February 20, 2018

House Judiciary Committee
Washington State Legislature
204A John L. O'Brien,
P.O. Box 40600,
Olympia, WA 98504-0600

Dear Members of the House Judiciary Committee:

We are current and former prosecutors and DOJ officials from across the nation. We understand the issue of using the death penalty to obtain plea bargains has been raised with this committee and felt the issue warranted sharing our experiences as well as notable research on the topic.

Some have said that without the death penalty, prosecutors will be disadvantaged in their ability to negotiate plea bargains, and that this will lead to additional expense. We find this notion to be deeply troubling. Whatever one may think about the merits of the death penalty, using this ultimate sanction as a threat to leverage pleas is both unethical and may increase the instances of unjust and unreliable convictions.

Recent reports have underscored that these concerns are more than theoretical. More than 25% of DNA exonerations are the result of a false confession or incriminating statements by innocent defendants.[1] The recent exoneration of a group of defendants known as the "Beatrice 6" in Nebraska exemplifies how this happens in practice. In 1985, investigators threatened several suspects with the death penalty and obtained what turned out to be false confessions. Based on those confessions, these individuals spent a combined 75 years behind bars until DNA eventually exonerated them.[2]

Sadly, this is not an isolated example. The non-partisan Death Penalty Information Center (DPIC) examined data from the National Registry for Exonerations on homicide exonerations in 2016 and found, for exonerations in just that one year, at least six wrongful homicide convictions had been the product of witnesses having falsely implicated innocent defendants after police had threatened the witness or a loved one with the death penalty and one innocent defendant had pled guilty to avoid the death penalty.[3]

It should also be noted that states that have ended the death penalty have not seen rates of plea bargaining impacted. Prosecutors in New Jersey have said that abolition of the death penalty there in 2007 has made no difference in their ability to secure guilty pleas.[4] In Alaska, where plea bargaining was abolished in 1975, a study by the National Institute of Justice found

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[1] Innocence Project, *False Confession or Admissions*, https://www.innocenceproject.org/causes/false-confessions-admissions/ (last visited February 20, 2018)
[2] "Nebraskans Mark Year of Freedom," Innocence Project, February 2, 2010, https://www.innocenceproject.org/nebraskans-mark-a-year-of-freedom/
[3] Death Penalty Information Center, *Causes of Wrongful Convictions*, https://deathpenaltyinfo.org/causes-wrongful-convictions (last visited February 20, 2018).
[4] Rudy Lardini, "A year later, state assesses justice without death penalty," in *The New Jersey Star Ledger*, December 15, 2008.

that since the end of plea bargaining, "guilty pleas continued to flow in at nearly undiminished rates. Most defendants pled guilty even when the state offered them nothing in exchange for their cooperation."[5]

Furthermore, numerous studies have shown that using the death penalty to obtain pleas does not result in cost savings. While obtaining pleas can eliminate the costs associated with a trial, these savings pale in comparison with the costs of preparing for a death penalty prosecution, even if it never goes to trial. According to a 2009 report by DPIC:

> "Some of the most thorough cost analyses conducted over the past 15 years specifically address plea bargaining as an area that could affect the costs of the death penalty, including those in North Carolina, Indiana, Kansas, and California, though some considered it too speculative to measure. These studies nevertheless concluded that the death penalty added significantly to the costs of the criminal justice system. The dubiousness of any savings from this practice is underscored by a federal death penalty cost study.
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> The Judicial Conference of United States concluded that the average cost of representation in federal death penalty cases that resulted in plea bargains was $192,333. The average cost of representation in cases that were eligible for the death penalty but in which the death penalty was not sought was only $55,772. This indicates that seeking the death penalty raises costs, even when the case results in a plea bargain. It would be far cheaper to pursue murder cases if the death penalty were never on the table, even taking some non-capital cases to trial, than to threaten the use of the death penalty to induce a plea bargain because the legal costs of preparing for a death penalty case far exceed the costs of a non-death penalty trial."[6]

Subsequently, cost analyses in at least two states have confirmed that the costs of capital cases resolved by plea is greater than the cost of non-capital prosecutions that proceed to trial. A February 2014 report of the Kansas Judicial Council Death Penalty Advisory Committee found that the average cost of a death-penalty case that was resolved by plea was double that of a non-capital case that ended in a plea and more than 20% greater than the combined costs of trial and appeal of a non-capital murder case.[7] Two fiscal reviews of proposed legislation by the Indiana Legislative Services Agency in 2015 found that a death penalty case resolved by guilty plea still cost more than 2.33 times as much as a life-without-parole case tried to a jury and that the average out-of-pocket expenditures by counties in capital cases that were resolved by plea were 4.43 times more than their average expenditures in life-without-parole case tried to a jury.[8]

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[5] Ralph Adam Fine, "Plea Bargaining: An Unnecessary Evil," *Marquette Law Review* 70 (1984): 615-632.
[6] Death Penalty Information Center, *Smart on Crime: Reconsidering the Death Penalty in a Time of Economic Crisis*, pp. 16-17, October 2009, https://deathpenaltyinfo.org/documents/CostsRptFinal.pdf.
[7] Report of the Kansas Judicial Council Death Penalty Advisory Committee, February 13, 2014, pp. 1, 7-8, https://deathpenaltyinfo.org/documents/KSCost2014.pdf.
[8] The Indiana legislative analysis is referenced at DPIC, Costs of the Death Penalty, https://deathpenaltyinfo.org/costs-death-penalty#financialfacts (last visited February 20, 2018).

Our experience as prosecutors has shown us that whatever one thinks about the death penalty, it is simply wrong to use it as a tool or “threat” to coerce a plea. That is not justice and it is not what our system of laws should embrace.

Sincerely,

The Undersigned (Listed alphabetically)*

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