Nevada Advisory Commission on the Administration of Justice

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INTRODUCTION

Good afternoon. I would like to thank Justice Hardesty and Members of the Advisory Commission for this opportunity to speak to you and to offer my remarks on the costs of the death penalty.

My name is Richard Dieter and I am the Executive Director of the Death Penalty Information Center in Washington, DC, a position I have held for the past 16 years. I am an attorney and an adjunct professor at Catholic University Law School. The Death Penalty Information Center is a non-profit organization whose focus is research and analysis of capital punishment.

The issue of the costs of the death penalty has been receiving increasing attention in recent years for two reasons. First, the costs of capital punishment have been growing. Second, all states are experiencing the effects of the economic slowdown and are seeking ways to reduce their expenses. The death penalty by every measure is an expensive government program. In the course of my work, I believe I have reviewed every state and federal study of the costs of the death penalty in the past 25 years. One element is common to all of these studies: They **all** concluded that the cost of the death penalty amounts to a **net expense** to the state and the taxpayers. Or to put it differently, the death penalty system is clearly **more expensive** than a system handling similar cases with a lesser punishment.

But the death penalty and its costs should not be considered in a vacuum. In broad terms, the death penalty is about a **search for justice and the safety of the community**. There are many ways to make the community safer, and most of these have costs associated with them. There is no bottomless pot of government money to

be spent on things that might help the community. The more you spend on one project, the less there is available for other worthwhile endeavors.

A recent article on this subject in the *Wall Street Journal* linked the death penalty with its increasing costs: "Nothing is certain," it stated, "except the death penalty and higher taxes."[1] The extra money spent on the death penalty could be spent on other means of achieving justice and making the community safer: compensation for victims, better lighting in crime areas, more police on the streets, or funds for pursuing cold homicide cases. Quite a few jurisdictions with the death penalty have recently had to cut back on other vital services. In some death penalty states, people are being released from prison early as a cost saving measure. Other states are closing libraries and other vital services.[2] The costs of the death penalty have a direct bearing on these issues.

Recent Prominence of the Cost Issue

Recently, the cost issue has reached crisis proportions in some states and changes are already underway as a result.

⇒ On June 30th, 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 spending $232 million per year where executions have averaged less than one per year. The Commission estimated that a comparable system that sentenced inmates to a maximum punishment of life without parole would cost only $11.5 million per year.

⇒ In New Mexico, the state Supreme Court held that more resources had to be made available for indigent defendants facing capital punishment. The legislature failed to respond and adjourned for the year. A trial judge then ruled that the state could not

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

pursue the death penalty in a homicide prosecution, and the attorney general's office concurred, thus halting capital prosecutions in that state.

⇒ In Georgia, the death penalty prosecution of 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 death penalty cases ground to a halt.

⇒ In Maryland, the governor has recommended abolishing the death penalty. A recent study concluded that the state had spent $186 million since the death penalty was reinstated. During that time, they had 5 executions, translating to a cost of $37 million per execution. Similarly, a recent study in Colorado estimated that the state spent $40 million in a system that has resulted in 1 execution.

⇒ 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.[3] New Jersey spent $250 million over a 25 year period and also had no executions.

Why the Death Penalty is So Costly

There is no dispute that the death penalty is expensive. Of course, 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.

But 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

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[2] . See, e.g., F. Butterfield, "As Cities Struggle, Police Get By With Less," N.Y. Times, July 27, 2004 (cities with budget shortfalls are closing innovative law enforcement units that helped reduce crime). Cleveland laid off 250 police officers. Meanwhile, Ohio has 206 people on death row.

[3] . 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).

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.

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, and they are more likely to be sequestered
- two trials instead of one will be conducted: one for guilt and one for punishment; in the state of Washington, the **extra** costs associated with the death penalty cases amounted to $463,000 per trial; in California, the extra trials costs in capital cases was about $1.2 million per trial.
- 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-sentence 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.[4] And the time between sentencing and execution has become longer in recent years. For those executed in 2006, the average time before execution was over 12 years.

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 convictions are overturned on appeal.[5] The serious errors that are discovered require that at least the sentencing phase be done over. When these death penalty cases are re-tried, approximately 82% result 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.[6] In Nevada, the rate of execution is about 8% of death sentences.

Theoretically, Nevada might fashion a more efficient death penalty system. Texas, for example, has executed about one-third of the people it has sentenced to death. But 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,[7] and the Texas system is not known for its careful protection of due process.

Nevada's death penalty is similar to that of many states: from the many potential capital cases, there are relatively few death sentences and even fewer executions. Many cases are overturned on appeal. About as many people die of natural causes on Nevada's death row as have been executed. And (unlike other states), almost all those

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[4] . 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, some of the studies cited below do mention this plea bargain factor: see North Carolina, Indiana, and Kansas below. These studies considered such a factor to be speculative or that such pleas were restricted by state law. 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.

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

[6] . See U.S. Dept. of Justice, Bureau of Justice Statistics, "Capital Punishment 2005," appendix Table 4 (2006).

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

executed waived the opportunity to complete their appeals process. Such a system is not that different from a system involving only life-without-parole as the most severe punishment. But using the death penalty to get to life without parole is the most expensive form of a life sentence; it is one in which the life sentences that are obtained occur *after* the high costs of death penalty trials.

COST STUDIES

It is difficult to put a precise figure on the cost of the death penalty, and very few states have actually conducted in-depth studies of the expenses. Nevertheless, there have been studies by government agencies, the media, and independent researchers that create a clearer picture.

COMMON ELEMENTS OF THE STUDIES

Most of these studies 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?

One important point about the better cost studies: the costs of the death penalty do not usually appear as line items in the budget. Nevertheless, it is not accurate to say that there is no expense attributable to prosecutors or judges because they would be paid the same regardless of whether they are doing death penalty cases. This ignores what the studies call "opportunity costs." Time is money. If a prosecutor or judge works longer on a case because it is a death penalty case, then those hours are not available for other work. If death penalty cases take more time, then that time difference is a net cost measured in the hours of all the participants.

HOW MUCH DOES THE DEATH PENALTY COST?

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:

⇒ The most comprehensive study conducted in this country 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.[8] 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.

⇒ Some years ago, 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.[9] 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.**[10]

⇒ In Texas, the *Dallas Morning News* concluded that a death penalty case costs an average of $2.3 million, about three times the cost of imprisoning someone in a single cell at the highest security level for 40 years.[11]

⇒ A recent study by Indiana's Criminal Law Study Commission found that the total costs of the death penalty projected into the future for the state's current capital cases would be about $51 million, exceeding the future costs of life without parole sentences by about 38%.[12]

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[8]. P. Cook, "The Costs of Processing Murder Cases in North Carolina," Duke University (May 1993).
[9]. D. Von Drehle, "Bottom Line: Life in Prison One-sixth as Expensive," The Miami Herald, July 10, 1988, at 12A.
[10]. S. V. Date, "The High Price of Killing Killers," Palm Beach Post, Jan. 4, 2000, at 1A.
[11] . C. Hoppe, "Executions Cost Texas Millions," Dallas Morning News, March 8, 1992, at 1A.
[12] . Indiana Criminal Law Study Commission, January 10, 2002 (assuming that only a modest 20% of death sentences are overturned and resentenced to life).

⇒ In its review of death penalty expenses, the State of Kansas concluded that capital cases are 70% more expensive than comparable non-death penalty cases. The study projected death penalty case costs through to execution (though none has occurred) and found that the median death penalty case costs $1.26 million. The trial costs for death cases were about 16 times greater than for non-death cases. The appeal costs for death cases were 21 times greater.[13]

⇒ A New Jersey Policy Perspectives report concluded that the state's death penalty has cost taxpayers $253 million since 1983, a figure that is over and above the costs that would have been incurred had the state utilized a sentence of life without parole instead of death.[14] The state conducted no executions and abolished the death penalty in 2007.

In a report from the Judicial Conference of the United States on the costs of the **federal death penalty**, it was reported that defense costs were about 4 times higher in cases where death was sought than in comparable cases where death was not sought. Moreover, the **prosecution** costs in death cases were 67% higher than the defense costs, even before including the investigative costs of law enforcement agencies.[15]

A recent article in the *Wall Street Journal* noted that in states where counties are chiefly responsible for prosecuting capital cases, the expenses could put an extraordinary burden on local budgets comparable to that caused by a natural disaster.[16] 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.[17]

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[13] . Performance Audit Report: Costs Incurred for Death Penalty Cases: A K-GOAL Audit of the Department of Corrections, State of Kansas, December 2003.
[14] . Newsday, Nov. 21, 2005.
[15] . See, "Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation," Judicial Conference of the United States (May 1998).
[16]. R. Gold, "Counties Struggle with High Cost of Prosecuting Death-Penalty Cases," Wall St. Journal, Jan. 9, 2002.
[17]. K. Baicker, "The Budgetary Repercussions of Capital Convictions," National Bureau of Economic Research, Working Paper 8382, July 2001.

The net effect of this burden on counties is a widely disparate and somewhat 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 at all, 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.[18]

Many of the costs of the death penalty are inescapable and have likely increased even since the studies mentioned here were conducted, as the demands for a more reliable and fairer system are heard. The appeals process is now longer, the defense attorneys, prosecutors and judges all are paid more, re-trials are long and more expensive. The majority of the costs occurs at the trial level, and cannot easily be streamlined or reduced. The U.S. Supreme Court recently 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.[19] A death penalty that attempts to be fair will also be costly.[20]

The recent controversy concerning lethal injection is another example that the death penalty will remain costly, slow, and unpredictable for the future. Executions were on hold across the country for almost 8 months, and it is likely that further litigation will ensue.

It is not my role to advocate any particular legislative remedy in response to these facts. However, there has been a clear trend in recent years away from use of the death penalty. There has been a 60% drop in death sentences, a 50% decline in executions, a smaller death row, and a decreasing level of public support.[21] In public opinion polls, there is a clear increase in support for life-without-parole sentences as a

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[18] . 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).
[19] . Wiggins v. Smith, 123 S. Ct. 2527 (2003).
[20] . See, e.g., Report of the Illinois Governor's Commission on Capital Punishment (April 15, 2002) (making 85 recommendations for reform, many at significant expense to the state).
[21] . See, e.g., Editorial, "The Year in Death," Washington Post, Dec. 31, 2006.

substitute for the death penalty. Moreover, the states without the death penalty have fared better in reducing their murder rates than states with the death penalty.

The death penalty concentrates millions of dollars on a few people with almost no control over the outcome. It is true that you cannot put a price on justice. But there are programs with a better track record in improving the safety of the community. A state has to choose where to put its limited resources.

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