# *HIDALGO V. ARIZONA* AND NON-NARROWING CHALLENGES

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ABSTRACT

On March 23, 2020, Colorado repealed its death penalty statute for all crimes committed after July 1, 2020. Prior to this repeal, the two of us, along with other researchers, conducted a multi-year empirical investigation of the extent to which Colorado's death penalty statute complied with the Eighth Amendment requirement of statutory narrowing. Litigants introduced our study in support of more than a dozen non-narrowing challenges to the Colorado statute, and we testified regarding what we believe was the failure of Colorado's statute to do the narrowing work required by the Constitution. In this article, we build on this experience to discuss how a *Hidalgo* claim can best be framed in other state courts for eventual adjudication in the United States Supreme Court. Obviously, what is needed is a robust empirical study demonstrating that the discretion and arbitrariness that concerned the *Furman* Court remain present in a state's modern capital punishment statute. But more than that, we discuss here how to structure lower court litigation of capital studies so as to foreground legal issues and to keep the focus on the relevant constitutional law rather than the credibility or motivations of the researchers.

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## INTRODUCTION

In 2015,[1] we wrote a response to an article written by Professor Robert Smith, contesting his call to forget *Furman v. Georgia*.[2] He had written in the *Iowa Law Review* that capital litigators and academics writing about the death penalty were overly enamored of *Furman* claims. He argued that these claims—based on the Supreme Court's 1972 opinion in *Furman v. Georgia* and alleging that modern capital statutes permit the same kind of discretionary decision-making that the Court rejected in that case—were distracting death penalty opponents from bringing other, more meritorious claims.[3] We countered that although we agreed with Professor Smith that claims based on diminished culpability were a ripe avenue for capital litigation, we saw no reason to abandon the *Furman* claim wholesale.[4]

Just three years later, Justice Breyer's opinion concurring in the denial of certiorari in *Hidalgo v. Arizona*[5] (joined by Justices Sotomayor, Ginsberg, and Kagan) gave credence to our argument by making clear that there were at least four votes on the Court to consider a properly framed *Furman* challenge.

> In support of his Eighth Amendment challenge, the petitioner points to empirical evidence about Arizona's capital sentence system that suggests about 98% of first-degree murder defendants in Arizona were eligible for the death penalty. That evidence is unrebutted. It points to a possible constitutional problem. And it was assumed to be true by the state courts below. Evidence of this kind warrants careful attention and evaluation. However, in this case, the

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1. Sam Kamin & Justin Marceau, *Remember Not to Forget* Furman*: A Response to Professor Smith*, 100 IOWA L. REV. BULLETIN 117 (2015).

2. Furman v. Georgia, 408 U.S. 238 (1972); *see* Robert J. Smith, *Forgetting* Furman, 100 IOWA L. REV. 1149 (2015).

3. Smith, *supra* note 2, at 1153 ("Death penalty scholars and defense lawyers have hitched themselves to the wrong doctrinal star. The thing that is most wrong about the death penalty today is our inability to reliably gauge personal culpability."). One of the most problematic aspects of the death penalty is our inability to reliably determine culpability. *Id*. While certain groups, including juvenile offenders and the intellectually disabled, are categorically exempt from the death penalty because of culpability, others with comparable or worse functional impairments are not. Of the last hundred people to be executed in America, most possessed such functional impairments. *Id*.

4. Kamin & Marceau, *supra* note 1, at 122–23.

5. Hidalgo v. Arizona, 138 S. Ct. 1054, 1054 (2018) (statement of Breyer, J., respecting the denial of certiorari).

> opportunity to develop the record through an evidentiary hearing was denied. As a result, the record as it has come to us is limited and largely unexamined by experts and the courts below in the first instance. We do not have evidence, for instance, as to the nature of the 866 cases (perhaps they implicate only a small number of aggravating factors). Nor has it been fully explained whether and to what extent an empirical study would be relevant to resolving the constitutional question presented. Capital defendants may have the opportunity to fully develop a record with the kind of empirical evidence that the petitioner points to here. And the issue presented in this petition will be better suited for certiorari with such a record.[6]

The fact that the four Justices did not vote to grant certiorari—and thus to compel the Court to consider Hidalgo's claim on the merits—likely indicated that the concurring Justices did not believe that Hidalgo's case was the proper vehicle for such a challenge.[7] But that simply begs the question: what, exactly, was missing from the record made by petitioner in the lower courts? After all, the state had not contested the petitioner's factual assertions regarding the capaciousness of the Arizona statute. Rather, the state seemed to concede, at least for the purposes of litigation, that the death penalty could have been sought in nearly every first-degree murder case identified by Hidalgo.[8] If the state conceded that its statute did not meaningfully narrow the pool of all killers to a smaller group against whom the penalty could be imposed, why did the Court not simply rely on that admission and decide the constitutional question whether such a broad capital statute comports with the Court's opinions in *Furman*?[9]

This essay explores what a properly framed record might look like in such a case. On March 23, 2020, Colorado repealed its death penalty statute for all crimes committed after July 1, 2020.[10] Prior to

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6. *Id.* at 1057.

7. *Id.* Justice Breyer may have been convinced by the state's argument that Hidalgo, who was convicted in 2001 when Arizona law contained just 10 aggravating factors, could not challenge the contemporary statute, which contains 14. *Id*. at 1056.

8. *Id*. at 1056.

9. *Cf.* Eric M. Freedman, *No Execution if Four Justices Object*, 43 HOFSTRA L. REV. 639, 640 (2015) (detailing the historical development of the "self-imposed Rule of Four, dating back to at least 1925").

10. COLO. REV. STAT. ANN. § 16-11-901 (West 2020) ("For offenses charged on or after July 1, 2020, the death penalty is not a sentencing option for a defendant convicted of a class 1 felony in the state of Colorado").

this repeal, the two of us, along with other researchers, conducted a multi-year empirical investigation of the extent to which Colorado's death penalty statute complied with the Eighth Amendment requirement of statutory narrowing.[11] Litigants introduced our study in support of more than a dozen non-narrowing challenges to the Colorado statute, and we testified regarding what we believe was the failure of Colorado's statute to do the narrowing work required by the Constitution.[12] In this article, we build on this experience to discuss how a *Hidalgo*[13] claim can best be framed in other state courts for eventual adjudication in the United States Supreme Court. Obviously, what is needed is a robust empirical study demonstrating that the discretion and arbitrariness that concerned the *Furman* Court remain present in a state's modern capital punishment statute. But more than that, we discuss here how to structure lower court litigation of capital studies so as to foreground legal issues and to keep the focus on the relevant constitutional law rather than the credibility or motivations of the researchers.

Our essay proceeds as follows. First, we begin by examining how our research was received by the trial courts of Colorado. Prior to the repeal of the Colorado capital sentencing system, our study became a staple of capital litigation in the state, and we offer here for the first time some reflections on the litigation of the past decade. Next, we put forth a number of recommendations for future *Furman* challenges in other states based on this experience in the Colorado courts. First, to the extent possible, defense counsel should seek to submit empirical studies through published reports and declarations rather than through live testimony; appellate courts are likely to defer to trial court determinations of credibility and live testimony at the trial court can generally only distract from the content of careful empirical work.

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11. *See, e.g.*, Meg Beardsley, Sam Kamin, Justin Marceau, & Scott Phillips, *Disquieting Discretion: Race, Geography & the Colorado Death Penalty in the First Decade of the Twenty-First Century*, 92 DENV. L. REV. 431 (2015) (demonstrating that non-white defendants and defendants in Colorado's Eighteenth Judicial District were more likely than others to face a death penalty prosecution); Justin Marceau, Sam Kamin & Wanda Foglia, *Death Eligibility in Colorado: Many Are Called, Few Are Chosen*, 84 U. COLO. L. REV. 1069 (2013) (arguing that Colorado's capital sentencing system is unconstitutional based on findings that nearly all defendants charged with first-degree murder are statutorily eligible for execution).

12. *See infra* Table 1 (compiling all the cases where our study has been introduced as evidence).

13. We use *Hidalgo* challenge and *Furman* challenge interchangeably to describe a claim based on the failure of a death penalty statute to do the narrowing work required by the Eighth Amendment.

Second, researchers should be transparent about their methodology, willing to share both their methods and their specific findings with the state. We found that when we give prosecutors an opportunity to replicate our work regarding death eligibility, they rarely disagreed with us on the merits of any particular factual determination we made.[14] Moreover, if prosecutors do disagree with coding decisions based on information available to them, the research and ultimately the findings are only improved as a result. Finally, and relatedly, researchers should be willing to give ground wherever possible in order to obtain a stipulation[15] from the state regarding the breadth of the state's capital statute; many capital statutes are so broad that they would be unconstitutional even if they narrowed twice as much (or more) than they do in fact. Rather than fighting over individual cases and making the enterprise seem more complicated than it is, agreeing with the state on any close calls in coding keeps the focus where it belongs: on the fact that most capital statutes simply cannot pass constitutional muster.[16]

## I. AN EMPIRICAL STUDY OF THE DEATH PENALTY IN COLORADO

The Supreme Court has required that the states use their capital statutes to meaningfully narrow the pool of persons convicted of murder to a smaller subset against whom the death penalty may be

14. The coding decisions in our study turn primarily on questions of whether a particular case was sufficiently aggravated to justify seeking the death penalty under Colorado's capital statute. Thus, we had to make determinations in hundreds of cases about the applicability of the state's aggravating factors to the facts of a given case. Neither the state nor its own independent experts have identified any material errors in our coding decisions. Sam Kamin & Justin Marceau, *The Truth Hurts: A Response to George Brauchler and Rich Orman*, 94 DENV. L. REV. 363, 369–70 (2017) [hereinafter *The Truth Hurts*] ("[Brauchler and Orman] point to no actual errors in our analysis and offer no supplemental data to critique our methodology.").

15. The stipulation would take the form of an agreement or concession that the state has no reason to dispute the factual findings in the study, but rather disagrees solely with the legal conclusions flowing from such facts.

16. At the outset we should note that each of the *Furman* claims we have testified in support of has failed at the district court level and that, prior to the repeal of the capital statute in Colorado, none had yet been tested in an appellate court. Our advice thus comes not from success but from experience. On the other hand, none of the cases in which we testified had a death sentence imposed. Thus, although we began testifying in cases in 2012, no appellate opinion has tested our study.

imposed.[17] In doing so, the court has distinguished between death penalty eligibility and penalty selection. Eligibility criteria must be set forth in statute and based on categorical questions about the defendant and his crime.[18] By contrast, penalty selection criteria can be more open-ended and permit the jury to consider a number of broad, often open-ended factors.[19] If a state's eligibility criteria are too broad or amorphous, then two related constitutional concerns arise: high death penalty eligibility rates and low death sentencing rates.[20] A broad statute permits prosecutors to seek the death penalty against nearly all first-degree murderers (high death eligibility) and virtually ensures that the death penalty will be imposed only against a small, non-representative minority of those eligible for it (low death sentencing). It was these phenomena that led the Supreme Court in *Furman* to invalidate the death penalty statutes before it.

Colorado's death penalty system was largely typical of the response by states to the mandate of *Furman* and its progeny.[21] The state limited the death penalty to those convicted of a Class 1 Felony.[22]

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17. Zant v. Stephens, 462 U.S. 862, 878 (1983) (describing as "constitutionally necessary" legislatively imposed criteria for narrowing).

18. *Id*.

19. Tuilaepa v. California, 512 U.S. 967, 973 (1994) ("The selection decision, on the other hand, requires individualized sentencing and must be expansive enough to accommodate relevant mitigating evidence so as to assure an assessment of the defendant's culpability.").

20. To the untrained eye, a critique of low death sentencing rates seems to amount to a claim that the death penalty is being deployed too infrequently. But in reality, the concern is with high statutory eligibility rates, which in turn lead to proportionately low death sentencing rates. Sentencing rates and eligibility rates are inextricably linked, because low death sentencing rates are primarily a product of high death eligibility rates. When a state's statutory framework defines many, or even most murderers as potentially death eligible, then the state's eligibility rate will be high and the sentencing rate will be correspondingly low. *See, e.g.*, Steven F. Shatz, *The Meaning of "Meaningful Appellate Review" in Capital Cases: Lessons from California*, 56 SANTA CLARA L. REV. 79, 82–83 (2016) (defining the terms "death eligibility rate" and "death sentencing rate" and discussing the relationship between them).

21. The Supreme Court has held that eligibility can be determined through a narrow capital statute, the use of statutory aggravating factors, or both. *See, e.g.*, Lowenfield v. Phelps, 484 U.S. 231, 246 (1988) ("[T]he narrowing function required for a regime of capital punishment may be provided in either of these two ways: the legislature may itself narrow the definition of capital offenses . . . or . . . more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase.").

22. COLO. REV. STAT. ANN. § 18-1.3-1201 (West 2018) ("Upon conviction of guilt of a defendant of a class 1 felony, the trial court shall conduct a separate

If the state announced its intention to seek the death penalty, the trial court would hold a separate penalty hearing following the defendant's conviction of a Class 1 crime.[23] At such a hearing, a defendant could only be sentenced to death if the jury unanimously found that the state had proven at least one of the state's seventeen enumerated aggravating factors beyond a reasonable doubt.[24] Colorado law required the jury to impose a life sentence if no aggravating factors were proven or if the aggravating factors proven by the state were insufficient to outweigh the case in mitigation.[25] At this point the law diverged from that of most other states in that it provided an additional opportunity for mercy: under Colorado's law, a jury could impose a life sentence even after concluding that the case in aggravation outweighed the case in mitigation.[26]

## A. The Colorado Study

Using a data set of all murder prosecutions in Colorado from January 1, 1999 to December 31, 2012, we set out to determine both how many of these cases could have ended in a death sentence and how many did in fact end in a death sentence.[27] We applied the coding analysis developed by scholars like David Baldus[28] to examine the death eligibility and death sentencing rates in the state. To determine whether a particular defendant was eligible to receive the death penalty, we examined each case to determine whether a jury finding of

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sentencing hearing to determine whether the defendant should be sentenced to death or life imprisonment . . . .").

23. *Id.*

24. *Id.* (listing the aggravating factors, some of which contain alternative means of satisfying the aggravating factor).

25. *Id.* (requiring the jury to assess "whether sufficient mitigating factors exist which outweigh any aggravating factor or factors found to exist").

26. People v. Dunlap, 975 P.2d 723, 736 (Colo. 1999) ("If the jury finds that the mitigating factors do not outweigh the statutorily specified aggravators, then the jury moves to the fourth and final stage of determining whether the defendant should be sentenced to death or to life imprisonment."). In the much-publicized case of James Holmes, the Aurora theater shooter, the jury exercised this option, choosing to spare his life even after concluding that the case in aggravation was not outweighed by the case in mitigation.

27. Marceau et. al., *supra* note 11, at 1082 ("The Court explicitly recognized that the process of narrowing is a legislative, not a prosecutorial function.").

28. *See* DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS (1990); *see generally* Catherine M. Grosso et al., *Death by Stereotype: Race, Ethnicity, and California's Failure to Implement* Furman*'s Narrowing Requirement*, UCLA L. REV. (forthcoming 2020) (explaining how Baldus's coding analysis functions).

a Class 1 felony and at least one aggravating factor would be upheld on review under the standard of *Jackson v. Virginia*.[29] We then compared the number of eligible murder defendants with the number of persons actually sentenced to death during this time. The research protocol we used has been examined and deployed by many other scholars seeking to study the constitutionality of state capital sentencing regimes.[30]

In March of 2013 we published a version of our report in the *University of Colorado Law Review*.[31] Our findings are striking and unequivocal. If the Eighth Amendment continues to impose a requirement of meaningful narrowing—if it continues to require "at the stage of legislative definition"[32] a statutory means of distinguishing between those murders that can result in a death sentence and those that cannot—then Colorado's recently repealed system was clearly unconstitutional. Subsequent to that publication, we continued to update our research so that our study now runs from 1999 through 2015 and includes every murder case that was concluded in a Colorado trial court during those years.

We found that during this period there were 876 first-degree murders charged in Colorado.[33] 795 of these cases had one or more aggravating factors (and were not otherwise ineligible for a death sentence),[34] which produced an aggravating factor rate of more than 90%.

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29. 443 U.S. 307, 318 (1979) ("After *Winship*, the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.").

30. *See, e.g.*, David Baldus et al., *Racial Discrimination and the Death Penalty in the Post-*Furman *Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1770 (1998); Steven F. Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for* Furman, 72 N.Y.U. L. REV. 1283, 1333 (1997). For a more general discussion of the narrowing requirement, *see also* Grosso et. al, *supra* note 28.

31. Marceau et al., *supra* note 11.

32. *Id.* at 1082.

33. This count of first-degree murders includes all procedural and factual first-degree murder cases. *Id.* at 1103 (examining whether "the defendant was actually convicted of first-degree murder (procedural first-degree murder); or . . . the facts in the case file provided by the DCT were legally sufficient to support a first-degree murder charge (factual first-degree murder).").

34. *Id.* at 1107. We excluded all cases where the person convicted of murder was a juvenile, had played a trivial role in the death, or who was determined to be

In only 3.39% (27/795) of these cases did the prosecution actually seek the death penalty.

In only 0.88% (7/795) of these cases did the prosecution seek a death sentence at the time of the final sentencing hearing.[35]

In only 0.38% of these cases (3/795) did the proceedings at any point result in a death sentence.[36]

Thus, from 1999–2015 there were nearly 800 cases in which, as a matter of law,[37] a prosecutor could have sought, and a jury could have lawfully imposed, a death sentence. Nonetheless, the prosecution only ever sought death in 27 such cases, only obtained 3 death sentences (one of which was later reversed), and there were only 2 men on death row as a result of prosecutions during this time frame.[38]

Our results are so robust that they do not rely on the accuracy of our coding of any individual case. Even if we were wrong in half the cases we coded (and every one of those errors overestimated death

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intellectually disabled. Put differently, this figure (795) reflects the total universe of cases for which the death penalty could have been sought during this time period.

35. The seven death prosecutions in which the sentence was determined by a capital sentencing proceeding were: Donta Paige, David Bueno, James Holmes, Dexter Lewis, Robert Ray, and Sir Mario Owens. Edward Montour also went through a single-judge capital sentencing hearing, and is included in this number because, although further proceedings resulted in a plea of guilty and sentence of life without parole in 2014, we have counted every possible death sentence in order to err on the side of inclusion. The 7 death prosecutions figure, then, is as generous as possible to the state within the timeframe available for study. Death prosecution cases that resulted in an acquittal at trial or in which a death sentence could not have been entered because of legal or constitutional bars were not counted against the state in calculating the death prosecution rate at sentencing.

36. For purposes of clarity and to arrive at calculations that are as favorable to the state as possible, this figure (3) also includes Edward Montour, whose judge-imposed death sentence was overturned by the Colorado Supreme Court before his case eventually resolved via plea bargain. Thus, the 3 death sentences included are: Montour, Ray, and Owens.

37. COLO. REV. STAT. ANN. § 18-1.3-1201 (West 2018) (referencing the legal standard for seeking and imposing the death penalty for Class 1 felonies in Colorado).

38. There was in fact a third person on death row, Nathan Dunlap. However, because he was sentenced to death in May of 1996, he is outside of our dataset. *See* Noelle Phillips, *Who Is on Colorado's Death Row?*, DENVER POST (Mar. 20, 2019), https://www.denverpost.com/2019/03/20/colorado-death-row-inmates/ [https://perma.cc/YH57-UKD6]. Colorado Governor Jared Polis commuted these three sentences when he signed the bill abolishing the state's death penalty. *See* Saja Hindi, *Colorado Abolishes the Death Penalty; governor commutes sentences of 3 on death row,* DENVER POST (Mar. 23, 2020), https://www.denverpost.com/2020/03/23/colorado-abolish-death-penalty/

eligibility), there would have been nearly 400 cases that could have been charged as first-degree murder, yielding an eligibility rate in Colorado of 45%. In fact, even if we were wrong three-quarters of the time in designating a case as death-eligible, the eligibility rate in our state would still have exceeded 20%. Our conclusions with regard to death sentencing rates are even starker. Were we to assume for the sake of argument that we made errors 50% of the time (and that all of the errors were in one direction, namely harmful to the constitutionality of the state death penalty), the death sentencing rate in Colorado during the period of study would still be less than 1% (3/400). Likewise, an error rate of 75% on our part would still produce a death sentencing rate of just 1.5% (3/200), which is still far lower than the death sentencing rates that led *Furman* to invalidate Georgia's death penalty statute.[39] In short, *even if* we discounted our findings so dramatically as to be farcical, the constitutional defects that triggered the result in *Furman* still plagued the Colorado system during the period of study. Our study provides one of the clearest examples of a state's failure to comply with the mandate of *Furman* and provides a roadmap for future litigation.

## II. THE TREATMENT OF OUR STUDY IN THE TRIAL COURT

Defendants introduced our study in thirteen capital cases in Colorado as a basis for a motion to invalidate the state's capital sentencing statute. Of these thirteen cases, two ended in guilty pleas to charges of less than first-degree murder, and thus the motions based on our study were mooted.[40] Of the remaining eleven motions, three were still pending at the time of the repeal of Colorado's capital statute.[41] The trial court denied the motion to invalidate the death penalty in each of the eight cases that were decided. One of these cases was still pending in the trial court, but the other seven cases resulted in sentences short of death, either through plea bargains or jury verdicts.[42] Thus, every guilt or sentencing trial court proceeding that

39. *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 386 n.11 (1972) (Burger, C.J., dissenting) ("Although accurate figures are difficult to obtain, it is thought that from 15% to 20% of those convicted of murder are sentenced to death in States where it is authorized.").

40. The two cases that involved a discussion of our study, but not a formal use of it, were resolved by guilty pleas to the charge of second-degree murder; Cassandra Rieb (Logan County) and Diego Chaco (El Paso County).

41. *See infra* Table 1.

42. The final completed case is slightly more complicated. Sir Mario Owens was sentenced to death in 2005 and submitted our study as part of a more general

reviewed our data ended in life without parole sentences, and thus there was no opportunity to litigate the narrowing question raised by our study on appeal.

**Table 1**

**NARROWING LITIGATION SINCE THE COLORADO MURDER STUDY**

| **Date Denied** | **County** | **Dist.** | **Case #** | **Def.** | **Def.'s Race** | **Case Results** | **Evid. Hr'g?** |
|---|---|---|---|---|---|---|---|
| 2018-10-09 | Pueblo | 16 | 2012CR60 | Miguel Contreras-Perez | Hispanic | Plea: LWOP | NO |
| 2017-09-01 | El Paso | 4 | 2016CR2749 | Glen Galloway | White | Trial: LWOP jury | NO |
| 2017-07-17 (and 2017-04-28) | Arapahoe | 18 | 2016CR337 | Brandon Johnson | Black | Plea: LWOP | NO |
| 2017-05-16 | Arapahoe | 18 | 06CR705 | Sir Mario Owens | Black | Post-conviction appeal pending | NO |
| 2015-07-15 | Denver | 2 | 2012CR4743 | Dexter Lewis | Black | Trial: LWOP jury | YES |
| 2015-03-11 | Logan | 13 | 2014CR99 | Brendan Johnson | White | Plea: LWOP | NO |

narrowing claim on state-post-conviction review. The post-conviction trial court in Owens' case denied this more general narrowing challenge arguing that the death penalty was unconstitutional "because the aggravating factors are too numerous and overbroad." P.C. ORDER (SO) No. 18, People v. Owens, No. 06CR705 (18th Jud. Dist. Ct., Arapahoe Cty., Colo.) at 1129. So, the only order denying relief in any court that has been appealed (with no decision on the appeal) is one that did not make any direct reference to our study, but rather rejected broader arguments about the general breadth of the Colorado capital sentencing statute. As noted above, three other trial courts (two guilt-phase and one post-conviction) had motions involving our study pending before them prior to the repeal of the statute.

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|---|---|---|---|---|---|---|---|
| 2014-05-02 | Arapahoe | 18 | 2012CR1522 | James Holmes | White | Trial: LWOP jury | NO |
| 2013-05-02 | Lincoln | 18 | 2002CR95 | Edward Montour | Hispanic/ NA | Plea: LWOP (during trial) | NO |
| Pending | Arapahoe | 18 | 2006CR697 | Robert Ray | Black | Post-conviction motion pending | YES |
| N/A | Logan | 13 | 2014CR98 | Cassandra Rieb | White | Plea – M2 | N/A |
| N/A | El Paso | 4 | 2017CR1716 | Diego Chacon | Hispanic | Plea – M2 | N/A |
| 2019-10-15 | El Paso | 4 | 2017CR1736 | Marco Garcia-Bravo | Hispanic | Pending | Pending |
| Pending | Adams | 17 | 2018CR375 | Dreion Dearing | Black | Pending | Partial (2019-09-27) |

On its face, a zero for eight record might indicate that Professor Smith is right and that there is little hope for a *Furman*-style challenge in today's legal landscape.[43] But we believe that these district court opinions can provide important information about how a robust study can succeed, if not in state court litigation, than when the issue eventually makes its way to the United States Supreme Court.[44]

We have reviewed each of the orders denying relief based on our study, and in the remainder of this section we identify the bases

43. *See* Smith, *supra* note 2, at 1153.

44. Two features of the denials of relief based on *Hidalgo* motions in the trial courts are worth mentioning. First the Colorado judiciary, although not elected, does subject judges to retention votes. *Frequently Asked Questions*, COLO. OFF. JUD. PERFORMANCE EVALUATION, http://www.coloradojudicialperformance.gov/faqs.cfm [https://perma.cc/T4U6-ACEH]. Second, the author of two of the orders denying relief and rejecting the very premise of such empirical challenges, Judge Carlos Samour, has been appointed to the Colorado Supreme Court by Democratic governor, John Hickenlooper. Jesse Paul, *Carlos Samour Appointed to the Supreme Court*, DENVER POST (May 30, 2018), https://www.denverpost.com/2018/05/30/carlos-samour-colorado-supreme-court/ [https://perma.cc/8L7Y-FZ9S].

upon which trial judges denied relief. There have been three primary reactions to our research. First, some prosecutors and trial judges concluded that the study's findings were unreliable because of bias or the lack of credibility of the researchers. Second, some prosecutors argued that as a factual matter our methods and coding were erroneous—that is, that we simply read the cases incorrectly. Third, and most frequently, courts held that numerical findings of non-narrowing are legally irrelevant to the question of the death penalty's constitutionality. We discuss the merits of each determination in turn.

### A. Credibility Findings

The first category of critique of our work involves judicial conclusions that we were either biased or unqualified to make the kinds of determinations necessary to determine death eligibility. The harshest findings relating to credibility came in the case that involved the most extensive live testimony to date. Following a lengthy evidentiary hearing with affidavits validating our work from experts around the country, Judge John W. Madden wrote that in reviewing our study he had uncovered a number of concerns, "some minor and some more significant."[45] In the category of more significant, he explained, "It is clear that [the study] was not an unbiased study, but one designed to provide support for a particular position and designed to reach an anticipated conclusion."[46] Explaining what rendered our opinions unreliable, the court reasoned that we were "commissioned by attorneys [for a death sentenced individual] . . . presumably in anticipation of crafting the specific argument that the death penalty is unconstitutional."[47]

It is difficult to read such conclusions without discerning a general hostility toward the idea of striking down the death penalty. Other than rare cases of judicially-appointed commissions or amicus briefs, expert involvement in any litigation is always at the behest of one party or the other. It is odd to suggest that death penalty researchers retained by defense counsel are somehow, as a class, an untrustworthy cohort. Even more damaging to this brand of critique is the fact that the state obtained funds, hired its own expert, and conducted a competing study in the first capital case in which our study

45. Denial of Defendant's Motions DL-D-3, 27, 39 & 102 C-61 at 5, People v. Lewis, No. I2CR4743 (2d Jud. Dist. Ct., Denver Cty., Colo. July 15, 2015).

46. *Id.*

47. *Id.*

was introduced, *People v. Montour*.[48] The state found an aggravating factor rate that did not differ from ours in any statistically significant way.[49] This replication of our study by experts funded by the prosecution rather than the defense certainly undercuts Judge Madden's conclusion that "whenever a study finds precisely what it set out to prove" there is a concern of bias.[50]

These orders denying relief based on credibility findings suggest, based on our experience, that in an ideal world a study would be designed and carried out without any entanglement with the defense team. But such a solution needlessly validates trial judges' concerns about bias. The fact-gathering in these cases—the collection of lists of murder prosecutions and the collection of case files—is difficult and time-consuming, often greatly aided by the resources and access to judicial support staff that attorney teams will enjoy. But once the records are gathered and verified by the state, legal and statistical work is relatively uncomplicated. The fact that our study was largely replicated by the prosecution shows that the source of funds for such a study is, at most, tangentially related to the study's veracity.

On this point, it is worth noting that we have also measured the presence of aggravating factors that are entirely objective—that is, not subject to judgement calls—and found such factors to be present in roughly 60% of the cases in our study. In other words, we repeated our analysis, but this time coding only those eight of Colorado's seventeen aggravating factors that require no subjective assessments on the part of the coder: (1) prior violent felony; (2) already serving a felony sentence at the time of the killing; (3) pregnant victim; (4) victim was a child; (5) possession of the murder weapon was a felony; (6) the defendant killed two or more people in one or more incidents; (7) felony murder; and (8) killing for pecuniary gain.[51] Using just these eight aggravating factors, we found that nearly two-thirds of all murderers in Colorado would still satisfy at least one aggravating factor.[52] This is yet further evidence that subjective motivations cannot explain away our findings.

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48. People v. Montour, 157 P.3d 489 (2007).

49. Submission of Murder Study Report, State v. Montour, No. 02CR782 (Dist. Ct. Douglas Cty., Colo. July 11, 2012).

50. Denial of Defendant's Motions DL-D-3, 27, 39 & 102 C-61 at 5, People v. Lewis, No. I2CR4743.

51. *See* COLO. REV. STAT. § 18-1.3-1201(5) (2014); *The Truth Hurts*, *supra* note 14, at 367–68.

52. *The Truth Hurts*, *supra* note 14, at 368.

B. Misunderstanding of Statute

Our study has also been critiqued on the basis that narrowing under the Colorado statute was essentially unmeasurable. The notion that narrowing is not a question that can reliably be assessed by quantitative analysis has taken both a general and a more specific form. The more general critique of our narrowing study is a close relative of the credibility findings discussed above. A number of Colorado decisions quote ad hominem attacks on death penalty research made by United States Supreme Court justices. For example, Justice Burger's dissent in *Furman* has been invoked in a Colorado decision in support of the proposition that "the mere fact of relative infrequency" is not a constitutional concern.[53] Similarly, courts have diminished research in support of *Furman* challenges by quoting concurring opinions by Justices Scalia and Thomas who have labelled research like this "abolitionist studies" that are "inherently unreliable."[54]

More specifically, courts have faulted narrowing studies for not having all of the information that prosecutors have when they decide whether to seek death in a particular case.[55] As one judge puts it, prosecutors consider "more than simply whether a single aggravating factor might exist."[56] This critique boils down to the truism that prosecutors may have access to information that post-hoc researchers and coders do not. And it may be true that prosecutors' files on a case would be much more robust than those compiled later from available records. But the argument that research regarding narrowing is not possible because prosecutors may have more information about a capital case rests on a flawed analytic framework. The critical assumption underlying this reasoning is that measuring death eligibility based on aggravating factors fails to recognize the role of prosecutor discretion in narrowing.

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53. Order Denying Galloway Motions. D-68, D-69, D-80, D-81, D-82 & D-83, 3, People v. Galloway, No. 16CR2749 (4th Jud. Dist. Ct., El Paso Cty., Colo. Sept 1, 2017).

54. *Id.* at 8.

55. We have previously noted the informational asymmetry in this context and affirmatively requested that prosecutors offer us additional records that are not available to researchers because they are sealed or otherwise not part of the judicial record in many cases. *See The Truth Hurts*, *supra* note 14, at 370 (noting that in some cases "police report or affidavit in support of probable cause" are not available).

56. Denial of Defendant's Motions DL-D-3, 27, 39 & 102 C-61 at 9, People v. Lewis, No. I2CR4743 (2d Jud. Dist. Ct., Denver Cty., Colo. July 15, 2015).

Applying this reasoning, courts in Colorado followed the lead of the Arizona Supreme Court in *Hidalgo*[57] and suggested that such research may be of limited utility because it fails to account for the role that jurors and prosecutors play in narrowing the class of death eligible defendants.[58] As one Colorado judge put it, by excluding this sort of information, the "circumstance brings to mind the data analysis acronym GIGO, which means garbage in garbage out."[59] But, the underpinnings of *Furman* include, as we have shown elsewhere, a stringent requirement that narrowing occur through legislative mandates as opposed to the whims of discretionary actors.[60] While death penalty selection necessarily involves more than simply whether an aggravating factor is present, the task of determining eligibility cannot.

In short, courts have been reticent to accept the idea that data alone could ever doom a state's death penalty scheme.[61] Some judges will always, as one Colorado court put it, reject the notion that the death penalty can be invalidated "based upon a bean counting exercise."[62] Yet, the *Furman* Court was concerned with precisely this sort of "bean counting." The problem with the Georgia statute at issue there was not just the vague and arbitrary standards for determining who could be sentenced to death, but also the exceedingly high eligibility rates and correspondingly low death sentencing rates that vague and arbitrary standards produce.

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57. State v. Hidalgo, 390 P.3d 783, 791 (2017), *cert. denied*, 138 S. Ct. 1054 (2018) ("Hidalgo is mistaken, however, insofar as he focuses only on the legislatively defined aggravating circumstances in arguing that Arizona's scheme does not constitutionally narrow the class of those eligible for death sentences."); *id*. ("Hidalgo cannot successfully argue that Arizona's capital sentencing scheme is 'arbitrary' and violates the Eighth Amendment or due process because it leaves the decision whether to seek death to the discretion of prosecutors.").

58. Denial of Defendant's Motions DL-D-3, 27, 39 & 102 C-61 at 9, People v. Lewis, No. I2CR4743.

59. *Id.* at 6.

60. Sam Kamin & Justin Marceau, *Waking the* Furman *Giant*, 48 U.C. DAVIS L. REV. 981, 992 (2015).

61. This is resonant with some of the work following McCleskey v. Kemp, 481 U.S. 279 (1987), including the essay by Reva Siegel concluding data will never prevail in this realm. Reva B. Siegel, *Blind Justice: Why the Court Refused to Accept Statistical Evidence of Discriminatory Purpose in* McCleskey v. Kemp*—And Some Pathways for Change*, 112 NW. U. L. REV. 1269, 1289 (2018).

62. Order Regarding Mot. BLJ-040 at 9, People v. Johnson, No. 14CR99 (13th Jud. Dist. Ct., Logan Cty., Colo.).

### C. Colorado's Capital Statute Was Uniquely Immune to Constitutional Study

Finally, prior to the repeal of Colorado's capital statute, the state's courts found that the nature of our statute made it uniquely immune from empirical study because it was comprised of four steps rather than the three steps in most states. The Colorado Supreme Court explained the system as follows:

> Colorado's capital sentencing scheme consists of four steps. First, it narrows the group of individuals convicted of first-degree murder at the eligibility stage by requiring that the jury be satisfied beyond a reasonable doubt of the existence of at least one of the statutorily specified aggravators. At the next stage, the statute contemplates that the jury will consider evidence to "decide whether any mitigating factors exist." Third, based upon that evidence, the jury must decide beyond a reasonable doubt whether "mitigating factors exist which outweigh any aggravating factor or factors found to exist." If the jury finds that the mitigating factors do not outweigh the statutorily specified aggravators, then the jury moves to the fourth and final stage of determining whether the defendant should be sentenced to death or to life imprisonment.

Hence, up to step three, Colorado's death penalty process resembled that of a weighing state in which the case in aggravation is weighed against the case in mitigation. However, Colorado's fourth step, in which the jury considers all relevant evidence without necessarily giving special consideration to statutory aggravators or mitigators, resembled the selection stage of a non-weighing state.[63]

As we have explained in detail in a previous article, the Colorado Supreme Court, in an entirely different context, had labelled the fourth stage of the capital process the "selection" phase and described the previous three stages as "narrowing." But this was never intended to be an Eighth Amendment holding; instead, it was a descriptive shorthand for when exactly a defendant could be selected – that is sentenced – to death. [64] Notably, however, several Colorado courts relied on this semantic distinction between stages three and four as the basis for concluding that narrowing studies were not possible in Colorado. In essence, these courts held that the balancing of mitigating

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63. People v. Dunlap, 975 P.2d 723, 736 (Colo. 1999).
64. *The Truth Hurts*, *supra* note 14, at 378–379.

and aggravating factors in stage three satisfies the constitutional requirement of narrowing and, because research can only document the presence or absence of aggravating factors (and not mitigators), courts had essentially held that an empirical study of Colorado's death penalty was impossible. Colorado, according to these courts, was inoculated from a *Furman-Hidalgo* challenge.[65]

In short, the critiques of our work have accused us of bias and an inability to understand both the nature of Colorado's recently repealed capital statute and the United States Supreme Court's constitutional requirements for such a statute. We continue to believe, however, that if the Court meant what it said in *Furman* and its progeny, Colorado's statute failed constitutional muster. Litigants and experts are likely to face similar critiques as they raise *Hidalgo* challenges in other states. As we discuss in the next section, we believe that the best way to vindicate these arguments in future litigation is to foreground the legal issues while allowing those regarding the facts and the investigators to retreat into the background.

## III. PROPERLY FRAMING A *HIDALGO* CLAIM

In the generation following *Furman v. Georgia*, the Supreme Court made quite clear that the states have a constitutional obligation to meaningfully narrow the pool of all those convicted of murder to a smaller subset eligible for death. *Furman* and its progeny—particularly cases such as *Zant v. Stephens*[66] and *Lowenfield v. Phelps*[67]—make clear that a state must quantitatively and qualitatively narrow, through either the definition of first-degree murder or the use of aggravating circumstances. The Court has made clear that this is a legislative requirement; the narrowing requirement cannot be satisfied by a discretionary decision of a prosecutor not to seek the death penalty or of a jury not to impose it.

Yet, a number of courts, including the Arizona Supreme Court in *Hidalgo*, seem to elide the mandate of *Furman*. The state high court in *Hidalgo*, for example, concluded that a non-narrowing challenge must be limited to the particular aggravating factor alleged against the defendant bringing the claim.[68] As Hidalgo pointed out in his petition

65. For a thorough critique of this view, *see* Kamin & Marceau, *supra* note 60, at 1017–19.

66. 462 U.S. 862 (1983).

67. 484 U.S. 231 (1988).

68. State v. Hidalgo, 390 P.3d 783, 790–91 (Ariz. 2017).

for certiorari, the Arizona Supreme Court's reasoning would uphold a death penalty statute where there was a separate aggravator for a murder committed on each day of the week. Thus, a killing would be aggravated if it were committed on Monday, or if it were committed on Tuesday, and so forth throughout the week. Although it is true that no one aggravator would apply to every murder under such a scheme, the statute as a whole would do exactly no narrowing work and would necessarily run afoul of the constitution. While the state high court was correct that a defendant may challenge the aggravators in his case as failing to narrow, it certainly does not follow that such a claim is the *only* one cognizable under *Furman*. It should be remembered that *Furman* was a structural challenge to a capital statute, arguing that the statute, as a whole, failed to meaningfully distinguish between the many convicted of murder and the few sentenced to death.

As we have seen, the Colorado courts engaged in a similar flavor of mistaken reasoning in the cases in which litigants introduced our study. They accused us of misconstruing the state statute and failing to take into account the way factors such as prosecutorial discretion, jury consideration of mitigating evidence, and opportunities for mercy do narrowing work under our statute. However, these factors cannot do the work required of the states under the Constitution. As the Supreme Court has made clear, narrowing is a statutory requirement—the state must make it clear through its legislative enactments who is eligible for the death penalty and who is not. The statute—taken as a whole—must genuinely narrow. Focusing on the work done by particular aggravating factors, for example, cannot save a statute that does not, as a whole, narrow.

For this reason, we believe that our reading of the requirements of *Furman* will carry the day when a properly framed *Hidalgo* challenge reaches the Court. Assuming that *Furman* remains the lodestar of modern death penalty jurisprudence, the only thing that could prevent such a conclusion is a record that allows the Court to decide the case on the basis of something other than its own constitutional precedents. In this section, we discuss our recommendations for foregrounding legal questions.

### A. Avoiding Credibility Determinations

We believe that the best way to counter the critiques described above and to keep the focus on the constitutional challenge is, to the extent possible, to remove the experts from the trial proceedings and allow one's study to speak for itself. Therefore, counsel bringing

*Hidalgo* challenges to their state's death penalty statutes should seek to introduce empirical studies through documentary testimony rather than live testimony.[69] The reason for this is simple. When investigators have confidence in the results of their study, live testimony will generally only hurt the defendant's case.

If judges do not have the opportunity to make credibility determinations regarding empirical studies, attention will have to be focused on the law. While it is possible that live testimony is better able to dispel judges' concerns about methodology and conclusions, it is likely that these issues can be adequately dealt with through declarations or argument by counsel. In our experience, judges disinclined to rule in defendants' favor will often rely on credibility determinations to avoid making the controversial and high-profile holding that a state's death penalty contravenes the Constitution. Particularly in states like Colorado where the numbers so overwhelmingly demonstrate a capital statute has failed to comply with the Constitution, isolating the legal impact of an empirical study is the most important thing trial counsel can do. What is more, credibility determinations, unlike conclusions of law, are afforded great deference by reviewing courts. We are confident that when the methods and arguments we employed in Colorado are used in other jurisdictions, they will eventually prevail. When such a case moves beyond the trial court stage, later courts will review legal decisions *de novo* but will give great deference to credibility determinations made in the court of first instance.

We acknowledge that attorneys will not always have the luxury of avoiding a hearing on a *Hidalgo* claim. The state, after all, has an interest in seeking the very sort of credibility determinations we are cautioning against in this Section. However, the state also has interests in making factual concessions and avoiding live-testimony hearings. For example, while it is easy for an experienced prosecution team to lob insults about "ivory-tower" academics misunderstanding how to apply the state's capital murder statute, the reality is that well-prepared experts overseeing coding are generally well-versed in the case law interpreting the state's statutory aggravating factors. If the state pursues a live review of coding decisions at a hearing, this will

69. There are evidentiary problems with avoiding testimony. For example, an affidavit submitted without an opportunity for cross-examination is hearsay testimony if offered for the truth. However, under the learned treatise exception to the hearsay rule, published studies *may* be admitted without the need for live testimony. *See* 6 WIGMORE §§ 1690–1700.

also give experts more time to demonstrate the soundness of their methodology to the court and to overcome overstated methodological critiques that are hard to make sense of on a cold record. That is to say, we think that many experts could create a strong record if they were allowed a full hearing to demonstrate their knowledge and acumen regarding the workings of the capital statute. The difficulty is that few courts facing a barrage of motions by a capital defense team are willing to offer more than a day or two of court time, at most, for any single hearing. Likewise, prosecutors will not want to consent to such an extended, full-length trial on the merits of a study, which may bolster its validity in the eyes of the factfinder. For these and other reasons we think that in many cases the state will be willing to stipulate to certain fundamental facts about defense studies. In our view, prudence suggests submitting a thorough report to the court and then engaging in as little live testimony as possible.

### B. Transparency in Methods

The sort of study we conducted is hardly novel. It has been repeated in many states and scholars have described the best practices for the carrying out of such research. In at least one Colorado case, we made our data available to the prosecution and encouraged them to double-check our determinations in individual cases. We provided them with a spreadsheet containing each of the cases we coded, whether we had coded each as a first-degree murder, and which aggravating factors, if any, we found to be present.

To our mind, the results of this disclosure were an unmitigated success. The prosecution took several weeks to recode our cases and came up with only a small handful of disagreements out of the more than 800 cases evaluated. Results such as this completely undermine the argument that defense experts are simply outcome-driven, partisan advocates. So many of the decisions involved in coding murder cases are objective—did the defendant cause the death of more than one person, was the defendant's possession of the murder weapon a felony, does the victim fall within a specified group of vulnerable individuals, and so on—that encouraging the prosecution to reproduce the findings of defense experts can generally only strengthen the probative value of those findings.

For this reason, we recommend that experts conducting non-narrowing studies reveal as much of their methodology as feasible to both the state and the court. This includes not just the overall conclusions regarding the percentage of cases that were death eligible

(as was done in *Hidalgo* itself) but also the actual aggravating factors found in individual cases. Because many states' death penalty statutes are so broad, this kind of radical transparency will reveal to both the court and the state how little the subjective motivations of defense experts play into their findings.

### C. Willingness to Give Way

The data produced by the public defender in *Hidalgo* were shocking. Their figures suggest that 98% of first-degree murders in the state were death-eligible. If true, this would be one of the highest death eligibility rates in the nation. Similarly, our study of Colorado makes it almost impossible to see how the state's system could have ever produce death sentencing rates of more than 1%. But it should be borne in mind that such numbers are hardly necessary to demonstrate a constitutional violation. The Georgia statute invalidated in *Furman* probably led to death sentences in 15–20% of the cases in which it was a possible punishment, a rate more than an order of magnitude greater than that demonstrated in Colorado.

It follows that making concessions about findings, even dramatic concessions, sharpens the legal dispute underlying these *Furman* challenges. Litigating particular cases and particular aggravating factors before a trial judge can make the process appear more complicated and contested than it is in fact. Given the overwhelming failure of many states' death penalty statutes to do the constitutionally required narrowing work, we believe it is better to assert that, even under the prosecution's reading of every disputed case, the legal conclusion would be the same—states are failing to meet their constitutional obligation to create an objective, statutory basis for determining who may be sentenced to death and who may not.

## CONCLUSION

In many ways, *Hidalgo* was the perfect case for the Supreme Court to take to reaffirm *Furman* and to invalidate a state death penalty statute on non-narrowing grounds. The empirical data was unrefuted and decisive. The Arizona Supreme Court's opinion took as a given the empirical studies and held, as a matter of constitutional law, that they did not demonstrate a constitutional defect in the Arizona statute. The legal issue thus seemed perfectly framed to test the constitutionality of a statute that made more than 98% of all first-degree murderers eligible for death.

Yet the study on which the petitioner relied was a slender reed; the single page submitted to the Arizona courts was long on conclusion and short on methodology. Although the state had stipulated to the accuracy of the study's findings, it is likely that the Supreme Court did not wish to decide such an important question—the continued validity of *Furman*—on such a bare empirical record. The case that will eventually test the continuing viability of *Furman* will need to be supported far more substantially. As we have demonstrated in this essay, the methods for creating a robust record are well-understood and accepted in the field. We have attempted to add to that knowledge by discussing how litigants in other states can use such a study to frame similar claims and make the most compelling argument in favor of invalidating an overly broad death penalty statute. Lessons from future litigation may also inform legislative repeal efforts.