Testimony before the Maryland Commission on Capital Punishment

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by Richard C. Dieter
Executive Director
Death Penalty Information Center

INTRODUCTON

Good afternoon, Chairman Civiletti, Members of the Commission. I would like to thank you for the invitation to testify before this important gathering.

My name is Richard Dieter. Since 1992, I have been the Executive Director of the Death Penalty Information Center[1] in Washington, DC. The Center is a non-profit organization that conducts research and publishes reports on issues related to capital punishment in the United States. I am also an adjunct professor at the Catholic University Law School in Washington. I am a long-time resident of Montgomery County and a member of the Maryland Bar.

The Center's role is not to advocate for particular pieces of legislation but to focus on research and trends in the death penalty, identifying problems and pointing to possible remedies. In my presentation today, I hope to give the Commission a national perspective on the status of capital punishment in this country, discuss the issue of the delay between sentencing and execution, and identify the relationship between these delays and the issues of innocence and costs. I would be more than happy to answer any questions that members of the Commission may have at any time.

THE STATUS OF THE DEATH PENALTY

There has been a clear national trend away from the broad use of the death penalty in the United States in recent years. Since 1999, there has been a 60% drop in

[1] . Death Penalty Information Center, 1101 Vermont Ave. NW, Suite 701, Washington, DC 20005; ph: 202-289-2275; Web site: www.deathpenaltyinfo.org; email: dpic@deathpenaltyinfo.org.

death sentences, a 50% decline in executions, and a decrease in the size of death row.[2] Public support has dropped from a high of 80% support in 1994 to 69% in the most recent Gallup Poll.[3] Moreover, when the public is given a choice between a sentence of life-without-parole for murder and the death penalty, more people would prefer the life sentence.[4] The sentence of life without parole is now available in virtually every state in the country.[5]

This distinction between people's support for the death penalty in theory and their simultaneous preference for the alternative of life without parole is important. Theoretical support for the death penalty measures people's choices assuming a perfect justice system in which mistakes and unfairness are absent. In the real world, where the problems of the death penalty have been apparent, and where people are asked to choose between a very risky and unpredictable punishment (the death penalty) and life without parole, which does not risk executing the innocent and is much more consistent, the public movement has been toward the alternative sentence.

This distinction is borne out in Maryland, where theoretical support for the death penalty stands at approximately 56%, already lower than the national average, and when given a choice of the alternative sentence of life without parole, only 27% of

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[2] . See, e.g., Bureau of Justice Statistics Annual Report on Capital Punishment, at <http://www.ojp.usdoj.gov/bjs/pub/html/cp/2006/cp06st.htm> (including data on 2006 and preliminary data on 2007).

[3] . See Gallup Poll, <http://www.gallup.com/poll/101863/Sixtynine-Percent-Americans-Support-Death-Penalty.aspx>.

[4] . See Gallup Poll, < http://www.gallup.com/poll/23548/Support-Death-Penalty-Years-After-Supreme-Court-Ruling.aspx>.

[5] . Only New Mexico and Alaska do not use a sentence of life without parole.

Marylanders would still chose the death penalty.[6] This practical choice is borne out in the dramatic decline in death sentences, both around the country and in Maryland.

The death penalty remains a controversial issue, but it is seen today more as a policy matter rather than as a moral litmus test for candidates. Increasingly, voters and legislators recognize that the death penalty is one among many government programs that must be evaluated in terms of their costs and possible benefits.

The growing skepticism about the death penalty and its declining use has led some states to take concrete actions away from this punishment. New Jersey voted to abolish the death penalty in 2007, and New York has also abandoned capital punishment, despite having reinstated it in 1995. Illinois has had a moratorium on executions since 2000 that remains in effect. Other states such as California, North Carolina and Tennessee, as well as Maryland, have recently instituted careful studies of their death penalty process. Finally, the U.S. Supreme Court has decided a series of cases that further restricts the use of the death penalty in a number of areas.[7]

It is important to realize that the trends in the use of the death penalty were in the opposite direction in the prior decade. Executions, the size of death row and public support for the death penalty were all on the rise in the early 1990s. New states were adopting the death penalty and the federal death penalty was greatly expanded. But the expansion of the death penalty turned into a sharp decline when the public became

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[6] . Mason-Dixon Polling and Research Inc, Feb. 6-8, 2007 (available from the Death Penalty Information Center).

[7] . See *Atkins v. Virginia* (2002) (excluding the mentally retarded), *Roper v. Simmons* (2005) (excluding juvenile offenders), *Kennedy v. Louisiana* (2008) (excluding crimes against a person where no death resulted), and *Wiggins v. Smith* (2003) (requiring more thorough mitigation investigations).

aware that so many mistakes were being made in capital cases. Advances in DNA testing and the images of death row inmates walking out of prison greeted by their attorneys and the journalism students who helped free them have had a profound impact on the use of the death penalty.[8]

TIME BETWEEN SENTENCING AND EXECUTION

The decline in the use of the death penalty has correlated with an increase in the time between sentencing and execution. This delay has been a source of dissatisfaction with the death penalty on the part of many victims' family members and with the public generally. However, much of the delay is the result of years of widespread use of capital punishment, which created large death rows and a backlog of cases in the appellate courts. The other reason for the delay is a healthy caution resulting from the near executions of innocent people.

The facts regarding the time between sentencing and execution are these: for all the executions that have been carried out between 1977 and the end of 2006, the average time between sentencing and execution has been 126 months, or 10.5 years.[9] For executions carried out in 2006 alone (the last year for which full data is available), the average time was 145 months, or 12 years. The times in 2005 and 2006 were the longest of any years since the death penalty was reinstated. The average time for all executions since reinstatement has gotten steadily longer. Even in Texas, the time between sentencing and execution is ten years. No state, including those with the fewest protections, has found a way to make the death penalty process work quickly.

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[8] . See Frank Baumgartner et al., *The Decline of the Death Penalty and the Discovery of Innocence* (2008) (Cambridge Press).

[9] . See Bureau of Justice Statistics, note 2 above (Table 11).

In some states, inmates are on death row for 20 or even 30 years awaiting execution. About 275 inmates have been on death row for 24 years or more[10] – including 3 out of the 5 death row inmates here in Maryland.

This extensive delay results in the imposition of two sentences on the defendant: a life sentence in solitary-like confinement, *and* a death sentence that may never be carried out. Such a system is enormously expensive for the state and a source of frustration for many victims' families. It has also created skepticism among the public regarding the value of such a nebulous form of justice. Indeed, some family members have remarked that, given the extensive time, the unpredictability of the outcome, and the painful reliving of the tragedy that inevitably accompanies this process, it would have been better if a life sentence had been imposed in the first place.[11]

In an earlier response to this delay, Congress and various states passed legislation such as the Anti-Terrorism and Effective Death Penalty Act of 1996[12] in an effort to speed up executions. However, some of these laws have proven cumbersome and overly restrictive in light of new evidence pointing to innocence.

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[10] . See Bureau of Justice Statistics, Capital Punishment, 2005 (2006), appendix Table 3.

[11]. James O'Brien's daughter Deidre was murdered in 1982, and the capital trials and appeals for the man convicted of the crime lasted many years. O'Brien stated, "I've lived through the state's process of trying to kill [a murderer], and I can say without hesitation that it is not worth the anguish that it puts survivors through…." Because of the "horrendous toll" the process took on his family and the little closure it gave them, O'Brien, a resident of St. Michael's, Maryland, called for abolition of the death penalty. Regarding closure for the family, he said, "the death penalty forces that closure further away than any other punishment on the books." J. O'Brien, "Death Penalty Punishes Victims' Families, Too," The Daily Record, Nov. 25, 2007.

[12] . See AEDPA, Pub. L. No. 104-132, 110 Stat. 1214.

RELATIONSHIP AMONG DELAY, COSTS AND INNOCENCE

As indicated above, the delay between sentencing and execution does not occur in a vacuum, but is closely related to other important death penalty issues, especially innocence and costs. Indeed, delay may be the most appropriate response in the face of evidence indicating a risk that innocent lives could be taken.

The American people now know that the problem of innocence is a lot more serious than was previously thought. Since 1973, 129 people who were sentenced to death in 26 states have been freed after their convictions were reversed. Kirk Bloodsworth, a member of this Commission, is among those 129 people and a living example of the risks involved if the death penalty is carried out quickly. On average, it took about 9.5 years between the defendant's sentencing and his or her exoneration.

In the vast majority of these cases, the defendants were acquitted of all charges at a retrial or the prosecution decided to drop all charges.[13] In the few remaining cases, a governor granted a complete pardon based on innocence. For every 9 people who have been executed since 1973, there has been one person slated for execution who was innocent and fortunately freed from death row. That represents a substantial risk when human lives are at stake.

Nor is this problem of innocence restricted to the earlier years of the death penalty. Most of the 129 people who have been freed were exonerated since 1995, and

[13] . See R. Dieter, *Innocence and the Crisis in the American Death Penalty,* Death Penalty Information Center (2004), listing the first 116 cases and discussing the problem generally. See also DPIC's Web site http://www.deathpenaltyinfo.org under "Innocence" for a complete list of all cases and the criteria for inclusion on the list.

45 were freed since the beginning of 2000. Three people have already been exonerated in 2008.

The reversals in these 129 cases do not prove that the system works. Many of the cases indicate just the opposite. The 16 cases where people were freed as the result of post-conviction DNA testing are a stark reminder of the fallibility of our justice system. DNA testing evolved as a tool of science. If this technology had emerged ten years later, those 16 people may have been executed. It is important to remember that the typical DNA case resulted not only from a unanimous jury conviction and a unanimous death sentence, but was also affirmed at numerous levels of appeal.

Many of the other exonerations similarly occurred because of fortuitous circumstances outside of the normal justice system. In some instances, journalism students were able to uncover glaring flaws in the original evidence, and were even able to locate the actual murderer. The media played an important role in many of the cases, and in others, volunteer lawyers from major law firms revisited the evidence and trial records. They donated thousands of free hours resulting in the freeing of death row inmates. But that kind of attention, and the millions of dollars for appeals that accompany it, is only applied to a few cases. Many people have been executed where there was considerable evidence that they may have been innocent, but there was neither the time nor the resources to thoroughly examine their cases.[14]

REFORMS AND COSTS

Preventing the errors that led to these wrongful convictions should be one of the highest priorities of our justice system. But typical reforms such as providing better representation to defendants, videotaping interrogations, and allowing for the introduction of new evidence, can raise the costs of the death penalty and even increase the initial time required (though in the long run they might avoid lengthy re-trials).

The death penalty on the cheap is really no bargain. There is no abstract dollar figure for the cost of the death penalty--it ultimately depends on the quality of the system a state demands. In Illinois, their system was fraught with error. Over a 20-year period, they freed more innocent people from death row than they executed. As a result, a blue-ribbon commission there recommended 85 changes to make the death penalty more reliable; most of these changes, if implemented, will cost the state even more money.[15]

There is little dispute that the death penalty is expensive. Sentencing someone to life in prison is also very expensive. But death penalty costs are accrued up-front, especially at trial and for the early appeals, while life-in-prison costs are spread out over many decades. A million dollars spent today is a lot more costly to the state than a million dollars that can be paid gradually over 40 years.

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[14] . See, e.g., T. Ganey, "Was the Wrong Man Executed, "St. Louis Post-Dispatch, July 11, 2005, regarding the case of Larry Griffin who was executed in 1995 in Missouri.

[15] . Report of the Governor's Commission on Capital Punishment (Illinois, released April 15, 2002).

Death penalty cases are clearly more expensive at every stage of the judicial process than similar non-death cases. Everything that is needed for an ordinary trial is needed for a death penalty case, only more so:

- more pre-trial time will be needed to prepare: cases typically take a year to come to trial
- more pre-trial motions will be filed and answered
- more experts will be hired
- twice as many attorneys will be appointed for the defense, and a comparable team for the prosecution
- jurors will have to be individually quizzed on their views about the death penalty
- they are more likely to be sequestered
- two trials instead of one will be conducted: one for guilt and one for punishment
- the trial will be longer: a cost study at Duke University estimated that death penalty trials take 3 to 5 times longer than typical murder trials
- and then will come a series of appeals during which the inmates are held in the high security of death row.

These individual expenses result in a substantial net cost to the taxpayer to maintain a death penalty system as compared to a system with a life sentence as the most severe punishment. It is certainly true that after an execution the death row inmate no longer has to be incarcerated while the life-sentenced prisoner remains under state care. But that partial saving is overwhelmed by the earlier death penalty costs, especially because relatively few cases result in an execution, and, even those that do occur, happen many years after the sentence is pronounced.[16]

A study at Columbia University Law School demonstrated how few capital cases actually result in an execution: the study found that 68% of death penalty sentences or

[16] . Some commentators have suggested that the existing cost studies ignore the possible financial savings from the theory that the threat of the death penalty results in more plea bargains. However, many of the studies do mention this plea bargain factor: see note 21 below (North Carolina); Indiana Criminal Law Study Commission, January 10, 2002; Kansas Performance Audit Report: Costs Incurred for Death Penalty Cases: A K-GOAL Audit of the Department of Corrections, December 2003. These studies considered such a factor to be speculative or that such pleas were restricted by state law.

convictions are overturned on appeal.[17] The serious errors that were discovered required at least the sentencing phase to be done over. When these death penalty cases were re-tried, approximately 82% resulted in a life sentence. Thus, the typical death penalty case has all the expenses of its early stages and appeal; it is then overturned, and a life sentence is imposed, resulting in all the costs of a lifetime of incarceration. Nationally, only about 12% of people who have been sentenced to death have been executed.[18] The numbers in Maryland are comparable, with approximately 53 death sentences and 5 executions in over 30 years.

The most expensive system is one that combines the costliest parts of both punishments: lengthy and complicated death penalty trials followed by incarceration for life. Surprisingly, research has shown that is exactly what you can expect from the death penalty. In most cases where the prosecution announces that the death penalty will be sought, it is never imposed. And even when it is imposed, it is rarely carried out.

Theoretically, Maryland might fashion a more efficient death penalty system. Texas, for example, has executed about one-third of the people it has sentenced to death. Even at that rate, it has been estimated that the **extra** costs of the death penalty in Texas are about $2.3 million per case.[19] And Texas' "efficient" death penalty system

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Moreover, if this was the avowed purpose of the death penalty, it is doubtful that courts would uphold the constitutionality of such an intentional interference with the right to trial.

[17] . James S. Liebman, "A Broken System: Error Rates in Capital Cases," (Columbia Univ. June, 2000) (executive summary).

[18] . See U.S. Dept. of Justice, Bureau of Justice Statistics, "Capital Punishment 2003," appendix Table 4 (2004).

[19]. C. Hoppe, "Executions Cost Texas Millions," Dallas Morning News, March 8, 1992, at 1A.

has also been accompanied by a record of sleeping lawyers, prosecutorial misconduct, and sharp reprimands from the U. S. Supreme Court.[20]

COST STUDIES

Most of the cost studies that have been conducted do not look solely at the costs of an isolated case. Rather the best analyses compare a **system** in which the death penalty is employed to a system dealing with similar crimes in which a life sentence is the most severe punishment allowed. At every step of the analysis, the question is asked: how much more, or less, does the system with the death penalty cost compared to the other system?[21]

The major cost studies on the death penalty all indicate that it is much more expensive than a system where the most severe sentence is life in prison. In recent years, cost studies have been used not just to determine the bottom line in dollars and cents for this system, but as a way of evaluating whether the death penalty is justified in comparison to other pressing state needs. In this context, it is the amount of money spent *per execution that* is significant. For example:

- On June 30, 2008, the California Commission on the Fair Administration of Justice released a 107-page report on the state's capital punishment system, calling it "dysfunctional" and a "broken system." The report stated that the state was spending $137 million per year on this failed system and that $95 million per year more was needed just to lessen the backlog of cases. That would amount to

[20] . See, e.g., Miller-El v. Dretke, 125 S. Ct. 2317 (2005) (race bias in jury selection).

[21] . See, e.g., P. Cook, "The Costs of Processing Murder Cases in North Carolina," Duke University (May 1993). This is probably the most comprehensive cost study conducted in this country. It found that the death penalty costs North Carolina $2.16 million per execution over the costs of a non-death penalty system imposing a maximum sentence of imprisonment for life. These findings are sensitive to the number of executions the state carries out. However, the authors noted that even if the death penalty were 100% efficient, i.e., if **every** death sentence resulted in an execution, the **extra** costs to the taxpayers would still be $216,000 per execution.

spending $232 million per year while the number of executions has averaged less than one per year. Thus, the cost *per execution* would be over $200 million. The Commission estimated that a comparable system that sentenced the same inmates to a maximum punishment of life without parole would cost only $11.5 million per year.[22] Meanwhile, the state has also indicated that it needs about $400 million more for a new death row.

- In New York and New Jersey, the high costs of capital punishment were one factor in those states recently abandoning the death penalty. New York spent over $170 million over 9 years and had no executions.[23] New Jersey spent $250 million over a 25-year period and also had no executions.[24]

And the cost per execution is growing. In 1988, the *Miami Herald* estimated that the costs of the death penalty in Florida were $3.2 million per execution, based on the rate of executions at that time.[25] Florida's death penalty system bogged down for a number of reasons, including a controversy over the electric chair. As a result, a more recent estimate of the costs in Florida by the *Palm Beach Post* found a much higher cost per execution: Florida spends $51 million a year above and beyond what it would cost to punish all first-degree murderers with life in prison without parole. Based on the 44 executions Florida had carried out from 1976 to 2000, that amounts to a cost of $24 million for each execution.[26]

The increasing costs of the death penalty are having a direct and negative impact on the administration of justice:

- In New Mexico, the state Supreme Court held that more resources had to be made available for indigent defendants facing capital punishment. The

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[22] . See Calif. Com. on the Fair Administration of Justice, http://www.ccfaj.org/rr-dp-official.html, June 30, 2008.
[23] . See, e.g., D. Wise, "Capital Punishment Proves to Be Expensive," New York Law Journal, April 30, 2002, at p.1; see also "Costly Price of Capital Punishment—Case Shows Effort Expended Before the State takes a Life," Albany Times-Union, Sept. 22, 2003 (over $160 million spent in 7 years).
[24] . See Newsday, Nov. 21, 2005.
[25]. D. Von Drehle, "Bottom Line: Life in Prison One-sixth as Expensive," The Miami Herald, July 10, 1988, at 12A.
[26]. S. V. Date, "The High Price of Killing Killers," Palm Beach Post, Jan. 4, 2000, at 1A.

legislature declined and adjourned for the year. A trial judge then ruled that the state could not pursue the death penalty in a prosecution and the attorney general's office concurred, thus halting capital prosecutions in that state.[27]

- In Georgia, the death penalty prosecution in one case (Brian Nichols) has already cost the state close to $2 million and the case has not yet gone to trial. There is no question of Nichols' guilt, but seeking the death penalty has proven enormously expensive. The case has resulted in a crisis in indigent funding across the state. The head of the death penalty unit of the public defender's office resigned because he said his office could no longer fairly represent its clients and many cases have ground to a halt.[28]

- In New Jersey, police chief James Abbott served on the commission that reviewed that state's death penalty law. He concluded that the money spent on the death penalty was wasteful and that there were better ways to reduce crime. He wrote: "I no longer believe that you can fix the death penalty. Six months of study opened my eyes to its shocking reality. I learned that the death penalty throws millions of dollars down the drain -- money that I could be putting directly to work fighting crime every day -- while dragging victims' families through a long and torturous process that only exacerbates their pain. . . As a police chief, I find this use of state resources offensive. . . . Give a law enforcement professional like me that $250 million, and I'll show you how to reduce crime. The death penalty isn't anywhere on my list."[29]

- In Florida, a budget crisis has led to a cut in funds for state prosecutors' offices. As a result, some prosecutors will be cutting back on use of the death penalty because it is so costly. Florida State Attorney Harry Shorstein recently said that cuts to his budget might mean abandoning expensive death penalty cases. "There will be cases that can't be tried. Will it mean we can't get to the trials? Will it take longer? Will it, will it clog the criminal justice system? Yes. . . . We are strained to the breaking point. . . . Instead of seeking the death penalty, maybe we'll seek something else," he said.[30]

Economic downturns in the past have meant that states have had to make drastic cuts in law enforcement and other services such as reducing the number of police officers, closing libraries, laying off prison guards and nurses, and neglecting to repair

[27] . Scott Sandlin, "Death Penalty Out in Guard Killing," Albuquerque Journal, April 4, 2008.
[28] . Shannon McCaffrey, "Georgia Senate slashes money for public defenders," Macon Telegraph, February 20, 2008; see also New York Times, September 7, 2007.
[29] . James Abbott, "Less money, more pain and injustice," Fort Worth Star-Telegram, January 20, 2008.
[30] . Jacksonville Daily Record, September 13, 2007.

essential vehicles.[31] The death penalty is not responsible for these budget crises, but it does force legislators to choose among programs that can make a difference in people's lives.

An article in the *Wall Street Journal* noted that in states where counties are chiefly responsible for prosecuting capital cases, the expenses can put an extraordinary burden on local budgets comparable to that caused by a natural disaster.[32] Katherine Baicker of Dartmouth concluded that capital cases have a "large negative shock" on county budgets, often requiring an increase in taxes. She estimated the extra expenses on counties to be $1.6 billion over a 15-year period.[33]

The net effect of this burden on counties is a widely disparate and arbitrary use of the death penalty. "Rich" counties that can afford the high costs of the death penalty may seek this punishment often, while poorer counties may never seek it, settling for life sentences instead. In some areas, this geographical disparity can have racial effects, as well, depending on the geographical location of racial minorities within the state. Some counties have approached the brink of bankruptcy because of one death penalty case that has to be done over a second or third time.[34]

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[31] . See, e.g., New York Times, June 7, 2003 (cuts in prison guards and police forces; Lakeland (Florida) Ledger, December 14, 2003 (cuts in libraries); Associated Press, April 2, 1999 (not replacing nurses or fixing vehicles).

[32]. R. Gold, "Counties Struggle with High Cost of Prosecuting Death-Penalty Cases," Wall St. Journal, Jan. 9, 2002.

[33]. K. Baicker, "The Budgetary Repercussions of Capital Convictions," National Bureau of Economic Research, Working Paper 8382, July 2001.

[34] . See generally, R. Dieter, "Millions Misspent: What Politicians Don't Say About the High Costs of the Death Penalty," (revised edit., 1994) (available from the Death Penalty Information Center).

Many of the costs of the death penalty are inescapable and have likely increased as the demands for a more reliable and fairer system have been heard.[35] The appeals process now takes longer, the defense attorneys, prosecutors and judges all are paid more, re-trials are long and more expensive. The majority of the costs occur at the trial level, and cannot easily be streamlined or reduced.

CONCLUSION

The death penalty in the United States has become unwieldy. In most states, executions are rare, the delay between sentencing and executions has lengthened, and the costs of the death penalty system have grown considerably. Yet for all this additional effort, death penalty cases are still prone to error and the risk of executing an innocent person remains. The public and the families of victims have a right to be frustrated with this system. But there is no simple way to reduce delays and costs while ensuring that innocent lives are protected and that the system works fairly. This dilemma is one of the principal reasons that the use of the death penalty has declined so dramatically in recent years.

I would be happy to provide this committee with more extensive information on the points I have raised. I would also be pleased to answer any questions you may have.

[35] . The U.S. Supreme Court placed higher demands on state-provided representation when it overturned a death sentence because the attorneys had not employed a mitigation specialist to thoroughly explore their client's background. *Wiggins v. Smith*, 123 S. Ct. 2527 (2003).