

**New Hampshire House Criminal Justice and Safety
Committee**

Hearing on H.B. 1422

Recent National Developments on the Death Penalty

Testimony of

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INTRODUCTION

Good morning. I would like to thank the Chairman, David Welch, and members of the Criminal Justice and Safety Committee for this opportunity to appear before you and to offer my remarks on the state 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 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.

NATIONAL TRENDS

I believe that this is a very appropriate time for New Hampshire to be considering a bill to abolish the death penalty. The clear national trend is away from a broad use of capital punishment: since the year 2000 there has been a 60% drop in death sentences, a 40% decline in executions, and a decrease in the size of death row. Public support has also dropped since its high point in 1994 to its lowest point in the past 27 years. In public opinion polls, there has been an upward trend in support for life-without-parole sentences as a substitute for the death penalty.

The current decline in the use of the death penalty may seem somewhat surprising. In the 1990s, capital punishment was on the rise: New York and Kansas became the most recent states to adopt the death penalty in 1995 and 1994 respectively. The federal death penalty was expanded to 60 crimes. Executions, the size of death row, and public support for the death penalty were all increasing. In 1999, there were 98 executions in this country. The number of death sentences averaged about 300 per year. Congress and many states were passing legislation to speed up executions.

THE INNOCENCE ISSUE

With the rise in executions, another phenomenon took place. Advances in DNA testing and an overall higher scrutiny of death penalty cases by attorneys, by the media, and by the courts has led to a high number of exonerations from among those

on death row. Since 1973, 122 people have been exonerated and freed from death row. The bulk of those cases have taken place since the mid-1990s, including 15 in which DNA evidence played a key role.

In Illinois, 13 people were freed from death row in the same time that the state carried out 12 executions. With that grim statistic in front of him, Governor George Ryan declared a moratorium on all executions in his state in 2000. He went on to grant a commutation to everyone on death row. And the moratorium on executions in Illinois is still in place today, six years later.

The public has seen inmates who were close to execution walking off death row and into the arms of their attorneys and the journalism students who helped free them. People realize that these reversals are not always the result of the system working well. It is fortunate that DNA testing came along when it did. It is fortunate that journalists chose to re-investigate a particular case, or that a large law firm in New York or Washington agreed to represent an indigent defendant on appeal. But those fortuitous circumstances are not present in most cases, yet the mistakes that lead to wrongful convictions are just as likely to be present in these other cases as well.

LIFE WITHOUT PAROLE

A second development has also contributed to the national turnaround on the death penalty. When the death penalty was stopped in 1972 by the U.S. Supreme Court, there were about 600 people on death row. All of those inmates had their sentences reduced to life sentences, and, in fact, most of them became eligible for parole at some point. Many were eventually released.

Today, the situation is very different. Thirty-seven out of the 38 death penalty states have adopted a sentence of life without parole. Texas became the most recent state to take this action in September of 2005. If the death penalty were ended today, life without parole would be the alternative sentence. In public opinion polls and in jury rooms, the public has indicated that it supports this sentence. Since the late 1990s, death sentences have dropped from 300 per year to 125 death sentences in 2004. The number

of sentences in 2005 will be down again, perhaps under 100 when the final count is made. Many states are experiencing their lowest number of death sentences since the death penalty was reinstated.

OTHER LEGISLATIVE AND LEGAL CHANGES

In addition to the drop in death sentences, in executions, in the size of death row, and in public support, concrete changes are also taking place in legislatures and in the courts. In 2005, the legislature of New York declined to reinstate the death penalty after its statute was ruled unconstitutional in 2004. Kansas' death penalty statute was similarly found unconstitutional and is currently being reviewed by the U.S. Supreme Court.

Just yesterday, the state of New Jersey voted to impose a moratorium on executions and to initiate a study of the death penalty. It is expected that the governor will sign this measure into law. The moratorium in Illinois has been continued by the new governor and a number of death penalty reforms have been passed by the legislature. Legislative study commissions have been appointed recently in North Carolina and California to conduct a broad review of their death penalty procedures.

A bill to abolish the death penalty passed one house in the New Mexico legislature last year. In Massachusetts, the legislature overwhelmingly defeated a proposal to reinstate the death penalty, even though they were promised that the law would be "foolproof" in terms of avoiding mistakes. As I mentioned earlier, the Texas legislature last year passed a bill allowing juries to impose a life-without-parole sentence for the first time in death penalty cases. And, of course, New Hampshire itself is considering a bill to abolish the death penalty.

In the U.S. Congress, a law entitled the "Innocence Protection Act" was passed in 2004 to provide greater resources for DNA testing and to encourage improved representation in death penalty cases. The President has promised similar assistance in his state of the union address.

Similar concerns about the death penalty have been evident in decisions from the U.S. Supreme Court. In 2002, the Court barred the execution of the mentally retarded and insisted that juries play a crucial role in death penalty sentencing. This past year, the Court barred the execution of juvenile offenders as a practice no longer in keeping with our national standards of decency. The Court also overturned a Texas case in which the prosecution had improperly used racial considerations in selecting the jury, sending a strong message about the importance of proper trials. Similarly, they have overturned death sentences when the defense lawyer fails to adequately investigate the client's complete background. Individual Justices, such as Justices O'Connor, Stephens and Ginsburg, have commented in speeches about their deep concerns on the death penalty.

It is not only the issue of innocence that has raised doubts about the death penalty among the public, the courts, and many legislators. Recent studies about the impact of race on death sentencing in California, Ohio, and Maryland confirmed a long series of similar research in other states all pointing to the same conclusion: race plays an unacceptable role in the death penalty. If you murder a white person, you are far more likely to be sentenced to death in this country than if you murder a black person. This statistical pattern sends a message that white lives are considered more valuable than black lives as judged by the punishments meted out. Such a practice is not only illegal; it is very divisive for our country.

COSTS

In the midst of these problems with the death penalty, the question of costs often gets overlooked. Fiscal considerations, however, are important in their own right, and they can 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 in the *Wall Street Journal* predicted: "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 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. 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

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

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).

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.

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.⁴
- ⇒ 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.⁵ 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.⁶
- ⇒ 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.⁷
- ⇒ 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

⁴ P. Cook, "The Costs of Processing Murder Cases in North Carolina," Duke University (May 1993).

⁵ D. Von Drehle, "Bottom Line: Life in Prison One-sixth as Expensive," *The Miami Herald*, July 10, 1988, at 12A.

⁶ S. V. Date, "The High Price of Killing Killers," *Palm Beach Post*, Jan. 4, 2000, at 1A.

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

incurred at the trial level.⁸ A more recent study of the costs in California by the *Los Angeles Times* indicated that with only one execution every two years, the costs of the death penalty are approaching \$250 million per execution.⁹ And the governor of California has requested an additional \$230 million from the legislature to construct a new death row.

⇒ 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. The study examined the costs of death penalty cases to prosecutor offices, public defender offices, courts, and correctional facilities.¹⁰

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.¹¹

An 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.¹² 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.¹³

⁸ . S. Maganini, "Closing Death Row Would Save State \$90 Million a Year," *Sacramento Bee*, March 28, 1988, at 1.

⁹ . *Los Angeles Times*, March 6, 2005.

¹⁰ . See *Newsday*, Nov. 21, 2005.

¹¹ . See, "Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation," Judicial Conference of the United States (May 1998).

¹² . R. Gold, "Counties Struggle with High Cost of Prosecuting Death-Penalty Cases," *Wall St. Journal*, Jan. 9, 2002.

¹³ . K. Baicker, "The Budgetary Repercussions of Capital Convictions," National Bureau of Economic Research, Working Paper 8382, July 2001.

Many of the costs of the death penalty are inescapable and have likely increased even since some of 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. In 2003, 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.¹⁴

The death penalty concentrates millions of dollars on a few people with almost no control over the ultimate outcome. While it is true that you cannot put a price on justice, 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, especially in light of the errors and injustices in the death penalty that have been recently revealed.

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

¹⁴ . Wiggins v. Smith, 123 S. Ct. 2527 (2003).