to directly vote their support or opposition for the death penalty.

Respectfully,

Daniel H. May  
District Attorney