New York State Assembly: Standing Committees on Codes, Judiciary, and Correction

Costs of the Death Penalty and Related Issues

Testimony of

Richard C. Dieter

Executive Director
Death Penalty Information Center

Roosevelt Hearing Room C
Legislative Office Building
Albany, New York

January 25, 2005

INTRODUCTION

Good afternoon. I would like to thank the Chairs of the respective Committees conducting these hearings, Assemblyman Lentol, Assemblywoman Weinstein, and Assemblyman Aubry, and all the Members of these Committees for this opportunity to appear before 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 13 years. I am an attorney, an adjunct professor at Catholic University Law School, and a native of New York. The Death Penalty Information Center is a non-profit organization whose focus is research and analysis of capital punishment.

There are many controversial aspects to the death penalty debate and the question of costs often gets overlooked. Fiscal considerations, however, are important in their own right, and they have a critical impact on other issues such as innocence and the quality of representation.

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.

All of the studies regarding the cost of the death penalty have concluded that it amounts to a **net expense** to the state and the taxpayers. As a recent article on this very subject in the *Wall Street Journal* put it: "Nothing is certain 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, even longer periods of incarceration for certain offenders, or projects to reduce unemployment. Quite a few

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

jurisdictions with the death penalty have recently had to cut back on other vital services. In some 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.

A second reason why the costs of the death penalty are so central is that they play a key role in how the death penalty is implemented. Supporters and opponents of the death penalty agree that the capital punishment system should not take unnecessary risks with innocent lives and should be applied with a strict fairness. As with many things, the death penalty on the cheap is really no bargain. There is no abstract dollar figure for the cost of the death penalty -- it depends on the quality of the system you demand. 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 will now cost the state even more money.[3]

There is little 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 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. New York's experience bears this out.

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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] . 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-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] A recent 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

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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 note 10 (North Carolina), note 15 (Indiana), and note 16 (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.

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]

Theoretically, New York 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.[7] But I am not sure that New York would want to emulate Texas' record of sleeping lawyers, prosecutorial misconduct, and sharp reprimands from the U. S. Supreme Court.

Other panelists will speak about the specific costs that New York has encountered so far with its death penalty.[8] One number, however, stands out: with well over $100 million spent,[9] there have been no executions. The death penalty without executions is just another name for life-without-parole; and this is the most expensive form of life-without-parole because the 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 conducted in-depth studies of the expenses. Despite the fact that it has been almost 30 years since the death penalty was reinstated, only a handful of states have averaged more than one execution per year in this time. Until an execution occurs, the

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[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 2003," appendix Table 4 (2004).
[7]. C. Hoppe, "Executions Cost Texas Millions," Dallas Morning News, March 8, 1992, at 1A.
[8] . See, e.g., D. Wise, "Capital Punishment Proves to Be Expensive," New York Law Journal, April 30, 2002, at p.1.
[9] . "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).

full costs can only be projected. Nevertheless, there have been studies by government agencies, the media, and independent researchers that create a clearer picture.

The studies differ widely in the states they cover, in their level of sophistication and in the assumptions they make. However, they have all come to similar conclusions, and many of their estimates of the costs are fairly close.

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 usually do not appear as line items in the budget. It is not accurate to say that there is no expense attributable to the prosecution 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.[10] These findings are sensitive to the number of executions the state carries out.

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[10]. P. Cook, "The Costs of Processing Murder Cases in North Carolina," Duke University (May 1993).

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.[11] 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.[12]

⇒ 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.[13]

⇒ The *Sacramento Bee* found that the death penalty costs California $90 million annually beyond the ordinary costs of the justice system - $78 million of that total is incurred at the trial level.[14] Since California has averaged much less than one execution per year, the costs per execution are astronomical, approaching $100 million per execution. Recently, the governor of California requested an additional $220 million from the legislature to construct a new death row.

⇒ 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

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[11]. D. Von Drehle, "Bottom Line: Life in Prison One-sixth as Expensive," The Miami Herald, July 10, 1988, at 12A.
[12]. S. V. Date, "The High Price of Killing Killers," Palm Beach Post, Jan. 4, 2000, at 1A.
[13] . C. Hoppe, "Executions Cost Texas Millions," Dallas Morning News, March 8, 1992, at 1A.
[14] . S. Maganini, "Closing Death Row Would Save State $90 Million a Year," Sacramento Bee, March 28, 1988, at 1.

cases would be about $51 million, exceeding the future costs of life without parole sentences by about 38%.[15]

⇒ 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. Non-death penalty cases were counted through to the end of incarceration and were found to have a median cost of $740,000. The trial costs for death cases were about 16 times greater than for non-death cases ($508,000 for death case; $32,000 for non-death case). The appeal costs for death cases were 21 times greater.[16]

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.[17]

A recent 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.[18] 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.[19]

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[15] . Indiana Criminal Law Study Commission, January 10, 2002 (assuming that only a modest 20% of death sentences are overturned and resentenced to life).
[16] . Performance Audit Report: Costs Incurred for Death Penalty Cases: A K-GOAL Audit of the Department of Corrections, State of Kansas, December 2003.
[17] . See, "Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation," Judicial Conference of the United States (May 1998).
[18]. R. Gold, "Counties Struggle with High Cost of Prosecuting Death-Penalty Cases," Wall St. Journal, Jan. 9, 2002.
[19]. 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.[20]

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 occur at the trial level, and cannot easily be streamlined or reduced. Just 18 months ago, 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.[21]

It is not my role to advocate any particular legislation in response to these facts. Nevertheless, I believe it is appropriate to say that the New York Court of Appeals may have given the State an opportunity to extricate itself from what many states are increasingly finding to be a cumbersome and expensive burden. The clear national trend is away from a broad use of the death penalty, as indicated by a 50% drop in death sentences, a 40% decline in executions, a smaller death row, and a decreasing level of public support.[22] In public opinion polls, there is a clear upward trend in support for life-without-parole sentences as a 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. I certainly can predict with a high degree of confidence that if New York should re-instate its death penalty, it will face 10 to 15 years with no

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[20] . 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).
[21] . Wiggins v. Smith, 123 S. Ct. 2527 (2003).
[22] . See, e.g., Editorial, "The Year in Death," Washington Post, Jan. 2, 2005.

executions, at an expense of probably hundreds of millions of dollars, and no confidence that this tremendous expenditure of time and resources has appreciably contributed to the welfare of its people.

The death penalty concentrates millions of dollars on a few people with almost no control over the outcome. (This does not even take into account the less tangible costs such as the risk of executing the innocent, or the divisiveness caused by the perceptions of racial unfairness.) It is true that you cannot put a price on justice. But you can put a price on programs with a proven track record in improving the safety of the community. A state has to choose where to put its limited resources.

Thank you for this opportunity. I would welcome any questions the Committee may have.