

**The Death Penalty As a Luxury:  
The High Cost of Capital Punishment In Trying Economic Times**

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**A. Introduction**

As the nation struggles through the most dire economic crisis since the Great Depression, state policymakers are reexamining the value of maintaining capital punishment in light of the high financial cost of the death penalty system. Armed with the findings of a recent capital punishment cost study, Maryland Governor Martin O'Malley recently testified before his state's Senate that "there are better and cheaper ways to reduce crime" than maintaining the death penalty. Ian Urbina, *Citing Cost, States Consider End to Death Penalty*, N.Y. Times, Feb. 25, 2009. Lawmakers in Colorado, Kansas, Nebraska, New Hampshire, Montana, and New Mexico have considered the same argument, and cost considerations played an important role in New Jersey's landmark 2007 repeal of capital punishment. *Id.*

A Virginia capital defense attorney might ask, so what? Aren't fiscal arguments a matter of public policy, within the strict domain of the Commonwealth's largely pro-death penalty legislature? Indeed, Virginia lawmakers recently attempted to expand the scope of the Commonwealth's death penalty statute by eliminating the "triggerman" rule in the same session when the legislature faced a \$3.7 billion budget deficit. Warren Fiske, *Federal Aid Helped Va. Avoid Deeper Budget Cuts*, The Virginian-Pilot, Mar. 11, 2009.

While Richmond may not be amenable to cutting back on death penalty prosecutions in response to the fiscal climate, capital defense attorneys should still be familiar with the latest capital punishment cost data. Individual prosecutors might utilize it as part of the public explanation of a decision to not pursue capital punishment in a particular case. Moreover, promotion of cost information in the media could sway public opinion against the expense of a

capital prosecution. Lastly, counsel may incorporate cost data into the framework of defense-initiated victim outreach efforts in an attempt to provide accurate information to the family of a murder victim concerning the death penalty prosecution process.

No Virginia-specific study on the cost of capital punishment has yet been published. This paper summarizes the findings of several recent death penalty cost studies conducted in other states and on the federal level. The conclusions of these studies may be persuasive in Virginia due to their uniformity—a death penalty case is much costlier to taxpayers over its lifetime than a non-capital prosecution resulting in a sentence of life without the possibility of parole (LWOP).

#### **A. Maryland**

The most extensive modern study of the cost of capital punishment was published in 2008 by the Urban Institute, utilizing data from the state of Maryland. Researchers analyzed a dataset set drawn from all 1,136 death-eligible prosecutions in the state between 1978 and 1999, rather than examining just a subset of relevant cases. John Roman et al., *The Cost of the Death Penalty in Maryland* 29 (2008), available at <http://deathpenaltyinfo.org/CostsDPMaryland.pdf>. Prosecutors sought the death penalty in 162 of those cases, obtaining 56 death sentences that led to five executions during the study period. *Id.* at 1. Researchers combined data on the length of every phase of each case with survey-based estimates of attorney and judicial time spent on the various adjudication steps, wage data, and estimates of lifetime incarceration costs for the offenders. *Id.* at 4-5.

The Urban Institute study found that the average death-eligible Maryland murder case in which the death penalty was *not* sought cost the state's taxpayers \$1.12 million over its lifetime, including \$250,000 in adjudication costs and \$870,000 in incarceration costs. *Id.* at 2. Filing a

notice of intent to seek the death penalty added an average of \$600,000 in adjudication costs and \$70,000 in incarceration costs to the overall bill, for a total case cost of \$1.8 million. *Id.* Finally, a successful death penalty prosecution cost taxpayers an average of \$3 million over its lifetime, or about \$1.9 million more than a non-death case. *Id.* The cases with a death sentence involved an average adjudication cost of \$1.7 million, and a prison cost of \$1.3 million. *Id.* Aggregating their findings, the researchers concluded that the total cost of death penalty prosecutions in the state of Maryland between 1978 and 1999 amounted to at least \$186 million. *Id.* at 3.

The Urban Institute study found that “[t]he majority (70%) of the cost differential between a death notice and a non-death notice case occurs during the trial phase.” *Id.* at 30. The increased cost of adjudication is attributed to the involvement of two attorneys on each side of the case, a longer preparation period, a greater number of pre-trial motions, a more intensive voir dire process, longer trials, and the need for a penalty hearing. *Id.* If a death sentence is handed down, the post-conviction motions, appellate, and federal habeas stages of the case cost an average of \$605,000 more than the same stages in a non-death penalty prosecution. *Id.* Moreover, the study found that incarceration on death row costs an average of \$316,000 more over a prisoner’s lifetime than does placement in the general prison population, due to the expensive nature of the confinement and “the reality that few of those sentenced to death are actually executed.” *Id.* at 31.

## **B. Federal Death Penalty**

In 2008, the Office of Defender Services of the Administrative Office of the U.S. Courts released findings on the cost of representing federal death penalty defendants. This study covered the 1998 to 2004 period and compared the cost of defending 95 death penalty-authorized federal cases with the relevant costs in 95 non-authorized death-eligible murder cases. Jon B.

Gould & Lisa Greenman, *Update on the Cost, Quality, and Availability of Defense Representation in Federal Death Penalty Cases: Preliminary Report on Phase One of the Research* 16-18 (2008), available at <http://www.uscourts.gov/defenderservices/FDPC.pdf>.

Thorough payment data was available through Criminal Justice Act (CJA) payment records.

In the federal system, Department of Justice regulations require that every death penalty prosecution be personally “authorized” in writing by the Attorney General. The study found that “authorized cases are substantially more expensive” and time consuming than non-authorized cases. *Id.* at 23-26. The defense of the median non-authorized death eligible case cost taxpayers \$44,809, while the median capital case cost \$353,185. *Id.* at 24. Defense counsel spent a median of 2,014 hours on authorized cases, 4.6 times more than the median of 436 hours devoted to non-authorized cases. *Id.* at 27. Expert payments are another major component of the capital cost burden. Use of experts was much more prevalent in death penalty cases, with a resulting median cost of \$83,029. *Id.* at 29. Non-capital cases featured a median expert cost of only \$5,275. *Id.*

Researchers found a strong relationship between defense costs and the likelihood of the defendant’s receiving a verdict of death. The cases in the lowest one third in terms of total defense cost featured a death sentence rate of 44%. *Id.* at 40. The remaining two thirds of authorized cases had a death sentence rate of 19%. *Id.* The study thus illustrates the expense of defending federal capital cases in comparison to non-capital cases, and appears to validate the effectiveness of vigorous capital representation.

### **C. New Jersey**

The 2007 report of the New Jersey Death Penalty Study Commission examined the financial impact of the state’s capital punishment regime as a part of a broader study of all

aspects of death penalty administration. New Jersey had not executed an inmate in the post-*Furman* era. The Commission obtained only a partial estimate of the cost of the death penalty, eschewing independent statistical analysis in favor of reliance on self-reported data gathered in a survey of participants in the capital punishment system. *New Jersey Death Penalty Study Commission Report 31* (2007), available at [http://www.njleg.state.nj.us/committees/dpsc\\_final.pdf](http://www.njleg.state.nj.us/committees/dpsc_final.pdf).

Notably, New Jersey's prosecutors claimed that death penalty abolition would save little money, for resources devoted to capital cases would be reallocated to other types of prosecutions, and death-eligible defendants would still face lengthy trials in LWOP cases. *Id.* at 32-33. Moreover, the Commission failed to obtain data necessary to compare the cost of administering a capital trial with a non-death penalty murder trial. *Id.* at 32.

Defense and incarceration cost data pointed to the savings that would result from abolition of capital punishment. New Jersey's Office of the Public Defender estimated that, given its 2006 caseload of nineteen capital cases, it would save \$1.46 million per year if the death penalty were abolished. *Id.* at 31. The savings would result from cutting pretrial investigation, jury selection, attorney hiring, penalty phase litigation, and appeals costs. *Id.* at 31-32. The state's Department of Corrections reported that the cost of incarcerating an inmate on death row is \$32,481 more per year than in general population, for a total of \$974,430 to \$1,299,240 per inmate over each inmate's lifetime. *Id.* at 32.

The Commission concluded that "the costs of the death penalty are greater than the costs of [LWOP], but it is not possible to measure these costs with any degree of precision." *Id.* at 31. This report played a major role in the ensuing debate over abolishing capital punishment in New Jersey, with the high costs of the system serving as a practical explanation for many lawmakers'

decisions. See Jeremy W. Peters, *In Ending Executions, Soul Searching*, N.Y. Times, Dec. 23, 2007; Jeremy W. Peters, *New Jersey Moves to End Death Penalty*, N.Y. Times, Nov. 19, 2007. Late in 2007, New Jersey became the first state to abolish the death penalty in the post-*Furman* era.

#### **D. Washington State**

The 2006 report of the Death Penalty Subcommittee of the Committee on Public Defense of the Washington State Bar Association found that both the prosecution and defense of a capital case involve greater costs than those in a non-capital case. Washington State reinstated the death penalty in 1981, and the Subcommittee identified 254 death-eligible murder prosecutions in the ensuing twenty-five years. Washington State Bar Association, *Final Report of the Death Penalty Subcommittee of the Committee on Public Defense* 44 (2006), available at <http://www.wsba.org/lawyers/groups/websitereport308final.doc>. The state sought capital punishment in 79 of those cases, obtaining 30 death sentences. *Id.* At the time of the study, seven of those verdicts were under appeal, four defendants had been executed, and nineteen capital verdicts had been reversed on appeal. *Id.* at 44-48.

In order to evaluate cost of prosecution, the Subcommittee surveyed prosecutors and public defenders. In contrast with the Maryland study, no detailed time allocation data was available. According to the survey, the prosecution of a capital case cost an average of \$217,000 more than a non-capital case, and the defense cost an average of an additional \$246,000, for a total death penalty pursuit cost of \$467,000. *Id.* at 55. The study also estimated the average cost of the capital appellate process at \$117,799, while non-capital appeals of first-degree murder cases cost an average of \$16,971. *Id.* at 58.

The researchers concluded that death penalty prosecutions involved higher costs than non-capital cases, but the benefit of not prosecuting a case capitally cannot be calculated as a dollar-for-dollar savings figure. First, “the salary costs for prosecutors in death penalty cases [would be] absorbed in existing budgets” and their resources reallocated to other cases. *Id.* at 61. Likewise, judges’ time would be reallocated to other tasks. *Id.* at 69. Second, the Subcommittee concluded that that death penalty prosecution provided an incentive for defendants to plead guilty to lesser offenses, meaning that an expensive trial and appeal process may be avoided entirely. *Id.* at 62. The Subcommittee found that the high cost of capital prosecutions may be a greater disincentive for prosecutors in smaller counties in Washington State who might be unable to shoulder their portions of the cost, leading to an inequitable and uneven application of the death penalty across the state. *Id.* at 69-70.

#### **E. Kansas**

In 2003, the Kansas legislature published an audit of the state’s capital punishment system. Between 1994, when Kansas reinstated the death penalty, and 2003, the state’s prosecutors sought the death penalty in fourteen of the 79 death-eligible murder cases, yielding seven death sentences. Legislative Division of Post Audit, *Costs Incurred for Death Penalty Cases: A K-GOAL Audit of the Department of Corrections* 3-11 (2003), available at [http://www.kslegislature.org/postaudit/audits\\_perform/04pa03a.pdf](http://www.kslegislature.org/postaudit/audits_perform/04pa03a.pdf). Kansas does not have an LWOP statute. The auditors surveyed the state’s courts, prosecutors, defense attorneys, and prisons in order to calculate time and cost estimates for the various stages of a capital case. *Id.* at 34. The study’s final sample contained seven death sentence cases, seven unsuccessful capital prosecutions, and eight non-capital prosecutions of homicides. *Id.* at 11.

The median total cost of a case in which a death sentence was handed down was \$1.1 million. *Id.* The median non-capital case cost the state 70% less, or \$740,000. *Id.* at 12. Cases in which a death sentence was actually imposed at trial carried three times greater median investigation costs, sixteen times greater trial costs, and twenty-one times greater appellate costs than non-capital prosecutions. *Id.* at 13. In contrast, lifetime incarceration costs in capital cases were projected to be twice lower due to the inmates' anticipated executions. *Id.* at 13-14. The trial costs of cases where the death penalty was unsuccessfully sought were six times greater than those in non-capital cases, while all other reported fiscal findings were comparable. *Id.* at 13. Notably, the results of this study may be skewed by the small sample size, and the national applicability of the findings may be limited due to Kansas not having an LWOP prosecution option.

## **F. Conclusions**

The studies examined in this paper utilize a variety of sampling techniques and methods of analysis, but the findings are uniform—capital prosecutions place a significantly greater burden on state budgets than non-capital homicide prosecutions. The Urban Institute's Maryland study stands out as the gold standard of modern death penalty cost research, utilizing two decades of extensive data and accounting for spending at every phase of a capital case. In Maryland, the filing of a death notice costs the government an average of \$670,000 more than prosecuting non-capitally, while the average total cost of a death sentence case over its lifetime amounts to \$3 million.

If a comparable study were conducted in Virginia, the results would undoubtedly be different, due to the Commonwealth's unique capital case processing mechanisms. There are too many variables in every one of these studies to permit a simple translation of the cost estimates

across state lines. However, all the studies highlight the components of the “death is different” due process mechanism as the driving forces of the death penalty cost burden. As in other states, in capital cases in Virginia a trial is likely required, and the voir dire takes a longer period of time. Michael E. Ebert, *Weighing the Costs of Capital Punishment v. Life in Prison Without Parole: An Evaluation of Three States’ Studies and Methodologies Comparing Costs of the Death Penalty Versus Life in Prison Without Parole (LWOP)* 4, 1 New Voices in Public Policy (2007), available at <http://journals.gmu.edu/index.php/newvoices/article/view/13/28>. At least two attorneys typically work on each side of the case, and use of expert testimony is much more prevalent than in a non-capital case. *Id.* The trials are bifurcated, taking up more court days. The appellate process is mandatory and lengthy.

In this time of financial turmoil, Virginia may not be immune from the growing realization that the resources expended on capital prosecutions are too great, and the resulting benefits too few. Continued focus on this issue, and demands for real cost-accounting of this wasteful and ineffective category of government activity, may hasten the day when Virginia turns away from the death penalty and toward more effective responses to murder.