Testimony before the Pennsylvania Senate Government Management and Cost Study Commission

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by Richard C. Dieter
Executive Director
Death Penalty Information Center

Introduction

Good morning, Chairman Argall, Members of the Commission. I would like to thank you for the opportunity to testify before you today on this important issue.

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 an attorney and also an adjunct professor at the Catholic University Law School in Washington.

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 costs of capital punishment and to briefly address the corollary question of whether the benefits of this system justify the costs. What I will not be able to offer is a detailed account of what the death penalty is costing the Commonwealth of Pennsylvania. That is an important, but by no means simple, research project of its own. I would be more than happy to answer any questions that members of the Commission may have at any time.

An Unusual Proposal

Perhaps some of you may be thinking that raising the death penalty as a cost cutting measure is unusual, to say the least. Although money can be saved by curtailing essential government functions such as schools and ambulances, no serious lawmaker would consider eliminating them altogether.

[1] . Death Penalty Information Center (DPIC), 1015 18th St. NW, Suite 704, Washington, DC 20036; ph: 202-289-2275; Web site: www.deathpenaltyinfo.org; email: rdieter@deathpenaltyinfo.org. Portions of this testimony are drawn from a recent report from DPIC, "Smart on Crime: Reconsidering the Death Penalty in a Time of Economic Crisis" (2009), which will be made available to members of the Commission.

Fortunately, your Chairman, Senator Argall, wisely asked everyone to keep an open mind, and cautioned, "There are no sacred cows"[2] here. But eliminating the death penalty deserves your careful attention not because it is a wildly original idea, but because the death penalty is *not* an essential government function and, in fact, is probably one of the least effective and most costly programs, when measured in terms of the people it affects. What Pennsylvania calls the death penalty is in reality a very expensive form of life without parole. Despite having the fourth largest death row in the country, Pennsylvania has not had an execution in 11 years.[3] All three of the people that the state has executed since the death penalty was reinstated by the U.S. Supreme Court in 1976 have been defendants who waived their appeals. Pennsylvania has not had a contested execution since 1962.[4]

The second reason that the death penalty should be considered in a discussion of costs is that choices have to be made from among many programs that claim to make society safer. All aspects of the criminal justice system—apprehending offenders, trials, and punishment—have costs. Cutbacks in any part of the criminal justice system can potentially result in a less safe society. The death penalty is the most expensive part of the system on a per-offender basis. Millions are spent to achieve a single death sentence that, even if imposed, is unlikely to be carried out. Thus money that the police desperately need for more effective law enforcement may be wasted on the death penalty. Some programs will have to be cut.

In the 1990s, Pennsylvania was handing down close to 20 death sentences per year. In recent years, however, the number of death sentences has dropped dramatically—reflecting a national trend—and is now closer to 7 per year.[5] This means that about 1% of the murders committed in the state result in a death sentence.[6] The overwhelming majority—99%—are resolved with a life sentence or other punishment.

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[2] . D. Argall, "Pa.'s New Cost-Cutting Commission Wants Your Ideas," Op-ed, Mar. 24, 2010, available at http://senaterepublicannews.com/news/2010/0310/argall-032410.htm.
[3] . See DPIC's Web site http://www.deathpenaltyinfo.org, at Facts/Executions/Execution Database.
[4] . Id. at Facts/Executions/Espy File.
[5] . Id. at Facts/Sentencing.
[6] . See FBI Uniform Crime Reports, annual. Pennsylvania had 723 murders in 2007.

But without using the death penalty, the state managed a significant drop in the number of homicides in 2009. According to the recent FBI Uniform Crime Report, Philadelphia experienced a 9% drop in homicides compared to 2008; Allentown had a 19% drop; and Pittsburgh had an impressive 46% decline in murders.[7] There is much that law enforcement is doing right in this state, but it is clearly not relying on the death penalty.

What happens to a person sentenced to death in Pennsylvania?

In Pennsylvania, the state goes through the expensive and time-consuming process of trying many death penalty cases and fighting appeals, but almost all cases end with a life sentence. According to a recent Associated Press article, 124 Pennsylvania death sentences have been overturned and a re-sentencing has occurred. When the cases went through the justice system a second time with the original errors corrected, *95% (118) resulted in life sentences or less*. Only 6 inmates were re-sentenced to death. Twenty-one inmates on death row have died of natural causes or suicide since 1983. Six inmates have been exonerated when their convictions were reversed and they were freed following acquittals or dismissal of all charges.[8]

Eliminating the Death Penalty Would Not Be Unusual

Judging by Pennsylvania's neighbors, eliminating the death penalty would not be unusual at all. New York abandoned the death penalty in 2007 after a 12-year experiment failed to produce any executions or any death sentences upheld by the state's high court. New Jersey also abolished the death penalty in 2007 after a state study commission strongly endorsed its end. Maryland came close to ending the death penalty last year, and will probably try again next year. All executions have been on hold since 2005. West Virginia does not have the death penalty and has a murder rate far below the national average.

In other areas of the country, New Mexico abolished the death penalty last year. Colorado, Montana, and Connecticut all came very close with at least one of their two

[7] . Id., 2009 Preliminary Report at <http://www.fbi.gov/ucr/prelimsem2009/index.html>, Table 4 (pub. May 2010).
[8] . "Facts about Pennsylvania's Death Penalty," Associated Press, July 24, 2009.

legislative houses voting to end capital punishment. A recent poll of the nation's police chiefs revealed they ranked the death penalty *last* among their priorities for crime-fighting, they do not believe the death penalty deters murder, and rate it as the least efficient use of limited taxpayer dollars.[9]

Pennsylvania's death penalty most closely resembles that of California. Pennsylvania's population is roughly one-third of California's. Similarly, its death row is about one-third of theirs, and the number of executions in the past 30 years is proportionately comparable—they have had 13 executions to Pennsylvania's 3. The leading criminal justice experts in California have concluded their death penalty system is a disaster: Ronald George, Chief Justice of the California Supreme Court, called the state's death penalty "dysfunctional" and said it would take even more money to fix the system.[10] The California Commission on the Fair Administration of Justice, chaired by former Attorney General John Van de Kamp, labeled the system "broken" and "flawed" and concluded that California would save hundreds of millions of dollars if capital punishment was eliminated. Their report stated, "The families of murder victims are cruelly deluded into believing that justice will be delivered with finality during their lifetimes. . . .The strain placed by these cases on our justice system, in terms of the time and attention taken away from other business that the courts must conduct for our citizens, is heavy."[11]

How Much Does This System Cost?

Without a sophisticated cost study, it is impossible to know how much the death penalty is costing Pennsylvania. We can, however, learn something from states that have conducted such studies. The California Commission cited above found that the state was spending $137 million per year on the death penalty (a system in which the same defendants were sentenced to life without parole would cost $11.5 million per

[9] . See RT Strategies, "Omnibus Poll and The Law Enforcement Leadership Poll," Oct. 29-Nov. 14, 2008. The margin of error for the poll was $\pm$5.1 percent.
[10] . Associated Press, April 30, 2006.
[11] . "Report: California death penalty system deeply flawed," New York Times, July 1, 2008 (AP article).

year).[12] If the one-third size ratio holds true for costs, then Pennsylvania may be spending as much as $46 million per year on the death penalty.

During the 9 years that New York had an active death penalty, it was estimated that the state spent about $170 on this program, or close to $20 million per year.[13] During that time the state had 7 death sentences. Pennsylvania has a much larger death penalty system, with more than 50 times as many death sentences as New York. A cost study in New Jersey estimated that the state had spent $253 million on the death penalty since 1983.[14] When New Jersey ended its death penalty in 2007, it had 9 people on death row. A recent cost study in Maryland found the cost to taxpayers for 20 years of the death penalty to be $187 million.[15] The state has 5 people on death row and has conducted 5 executions in those 20 years.

Thus, states with death penalty systems much smaller than Pennsylvania's were spending $10-20 million annually on capital punishment, with little or nothing to show in return. Pennsylvania's bill is likely much higher, perhaps as much as $46 million per year, but also with virtually no return.

Why Does the Death Penalty Cost So Much?

The principal reason why the death penalty is so expensive can be summed up in one phrase: "death is different."[16] Whenever the government seeks to execute a human being, the legal system is required by a long line of U.S. Supreme Court precedent, buttressed by American Bar Association guidelines, to apply a more methodical and reliable process. The older, less guided form of capital punishment, was struck down as unconstitutional in 1972.[17]

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[12] . See California Commission on the Fair Administration of Justice, http://www.ccfaj.org/rr-dp-official.html, June 30, 2008 [hereinafter *California Commission*].
[13] . 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); N.Y. Times, Feb. 28, 2005 (citing costs of $170 million).
[14] . See Newsday, Nov. 21, 2005.
[15] . See J. McMenamin, "Death penalty costs Md. more than life term," Baltimore Sun, March 6, 2008.
[16] . See Gregg v. Georgia, 428 U.S. 153, 188 (1976) ("penalty of death is different in kind from any other punishment").
[17] . See Furman v. Georgia, 408 U.S. 238 (1972).

Every stage of a capital case is more time-consuming and expensive than in a typical criminal case. Jury selection takes much longer;[18] more mental health and forensic experts will be needed; two trials will be required—one for guilt and one for sentencing; and the appeals will be far more complex, focusing on both the conviction and the death sentence. Two attorneys are usually appointed for the defense, so that issues of guilt and sentencing can be separately explored. The prosecution has to respond with equal or greater resources since they have the burden of proof.

The exposure of so many mistakes in death penalty cases in recent years has shown that the ideal of "heightened due process" in capital cases has often been ignored. It has become clear that a shoddy, less expensive death penalty risks innocent lives. It can also make the punishment of death depend on whether a state is willing to provide adequate representation. The choice today is between a very expensive death penalty and one that risks falling below constitutional standards.

Costs alone may not carry the day in deciding the future of an institution as entrenched as capital punishment. The costs of the death penalty must be compared to other ways of achieving a safer community. The money saved by giving up the death penalty is desperately needed elsewhere: for hiring and training police, solving more crimes, improving forensic labs and timely DNA testing, and crime prevention.

Expensive Life Sentences

It is important to note that all of these expenses are incurred in the many death penalty cases that never result in an execution. Sentences or convictions can be reversed, defendants may die of natural causes or suicide, governors occasionally grant clemency, and entire statutes can be overturned by the courts. This often means that a life sentence is the end result, but only after a very expensive death penalty process. According to one comprehensive study, 68% of death penalty cases are reversed at some point in the appeals process. When these cases are retried without the defect that

[18] . See, e.g., B. Miller, "D.C. Case Has Court Struggling for a Jury," Washington Post, April 29, 2001, at C1 (after 5 weeks of jury selection in a capital case, jury was still not complete).

led to the reversal, 82% result in a sentence of life or less.[19] This is an extremely wasteful process.

Opportunity Costs

Not every cost associated with the death penalty appears as a line item in the state budget. Prosecutors, who are not paid by the hour, may say that nothing would be saved by eliminating the death penalty because they would shift to other cases. Judges and public defenders are usually salaried employees who will be paid the same amount whether assigned to death penalty cases or other work. But it would be misguided not to include the extra time that pursuing the death penalty takes compared to cases prosecuted without the death penalty in calculating costs.

If it takes 1,000 hours of state-salaried work to arrive at a death sentence and only 100 hours to have the same person sentenced to life without parole, the 900 hours difference is a state asset. If the death penalty is eliminated, the county or the state can decide whether to direct those employee-hours to other work that had been left undone, or choose to keep fewer employees. There is a financial dimension to all aspects of death penalty cases, and proper cost studies take these "opportunity costs" into account.[20]

The Effect of Plea Bargaining

One response to the high cost of the death penalty is that the threat of this punishment produces financial savings because defendants are more likely to accept plea bargains, thus avoiding the cost of a trial.[21] However, whatever savings are

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[19] . See J. Liebman, et al., *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 Texas Law Review 1839 (2000). The author notes that in an additional 7% of the cases there is not even a conviction after retrial.

[20] . See, e.g., P. Cook, "The Costs of Processing Murder Cases in North Carolina," Duke University (May 1993). This is one of the most comprehensive cost studies conducted in the country. It included the costs of the extra time spent by prosecutors, judges, and other personnel on death penalty cases and concluded 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.

[21] . See, e.g., K. Scheidegger, "The Death Penalty and Plea Bargaining to Life Sentences," Working paper 09-01, at 13, Criminal Justice Legal Foundation (Feb. 2009) ("repeal of the death penalty would likely result in fewer pleas to life or long sentences, requiring that prosecutors either take more cases to trial at a substantial financial cost or accept bargains to lesser sentences at a substantial cost to public safety.").

produced through this ethically questionable practice are overwhelmed by the costs of preparing for a death penalty prosecution even if it never goes to trial.

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,[22] Indiana,[23] Kansas,[24] and California,[25] 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. 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.[26] 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.

Moreover, data from some states refute the notion that the death penalty increases the incentive to plea bargain. Prosecutors in New Jersey said that abolition of the death penalty there in 2007 has made no difference in their ability to secure guilty

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[22] . See P. Cook, note 20 above. A more recent cost study at Duke University in North Carolina estimated that the state is spending about $11 million per year on the death penalty, excluding the extra costs to the prosecution and judicial system. P. Cook, "Potential Savings from Abolition of the Death Penalty in North Carolina," American Law and Economics Review, advance access, December 11, 2009.
[23] . Indiana Criminal Law Study Commission, January 10, 2002.
[24] . Performance Audit Report: Costs Incurred for Death Penalty Cases: A K-GOAL Audit of the Department of Corrections, Kansas (2003).
[25] . See *California Commission,* note 12 above.
[26] . See, "Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation," Judicial Conference of the United States (May 1998). The **prosecution** costs in death cases were 67% higher than the defense costs, even before including the investigative costs of law enforcement agencies.

pleas.[27] In Alaska, where plea bargaining was abolished in 1975, a study by the National Institute of Justice found 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."[28]

In addition, the practice of charging the death penalty for the purpose of obtaining plea bargains is an unethical and unconstitutional interference with a defendant's Sixth Amendment right to trial. It risks convicting innocent defendants who plead guilty solely to avoid the possibility of a death sentence—which has occurred on numerous occasions.[29]

Can the Costs of the Death Penalty Be Reduced?

An understandable reaction to the high costs of the death penalty is to ask whether there are ways it could be made less expensive, such as by 1) curtailing the appeals process, or 2) limiting trial expenses. However, the first interferes with a critical part of the death penalty process and could result in the execution of innocent defendants, and the second could end up costing more than the current system.

Although the appeals process is a tempting target for critics, it actually does not constitute most of the death penalty's costs. In the cost study conducted by Duke University, trial costs in North Carolina made up over 4 times the appeals costs for each death sentence imposed.[30] But cutting back on appeals presents another, more serious problem.

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[27] . R. Lardini, "A year later, state assesses justice without death penalty," *New Jersey Star Ledger*, December 15, 2008.
[28] . R. Fine, "Plea Bargaining: An Unnecessary Evil," in *Criminal Justice?*, Robert Bidinotto, ed. Irving-on-Hudson: Foundation for Economic Education, 1996; cited in "Plea Bargaining: Economic Costs and Benefits," undergraduate paper for *The Economics of the Law*, Washington University in St. Louis, December 5, 1996; www.dianahsieh.com/undergrad/pb.html.
[29] . See, e.g., P. Hammel, "Pardons granted to five in murder they didn't commit," Omaha World-Herald, January 27, 2009. The defendants who were pardoned had confessed to the crime to escape the threat of the death penalty. "We were all scared of it. They were all threatening us with it," said James Dean, one of the five who was exonerated. Ada Joann Taylor, another defendant, said, "They told me they wanted to make me the first female on death row." *Id*.
[30] . See P. Cook, note 20 above, at p. 97, table 9.1.

Since 1973, 138 people have been exonerated and freed from death row.[31] In many of these cases, the appeals process was critical in overturning an unfair conviction and allowing a new trial at which the defendant was acquitted. In other cases, even the appeals failed to find evidence of innocence or a constitutional flaw in the process that led to conviction, but the process at least allowed for the passage of time, during which exonerating DNA evidence was discovered and tested, or the person actually responsible for the crime was identified. The average time between sentencing and exoneration was 9.8 years. If the appeals process were truncated there might not have been time for the mistakes to be found or new evidence to emerge. Most of the innocent people who were sentenced to death would have been executed before they could demonstrate their conviction was a mistake.

The same can be said for attempts to shortchange the defense in capital trials. Good lawyers who are given adequate resources often can uncover the evidence that leads to the acquittal of an innocent defendant.

Good representation and thorough appeals are also necessary for guilty clients. It is impossible to know before the process has run its course who is guilty and who is innocent. Qualified defense lawyers are needed to ensure that juries have all the information they need to make an informed sentencing decision. In 2003 the American Bar Association issued new guidelines for the appointment and performance of defense counsel in capital cases.[32] These guidelines were intended to establish a national standard of practice, and courts that ignore them risk reversal at a later time.

From a cost perspective, the reasons for providing a full defense are also compelling. In recent years the U.S. Supreme Court has overturned several death penalty cases because of inadequate representation, including one from Pennsylvania.[33] The thrust of these decisions is that death penalty cases require defense attorneys to investigate every aspect of their client's history in order to prepare an adequate defense on penalty as well as guilt. This implies states should hire experienced attorneys who

[31] . See DPIC, http://www.deathpenaltyinfo.org/innocence-and-death-penalty (visited June 3, 2010).
[32] . "ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases," 31 Hofstra Law Review 913 (2003) (revised edit.).
[33] . See, e.g., *Wiggins v. Smith*, 539 U.S. 510 (2003); *Rompilla v. Beard*, 545 U.S. 374 (2005) (Pa.).

know how to conduct such investigations, and give them the resources to carry them out. If not, the case may have to be done over, requiring all the expenses of a death penalty trial a second time. Cost studies of the death penalty indicate that 70% of the expenses occur at the trial level. Two trials greatly increase the cost of the death penalty, especially when the passage of time makes re-trial more difficult. If a new conviction or sentence is handed down, a second appeals process must also be conducted.

Conclusion: Time is Ripe to Reconsider the Death Penalty

The death penalty is on the decline across the country. Death sentences have dropped dramatically since 2000. In the 1990s, the annual number of death sentences averaged close to 300, but in recent years the number is down to 115, a 62% drop. Skeptical juries concerned about innocence[34] and the availability of life without parole sentences have played a part in this decline. The rising costs of the death penalty have caused some prosecutors not to seek the death penalty or to accept plea bargains.[35] The current economic climate could accelerate this trend.

Ironically, a death penalty that is rarely used raises its own concerns. Are the few people chosen for execution really the worst of the worst, or was their sentence just the unfortunate product of ineffective representation or their crime being committed in a high-death penalty county? Do the rationales of deterrence and retribution make sense in a system where only a tiny fraction of eligible criminals in only a few states receive the ultimate punishment?

Referring to the costs of the death penalty often evokes a response that money is irrelevant when it comes to justice and a safer society. But the death penalty is not essential to those goals, as the 15 states in the U.S. and the growing majority of countries in the world without the death penalty have demonstrated. Even states with the death penalty rarely use it. Justice can be achieved far more reliably and equitably without the death penalty. There are more efficient ways of making society safer.

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[34] . See R. Dieter, "A Crisis of Confidence: Americans' Doubts About the Death Penalty," DPIC (2007).
[35] . See, e.g., T. Coyne, "Indiana Executions at slowest pace in 15 years," Chicago Tribune, June 14, 2009 (citing prosecutors' hesitations due to the high costs of the death penalty).

The economic crisis that began in 2008 continues, and its impact on states will be felt for years to come. There is no reason the death penalty should be immune from reconsideration, along with other wasteful, expensive programs that no longer make sense. The promised benefits from the death penalty have not materialized. Deterrence is not credible; vengeance in the name of a few victims in a handful of states is both divisive and debilitating. If more states choose to end the death penalty, it will hardly be missed, and the economic savings will be significant. The positive programs that can be funded once this economic burden is lifted will be readily apparent. Such an approach would be smart on crime.