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To the
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Benjamin R. Civiletti, Chair

Notes on Accounting for the Costs of the Death Penalty

By

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The Maryland Commission on Capital Punishment was tasked with assessing the costs of the death penalty. I am trained as an economist and I have conducted research on this topic. My report titled *The Costs of Processing Murder Cases in North Carolina* has been widely recognized as the most thorough accounting of the costs of the death penalty at the time that I published it (1993). I have submitted the executive summary of that report as part of this testimony.

In that study I found that the annual accrued costs associated with murder cases in which the district attorney proceeded capitally amounted to $4 million *net* in 1991 and 1992. The only costs I considered in that analysis were the costs to state government – private costs and costs to the federal government were not considered.

While that cost estimate may remain of some interest, it is out of date for a variety of reasons. Among the changes in procedure that have occurred since then in North Carolina are the introduction of life without parole as the sentencing alternative to death in first degree murder cases, the legalization of sentence bargaining by district attorneys, and a rather dramatic reduction in capital trials since 2001. For that reason I have undertaken a new study of the costs of processing murder cases in North Carolina. Unfortunately that work is not yet completed. Nonetheless I believe that there are qualitative lessons from my research that may be of interest to the Commission because they are likely to be valid in Maryland as well as North Carolina.

1. *In assessing the costs of capital punishment it is very important to ask the right question.*

Often what people seem to have in mind in considering cost is a comparison of two hypothetical scenarios. In Scenario I, a murder defendant is prosecuted capitally, convicted, sentenced to death, and after exhausting post-conviction remedies, executed. In Scenario II the same defendant is prosecuted for non-capital first degree murder, convicted, and sentenced to life without possibility of parole. In comparing the two scenarios, there are extra costs in Scenario I associated with super due-process

protections during the trial phase, a separate sentencing hearing, and greater access to the appellate courts (both state and federal). But if the defendant is executed, then there are also cost savings from reduced time in prison. The net cost of Scenario I compared with Scenario II may be positive or negative, depending on the relative magnitudes of the extra processing costs and the savings from less time in prison.

In any event, that comparison is essentially irrelevant to the question of whether capital punishment is costly.

The extra costs associated with super due process accrue for **every** murder case in which a district attorney proceeds capitally. In only a small fraction of such cases is the defendant convicted, sentenced to death, and executed. In North Carolina, for example, only about one-quarter of the cases that were tried capitally since 2000 resulted in a death sentence. Fewer than 10% of all defendants sentenced to death since 1973 have been executed – most have had their sentence or conviction overturned on appeal. So the relevant cost comparison must take account of the facts that *every* capital case costs extra (super due process) but that in only a tiny fraction of capital cases is there any savings (due to an execution that cuts short the prison term).

2. *In assessing overall net costs associated with having the death penalty on the books, it is reasonable to use either of two accounting schemes.*

Two accounting schemes that seem useful in understanding the cost issue are (1) cash accounting and (2) accrual accounting. A cash-accounting tabulation would provide an answer to the following question: "What is the annual current net cost to the Maryland state government arising from death penalty prosecutions, past and present?" The accrual-accounting tabulation would provide an answer to the following question: "What net liability is incurred by Maryland as a result of new capital cases originating during the course of a particular year?" The cash-accounting scheme is easier to implement and gives a more reliable answer, since it requires far fewer assumptions about the future than does the accrual-accounting scheme. The cash-accounting scheme may also be most relevant to those concerned with the near-term budget consequences of the death penalty.

From the cash accounting perspective, we note that during any particular fiscal year the state incurs extra costs as a result of new capital cases; re-trials and re-sentencing hearings resulting from successful appeals in previous capital cases; on-going appeals and post-conviction proceedings, maintenance of an infrastructure for executions; and other requirements. In addition it is spared the expense of housing the five inmates who have been executed during the modern era (assuming that they would not have died of natural causes or been released from prison).

3. *Most of the extra cost of the death penalty falls on the trial courts.*

Contrary to conventional wisdom, it is not the extra appeals that make capital punishment so costly, but rather the extra resources utilized by such cases in the trial courts. All capital cases, whether or not they result in a death sentence, require more time and resources during the trial phase. If there is a sentence of death, these cases are far more likely to return to the trial courts for retrial or resentencing as a result of a successful appeal. Because capital cases tie up the trial courts, they may reduce the resources available to try other cases. That is an important opportunity cost of capital punishment.

4. *There are additional considerations in conducting a complete assessment of costs.*

My remarks so far have not considered two issues that are potentially important: deterrence and sentence bargaining.

It capital punishment had a powerful deterrent effect on would-be murderers, then there would be fewer murder cases flowing through the criminal justice system. That would not only save lives, it would also save criminal-justice resources. Economists have researched the deterrent effect of the death penalty and come to conflicting conclusions. My judgment is that it is impossible to obtain a reliable answer based on a statistical analysis. Only a tiny fraction of murderers are executed in practice, so the "dose" in this "treatment" is so small that its effect, if any, cannot plausibly be discerned in the ups and downs of state murder rates. There is also no basis for making the judgment based on other considerations, such as a belief in the rationality of potential murderers. It is not clear that having the death penalty on the books increases the **average** severity of punishment for murder – even in states where there are occasional executions, the costs of capital processing are such that other murder cases may be given shorter shrift and end up with an unjust acquittal or light sentence. So both the statistical and conceptual arguments on this issue lead nowhere. The effect of the death penalty may be to either increase or reduce the murder rate.

The second complication is that having the death sentence on the books may provide prosecutors with extra leverage in pre-trial negotiations. Since North Carolina legalized sentence negotiations in potentially capital murder cases, there have been a handful of defendants each year who have pled guilty to first-degree murder, thus choosing a sentence of life without parole rather than risk a death sentence at trial. Those cases may have gone to trial if the death penalty had not been available as a threat; I have no way of knowing. (Alternatively the prosecutor may have accepted a plea to a lesser charge, and avoided a trial that way.)

Given these two potential complications, neither of which lend themselves to a reliable estimate, there is uncertainty in any estimate of the costs of the death penalty.