

**MARYLAND  
COMMISSION ON  
CAPITAL PUNISHMENT**

**FINAL REPORT  
TO THE  
GENERAL ASSEMBLY**

December 12, 2008

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# COMMISSIONER LIST<sup>1</sup>

## Commission Chairman:

**Benjamin R. Civiletti**, former U.S. Attorney General, senior partner at Venable LLP, *jointly appointed as Chairman by the Governor, the President of the Senate of Maryland, and the Speaker of the House of Delegates.*

## Commissioners:

**Senator Jamie Raskin**, *appointed by the President of the Senate*

**Senator James N. Robey**, *appointed by the President of the Senate*

**Delegate Adrienne A. Jones**, *appointed by the Speaker of the House*

**Delegate William Frank**, *appointed by the Speaker of the House*

**Shanetta J. Paskel**, *representing Attorney General Douglas Gansler*

**The Honorable William Spellbring**, *former member of the Judiciary appointed by the Chief Judge of the Court of Appeals*

**Gary Maynard**, *Secretary of the Department of Public Safety and Correctional Services*

**Katy C. O'Donnell**, Chief Attorney of the Maryland Office of the Public Defender's Capital Defense Division, *designated by the State Public Defender*

**Scott Shellenberger**, Baltimore County State's Attorney, *designated by the president of the Maryland State's Attorneys' Association*

**Chief Bernadette DiPino**, Chief of the Ocean City Police Department, *representative of the Maryland Chiefs of Police Association, appointed by the Governor*

**Percel Odel Alston, Jr.**, Legislative Chairman for the Maryland State Lodge Fraternal Order of Police, *representative of the Maryland State Lodge Fraternal Order of Police, appointed by the Governor*

**Noel Lewis Godfrey**, correctional officer at Patuxent Institution, Jessup, Maryland, *appointed by the Governor*

**Kirk Noble Bloodsworth**, Former State Prisoner who was exonerated, *appointed by the Governor*

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<sup>1</sup> See Appendix B for Commissioner biographical information.

**Reverend Alan M. Gould, Sr.**, Allen Chapel African Methodist Episcopal Church in Silver Spring, *appointed by the Governor*

**Rabbi Mark G. Loeb**, Beth El Congregation, Baltimore County, *appointed by the Governor*

**Bishop Denis J. Madden**, Archdiocese of Baltimore, *appointed by the Governor*

**Vicki A. Schieber**, Mother of Victim, *representative of the general public, appointed by the Governor*

**Rick N. Prothero**, Brother of Victim, *representative of the general public, appointed by the Governor*

**Oliver Smith**, Father of Victim, *representative of the general public, appointed by the Governor*

**Matthew Campbell**, legal counsel for the Market Regulation Department of the Financial Industry Regulatory Authority, *representative member of the public, appointed by the Governor*

**David Kendall**, Partner, Williams and Connolly LLP, *representative member of the public, appointed by the Governor*

**Delegate Sandy Rosenberg**, District 41, Baltimore City, *representative member of the public, appointed by the Governor*

## **ACKNOWLEDGMENTS FROM THE CHAIRMAN**

It has been a great honor and privilege to serve as the Chairman of the Maryland Commission on Capital Punishment. I commend my fellow commissioners for their exceptional attentiveness during our many hours of testimony and for their diligent work ethic regarding commission matters. The issues that we addressed are complex and difficult ones and I appreciated the open, frank, and always respectful discussions by commissioners even though their views on these issues may have differed. The citizens of Maryland have benefited from having such devoted and thoughtful individuals on this Commission.

On behalf of the Commission, I would like to thank everyone who testified before the Commission. Many experts traveled to Maryland to share their expertise on issues relating to capital punishment, without which the Commission could not have completed its work. I would also like to extend a very heartfelt thank you to the members of the public who testified before us. Many of those who testified had lost a loved one to homicide and the stories they shared truly put a human face on the difficult issues the Commission addressed.

Finally, I would like to thank the staff who has worked so very long and hard to make this report a reality. Specifically, I would like to thank Rachel Philofsky, our chief editor and organizer, and Patty Mochel and Ráchael Powers of the Governor's Office for Crime Control and Prevention; Danette Edwards and Heather Mitchell, associates at Venable LLP; and Nathaniel Berry and Uyen Pham, summer associates at Venable LLP for all of their exceptional work.

## INTRODUCTION

The Maryland Commission on Capital Punishment was created by an act of the Maryland General Assembly in the 2008 legislative session for the purpose of studying all aspects of capital punishment as currently and historically administered in the State. The Commission's membership is comprised of twenty-three appointees. Thirteen of the Commissioners were gubernatorial appointees and nine were non-gubernatorial appointees. The Chair was jointly selected by the Governor, the Speaker of the House, and the Senate President. The Commission represents a broad diversity of views on capital punishment, as well as the racial, ethnic, gender, and geographic diversity of the State.<sup>2</sup> The Commission is staffed by the Governor's Office of Crime Control and Prevention Statistical Analysis Center. The Commission held five public hearings where testimony from experts and members of the public was presented and discussed.<sup>3</sup> The Commission held five additional meetings to discuss the evidence presented at the hearings. The Commission has made a recommendation concerning capital punishment in the State, so that its application and administration are free from bias and error and achieve fairness and accuracy. The Commission presents this recommendation in this final report and a minority report<sup>4</sup> in accordance with §2-1246 of the State Government Article, to the General Assembly on or before December 15, 2008.

The Commission's recommendations address the following topic areas:

1. Racial disparities;
2. Jurisdictional disparities;

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<sup>2</sup> See Appendix B for a compilation of the Commissioner biographies.

<sup>3</sup> See Appendix C for a list of witnesses who testified in person before the 2008 Commission.

<sup>4</sup> The Minority Report appears at the end of this document.

3. Socio-economic disparities;
4. A comparison of the costs associated with death sentences and the costs associated with sentences of life imprisonment without the possibility of parole;
5. A comparison of the effects of prolonged court cases involving capital punishment and those involving life imprisonment without the possibility of parole;
6. The risk of innocent people being executed;
7. The impact of DNA evidence in assuring the fairness and accuracy of capital cases; and
8. Other aspects of capital punishment currently and historically administered in the State.



## **EXECUTIVE SUMMARY**

The Maryland Commission on Capital Punishment has reviewed testimony from experts and members of the public, relevant Maryland laws and court cases, as well as statistics and studies relevant to the topic of capital punishment in Maryland. After a thorough review of this information, the Commission recommends that capital punishment be abolished in Maryland. The following sections detail the findings that support the recommendations and address each major issue the Commission was charged with studying.

## **1. RACIAL DISPARITIES**

***Finding: Racial disparities exist in Maryland's capital sentencing system. While there is no evidence of purposeful discrimination, the statistics examined from death penalty cases from 1978 to 1999 demonstrate racial disparities when the factors of the race of the defendant and the race of the victim are combined.***

***(Results of Commission Vote on Finding: AGREE = 20; DISAGREE = 1)***

Between 1979 and 1999, there were 1,311 death-eligible cases in Maryland, resulting in five executions and five persons remaining on Death Row today—in other words, an execution rate of less than one-half of one percent (<.5%).<sup>5</sup> The evidence shows that the troublesome factor of race plays a dominant role in the administration of the death penalty in Maryland. Research presented to the Commission showed that cases in which an African-American offender killed a Caucasian victim are almost two and a half times more likely to have death imposed than in cases where a Caucasian offender killed a Caucasian victim.<sup>6</sup> Race plays such a significant role that it overshadows several of the statutorily required factors in Maryland's system of guided discretion. The worst or most serious cases thus do not necessarily receive the most severe sanction of execution.

After controlling for relevant legal characteristics, Professor Ray Paternoster<sup>7</sup> found that cases in which an African-American defendant allegedly killed a Caucasian victim were more likely to be advanced for capital punishment at every stage than cases of similar seriousness with

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<sup>5</sup> .76% or roughly  $\frac{3}{4}$  of 1% of people who could have received a death sentence that did receive a death sentence who are currently sitting on death row or have been executed. Of the people who committed crimes eligible for the death penalty, .38% or less than  $\frac{1}{2}$  of 1% have been executed.

<sup>6</sup> July 28, 2008 Oral Testimony of Professor Ray Paternoster, Tr. at 57.

<sup>7</sup> Ray Paternoster has been a professor at the University of Maryland Department of Criminology since 1983 where he has studied issues related to capital punishment, criminological theory, quantitative methods, and offender decision making. He has published numerous articles, books and reports on capital punishment and has testified before the Maryland legislature on the subject of race and geographic disparities. Professor Paternoster is a fellow of the American Society of Criminology and the National Consortium on Violence Research.

other race combinations for the victim and offender.<sup>8</sup> Professor David Baldus<sup>9</sup> echoed these findings to the Commission and reported that of the ten cases that have resulted in a death sentence in Maryland since 1978, seventy percent (70%) of those featured an African-American perpetrator and a Caucasian victim. However, this combination constitutes only twenty-three percent (23%) of all death-eligible cases in Maryland.<sup>10</sup> This Commission finds that the administration of the death penalty clearly shows racial bias and that no procedural or administrative changes to the processing of capital cases would eliminate these racial disparities.

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<sup>8</sup> By “treated more harshly at every stage”, Professor Paternoster refers to the different stages of the process, so that defendants in those cases would be more likely to have the death notice filed, less likely for the death notice to be withdrawn, more likely to go to the penalty phase and more likely for a death sentence to be imposed as opposed to cases with other race combinations. See Paternoster, R., Brame, R., Bacon, S., Ditchfield, A., Beckman, K., Frederique, N., et al. (2003). *An Empirical Analysis of Maryland's Death Sentencing System With Respect to the Influence of Race and Legal Jurisdiction*. University of Maryland, Department of Criminology. College Park: Report to the Governor of Maryland.

<sup>9</sup> David C. Baldus is a professor of law at the University of Iowa College of Law. He is co-author of two books, *STATISTICAL PROOF OF DISCRIMINATION* (1980) and *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS* (1990) as well as numerous articles on capital punishment. Over the past 25 years he and his colleague George Woodworth, have conducted empirical studies of capital charging and sentencing in many states including Maryland. His Georgia research conducted with Professor Woodworth formed the basis of petitioner's claims in *McCleskey v. Kemp* (1987).

<sup>10</sup> July 28, 2008 Oral Testimony of Professor David Baldus, Tr. at 86-127.

## 2. JURISDICTIONAL DISPARITIES

***Finding: Jurisdictional disparities exist in Maryland's capital sentencing system.***

***(Results of Commission Vote on Finding: AGREE = 20; DISAGREE = 1)***

Research presented to the Commission conclusively shows that the chances of a State's Attorney seeking and imposing a death sentence differs alarmingly across jurisdictions in Maryland, even when the cases are similar. Professor Paternoster has found that the Baltimore County State's Attorney seeks a death sentence more frequently than the Baltimore City State's Attorney by a ratio of thirteen-and-a-half to one, even after statistically controlling for the possibility that crimes in different counties are more serious than others. In other words, the probability of a State's Attorney seeking death is over thirteen times higher in Baltimore County than it is in Baltimore City in similar cases.<sup>11</sup> Furthermore, the probability of receiving a death sentence in Baltimore County is almost twenty-three times higher than the probability of receiving a death sentence for a similar crime in Baltimore City.<sup>12</sup> Professor Paternoster points to Baltimore County and Baltimore City as simply the most glaring comparison; however, jurisdictional disparities were not limited to these two counties. He continued, "Baltimore County cases are five times more likely to have death requested than Montgomery County cases... Harford County cases were eleven times more likely than Baltimore City cases to have death requested."<sup>13</sup> Professor Paternoster emphasizes that the statistically significant factor of

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<sup>11</sup> Paternoster Oral Testimony, *supra* at 57.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*, p. 58.

jurisdiction in the decision to seek death is an arbitrary factor not included in the statutorily defined aggravators and mitigators.<sup>14</sup>

Gross jurisdictional disparities mean that like cases proceed or are sentenced differently based on the mere happenstance of where the homicide occurred and the accused is prosecuted. Former Chief Justice of the New Jersey Supreme Court Deborah T. Poritz<sup>15</sup> also condemned this capriciousness in her testimony referring to a portion of a report presented to the New Jersey Supreme Court in 2006 regarding jurisdictional disparities in the New Jersey death penalty system:

We are of the view that county variability should not be judicially countenanced. In these cases, we deal with the worst of the worst, the dregs of society. It is difficult to sympathize with a coldblooded killer, but it makes no sense that a murderer in one county is subject to the death penalty when an identical crime would be treated in an entirely different way if it were committed in another county. Whether viewed as a constitutional imperative, a requirement of statutory policy, or simply a matter of fundamental fairness, we submit that county variability is a basis for judicial intervention.<sup>16</sup>

Alone and together racial disparities and the jurisdictional disparities make the capital punishment system in Maryland unfair and arbitrary based not solely on the statutory legal factors, but on race and jurisdiction. This Commission finds no procedural or administrative changes to the process of capital cases that would eliminate these disparities.

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<sup>14</sup> Paternoster, et al., 2003, *supra*; also see Md. Code, Art. 27, § 413(d); Md. Code, Crim. Law § 2-303(g)-(h) (2008) for the complete list of aggravators.

<sup>15</sup> Deborah T. Poritz is the former Chief Justice of the New Jersey Supreme Court. In 1994, she was appointed as New Jersey's first female attorney general by Governor Christine T. Whitman. On July 10, 1996, she took the oath of office as chief justice of the Supreme Court of New Jersey.

<sup>16</sup> Former Chief Justice Poritz cited a 2006 report presented to the New Jersey Supreme Court by Honorable David Baime, Special Master for Proportionality Review and Appellate Judge, New Jersey Supreme Court. *See* July 28, 2008 Deborah T. Poritz Oral Testimony, Tr. at 23.

### **3. SOCIO-ECONOMIC DISPARITIES**

***Finding: Due to a lack of research on socio-economic disparities in Maryland, the Commission does not reach a conclusion on this matter.***

***(Results of Commission Vote on Finding: AGREE = 21; DISAGREE = 0)***

Research is less conclusive regarding the relationship between socio-economic status and the outcome of capital cases. This is due in part to the fact that socio-economic status as a variable is difficult to measure. Socio-economic status is a factor that represents a person's overall social and economic standing and can include indicators such as income, education, occupational prestige, etc. and therefore can be difficult to capture with data. Although the research is not as well established in this area in Maryland, Professor Baldus has found the presence of socio-economic disparities in the death sentencing system of other states. The possibility of disparities based on socio-economic status exists in Maryland. However, due to a lack of research on socio-economic disparities in Maryland, the Commission does not reach a conclusion on this matter.

#### **4. THE COMPARISON OF COSTS ASSOCIATED WITH DEATH SENTENCES AND THE COSTS ASSOCIATED WITH SENTENCES OF LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE**

***Finding: The costs associated with cases in which a death sentence is sought are substantially higher than the costs associated with cases in which a sentence of life without the possibility of parole is sought.***

***(Results of Commission Vote on Finding: AGREE = 17; DISAGREE = 4)***

The cost of pursuing a capital case is estimated conservatively to be at least three times the cost of a non-death penalty homicide prosecution (\$1.1 to \$2.9 million). The cost studies<sup>17</sup> are based on opportunity costs and not out-of-pocket expenses. Nevertheless, the direct savings calculated from 1978 to 1999 would amount to \$186 million dollars, which is the value of the resources that could be used for other purposes by members of the criminal justice system.<sup>18</sup> Many witnesses testified that the estimated opportunity cost savings could be better devoted to preventing violent crime and homicides and to increasing services to the families of victims. The Commission agrees and finds that the vast resources that are currently devoted to an uncertain and arbitrary death sentence system could be better utilized to stop homicides and other violent crimes before they occur. For example, these resources could be used to develop intelligence units in police departments that will identify and target violent offenders and get them off the streets before they ever have the chance to commit murder. Moreover, these resources could be used to increase services to better assist and support the family members of murder victims.

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<sup>17</sup> See Roman, J., Chalfin, A., Sundquist, A., Knight, C., & Darmenov, A. (2008). *The Cost of the Death Penalty in Maryland*. Washington, DC: Urban Institute Justice Policy Center.

<sup>18</sup> August 19, 2008 Oral Testimony of John Roman, Tr. at 18.

## **5. THE EFFECTS OF PROLONGED COURT CASES INVOLVING CAPITAL PUNISHMENT AND THOSE INVOLVING LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE**

***Finding:*** While both life without the possibility of parole and death penalty cases are extremely hard on families of victims, the Commission finds that the effects of capital cases are more detrimental to families than are life without the possibility of parole cases.

***Recommendation:*** Increase the services and resources already provided to families of victims as recommended by the Victims' Subcommittee.

***(Results of Commission Vote on Finding: AGREE = 20; DISAGREE = 1)***

Many witnesses testified about the grief, and heartbreak that the capital punishment process causes for family members of victims. The significant amount of time offenders remain on Death Row and their lengthy appeals process perpetuates the injury, grief and heartbreak to the families of victims. They are forced to relive the tragedy of the crime and re-experience its trauma. While a convicted felon who receives the sentence of life without parole goes directly to prison to serve this sentence, a convicted felon who receives a death sentence goes to Death Row and waits, often several decades before the sentence is carried out and the person is executed. Some family members of victims are embittered by the perceived failure of the system to carry out the sentence. As a result, many members of the families of victims oppose the death penalty as serving no useful purpose and instead causing societal harm.

A Subcommittee of the Commission, comprised of the three members who have lost a family member to murder, with sorrowful personal experience reviewed their collective in-depth knowledge of the services provided to the families of homicide victims in Maryland and collected information from service providers throughout the State regarding the services that each offers. Although the State has recognized the need for better remedial services to these victims, it has not sufficiently funded or focused on the improvements necessary to meet the



needs of the family members of victims. Pursuant to the findings of the Victims' Subcommittee, among the items which should be developed and supported are:

- Statewide uniformity in enforcing victims' rights laws that currently exist;
- Improved training for law enforcement personnel and prosecutorial staff regarding both how to deal with survivors of homicides and the rights of crime victims;
- State support for non-profit service providers who provide services to survivors of homicide victims;
- Updating criminal injury compensation benefits;
- Greater finality for the victims of homicides and better truth-in-sentencing;
- An awareness and educational campaign to educate the community, the bench, the bar, social service entities, law enforcement and other interested parties regarding their roles with respect to and obligations to victims and survivors of homicides; and
- Increased funding to the Maryland Victims of Crime Fund to be used to help the families of victims of homicides.

## **6. THE RISK OF INNOCENT PEOPLE BEING EXECUTED**

***Finding: Despite the advance of forensic sciences, particularly DNA testing, the risk of execution of an innocent person is a real possibility.***

***(Results of Commission Vote on Finding: AGREE = 18; DISAGREE = 3)***

Since 1973, there have been 1,125 executions and 130 exonerations of innocent persons nationwide from Death Row. Stated differently, for every 8.7 executions, there has been one exoneration. Exonerations comprise part of an alarming number of reversals in capital cases. The reversal rate for capital cases in Maryland outpaces that of many other jurisdictions, totaling eighty percent (80%) for the years 1995-2007. The figures pertaining directly to exonerations, and the high percentage of reversals overall (regardless of the outcome upon retrial), suggest that there are flaws in the system that might allow innocent persons to be executed.

One source of potentially fatal flaws in capital cases in Maryland is eyewitness misidentification testimony. Eyewitness misidentification testimony is widely recognized as the leading cause of wrongful convictions in the United States, accounting for more wrongful convictions than all other causes combined.

Another source of error is false confession evidence. Fifty of the first 200 DNA exonerees in the United States purportedly confessed to crimes that they did not commit. Criminal justice officials and jurors often treat confession evidence as dispositive or uniquely persuasive, so much so that they will allow it to outweigh even strong evidence of a suspect's factual innocence.

The death penalty also poses a serious risk that innocent persons will be executed because forensic labs have a difficult time assuring that accurate findings are made. Forensic evidence is easily contaminated at the scene or in the laboratory. Lab workloads lead to error and mistakes. In addition, there are instances of incompetence by lab staff persons. Because of fictional

characterizations of forensic infallibility and widespread belief in the depiction of this evidence in movies and television as both reliable and irrefutable, forensic evidence all too often wrongfully outweighs evidence of innocence.

The aforementioned flaws and errors persist in capital cases *despite* numerous procedural safeguards built into the criminal justice system, and may even be more likely in capital cases *because* of the uniquely complex and elaborate safeguards associated with the administrative process of the death penalty. The complexities of the administrative process in capital cases can work hardships on defense counsel, sometimes leading to shoddy representation and the attendant risk of wrongful conviction.

## **7. THE IMPACT OF DNA EVIDENCE IN ASSURING FAIRNESS AND ACCURACY IN CAPITAL CASES**

*Finding: DNA testing has improved fairness and accuracy in capital cases. DNA is regarded as a highly reliable source of information and serves as a powerful tool for proving guilt and innocence. Nevertheless, while DNA testing has become a widely accepted method for determining guilt or innocence, it does not eliminate the risk of sentencing innocent persons to death since, in many cases, DNA evidence is not available and, even when it is available, is subject to contamination or error at the scene of the offense or in the laboratory.*

*(Results of Commission Vote on Finding: AGREE = 16; DISAGREE = 5)*

DNA evidence and testing is remarkable in its capacity for ensuring that the criminal justice system targets the correct perpetrator. It is not, however, a panacea that assures fairness and accuracy in all capital cases.

The majority of criminal cases do not include biological evidence that definitively determines the identity of the perpetrator through DNA testing. It is estimated that credible DNA evidence is available in only ten to fifteen percent (10% - 15% ) of death penalty cases.

DNA technology was not available when the offenses underlying many capital cases were committed, and it has evolved considerably since its first use in criminal cases in 1984. Biological material suitable for comparison/exoneration purposes may not exist in “cold cases” because of a lack of awareness of DNA technology or because the law had not evolved to require collection or maintenance of collected evidence. Newly adopted DNA laws enhancing the fairness of the use of DNA technology will only affect cases in which DNA evidence has been preserved.

Even where testable DNA exists, there is always the possibility of contamination, misinterpretation, or other errors relating to the test results. Several real-world examples of errors were presented to the Commission.

Finally, the most important lesson that DNA-based exonerations have taught us about the risk of wrongful convictions—that they are really possible—also forces us to conclude that this remarkable science is not infallible.

## ***DETERRENCE***

***Finding: The Commission finds that there is no persuasive evidence that the death penalty deters homicides in Maryland.***

***(Results of Commission Vote on Finding: AGREE = 17; DISAGREE = 4)***

Although there are some econometric studies claiming that executions deter homicides, the Commission is convinced by the strong consensus among respected social scientists that sound research does not support the proposition that capital punishment deters murders. The idea that capital punishment could deter homicides assumes murderers would rationally choose not to kill in order to avoid execution. The evidence presented showed that many murders are crimes of passion, often impulsive, frequently committed by dysfunctional persons with serious emotional or mental disorders or acting under the influence of drugs or alcohol. Furthermore, in view of the fact that executions are so rare – less than one half of one percent (<.5%) of homicides result in a sentence of death – a rational offender would deduce a 99.5% likelihood of avoiding execution for murder, a figure unlikely to deter.

## ***FINAL RECOMMENDATION OF THE MARYLAND COMMISSION ON CAPITAL PUNISHMENT***

***Ultimate Recommendation: This Commission recommends abolition of capital punishment in the state of Maryland.***

***(Results of Commission Vote on Recommendation: AGREE = 13; DISAGREE = 9)***

Over the past several months, the Maryland Commission on Capital Punishment has seriously considered the seven topics it was charged with examining as well as several others that Commissioners deemed relevant. The Commission took its responsibilities very seriously, listening carefully, and weighing the evidence it heard and read. The Commission's findings and recommendations are consistent with the evidence and information it reviewed.

The present administration of capital punishment shows substantial disparities in its application based on race and jurisdiction. These disparities are so great among and between comparable cases that the death penalty process is best described as arbitrary and capricious. It is neither fair nor accurate. The costs of capital cases far exceed the costs of cases in which the death penalty is not sought. These resources could be better used elsewhere. The effects of prolonged capital cases take an unnecessary toll on the family members of victims. The risk of executing an innocent person is, in the Commission's view, a real possibility. One of our own Commissioners, Kirk Bloodsworth, spent two years on Death Row and nearly nine total in prison for a crime he did not commit. He was finally exonerated by DNA evidence. Nationwide, 130 Death Row prisoners have been exonerated. New DNA laws do not completely eliminate the risk of other innocent people being wrongfully convicted and sent to Death Row, the way that Commissioner Bloodsworth was. While DNA testing has become a widely accepted method for determining guilt or innocence, it does not eliminate the risk of sentencing innocent persons to

death, since, in many cases, DNA evidence is not available and, even when it is available, it is subject to contamination or error at the scene of the offense or in the laboratory.

For all of these reasons—to eliminate racial and jurisdictional bias, to reduce unnecessary costs, to lessen the misery that capital cases force victims of family members to endure, to eliminate the risk that an innocent person can be convicted—the Commission strongly recommends that capital punishment be abolished in Maryland.



## ***VOTING RECORD***

Name	Issue 1	Issue 2	Issue 3	Issue 4	Issue 5	Issue 6	Issue 7	Deterrence	Amendment <sup>19</sup>	Abolition
Alston	Y	Y	Y	Y	Y	Y	Y	NO	NO	NO
Bloodsworth	Y	Y	Y	Y	Y	Y	Y	Y	NO	Y
Campbell	Y	Y	Y	Y	Y	Y	Y	Y	NO	Y
Civiletti	Y	Y	Y	Y	Y	Y	Y	Y	NO	Y
DiPino	not pres.	not pres.	not pres.	not pres.	not pres.	not pres.	not pres.	not pres.	not pres.	NO
Frank	Y	Y	Y	Y	Y	Y	NO	Y	NO	NO
Godfrey	Y	Y	Y	Y	Y	Y	Y	Y	NO	Y
Gould	Y	Y	Y	Y	Y	Y	Y	Y	NO	Y
Jones	Y	Y	Y	Y	Y	Y	Y	Y	NO	Y
Kendall	Y	Y	Y	Y	Y	Y	Y	Y	NO	Y
Loeb	Y	Y	Y	Y	Y	Y	Y	Y	NO	Y
Madden	Y	Y	Y	Y	Y	Y	Y	Y	NO	Y
Maynard	abstain	abstain	abstain	abstain	abstain	Abstain	abstain	Abstain	abstain	abstain
O'Donnell	Y	Y	Y	Y	Y	Y	Y	Y	NO	Y
Paskel	NO	NO	Y	NO	NO	NO	NO	NO	NO	NO
Prothero	Y	Y	Y	Y	Y	Y	NO	Y	NO	NO
Raskin	Y	Y	Y	Y	Y	Y	Y	Y	NO	Y
Robey	Y	Y	Y	NO	Y	NO	NO	NO	NO	NO
Rosenberg	Y	Y	Y	Y	Y	Y	Y	Y	NO	Y
Schieber	Y	Y	Y	Y	Y	Y	Y	Y	NO	Y
Shellenberger	Y	Y	Y	NO	Y	NO	NO	NO	NO	NO
Smith	Y	Y	Y	NO	Y	Y	Y	Y	NO	NO
Spellbring	Y	Y	Y	Y	Y	Y	Y	Y	Y	NO

Totals	Issue 1	Issue 2	Issue 3	Issue 4	Issue 5	Issue 6	Issue 7	Deterrence	Amendment	Abolition
Yes Votes	20	20	21	17	20	18	16	17	1	13
No Votes	1	1	0	4	1	3	5	4	20	9

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<sup>19</sup> Commissioner Spellbring proposed a carve-out amendment that would reserve the death penalty for the murderers of law enforcement officers killed in the line of duty or for those who are serving life sentences with or without the possibility of parole who murder either a correctional officer or an inmate in prison.

## ISSUE 1: RACIAL DISPARITIES

***Finding: Racial disparities exist in Maryland's capital sentencing system. While there is no evidence of purposeful discrimination, the statistics examined from death penalty cases from 1978 to 1999 demonstrate racial disparities when the factors of the race of the defendant and the race of the victim are combined.***

***(Results of Commission Vote on Finding: AGREE = 20; DISAGREE = 1)***

The Commission heard testimony and reviewed research on racial disparities in the administration of the death penalty by several experts. Witnesses raised issues of racial disparities at sentencing, racial disparities in jury selection, and racial disparities throughout the capital punishment system, the effects of these racial disparities, and the importance of addressing this problem.

### ***Racial Disparities Throughout the Criminal Justice System***

The Commission heard the testimony of Marc Mauer<sup>20</sup> regarding the issue of racial bias in the criminal justice system in general. He explained that race is still a factor in sentencing. A 2000 National Institute of Justice Report found that African-American and Hispanic offenders, especially young, unemployed males, were more likely to be incarcerated than other race and gender categories.<sup>21</sup> Mr. Mauer asserted that if these disparities have been repeatedly found in other areas of the criminal justice system, it is probable that they are also present in capital cases, and that removing these disparities would be very difficult.<sup>22</sup> Stuart Simms<sup>23</sup> echoed these

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<sup>20</sup> Marc Mauer, Executive Director of The Sentencing Project, is one of the country's leading experts on sentencing policy, race and the criminal justice system. He has directed programs on criminal justice policy reform for 30 years, and is the author of some of the most widely-cited reports and publications in the field.

<sup>21</sup> See Spohn, C. C. (2000). *Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process*. Washington, DC: National Institute of Justice: Criminal Justice 2000.

<sup>22</sup> August 19, 2008 Oral Testimony of Marc Mauer, Tr. at 198-213.

concerns from his own experience as a prosecutor in Maryland and testified that racial bias permeates all aspects of the criminal justice system. In addition he argues that capital cases are especially vulnerable to this bias, in part because of the amount of discretion present in each stage of the process. He also testified that often this bias is inadvertent and not attributable to willful prejudice. However, Mr. Simms contends that the presence of bias, no matter what the motive, is still unconstitutional and carries the same detrimental implications for defendants and society.<sup>24</sup>

### ***Racial Disparities in the Maryland's Capital Sentencing System***

Professor Paternoster testified to the Commission on July 28, 2008 regarding racial and jurisdictional disparities in the administration of the death penalty in Maryland. Professor Paternoster's testimony was largely based on his study commissioned in 2003 by Governor Glendenning, that examined racial and jurisdictional disparities in capital cases in Maryland from 1978 - 1999. In this study, he examined the factors that influenced whether or not a person received a death sentence in Maryland. He examined over eight hundred variables that may have influenced the administration of the death penalty, including statutorily specified aggravators and mitigators, as well as several non-legal factors such as jurisdiction of the crime, and race of the victim and defendant. This study examined the impact of many of these factors at four critical decision-making points in the administration of Maryland's capital punishment system:

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<sup>23</sup> Stuart Simms is currently an attorney in Maryland. His practice focuses on business litigation, legislative and governmental affairs, government contracting and procurement, and issues related to technology in law enforcement, with a special emphasis on homeland security. From 1997 to 2003, Mr. Simms was Secretary of the Maryland Department of Public Safety and Correctional Services. From 1995 to 1997 he was Secretary of the Maryland Department of Juvenile Services. Prior to those positions, Mr. Simms was twice elected to four-year terms as Baltimore State's Attorney, the City's chief prosecutor.

<sup>24</sup> August 5, 2008 Oral Testimony of Stuart Simms, Tr. at 121-161.

1. The decision of the State's Attorney to file a formal notification to seek a death sentence;
2. The decision of the State's Attorney to not withdraw a death notification once filed, in other words, the decision to make the death notification "stick";
3. The decision of the State's Attorney to advance a death-eligible offense to a penalty trial upon a conviction for first-degree murder; and
4. The decision of the jury or judge to sentence a defendant to death.

To begin the study, Professor Paternoster looked at case characteristics for each first and second degree homicide in Maryland from 1978-1999. Based on these case characteristics, Professor Paternoster classified cases as "death-eligible" if they presented facts that legally qualified them for the death penalty.<sup>25</sup> Professor Paternoster identified 1,311 cases which, based on the facts of the case, could have received a death sentence. From these 1,311 cases, only five have resulted in actual executions, with another five on Death Row, awaiting execution. The goal was to determine which factors influenced the administration of the death penalty in Maryland and how this small group—less than 1% of all possible death-eligible homicides—ended up with death sentences.

After collecting data on each homicide, Professor Paternoster conducted statistical analyses in order to identify the factors that influenced the administration of the death penalty. Professor Paternoster and his colleagues looked at over 800 factors for each death-eligible case, but did not include the pre-prosecutorial aspects of the case, which may include interrogation, arrest, pretrial hearings, etc., or a decision to charge for a lesser offense such as manslaughter. He noted that these decisions do have a filtering effect on the cases that make it to the State's Attorney's office.

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<sup>25</sup> Paternoster, et al., 2003, *supra* at 3.

Professor Paternoster first examined the race of the defendant and found that there was no real evidence of disparity between Caucasians and African-Americans based on the race of the defendant alone. In other words, relatively the same percentage of each race that enters the system (death-eligible cases) continues through the system. This suggests that other factors may be more influential in determining who is brought to trial and sentenced to capital punishment than race of the defendant.<sup>26</sup> The New Jersey Death Penalty Study Commission also found that there was no conclusive evidence that supported systematic disparities with regard to the race of the offender in capital cases. Their finding was based in large part on the Supreme Court's Proportionality Review Project in New Jersey.<sup>27</sup>

Although the New Jersey Death Penalty Study Commission also concluded that the race of the victim did not cause a substantial impact on the administration of the death penalty in the State when county disparities were included in the multivariate analyses, research conducted in Maryland suggests that the race of the victim did impact the proportion of cases filtered through the system. In particular, the proportion of Caucasian victims significantly increased through the progression of each stage that Professor Paternoster measured. This means that cases in which there is a Caucasian victim are more likely to have a death notice filed, be prosecuted, have a death penalty sought, and have a death penalty sentenced. Professor Baldus testified that of all the cases in Maryland that have resulted in a death sentence since 1978, none of the victims in those cases were African-American, despite the fact that 43% of death-eligible cases involve African-American victims.<sup>28</sup>

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<sup>26</sup> Paternoster Oral Testimony, *supra* at 42 – 85.

<sup>27</sup> *See* the New Jersey Death Penalty Study Commission Report, 2007.

<sup>28</sup> Baldus Oral Testimony, *supra* at 86-127.

A second disparity regarding race is the finding that cases in which an African-American offender killed a Caucasian victim are almost two-and-a-half times more likely to have death imposed than are cases where a Caucasian offender killed a Caucasian victim.<sup>29</sup> This is indicative of underlying systemic racial bias with regard to capital sentencing. Professor Paternoster

reports with regard to the filtering of cases with the combination of a Caucasian victim and an African-American offender:

Twenty-three percent of all the death eligible crimes involved a black offender and a white victim, but that increases to fifty percent at the end of the process. So, at the point of death sentencings, blacks who kill whites are twice as represented as you would expect, given their participation in death eligible crimes. So that raised a suspicion to us that a combination of offender and victim's race was one of the factors that mattered, as well.<sup>30</sup>

After controlling for relevant legal characteristics, Professor Paternoster found that the combination of a Caucasian victim and an African-American offender increases the probability that the case will be treated more harshly at each of the four major decision-making points.<sup>31</sup> Professor Baldus echoed these findings to the Commission and reported that of the ten cases that have resulted in a death sentence in Maryland since 1978, seventy percent (70%) of those featured an African-American perpetrator and a Caucasian victim. However, this combination constitutes only twenty-three percent (23%) of all death-eligible cases in Maryland.<sup>32</sup> Furthermore, in follow-up analysis both Professor Paternoster and Professor Baldus determined

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<sup>29</sup> Paternoster Oral Testimony, *supra* at p. 57.

<sup>30</sup> *Id.*, p. 47 – 48.

<sup>31</sup> Paternoster, et al., 2003, *supra*.

<sup>32</sup> Baldus Oral Testimony, *supra* at 86-127.

that the adverse racial affects found statewide were not simply a result of different counties making different charging decisions. Racial disparities that existed statewide also existed within individual counties and therefore could not simply be attributed to different prosecutors seeking the death penalty more or less often.<sup>33</sup>

Professor Paternoster summarized the findings of his multivariate analysis regarding the combination of a Caucasian victim and an African-American offender to the Commission as follows:

For the probability of a Death Notice, death being sought, that a black who kills a white is two point four times higher to have death sought than a black killing a black. A black killing a white is almost twice as likely to have death sought against him than a white killing a white. In terms of the probability of a death sentence, a black killing a white is over three times more likely to have death sought, and to have death imposed. And a black killing a white is two and half times, or almost two and a half times more likely to have death imposed than in cases involving a white victim and a white offender.<sup>34</sup>

### ***Racial Bias and Capital Juries***

In addition to the findings that the race of the victim impacts the treatment of capital cases, racial bias is also evident in the composition of the jury. As explained to the Commission by Professor Baldus, there are two mechanisms whereby this presence of racial prejudice in the courtroom of capital cases can result in the case being treated more harshly. Prejudices can lead to the jury inflating aggravating factors and therefore finding the defendant more culpable or deflating the weight of mitigating factors.<sup>35</sup>

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<sup>33</sup> See Baldus Written Testimony at 16 – 18.

<sup>34</sup> Paternoster Oral Testimony, *supra* at 56 – 57.

<sup>35</sup> Baldus Oral Testimony, *supra* at 86-127.

Professor Thomas Brewer<sup>36</sup> presented research on racial bias and jury composition in the cases of interracial homicide to the Commission. He summarized the results of his research:

[T]wo groups, the African-American jurors and the white jurors saw the exact same case. And we were able to compare their answers. The racial composition of the jury was strongly related to the outcome of the case. The chances of a death sentence were thirty percent when there were less than five white male jurors, but more than doubled when there were more than five or more white jurors.<sup>37</sup>

In other words, African-American jurors were more likely to question the guilt of the defendant and attribute remorse to the defendant. In addition, they were more likely to report that they were empathetic to the defendant. Not all of these are mitigating factors in the sentencing process. In contrast, Caucasians utilized more aggravating factors in their decision making. Caucasian jurors were more likely to view the defendant as dangerous and thought that if a death sentence were not imposed, the offender would eventually be released from prison.

### ***The Negative Effects That Racial Disparities Have on the Criminal Justice System***

In addition to presenting evidence of racial disparities throughout the criminal justice system and most specifically the capital punishment system, some witnesses discussed the negative impact the presence of racial disparities has on the system. One expert witness, Bryan Stevenson<sup>38</sup> testified regarding the implications of racial bias in capital cases. He explained that

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<sup>36</sup> Thomas Brewer is a professor in the Department of Justice Studies at Kent State University. He has worked with the Capital Jury Project to interview jurors in capital cases. The Capital Jury Project conducted extensive research interviewing nearly 1,200 jurors who had served on death penalty cases in 14 different states, including Maryland.

<sup>37</sup> July 28, 2008 Oral Testimony of Professor Thomas Brewer, Tr. at 180.

<sup>38</sup> Bryan Stevenson is the Executive Director of the Equal Justice Initiative in Montgomery, Alabama. A graduate of Harvard Law School and the Harvard School of Government, he has represented capital defendants and Death Row prisoners in the Deep South since 1985 when he was a staff attorney with the Southern Center for Human Rights in



citizens must trust that the criminal justice system is a fair and impartial institution in order for the actual system to be effective. When racial bias occurs or is perceived to occur, it undermines the government's legitimacy.<sup>39</sup> Mr. Mauer also addressed the detriment that a racially biased system can have on the government. In particular, he posited that the success of law enforcement in part depends on the relationship with the community. If the community perceives the system to be biased and unfair, it will lose trust and belief in its authority.<sup>40</sup> In addition, Mr. Stevenson asserted that the issue of race in the criminal justice system cannot be addressed by the courts at the end of the process. Instead, it must be addressed by the legislature because racial bias pervades the entire process in capital cases, from jury selection to sentencing. Therefore, any discussion of the procedures in capital cases must include the examination of racial disparities throughout the entire trial process. Mr. Stevenson summarized the importance of examining racial bias with regard to the death penalty as follows:

The death penalty, in many ways, reflects our criminal justice system's ultimate authority. We claim that we can execute people, and that is exercising great power. It is the ultimate power. I'm going to argue that that ultimate authority comes with an ultimate responsibility, and that if [we] don't exercise that responsibility fairly, reliably, in a non-racially discriminatory manner, the implications for this broader story about race and the criminal justice system get larger. The question of the integrity of the criminal justice system is at its most demanding when we talk about things like race and the death penalty.<sup>41</sup>

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Atlanta, Georgia. Since 1989 he has directed a non-profit organization that defends the legal rights of the poor and people of color in Alabama.

<sup>39</sup> July 28, 2008 Oral Testimony of Bryan Stevenson, Tr. at 128-162.

<sup>40</sup> Mauer Oral Testimony, *supra*, at 198-213.

<sup>41</sup> Stevenson Oral Testimony, *supra* at 133 – 134.

The research of Professor Paternoster, Professor Baldus, and Professor Brewer shows that racial bias is present throughout all stages of the criminal justice process in capital cases in Maryland. It therefore stands to reason that the mechanisms of racial bias are not isolated in the sentencing phase. In general, Mr. Stevenson argued that minorities are often presumed to be guilty when they enter the system.<sup>42</sup>

To illustrate the different mechanisms of racial disparities, Professor Baldus explained how the combination of an African-American perpetrator and a Caucasian victim can lead to different manifestations of racial bias throughout the criminal justice process:

The first form of prejudice is consistent with stereotypical perceptions of minorities, such as the violence prone and moral inferiority stereotypes mentioned by Justice White. And the second form of prejudice, deflating mitigation, is also consistent with stereotypical perceptions of minorities, whereby the race of the defendant and victim may affect the empathy of the fact finder toward each. Caucasian charging authorities and juries may be more likely to identify sympathetically with white defendants than with black defendants, and to identify more strongly with white victims than with black victims, thereby producing a more punitive response in white victim cases.<sup>43</sup>

Mr. Stevenson also addressed the problem of racial bias, which is evidently so deep as to confound any efforts at reform that the Commission can conceive:

I think, as a practical matter, that on the current legal course we will not get a correction [regarding racial disparities] any time soon on these problems... but that doesn't relieve us from the obligation of dealing with this problem. I mean, obviously, if you don't have the death penalty then racial bias in the administration of the death penalty is neither inevitable or eradicable. You have done something about it. And I'm suggesting that you've done something quite profound and significant that has even

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<sup>42</sup> Stevenson Oral Testimony, *supra* at 128-162.

<sup>43</sup> Baldus Oral Testimony, *supra* at 99 – 100.

implications for the tolerance of race in the broader criminal justice system...<sup>44</sup>

Based on the evidence presented, the Commission concludes that racial disparities exist in Maryland's capital sentencing system. While there is no evidence of purposeful discrimination, the statistics examined for death penalty cases from 1978 to 1999 demonstrate evidence of racial bias when the factors of the race of the defendant and the race of the victim are combined. Considering all of the manifestations of racial bias with regard to capital cases, the Commission does not find that these biases can be rectified through procedural guidelines or changes to the current administration of capital sentencing.

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<sup>44</sup> Stevenson Oral Testimony, *supra* at 159-160.

## ISSUE 2: JURISDICTIONAL DISPARITIES

*Finding: Jurisdictional disparities exist in Maryland's capital sentencing system.*

*(Results of Commission Vote on Finding: AGREE = 20; DISAGREE = 1)*

The issue of whether jurisdictional disparities are present in Maryland's capital sentencing system is undisputed. However, whether the presence of these disparities represents a system that is arbitrary and unfair or justified is disputed. The fact that similar capital offenses perpetrated by similar offenders are treated so differently depending on where the crimes are committed renders the administration of capital punishment irretrievably inconsistent, non-uniform and therefore unfair in Maryland. The problem of jurisdictional disparities as portrayed by the witnesses is evidently so deep as to confound any efforts at reform that the Commission can conceive.

### ***The Presence of Jurisdictional Disparities in Maryland's Capital Punishment System***

Research presented to the Commission provides overwhelming evidence that jurisdictional disparities exist in Maryland's capital sentencing system. Professor Paternoster testified that the ratio of the Baltimore County State's Attorney seeking a death sentence to the Baltimore City State's Attorney seeking a death sentence is thirteen and a half to one, even after statistically controlling for the possibility that crimes in different counties are more serious than others. In other words, the probability of a State's Attorney seeking death is over thirteen times higher in Baltimore County than it is in Baltimore City in similar cases.<sup>45</sup> Professor Paternoster points to Baltimore County and Baltimore City as simply the most glaring comparison; however,

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<sup>45</sup> Paternoster Oral Testimony, *supra* at 57.

jurisdictional disparities were not limited to these two counties. He continues, “Baltimore County cases are five times more likely to have death requested than Montgomery County cases... Harford County cases were eleven times more likely than Baltimore City cases to have death requested.”<sup>46</sup> In addition to finding jurisdictional disparities at the point where the State’s Attorney requests the death sentence, Professor Paternoster also reported jurisdictional disparities at the point where the death sentence is imposed. The probability of receiving a death sentence in Baltimore County is almost twenty-three times higher than the probability of receiving a death sentence for a similar crime in Baltimore City. The probability of a death sentence being imposed in Baltimore County is nearly fourteen times higher than the probability of a death sentence in Montgomery County being imposed for a crime of similar seriousness. The probability of a death sentence being imposed in Baltimore County is over eight times higher than the probability of a death sentence in Prince George’s County being imposed for a crime of similar seriousness.<sup>47</sup>

Each of these comparisons was made after statistically controlling for the possibility that crimes in different counties are more serious than crimes in others. Professor Paternoster emphasizes that the statistically significant factor of jurisdiction in the decision to seek death is a non-legal factor that is not included in the statutorily defined aggravators and mitigators.<sup>48</sup>

Professor Paternoster also testified that, even though Baltimore City cases make up forty-four percent (44%) of the total cases eligible for the death penalty in the State, they make up only thirteen percent (13%) of the cases where a death sentence is imposed. By contrast, Baltimore

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<sup>46</sup> *Id.*, at 58.

<sup>47</sup> See Paternoster Written Testimony at 13.

<sup>48</sup> See Paternoster, et al., 2003, *supra*; also see (27, §. 413(d)) for the complete list of aggravators.

County cases make up only twelve percent (12%) of the death-eligible cases in the State; however, they make up forty-five percent (45%) of cases where a death sentence is imposed.<sup>49</sup> The same can be seen in Harford County, albeit with a smaller disparity. In addition, there is a wide variability with regard to those cases that receive a death notice throughout the State, although if the law were applied equally, this proportion would be expected to be uniform.<sup>50</sup>

### ***The Source of Jurisdictional Disparities in Capital Cases***

Mr. Simms, who testified before the Commission, opines that “society today is one in which we have portability and movability” and therefore should have statewide uniformity in the handling of capital cases because the boundaries in which crime occurs within the State are not meaningful in themselves.<sup>51</sup> Andrew Sonner, former State’s Attorney, Montgomery County who also testified before the Commission, agreed with Simms:

There is not a common standard among state’s attorneys today any more than there was when we first sought to reform the system and make it more uniform. Yet the death penalty is a state—not a county—law, and its high profile nature creates a state interest in uniformity that we simply cannot meet. Uniformity in death sentencing directly contradicts with prosecutorial discretion, which is otherwise an important hallmark of our system in other kinds of cases.<sup>52</sup>

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<sup>49</sup> See Figure 5 of Paternoster Written Testimony at 5.

<sup>50</sup> Paternoster Oral Testimony, *supra* at 42 – 85.

<sup>51</sup> Simms Oral Testimony, *supra* at 121 – 161.

<sup>52</sup> See Sonner Written Testimony at 121-161.

This was also concluded by the New Jersey Commission on Capital Punishment, which stated that despite the explanations for their inter-county disparities, the presence of any jurisdictional bias “undermines uniformity in the capital punishment system.”<sup>53</sup>

### ***The Problem with Jurisdictional Disparities***

While the Commission is in agreement that the jurisdictional disparities do exist, Commissioner Shellenberger<sup>54</sup> asserts that the disparities are the equivalent to “local rule.”<sup>55</sup> This would mean that there would be different results for the same facts in homicides and decisions based not on the law, but the prosecutor’s perceived political appeal of the decision. Such gross jurisdictional disparities mean that like cases proceed differently based on the mere happenstance of where the homicide occurred and not on the statutory aggravating and mitigating facts of the homicide. As to this question of whether jurisdictional disparities are justified on the basis of local will, Professor Baldus addressed this issue directly in his written testimony. Professor Baldus explained that the only viable measure of local will for aggressive use of the death penalty is the frequency with which juries choose death over other punishments, such as life without parole. Professor Baldus noted that in Baltimore County, juries chose death fifty-four percent (54%) of the time, whereas juries in Baltimore City chose death forty-seven percent (47%) of the time – “only a seven point difference and not nearly enough to justify the fifty-seven point difference in charging rates between the two counties... Claims of public

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<sup>53</sup> See the New Jersey Death Penalty Study Commission Report, 2007 at 50.

<sup>54</sup> Commissioner Scott Shellenberger is the Baltimore County State’s Attorney.

<sup>55</sup> October 7, 2008 Scott Shellenberger Oral Testimony, Tr. at 72.

support for capital punishment that ignore what juries actually do are hard to distinguish from rationalizations offered to justify the tastes of individual prosecutors for capital punishment.”<sup>56</sup>

Former Chief Justice Poritz echoed this sentiment in referring to a portion of a report presented to the New Jersey Supreme Court in 2006 where they found jurisdictional disparities in the New Jersey death penalty system to be unacceptable:

We are of the view that county variability should not be judicially countenanced. In these cases, we deal with the worst of the worst, the dregs of society. It is difficult to sympathize with a coldblooded killer, but it makes no sense that a murderer in one county is subject to the death penalty when an identical crime would be treated in an entirely different way if it were committed in another county. Whether viewed as a constitutional imperative, a requirement of statutory policy, or simply a matter of fundamental fairness, we submit that county variability is a basis for judicial intervention.<sup>57</sup>

The geographical variability within the state of Maryland with regard to capital cases renders the process non-uniform, arbitrary and capricious. The problem of jurisdictional disparities as portrayed by the witnesses is evidently so deep as to confound any efforts at reform that the Commission can conceive.

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<sup>56</sup> See Baldus Written Testimony at p. 26.

<sup>57</sup> Former Chief Justice Poritz cited a 2006 report presented to the New Jersey Supreme Court by Honorable David Baime, Special Master for Proportionality Review and Appellate Judge, New Jersey Supreme Court. See July 28, 2008 Deborah T. Poritz Oral Testimony Tr. at 23.



### **ISSUE 3: SOCIO-ECONOMIC DISPARITIES**

*Finding: Due to a lack of research on socio-economic disparities in Maryland, the Commission does not reach a conclusion on this matter.*

*(Results of Commission Vote on Finding: AGREE = 21; DISAGREE = 0)*

Research is less conclusive regarding the relationship between socio-economic status (“SES”) and the outcome of capital cases, partly because SES as a variable is difficult to measure. SES is a factor that represents a person’s overall social and economic standing and can include indicators such as income, education, occupational prestige, etc.; it therefore can be difficult to capture with data. Although the research is not as well established in this area in Maryland, Professor Baldus has found the presence of socio-economic disparities in the death sentencing system of other states including Nebraska, Georgia, Pennsylvania, and New Jersey. Professor Baldus testified that he has “no reason to believe that a study conducted here in the state of Maryland would find results that were any different than this [research finding socio-economic disparities in capital sentencing systems in other states].”<sup>58</sup> The possibility of disparities based on SES status exists in Maryland.

SES disparities can arise on the part of both the defendant and the victim. With regard to the defendant, SES can determine the outcome of a capital case most directly through the amount of resources at the defendant’s disposal for counsel. The extent to which the verdict in a capital case is influenced by non-legal factors such as resources instead of legal factors renders the implementation of the death penalty to be arbitrary and capricious. This disparity on the part of the defendant is exacerbated, as noted by Mr. Stevenson, due to the interplay between race and

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<sup>58</sup> Professor Baldus presented testimony to the Maryland Commission on Capital Punishment on socio-economic disparities he found in other states including Nebraska, Georgia, Pennsylvania, and New Jersey, as well as the possibility of finding them in Maryland. *See* Baldus Oral Testimony, *supra* at 118.

socio-economic disparity and can greatly disadvantage minorities in capital cases. He explains, “Frequently, culpability and evidence of guilt is not going to be more significant than the resources you bring into that process, and race becomes a part of that question.”<sup>59</sup>

With regard to research, Professor Baldus explained that in all of the studies that he has conducted regarding SES and capital punishment, the SES of the victim or the defendant had a significant impact on the outcome of the case. However, he notes that usually the effects are seen on the part of the victim due to the lack of variability in SES on the part of defendants.<sup>60</sup> Professor Baldus explained the results of his study conducted in Nebraska where he compared cases where the victim was either of low SES, middle SES, or high SES:<sup>61</sup>

You go from thirty-seven percent penalty trial for low, to seventy percent for the high, and then you just finally, over in Column C [referring to supplemental materials provided to the Commission], the rate of death sentencing in the middle SES category is three times higher than it is in the low SES category -- fifteen versus five. And when you compare the high SES category, twenty-eight percent and you compare it with the SES category for low SES crimes it's a five point -- it's a ratio of five.<sup>62</sup>

Professor Baldus’s research points to, in particular, the problem that socio-economic disparities cannot be eliminated through the allocation of additional funds to public defenders, partly because the bias exists on behalf of the victim as well. In particular, juries are influenced by the victim’s SES and render harsher decisions when the victim was affluent. While the Commission does consider the research presented showing socio-economic disparities in the

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<sup>59</sup> Severson Oral Testimony, *supra* at 143.

<sup>60</sup> Baldus Oral Testimony, *supra* at 86-127.

<sup>61</sup> Baldus, D., Woodworth, G., & Christ, A. (2002). Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973-1999). *Nebraska Law Review*, 486, 271.

<sup>62</sup> Baldus Oral Testimony, *supra* at 118 – 119.

administration of other states important, it did not find any research on socio-economic disparities specific to Maryland. Therefore, due to a lack of research on socio-economic disparities in Maryland, the Commission does not reach a conclusion on this matter.

## **ISSUE 4: A COMPARISON OF THE COSTS ASSOCIATED WITH DEATH SENTENCES AND THE COSTS ASSOCIATED WITH SENTENCES OF LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE**

*Finding: The costs associated with cases in which a death sentence is sought are substantially higher than the costs associated with cases in which a sentence of life without the possibility of parole is sought.*

*(Results of Commission Vote on Finding: AGREE = 17; DISAGREE = 4)*

### ***The Cost of Capital Cases***

In March 2008, the Urban Institute concluded a study that analyzed the cost of the death penalty regime in the State of Maryland. The researchers collected data regarding the costs of all phases of capital-eligible cases in Maryland between 1978 and 1999. The study applied dollar values to all of the resources that are utilized in capital-eligible cases, in an attempt to determine the opportunity cost of the death penalty.

The Urban Institute Study found that, throughout the duration of a case, it costs:

- **\$1.1 million** to prosecute a capital-eligible case **in which the death penalty is not sought**, which includes \$870,000 in life imprisonment costs and \$250,000 in adjudication costs;
- **\$1.8 million** to prosecute a capital-eligible case **in which prosecutors unsuccessfully sought the death penalty**, which includes \$950,000 in prison costs and \$850,000 in adjudication costs; and
- **\$3 million** to prosecute a capital-eligible case **resulting in a death penalty**, which includes \$1.3 million in prison costs and \$1.7 million in adjudication costs.

Based on these findings, the Urban Institute Study calculated that the lifetime opportunity costs of the capitally-prosecuted cases between 1978 and 1999 has and will cost Maryland taxpayers **\$186 million**, which includes \$107.3 million over the lifetime of the 56 cases that resulted in death sentences, \$71 million over the lifetime of the 106 capital-eligible cases that did not result in a death sentence, and \$7.2 million for the Maryland Capital Defender's Division. These dollar

amounts represent the opportunity cost of the death penalty, which is the value of resources in their next best use.<sup>63</sup>

The Commission heard a great deal of testimony regarding the accuracy of the Urban Institute Study. Both Joseph Cassilly, the State's Attorney for Hartford County, and Commission Member Scott Shellenberger, the State's Attorney for Baltimore County, testified that they believed the Urban Institute Study overestimated the cost of the death penalty based primarily on out-of-pocket expenses. However, as the experts testified, out-of-pocket expenses are not an accurate or proper measure of death penalty costs. Rather, the proper measure is the amount of costs or resources that could be used for more effective purposes. Kenneth Stanton, an econometrics expert, and Jonathan Gradess, the Executive Director of the New York State Defender's Association, both testified that the Urban Institute Study was sound methodologically, but it underestimated the cost of the death penalty based on alternative uses of these resources.

While the Commission acknowledges that disagreement exists as to the exact amount that the capital punishment system costs, **every Maryland attorney who testified before the Commission regarding this subject acknowledged that capital cases are more expensive and exploit more resources than non-capital cases:**

- Scott Shellenberger testified that “There is no question that the cost of a death penalty case is greater than of a non-death penalty case.”<sup>64</sup>
- Stuart Simms testified that when he served as the State's Attorney in Baltimore City, his decision whether or not to seek death was affected by whether his office would have the capacity to sustain the effort necessary to try such a case. He stated that “you were going to take two prosecutors, or three prosecutors, and other support staff

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<sup>63</sup> Roman et al., *Supra* at 2-3.

<sup>64</sup> See Shellenberger Written Testimony.

and sort of dedicate them to that particular function.... [Y]ou had other homicides, child abuse, sex offense, domestic violence and narcotics [cases] and you had to sort of make a commitment in terms of how to manage these issues....”<sup>65</sup>

- Glenn Ivey, the State’s Attorney for Prince George’s County, testified that “With respect to expenses, ... I’m not actually sure that I share the view on the methodology that was used [in the Urban Institute Study], but I do think it’s clear that there are going to be additional expenses, and we’ve seen those when we’ve sought death in cases in our offices.” He also testified that his office transferred the last potential death penalty case in Prince George’s County to the federal government “because the number of hearings that we were having in the case, because it was a death-eligible case, were really starting to drain our office ....”<sup>66</sup>
- Joseph Cassilly, who disagreed with the Urban Institute’s methodology and findings, nonetheless testified that he believes death penalty cases are more expensive than non-death penalty cases.<sup>67</sup>
- Donald Zaremba, the Deputy District Public Defender for Baltimore County, testified that “having defended non-capital homicides and capital homicides, that there is a palpable difference, in the amount of time, as an attorney, that it takes for you to try the case, to prepare the case. The amount of life investigation that is involved.”<sup>68</sup>

Although every state is unique, the Commission notes that every study that has investigated the cost of the death penalty, including studies in North Carolina, Florida, California, Texas, Indiana, Iowa, Kansas and the federal government, has determined that (1) capital cases cost more than non-capital cases, (2) the main costs of capital litigation occur up front during the trial and penalty phases of capital proceedings, not during the appeals process as is commonly believed, and (3) the exorbitant costs of the death penalty drain resources from other critical government functions.<sup>69</sup>

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<sup>65</sup> Simms Oral Testimony, *supra* at 133-134.

<sup>66</sup> September 5, 2008 Oral Testimony of Glenn Ivey, Tr. at 111-112 and 115-116.

<sup>67</sup> August 19, 2008 Oral Testimony of Joseph Cassilly, Tr. At 74-75.

<sup>68</sup> September 22, 2008 Oral Testimony of Donald Zaremba, Tr. at 102.

<sup>69</sup> *See* Gradess Written Testimony.

Two former United States Senators also provided testimony to the Commission regarding the issue of the cost of the death penalty. Senator Charles Mathias submitted written testimony to the Commission in which he stated:

From investigation through trial, followed by appeal, post-conviction proceedings, and the ultimate issues of clemency, the death warrant, and even the means adopted to carry out the penalty, these cases are far more costly than all others. The reasons for these costs – in time, money, judicial resources, and the patience of witnesses and of the families of victims – are understandable: Supreme Court decisions have imposed detailed standards for death penalty cases. This capital punishment jurisprudence demonstrates both an extraordinary concern for human life, and an extraordinary effort to eliminate unfairness from the system by which the decision to take a life is made. The success of this effort is debatable, but its cost are undeniable. And in adding up the costs, we must also consider the “opportunity costs” – how these resources could otherwise have been spent to make our streets safer, to aid victims of crime, or to deal more effectively with hardened criminals.<sup>70</sup>

Senator Joseph Tydings testified that in order to correct the problems that currently exist in Maryland’s death penalty system, significant reforms would be necessary. Funding those reforms, however, will “run into [the] millions of dollars.” It is his opinion that given the “tremendous fiscal pressures” that Maryland is currently facing, it would be “fiscally impossible to raise the money to correct the system to go forward with the death penalty.”<sup>71</sup>

### ***Why Do Capital Cases Cost More?***

The reason that capital punishment cases are more expensive is because they require enormous resources. The Urban Institute Study attributed the additional costs to several factors. First, the Urban Institute Study concluded that seventy percent (70%) of the added cost of a death notice case occurs during the trial phase. For example, in death notice cases, voir dire includes a process of “death qualification” – no juror may serve on a death penalty trial unless he

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<sup>70</sup> See Mathias Written Testimony.

<sup>71</sup> See Tydings Written Testimony at 26.

or she is willing to impose the death penalty. The extra step in determining eligibility adds additional time and complexity to voir dire. With regard to the guilt/innocence phase of trial, research suggests that death notice cases are more complex and require longer trials, more expert witnesses, and more motions, hearing and deliberations.

If a guilty verdict is issued for a death notice case, a second phase of trial commences to determine whether or not a death sentence will be handed down. There is no analogous phase in non-death notice cases. During the penalty proceeding, in order to impose a death sentence, the judge or jury must unanimously determine whether the case's aggravating circumstances outweigh the mitigating circumstances by a preponderance of the evidence.

Finally, there are additional appeals when death sentences are issued. The Urban Institute found that the average number of appeals for a capital-eligible case is greater than the number of appeals for a non-capital case. The Institute found that in a case in which a death notice was not issued the average number of appeals is 0.7, the average number of appeals for a capital-eligible case in which prosecutors unsuccessfully sought the death penalty is 1.3, and the average number of appeals for a capital-eligible case resulting in a death penalty is 1.9.<sup>72</sup>

Additionally, the Commission heard testimony from several experts regarding why death penalty cases were more expensive than other cases. Jonathan Gradess testified that there are more defense attorneys appointed and prosecutors assigned to capital cases; more pre-trial preparation and motions practice; a longer and more complicated jury selection process; more experts used; and more in-depth investigation conducted into the background of the defendant (to prepare mitigation for the penalty phase). With respect to the investigation into the defendant's background in order to uncover mitigating evidence, Mr. Gradess testified that it is an

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<sup>72</sup> See Roman et al., 2008 *supra* at 2; 11-12; 24.



examination of the life of a defendant from the instant of his or her birth essentially to the moment of the proceeding. It is a unique and expensive investigation that drives the cost of death penalty cases up.<sup>73</sup>

Similarly, Deborah Fleischaker, the former Director of the American Bar Association's Death Penalty Moratorium Implementation Project, testified that the scope of potential mitigating evidence and its importance in the sentencing decision requires that defense counsel engage in an exhaustive life history investigation, with the assistance of a multi-disciplinary team of professionals. When undertaken with the requisite degree of thoroughness, this examination of the client and his or her family history, often the key to providing the decision maker with an understanding of why the crime occurred, is demanding and costly.<sup>74</sup> Additionally, as Mr. Simms, a former State's Attorney for Baltimore City, testified, the resources required to prosecute a capital case include multiple prosecuting attorneys, multiple experts and significant time commitments for investigation, preparation, motions and trials.<sup>75</sup>

Finally, it is also more expensive to house a Death Row inmate than an inmate serving a life sentence. In Maryland, Death Row inmates are housed at the Maryland Correctional Adjustment Center or "Supermax", where the average cost of incarcerating an inmate is \$68,000 per year. Offenders serving life sentences are typically housed in maximum and medium security facilities, where the average cost of incarcerating an inmate is \$38,140 per year.<sup>76</sup>

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<sup>73</sup> September 5, 2008 Oral Testimony of Jonathan Gradess, Tr. at 125-128.

<sup>74</sup> August 5, 2008 Oral Testimony of Deborah Fleischaker, Tr. at 18-19.

<sup>75</sup> See Simms Written Testimony.

<sup>76</sup> See Maynard Written Testimony.

### ***What Has Maryland Gained From Its Capital Punishment System?***

In order to properly consider what Maryland has gained from its capital punishment system and whether the expenditure of such significant money and resources on that system was worthwhile, the Commission heard evidence regarding the results that the system has produced. Since 1978, when the death penalty was reinstated in Maryland, there have been 353 death notices issued, 215 death notice cases that went to trial and 77 death sentences issued. For every one of those cases, the extra costs associated with a capital case accrued; however, in only a very small fraction of those cases was there an execution in thirty years. Specifically, in Maryland, as of the date of the Commission's report, there have only been five executions. Moreover, of the 77 death sentences that have been issued, in addition to the five executions, there have been two commutations, three natural deaths, and there are five individuals still on Death Row, which leaves 62 death sentences that have been reversed. Sixty-two reversals out of 77 sentences is an error rate of approximately eighty percent (80%). **Accordingly, the significant expenditure of time and resources that the State of Maryland has put into its capital punishment system has resulted in only five executions and an error rate of eighty percent (80%).**<sup>77</sup>

While significant resources have been expended on Maryland's capital punishment system, and have produced such limited results, many experts testified that **there are other areas in the Maryland's criminal justice system where such resources could be applied and significant results could be expected.** For example, Mr. Simms testified that he believed that public safety might be greatly enhanced if the resources currently being expended on capital punishment were instead invested in law enforcement for improved investigation, especially laboratory and technical investigations, and in victim service programs for counseling and

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<sup>77</sup> September 5, 2008 Oral Testimony of Professor Michael Millemann, Tr. at 276.

support benefits.<sup>78</sup> Likewise, Glenn Ivey testified that the State could better spend those resources on efforts to eliminate recidivism and reduce crime.<sup>79</sup>

Moreover, Michael Millemann, a professor at the University of Maryland School of Law, testified that there are programs across the country that have shown results in reducing homicides. By closely monitoring a limited number of career criminals, these programs address the proliferation of guns, threats to witnesses, child abuse and domestic violence, which are the precursors to homicide. They have also been effective at protecting at-risk children, who continue to be murdered at appalling rates. The Commission agrees with Mr. Millemann's point that the true cost of the death penalty is "the lack of resources to actually, realistically, and seriously go after [preventing] homicide."<sup>80</sup>

A program like the ones about which Professor Milleman testified is already showing results in Baltimore City. The newly formed Violent Crime Impact Division of the Baltimore City Police Department ("VCID") has been tasked with targeting the most violent criminals in Baltimore. As reported in the Baltimore Sun's October 14, 2008 article, *As city homicides decline, special police team gets most of credit*, the VCID targets residents "who have been convicted of violent crimes and are out on probation, ... who have been charged with violent crimes but found not guilty, ... [and] who have been homicide suspects but were never charged." This new program is believed to be largely responsible for the substantial drop in the homicide

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<sup>78</sup> See Simms Written Testimony.

<sup>79</sup> Ivey Oral Testimony, *supra* at 188.

<sup>80</sup> Millemann Oral Testimony, *supra* at 281.

rate in Baltimore City in 2008.<sup>81</sup> It is programs such as these that could benefit from the abolition of the death penalty because resources could be directed away from death penalty cases and towards these types of programs that promise better safety and realistic justice.

### ***Will Elimination of the Death Penalty Increase Some Costs?***

One defense of the death penalty is that eliminating the penalty will eliminate any defendant's willingness to plead guilty and accept a sentence of life without the possibility of parole in order to avoid the death penalty, which will result in an increase in the number of trials and overall costs. The Commission is not sure that the premise underlying this argument is accurate, as the existence of the death penalty was likely a hindrance to plea-bargaining in cases where the prosecutor was committed to seeking the death penalty. Even assuming that the elimination of the death penalty may lead to an increase in the number of trials in previously capital-eligible cases, given the significant cost of death penalty cases, the Commission does not believe that the cost of these additional trials will be equal to the money and resources that will be saved by elimination of the death penalty. Similarly, the Commission that studied the death penalty in California and released its report on June 30, 2008 concluded that the cost resulting from the increase in the number of life without parole trials would be considerably less than the cost of death penalty cases.<sup>82</sup>

A second question raised by opponents of abolition is whether all of the procedural protections that have arisen with respect to death penalty cases and that are the cause of the exorbitant cost of those cases, will be made to apply in life sentence cases if the death penalty no

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<sup>81</sup> Fenton, J. (2008, October 14). As city homicides decline, special police team gets most of the credit. *Baltimore Sun*, p. 1.

<sup>82</sup> See the California Commission on the Fair Administration of Justice Report, June 30, 2008 at 81.

longer exists. The Commission heard from several experts on this subject: they unequivocally stated that it is very unlikely that the unique procedural protections applicable to capital cases will be held to apply in life without parole cases. To begin with, Donald Zaremba testified that in order for life without parole cases to be afforded the many protections afforded to death penalty cases, “the appellate courts would have to set the bar higher than it is right now.”<sup>83</sup> As was often repeated by witnesses testifying before the Commission, Deborah Fleischaker testified that “death is different.” She stated that she would not expect the protections that are currently afforded to the defendant in death penalty cases to be afforded to defendants in life without parole cases if the death penalty is abolished. Specifically, she testified that “[t]here are Constitutional standards requiring different performance for defense counsel in capital cases, and so they’re constitutionally required to be a step above even the most heinous non-death penalty cases.... My expectation would be that, no, that the line of case law is distinct enough and related only to capital cases, and so that doesn’t simply trickle down to the next highest punishment.”<sup>84</sup>

In a letter submitted to the Commission, former Attorney General of Massachusetts Scott Harshbarger addressed this question from the direct experience of a state that does not have the death penalty. If abolition of the death penalty resulted in a transfer of the extra due process requirements to life without parole cases, Massachusetts would be a prime candidate to experience such burdens, since the state has not had the death penalty since 1984. Harshbarger wrote that this is not the case. He explained that a death penalty case is more complicated because it is *irreversible* – not because it is the highest punishment. Harshbarger wrote:

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<sup>83</sup> Zaremba Oral Testimony, *supra* at 104.

<sup>84</sup> Fleischaker Oral Testimony, *supra* at 59-61.

Second, and just as important, there is a dramatic difference in the prosecutorial resources used in “life without parole” versus death penalty cases, even when “life without parole” is the highest punishment... The imposition of “life without parole” in Massachusetts, while subject to strict due process and legal/constitutional scrutiny, has never been hamstrung by the extraordinary constitutional review that death cases rightfully receive: the sentence doesn’t require two trial phases; it doesn’t require us to “death qualify” juries; it doesn’t require separate appellate divisions or resources for prosecutors, defenders, or appeals courts; nor does it require a heightened focus on the quality of defense counsel. Appeals are certainly filed, as they are in all cases from burglary to life *with* parole cases, but they are all handled in the ordinary course – with great seriousness but with a far lower success rate (if prosecutors are doing their job well). Most of these appeals are filed and convictions affirmed, as are the majority of criminal appeals.

Likewise, Jonathan Gradess testified:

If the death penalty is abolished, it is unlikely that the unique procedural protections that apply in capital cases will be held to apply in life without parole cases. In the four years since New York has had life without parole as the exclusive punishment for first-degree murder, this has been the case. There has been no revision of the statutes to provide for specialized services in life without parole cases. Nor has a broader right to counsel emerged or a more extensive right to appeal. And no greater procedural protections have been articulated by the courts. The experiences in Massachusetts and Michigan, both of which have only life without parole as the most severe penalty for murder, is similar.<sup>85</sup>

Accordingly, the Commission does not believe that if the death penalty is abolished that life without parole cases will be afforded the many protections that have made the death penalty

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<sup>85</sup> See Gradess Written Testimony.

## **ISSUE 5: A COMPARISON OF THE EFFECTS OF PROLONGED COURT CASES INVOLVING CAPITAL PUNISHMENT AND THOSE INVOLVING LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE**

*Finding: While both life without the possibility of parole and death penalty cases are extremely hard on families of victims, the Commission finds that the effects of capital cases are more detrimental to families than are life without the possibility of parole cases.*

*Recommendation: Increase the services and resources already provided to families of victims as recommended by the Victim's Subcommittee.*

*(Results of Commission Vote on Finding: AGREE = 20; DISAGREE = 1)*

The Commission finds that, other than cost, which is addressed in the previous chapter, the primary effect of prolonged capital cases is the effect that such cases have upon the families of murder victims. The Commission heard testimony from many family members of murder victims regarding their opinions on the death penalty and their experiences with the criminal justice system.

Much like the general public, the family members of murder victims have differing views on capital punishment. Some, like Phyllis Bricker, whose parents were murdered, Harold Bernadzikowski, whose sister was murdered, and Sharon Ward Blickenstaff, whose father was murdered, support the death penalty.<sup>86</sup> Others, like Bonnita Spikes, whose husband was murdered, Lisa Delity, whose brother was murdered, Ginger Beale, whose son was murdered, Art Laffin, whose brother was murdered, Kim Armstrong, whose son was murdered and Erricka Bridgeford, whose brother was murdered, favor repeal of the death penalty.<sup>87</sup>

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<sup>86</sup> See August 5, 2008 Oral Testimony of Phyllis Bricker, Tr. at 7-15; September 22, 2008 Oral Testimony of Harold Bernadzikowski, Tr. at 301-311; also see Sharon Ward Blickenstaff Written Testimony.

<sup>87</sup> See August 5, 2008 Oral Testimony of Bonnita Spikes, Tr. at 173-180; August 19, 2008 Oral Testimony of Lisa Delity, Tr. at 237-243; August 19, 2008 Oral Testimony of Ginger Beale, Tr. at 243-245; August 19, 2008 Oral Testimony of Art Laffin, Tr. at 251-258; September 22, 2008 Oral Testimony of Kim Armstrong, Tr. at 214-219; Erricka Bridgeford Written Testimony.

Regardless of whether family members do or do not support the death penalty, one fact that became abundantly clear to the Commission is that the criminal justice process is exceedingly difficult for family members who have just lost a loved one. Sarah Gardner, who counsels individuals who have suffered traumatic losses, testified that the surviving family members of victims of homicide suffer a range of traumatic responses to the sudden and violent death of their loved ones, including, in some cases, post-traumatic stress disorder.<sup>88</sup> Kathy Garcia, who served as a victim's advocate on the New Jersey Death Penalty Commission, testified that the survivors' post-traumatic stress disorder symptoms are often the result of their exposure to the criminal justice system, which focuses all of its attention on the accused, and leaves survivors feeling helpless and shut out of the process. Moreover, this helplessness is compounded as the family is forced to hear details of the murder in the courtroom time and again, essentially forcing them to relive the trauma.<sup>89</sup> Ginger Beale, whose son was murdered on February 11, 2007, testified that she has been through six postponements for the trial of her son's accused murderers and each time she goes to court it hurts.<sup>90</sup>

The death penalty exacerbates these problems. First, the process is very painful for families. It is on average significantly longer than non-capital cases. With respect to the five individuals who have been executed in Maryland since 1978, an average of 13.5 years passed between the date of the crime for which they were executed and their execution.<sup>91</sup> Likewise,

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<sup>88</sup> See Sarah Gardner Written Testimony.

<sup>89</sup> August 19, 2008 Oral Testimony of Kathy Garcia, Tr. at 215-216.

<sup>90</sup> Beale Oral Testimony, *supra*.

<sup>91</sup> This calculation excludes John Thanos who spent less than four years on Death Row due to his waiver of a significant portion of his appellate rights.



with respect to the five individuals currently on Death Row, an average of just over 20 years has passed since the crime for which they were convicted occurred.

Moreover, death penalty cases frequently result in reversals and retrials. In Maryland, there have been 62 reversals of death sentences since the death penalty was reinstated in 1978. Each one of those reversals represents a family that had expected an execution, lived through years of agonizing appeals, and ultimately, many of them, ended up with a life sentence in the end.

In essence, a death penalty in Maryland is an illusory sentence because it is so unlikely to actually be imposed. A family that is promised an execution is not placated by knowing their loved one's murderer is serving time in prison while appeals are being decided and while retrials are occurring because the sentence that was imposed was an execution – not a prison term. On the other hand, those who are sentenced to life without parole begin to serve that sentence immediately and even throughout any appeals or reversals, they are still in prison, in effect serving the sentence that was imposed. This is a substantial difference in expectation and fulfillment that makes death penalty cases much more difficult for the family members of victims to understand or tolerate.

As Kathy Garcia testified, she has met numerous families who said that they wanted the death penalty when their loved one was killed and then changed their minds, years later, because the process was so very painful.<sup>92</sup> Similarly, Lisa Delity testified that capital punishment drags victim's loved ones through an agonizing and lengthy process, holding out the promise of one

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<sup>92</sup> Garcia Oral Testimony, *supra* at 218-219.

punishment in the beginning and often resulting in a life sentence in the end.<sup>93</sup> Retribution, which is seldom if ever achieves, loses its appeal.

Glenn Ivey, the State's Attorney for Prince George's County, testified that "the reality is ... whether I seek [the death penalty] or not, if I do seek it, it's probably never going to happen. And long after I'm not State's Attorney, my successor, successor's successor, will probably still be fighting over these issues, in one way or another, and this family will keep going through the new appeal and the new rehearing and the new this and the new that, and moratorium, or whatever."<sup>94</sup>

Phyllis Bricker, whose parents were murdered by Death Row inmate John Booth-El in 1983, testified that she has followed the case closely for twenty-five years. It has been in the Baltimore City Circuit Court, the Maryland Court of Appeals, the United States District Court, the Fourth Circuit Court of Appeals and the United States Supreme Court and she has attended every trial, appeal, and hearing. Regarding the length and nature of the death penalty proceedings, she testified, "You can just imagine if it had been your parents that were murdered brutally. We've attended – our family has attended every trial, including Richmond, Virginia and the Supreme Court in Washington. And what it's done to our family is just – it's probably devastated us because of the way we know that our parents were killed. They weren't shot. They were stabbed repeatedly, each one, twelve times. We have seen the autopsy reports. We know what they went through. And it has devastated us because all we ever sought was justice in this case."<sup>95</sup>

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<sup>93</sup> Delity Oral Testimony, *supra* at 240.

<sup>94</sup> Ivey Oral Testimony, *supra* at 107-108.

<sup>95</sup> Bricker Oral Testimony, *supra* at 8-13.

The Commission finds that regardless of whether or not a survivor supports an execution, years of court dates, reversals, appeals and exposure to the killer is harmful to the family members of murder victims.

Another way in which the death penalty exacerbates families' suffering is through the prosecutors' consultation with the family regarding whether to pursue the death penalty. Although well-intentioned, prosecutors consulting with family members on the death penalty can be harmful for two reasons. First, it adds an additional burden on the traumatized family at a time when they are still processing the shock of the murder and the stress of beginning the journey through the criminal justice system. A family in a state of shock cannot easily determine whether they will still seek the death penalty in ten or fifteen years when they are still embroiled in the process. Moreover, family members may feel that they are betraying their murdered loved one if they do not choose to pursue the death penalty.<sup>96</sup>

Consultation with family members can also be harmful when family members do not agree on whether to seek the death penalty. Disagreement on this question can divide a family at a time when they need each other the most. Kathy Garcia and Glenn Ivey both testified that they had seen families torn apart by this issue.<sup>97</sup>

Many family members of murder victims who came before the Commission asked that the Commission not only recommend repeal of the death penalty, but more importantly, recommend that a portion of the money and resources saved through abolishment of the death penalty be redirected to provide additional services to families of murder victims. The

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<sup>96</sup> Garcia Oral Testimony, *supra* at 219-220.

<sup>97</sup> *Id.*, Garcia at 220; Ivey Oral Testimony, *supra* at 108 and 153.

Commission finds this request warranted and recommends the adoption of the recommendations of the Report of the Victims' Subcommittee.

## **ISSUE 6: THE RISK OF INNOCENT PEOPLE BEING EXECUTED**

*Finding: Despite the advance of forensic sciences, particularly DNA testing,<sup>98</sup> the risk of execution of an innocent person is a real possibility.*

*(Results of Commission Vote on Finding: AGREE = 19; DISAGREE = 2)*

### ***DISCUSSION CONCERNING THE RISK OF INNOCENT PEOPLE BEING EXECUTED***

#### ***A. Introduction***

In Maryland, the experience of Kirk Bloodsworth<sup>99</sup> is a frightening example of mistake and injustice. The risk of execution of an innocent can be explained by many factors, including, among others, mistaken identity, contaminated evidence, incompetence by a small number of persons involved in the criminal justice system, and problems stemming from the elaborate administrative process associated with the death penalty. And, while it may be difficult to identify a source of error in any given case, one simple truth is certain—human errors occur regularly.

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<sup>98</sup> The impact of DNA testing in assuring fairness and accuracy in capital cases is discussed more fully in the next section of this Report.

<sup>99</sup> Commissioner Kirk Bloodsworth testified regarding his exoneration from Maryland's Death Row. His experience, discussed at various places in this Chapter and the next, is an example of how the system is susceptible to error; it is the antithesis of how Maryland's criminal justice system ought to work and is a lesson to us all. So too is the experience of public witness Michael Austin, who spent twenty-seven (27) years in prison in Maryland before being exonerated. Additionally, public witnesses Randy Steidl and Juan Melendez told the Commission how they spent twelve (12) and eighteen (18) years, respectively, on Death Row in other states before being exonerated.

## ***B. Widespread Exonerations and Reversals Reveal Fatal Flaws in the Capital System***

Since 1973, there have been 1,125 executions and 130 exonerations of innocent persons nationwide from Death Row.<sup>100</sup> Stated differently, for every 8.7 executions, there has been one exoneration. Exonerations comprise part of an alarming number of reversals in capital cases.

Recent comprehensive studies of the death penalty have shown that during the period from 1976 through 2002, state and federal courts overturned sixty-eight percent (68%) of all death verdicts that they reviewed.<sup>101</sup> In eighty-five percent (85%) of all states, the reversal rate was over fifty percent (>50%).<sup>102</sup> The reasons for those reversals are myriad. Half of the death verdicts were overturned because the guilt phase of the trial was found to have been seriously flawed to the point where the verdict could not be enforced. The other half were overturned because the sentencing determination was flawed in that information about mitigation and aggravation was faulty or was presented to the jury in a flawed manner.<sup>103</sup> In all cases, these serious errors required the sentencing phase of the trial to be repeated. Upon retrial, approximately eighty-two percent (82%) of cases resulted in a life sentence. In other words, the vast majority of cases warranting retrial resulted in a sentence *less than death*.<sup>104</sup>

The reversal rate for capital cases in Maryland outpaces that of many other

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<sup>100</sup> See Death Penalty Information Center Website for statistics through October 15, 2008. See also Testimony of former U.S. Senator Joseph D. Tydings (one person freed for every eight executed in the U.S.). The ACLU's Written Testimony Dated September 22, 2008 also highlights the high rate of exonerations, albeit with reference to earlier statistics.

<sup>101</sup> See Liebman, *et al.*, *A Broken System, Part I* (2000); Liebman, *et al.*, *A Broken System, Part II* (2002).

<sup>102</sup> *Id.*; September 5, 2008 Oral testimony of Professor Jeffrey Fagan, Tr. at 237-38.

<sup>103</sup> *Id.*

<sup>104</sup> See Written testimony of Richard Dieter at 5 (citing *A Broken System* study by Professor Leibman, *et al.*).

jurisdictions.<sup>105</sup> In testimony before the Commission on September 5, 2008, Professor Jeffrey Fagan<sup>106</sup> concluded that the reversal rate in capital cases in Maryland for the years 1995-2007 is eighty percent (80%).<sup>107</sup> Professor Fagan cited the following reasons for these reversals: failure to thoroughly investigate evidence and mitigation; *Brady* violations resulting from the withholding of potentially exculpatory evidence;<sup>108</sup> prejudicial decisions by judges;<sup>109</sup> failure to prove the requisite aggravating circumstance in a felony murder case; and involuntary confessions.<sup>110</sup> On retrial, *all* of these Maryland cases (excluding those of two inmates who died of natural causes before their appeals could be decided and those of three inmates whose appeals

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<sup>105</sup> Admittedly, this statistic must be viewed in the context of Maryland's death penalty jurisprudence, which, like federal law in this area, is quite inconsistent. Maryland's "zig and zag" of decisional precedent has essentially resulted in the clearing of Death Row with some regularity. *See* September 5, 2008 Oral Testimony of Professor Michael Milleman, Tr. at 274-75: "Death penalty law is full of contradictions. And the reason it is full of contradictions is because it reflects the same schizophrenia about the death penalty that society has. The justices have put it in the case law. I teach it, every five or so years, and I struggle with it as I teach it. And that's an important point because what happens, is it produces a zig and a zag of decisions, that every five or ten years will clear death rows."

<sup>106</sup> Jeffrey Fagan is a Professor of Law and Public Health at Columbia University, and Director of the Center for Crime, Community and Law at Columbia Law School. His current research examines capital punishment, racial profiling, legal socialization of adolescents, the jurisprudence of adolescent crime, and perceived legitimacy of the criminal law. He served on the *Committee on Law and Justice* of the National Academy of Science from 2000-2006, and served as the Committee's Vice Chair for the last two years. He serves on the editorial boards of several journals on criminology and law. He is an elected Fellow of the American Society of Criminology.

<sup>107</sup> September 5, 2008 Oral Testimony of Professor Jeffrey Fagan, Tr. at 241-44. Deborah Fleischaker, Esquire, formerly with the ABA's Death Penalty Moratorium Project similarly estimated that the constitutional error rate in capital cases in Maryland is seventy-seven percent (77%).

<sup>108</sup> *Brady* material consists of significant information or evidence that is favorable to a criminal defendant's case and that the prosecution has a duty to disclose pursuant to the U.S. Supreme Court's ruling in *Brady v. Maryland*, 373 U.S. 83 (1963). The prosecution's withholding of such information violates the defendant's due process rights, and is often referred to as a "Brady violation." The Court of Appeals of Maryland found that there was a *Brady* violation in Commissioner Bloodsworth's original case, specifically, the failure to turn over a police officer's notes concerning an unusual suspect. *See* Sept. 5, 2008 Tr. at 50.

<sup>109</sup> In a handful of cases, this included the failure to investigate the youthful age of the defendant as a potential mitigating factor. September 5, 2008 Oral Testimony of Professor Jeffrey Fagan, Tr. at 243-44.

<sup>110</sup> *Id.*

are still pending) resulted in a sentence *less than death*.<sup>111</sup>

The figures pertaining directly to exonerations, and the high percentage of reversals overall (regardless of the outcome upon retrial), suggest that there are flaws in the system that might allow innocent persons to be executed. *See generally* September 22, 2008 Oral Testimony of Former U.S. Senator Joseph D. Tydings, Tr. at 9-12 (while we cannot know for sure whether innocent persons have been executed in Maryland, we know with certainty that there are flaws in the system that allow for fatal mistakes).<sup>112</sup>

We do not accept the notion that the high rate of reversals in capital cases means that the criminal justice system will eventually catch all wrongful convictions prior to execution. Rather, the high rate of reversals reflects basic errors in the criminal justice system that at once pose risks to innocent persons and give the guilty repeated chances to escape punishment.

### ***C. Frailty of Eyewitness Testimony***

One source of error in capital cases in Maryland is eyewitness misidentification testimony. Eyewitness misidentification testimony is widely recognized as the leading cause of wrongful convictions in the United States, accounting for more wrongful convictions than all other causes combined.<sup>113</sup> Eyewitness misidentification testimony was a factor in seventy-seven percent (77%) of post-conviction DNA exoneration cases in the U.S. Of that seventy-seven percent (77%), approximately half of the cases where race is known involved cross-racial

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<sup>111</sup> September 5, 2008 Oral Testimony of Professor Jeffrey Fagan, Tr. at 242-43.

<sup>112</sup> *See also* Senator Tydings' op-ed article, *No fatal mistakes*, BALTIMORE SUN, August 22, 2008.

<sup>113</sup> *See* The Justice Project's Policy Review entitled, EYEWITNESS IDENTIFICATION: A POLICY REVIEW at 1.



eyewitness identifications.<sup>114</sup> Previous research has shown that people are less able to recognize faces of a different race than their own.<sup>115</sup>

We need look no further than Commissioner Bloodsworth's case to see the severe consequences of faulty eyewitness testimony at a death penalty trial. Commissioner Bloodsworth was misidentified by five (5) eyewitnesses:

[T]here was five identification witnesses in my case. Now, they called each and every witness in my case and told them not to watch television. All of them did. And, you know, Albert Einstein said that memory is deceptive because it's colored by today's events. And that is a fact. And, you know, people can say-- and even in some cases, some witnesses in my case, they told them my name. "Kirk Bloodsworth's a suspect, he's been arrested."

Bloodsworth Oral Testimony, Tr. at 103.

Other first-hand testimony on the horrors of eyewitness misidentification was presented by Jennifer Thompson, a rape victim whose incorrect identification testimony sent an innocent man named Ronald Cotton to jail for eleven (11) years:

I was asked to do a physical lineup...[and] I saw him. It was number five. And I wrote his number on a card and handed it to the detective, and that was the last time Ronald Cotton ever saw freedom for eleven years. .... Ronald Cotton was going to go to prison for the rest of his life. He'[d] never touch his mother again, he'd never celebrate another birthday with his family. But that was good. That's the way it was supposed to be. It was a victory for the judicial system. We went back and toasted champagne to the judicial system. [Ten years after the trial]...I was told a DNA test was going to be run. .... The DNA test came back...and standing in my kitchen I was told, "Jennifer, we were wrong. It's not Ronald Cotton's DNA."

Tr. at 35-7.

The stories of Commissioner Bloodsworth, Ronald Cotton, and countless others who were wrongly convicted based on flawed witness testimony highlight the importance of taking

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<sup>114</sup> See <http://www.innocenceproject.org/Content/351.php>, last visited Dec. 6, 2008.

<sup>115</sup> *Id.*

steps to enhance the reliability of eyewitness evidence. Indeed, ensuring that eyewitness evidence is reliable and not unnecessarily suggestive is essential in preserving a defendant's due process rights. In 1999, the U.S. Department of Justice ("DOJ") released a report entitled, "Eyewitness Evidence: A Guide for Law Enforcement," which recommended specific procedures for obtaining reliable eyewitness evidence through line-ups, field identifications, "mug shot" books, and other methods. Since the release of the DOJ report, three states have passed eyewitness identification reform laws adopting some or all of those recommendations. With Senate Bill 157/House Bill 103 of 2007, Maryland joined this list of states.<sup>116</sup> The bills required each law enforcement agency in the State to adopt a written policy relating to eyewitness identifications by December 1, 2007. The policies must comply with DOJ standards on obtaining accurate eyewitness identification.

We commend the Maryland General Assembly for enacting legislation aimed at reducing the risk of flawed eyewitness identifications. While this legislation may be useful, especially in non-capital cases, it will not guarantee correct identifications in every case, nor will it cure the inherent risk of executing an innocent person that pervades the capital system and stems from a multitude of other factors such as false confessions, bad science, etc. Although still tragic, the errors in non-death penalty cases can be remedied, whereas erroneous executions cannot.

#### ***D. False Confession Cases***

The Commission received evidence of cases involving proven false confessions (i.e., cases in which indisputably innocent individuals confessed to crimes they did not commit), both in Maryland and nationally, and learned about the unacceptable risk of execution that false

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<sup>116</sup> Information on Maryland's eyewitness reform legislation supplied by Commissioner/Delegate Sandy Rosenberg.

confessions pose for innocent defendants in capital cases. Andrew Sonner, an Associate Judge (Senior Status) for the Circuit Court of Montgomery County, Maryland who previously served as a Maryland Court of Special Appeals Judge and as the State's Attorney (elected seven times) for Montgomery County, presented testimony to the Commission on this matter. He highlighted the following example where a confession was eventually proved false by DNA evidence:

There's a case out of San Diego where they [(law enforcement)] succeeded in getting a young, fifteen, sixteen year old boy, to admitting that he killed his sister. And then they not only succeeded...in getting him to do that, he implicated at least one other, maybe two other people who helped him do it. And then a year or two later they found somebody in the area whose DNA matched the DNA that they found at the scene crime, and the police had wrongly extracted a confession from him at that time.

Oral testimony of Andrew Sonner to the Maryland Commission on Capital Punishment, Aug. 19, 2008, Page 120 of hearing transcript.

Judge Sonner's account of the San Diego case is consistent with other evidence presented to the Commission,<sup>117</sup> including frightening statistics that fifty (50) of the first 200 DNA exonerees in the United States purportedly confessed to crimes that they did not commit,<sup>118</sup> and disturbing testimony from a public witness named Carey Hansel.

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<sup>117</sup> For instance, Earl Washington, Jr. spent eighteen years in prison, including nine on Death Row, after confessing to a crime he did not commit because he was mentally retarded. He came within nine days of being executed. The first DNA analyst in Washington, Jr.'s case "gave a scientifically indefensible interpretation that...if we looked at it in a way that had no scientific basis, but accommodated the inevitable pressure [not to concede that the system had sentenced an innocent man to death], maybe he couldn't be excluded." Kent Oral Testimony at 86-7. A second round of DNA tests performed seven years later exonerated Mr. Washington.

<sup>118</sup> See The Justice Project, *IMPROVING ACCESS TO POST-CONVICTION DNA TESTING: A POLICY REVIEW*, (2008) (citing Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 60, 74 (2008); The Innocence Project, *News and Information Fact Sheets*, available on June 19, 2008 at <http://www.innocenceproject.org/Content/351.php>). Other statistics regarding false confessions are even higher. The Innocence Project posted a list on the internet of 208 false confession cases. The list was available on November 9, 2008 at the following address: [http://www.innocenceproject.org/docs/Master\\_List\\_False\\_Confessions.html](http://www.innocenceproject.org/docs/Master_List_False_Confessions.html).

Hansel, a lawyer in Maryland, spoke about the false confessions and resulting convictions of Keith Longtin and Corey Beale. Stories of Longtin's and Beale's false confessions to Maryland police a few years ago appear in press reports<sup>119</sup> and law review articles.<sup>120</sup> The thrust of Hansel's testimony and the other sources reporting on Longtin and Beale is that even in the age of DNA testing and despite numerous procedural safeguards built into the criminal justice system, false confessions still occur and, once extracted, are dangerously persuasive to criminal justice officials and jurors. Indeed, certain research suggests that criminal justice officials and jurors often treat confession evidence as dispositive or uniquely persuasive, so much so that they will allow it to outweigh even strong evidence of a suspect's factual innocence.<sup>121</sup>

Given the number of proven false confessions and the risks they pose for the innocent, the Commission concludes that there is a palpable risk that innocent defendants in capital cases may be executed in Maryland if the State continues to preserve the death penalty. Our ultimate

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<sup>119</sup> See, e.g., Associated Press article entitled, *\$6 million awarded in false confession lawsuit: Innocent Md. man admitted killing wife after 38-hour grilling with no sleep*, available online on November 9, 2008 at the following site: <http://www.msnbc.msn.com/id/14609924/>. (The article was last updated on August 31, 2006.). The article describes how a Prince George's County jury awarded \$6.38 million to Longtin after he spent eight months in jail for a murder that he did not commit, but nevertheless confessed to after allegedly being interrogated by police for thirty-eight (38) hours. DNA evidence later exonerated Longtin. See also, e.g., <http://www.washingtonpost.com/wp-dyn/metro/md/princegeorges/government/police/confess/> (last visited Nov. 9, 2008). Among other false confession cases, the site profiles Corey Beale's false confession following "marathon interrogations" by Maryland police.

<sup>120</sup> Steven A. Drizin and Richard A. Leo, *The Problem of False Confessions in the Post DNA World*, 82 N.C. L. Rev. 891 (2004). This article analyzes 125 cases of proven interrogation-induced false confessions and concludes that more than four-fifths (81%) of factually innocent defendants who chose to take their case to trial were wrongfully convicted "beyond a reasonable doubt" even though their confession was ultimately demonstrated to be false.

<sup>121</sup> *Id.* at 960 (citing Saul Kassin & Katherine Neumann, *On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis*, 21 LAW & HUM. BEHAV. 469, 480 (1997) (arguing that experimental results indicate that confession is seen as the most incriminating type of evidence); Saul Kassin & Holly Sukel, *Coerced Confessions and the Jury: An Experimental Test of the "Harmless Error" Rule*, 21 LAW & HUM. BEHAV. 27, 35 (1997) (arguing that empirical evidence suggests that confessions increase conviction rate, regardless of whether the confession is seen as coerced); Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 440 (1998) (arguing that confession evidence biases the trier of fact's evaluation of the case, favoring prosecution and conviction)).

recommendation to abolish capital punishment in Maryland is based, in part, on the very real possibility of making a fatal mistake based upon false confession evidence.

We commend the Maryland General Assembly for enacting Senate Bill 76/House Bill 6 of 2008, which encourages the use of audiovisual recordings of custodial interrogations in several types of felony cases and thereby reduces the likelihood of false confessions.<sup>122</sup> The 2008 legislation makes the use of audiovisual recordings of custodial interrogations a matter of *public policy* in certain circumstances, but it does *not mandate* the use of this technique in any circumstance. Accordingly, we recommend that recording of interrogations be made mandatory in the specified circumstances for all jurisdictions. Such legislatively-mandated changes to police practices may prove useful in non-capital cases.

While Maryland should be proud of both this legislative improvement and the eyewitness identification reform laws (discussed in the immediately preceding Section C), Maryland still falls short in many areas recommended by other state commissions to reduce the risk of executing an innocent person. Comprehensive studies undertaken in Illinois and Massachusetts, for instance, contain numerous recommendations designed to protect innocent defendants from being sentenced to death. The Illinois Commission recommended eighty-five (85) reforms of the

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<sup>122</sup> Senate Bill 76/House Bill 6 of 2008 declares that it is the *public policy* of the State that (1) a law enforcement unit that regularly utilizes one or more interrogation rooms capable of creating audiovisual recordings of custodial interrogations shall make reasonable efforts to create an audiovisual recording of a custodial interrogation of a criminal suspect in connection with a case involving murder, rape, sexual offense in the first degree, or sexual offense in the second degree, whenever possible; and (2) a law enforcement unit that does not regularly utilize one or more interrogation rooms capable of creating audiovisual recordings of custodial interrogations shall make reasonable efforts to create an audio recording of a custodial interrogation of a criminal suspect in connection with a case involving murder, rape, sexual offense in the first degree, or sexual offense in the second degree, wherever possible. Under the bills, an audio or audiovisual recording made by a law enforcement unit of a custodial interrogation of a criminal suspect is exempt from the Maryland Wiretapping and Electronic Surveillance Act.

death penalty, many of which are missing in Maryland.<sup>123</sup> Governor Mitt Romney established the Massachusetts Commission to propose a capital system that would be as fair and accurate "as humanly possible." That Commission suggested a system distinct from that of all other states, but rightly did not promise that the enactment of its proposal would guarantee fairness or accuracy. Likewise, the Illinois Commission found that even if all eighty-five of its proposed reforms were enacted, the risk of executing an innocent person would remain.

For all of the reasons discussed in this Chapter, we find that the risk of wrongful executions that is inherent in the capital system cannot be remedied by enacting new laws to comply with the universe of recommendations made by other commissions.

## ***E. Limitations of Science***

### **i. False Reports**

The death penalty also poses a serious risk that innocent persons will be executed because forensic labs have a difficult time assuring that accurate findings are made. Scientific evidence is easily contaminated at the scene or in the laboratory, and thereafter skewed (intentionally or

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<sup>123</sup> (Source: General comparative analysis supplied by Commissioner/Delegate Sandy Rosenberg.) Contrary to the suggestion of the minority, Maryland *lacks* a majority of Illinois' recommended reforms. Recommendation 10 in the "Recommendations Only" section of the 2002 Illinois Report—that police departments utilize a "blind administrator" (i.e., someone who is not aware of the suspect's identity) in conducting lineups and photospreads—is but one example. Mr. Scheck's written testimony notes that Maryland's eyewitness identification reform laws fail to require blind administrators and thus *overlook "the single best reform available"* to minimize the possibility of the lineup administrator...providing inadvertent or intentional verbal or nonverbal cues to influence the eyewitness to pick the suspect." Scheck, Written Testimony at 11 (emphasis added). Maryland's capital system similarly fails to meet the "gold standard" process outlined in Massachusetts, lacking, among others, the following procedural checks: a requirement that an enhanced, "no doubt" standard of proof be met before a death sentence is imposed; standards for prosecutorial discretion; and centralized review of prosecutorial discretion in capital charging. *See* 8/19/2008 Oral Testimony of Owen Wise, retired Circuit Court Judge for Caroline County, at 260 (recommending an impartial panel to screen and certify death notices).

Whatever the merits of these many reform suggestions, we feel compelled to note the obvious—to comply with all of the available recommendations would greatly increase the cost of the capital punishment process in Maryland.

unintentionally) by analysts. Lab workloads lead to error and mistakes or lack of proven competence. According to Patrick Kent, Chief of the Forensic Division, Office of the Public Defender in Maryland, “bad science” contributed to sixty-five percent (65%) of the convictions that have been overturned as a result of post-conviction DNA testing.<sup>124</sup> Mr. Kent argued that bad science will always threaten the lives of innocent defendants as long as the death penalty exists in Maryland:

Can we base it on infallible scientific evidence, such that only the guilt[y] are executed? And the answer is, unequivocally, is that we cannot because, in the end, we are human. We can take our best analysts, our best crime laboratories, our best sciences—they will always be performed by those of us who are imperfect. And, too often, tragic results will come because the analysts... are incompetent...engaged in misconduct, or ultimately, even if they acted in good faith [were later proven wrong because the science used to convict was invalidated]. There is no panacea, there is no magic answer. The only way that we can unequivocally say that we are not executing the innocent is simply not to execute.

Oral Testimony of Patrick Kent to the Maryland Commission on Capital Punishment, September 22, 2008, at 89-90 of hearing transcript.

Intentionally false forensics work has proved devastating in capital cases around the country,<sup>125</sup> contributing to the execution of at least eleven (11) persons and helping to send at

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<sup>124</sup> September 22, 2008 Oral Testimony of Patrick Kent, Tr. at 74.

<sup>125</sup> See slide show presented to the Commission in oral and written form by Patrick Kent on September 22, 2008. Besides misconduct in capital cases, Mr. Kent’s presentation addressed misconduct in the following cases:

- A forensic scientist with the Illinois State Police Crime Lab falsely testified to misleading serology and hair results in a rape case to favor the prosecution’s case against Gary Dotson. Dotson was ultimately exonerated by DNA evidence.
- A supervisor of a forensic unit of the New York State Troopers admitted to planting fingerprint evidence in numerous cases to secure convictions when applying for a job with the Central Intelligence Agency.
- The Laboratory Director of DNA Security, Inc. testified that he colluded with the prosecution in the Duke lacrosse rape cases by agreeing not to report DNA results favorable to the players charged with rape. This exculpatory evidence was intentionally withheld from the defense.

least fifteen (15) others to Death Row.<sup>126</sup> Maryland's labs have also recently come under fire for misconduct. This year, a former Baltimore County Police chemist was said to have provided explanations about blood typing that fell "within the definition of material perjury."<sup>127</sup> In 2007, a forensic expert who had testified in hundreds of Maryland cases—including capital cases—was found to be a fraud who forged his credentials.<sup>128</sup> In 2004, a DNA lab based in Montgomery County, Maryland fired an analyst for "professional misconduct" after discovering that she apparently substituted data for control samples. Finally, the Director of the Baltimore City Crime Laboratory was fired this year after a database update revealed that employees' DNA may have tainted evidence.<sup>129</sup> Although the latter example reflects an unintentional quality control issue (as opposed to deliberate misconduct), the potential harm to innocent defendants remains the same.

Barry Scheck, the Co-Director of the Innocence Project at the Benjamin N. Cardozo School of Law, used the example of Brandon Mayfield and the Madrid train bombings to make the point that unintentional errors in the forensic science arena can be disastrous for innocent

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- A forensic chemist with the West Virginia State Police Lab was found to have committed numerous acts of misconduct on a systematic basis, such as altering lab records and implying a match with a suspect when testing supported only a match with the victim.

<sup>126</sup> *See id.* These known statistics involve cases handled by the Oklahoma City Police Lab and the Houston Crime Lab. In 2001, the Oklahoma City Police Lab fired a chemist for giving false and misleading testimony that helped secure twenty-three death verdicts (and, ultimately, eleven (11) executions). More recently, the Houston Crime Lab failed to report test results that did not implicate suspects already identified by police. This practice occurred in at least three (3) cases resulting in death verdicts.

<sup>127</sup> *See id.*

<sup>128</sup> Kent Oral Testimony, Tr. at 77-79 of hearing transcript. *See also* August 19, 2008 Oral Testimony of Judith Catterton, Tr. at 101-02 (Forensics expert Joseph Kopera committed suicide when challenged with the fact that the training and knowledge and experience he set forth in the Flint Gregory Hunt case and in many other cases was a complete falsehood).

<sup>129</sup> *See* slide show presented to the Commission in oral and written form by Patrick Kent on September 22, 2008.



defendants. Mayfield was erroneously linked to the Madrid train bombings based on inconclusive fingerprint evidence<sup>130</sup> and later cleared by the FBI. The FBI's original, mistaken conclusion that the print belonged to Mayfield could have put his life in jeopardy: "Over the course of some 19 days, Brandon Mayfield experienced the nightmare of an innocent man connected to a capital offense by seemingly conclusive evidence. At the end of those 19 days, he was exonerated. But his life has not gone on as it did before. This has been a life-changing experience for all who were involved."<sup>131</sup>

One lesson to take from the Mayfield case is that forensic science is not infallible. *See* Sept. 5, 2008 Scheck, Oral Testimony, Tr. at 81-2 ("[A]fter the Mayfield case... *how can anybody think that we've reached a point where forensics are so good we can't make a mistake? It's absolutely the opposite.*") (emphasis added). Indeed, there have been several Innocence Project cases where flawed fingerprint evidence was ultimately discredited by DNA. This point assumes special significance in Maryland, as a state court judge recently threw out fingerprint evidence on scientific grounds.<sup>132</sup>

## ii. Misplaced Emphasis on Flawed Science

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<sup>130</sup> In the Mayfield case, the FBI, Spanish government authorities, and an independent defense expert all reached different conclusions regarding the same fingerprint. As Mr. Scheck explained, different countries have different standards for how many points within a fingerprint make for a reliable match, and that the FBI's own standards have changed over time: "The FBI used to have a set number...now they say, we know it when we see it. And so errors have been made in fingerprints." With respect to the error in the Madrid train bombing case in particular, a "postmortem" study by the Quality Assurance Officer of the FBI concluded that "the problem here was that it was a high profile case, and when you have a discipline that's part objective, part subjective, in a high profile case, errors are more likely..." *See* September 5, 2008 Oral Testimony of Barry Scheck, at 76-82 (emphasis added).

<sup>131</sup> Steven T. Wax and Christopher J. Schatz, *A Multitude of Errors: The Brandon Mayfield Case*, *Champion Magazine*, September/October 2004, Page 6, available at <http://www.nacdl.org/public.nsf/0/9090373de4fa9c7d85256f3300551e42?OpenDocument>.

<sup>132</sup> *See* Scheck, Oral Testimony, Tr. at 76-82.

Because of fictional characterizations of forensic infallibility and widespread belief in the depiction of this evidence in movies and television as both reliable and irrefutable, forensic evidence all too often wrongfully outweighs evidence of innocence.

The Commission received testimony regarding the wholesale invalidation of certain types of scientific tests. *See, e.g.*, Scheck, Oral Testimony, Tr. at 11 (“Post-conviction DNA exonerations have demonstrated that many forensic assays are, in fact, not real science [at] all, or certainly have to be greatly improved.”); Kent Oral Testimony, Tr. at 81 (“The other problem is that science marches forward and it leaves bad science behind. And it should leave bad science behind. Unfortunately, it's leaving hundreds of wrongfully convicted behind, as well.”). In the words of Mr. Kent, these tests were “infallible but only for the moment.”<sup>133</sup> Testimony on this point reinforces our view that the risk of executing an innocent person exists in Maryland.

A prime illustration of how scientific consensus can change over time involves comparative bullet-lead analysis, a technique that employed chemistry to link crime-scene bullets to ones possessed by suspects on the theory that each batch of lead had a unique elemental makeup. The technique was used from 1963 until just recently when the National Academy of Sciences concluded that it was unreliable and potentially misleading. The FBI abandoned the technique in 2005. The FBI had used the analysis in 2500 cases since the early 1980s. Another discredited scientific process involves bite mark comparisons or “forensic odontology.”<sup>134</sup> This process, according to Mr. Kent’s testimony, “has come to represent a case study in how easily

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<sup>133</sup> *Id.*

<sup>134</sup> The Commission heard a first-hand account from Ray Krone of Pennsylvania about how bite mark technology failed in his case. Krone, who testified during the public portion of the September 5, 2008 meeting, was convicted of murdering a young woman based upon a bite mark that was said to match his teeth. Krone emphasized that the criminal justice system has weaknesses stemming from the fact that human actors within the system are bound to make mistakes.

forensic science’s false aura of infallibility can distort the adversarial system of American justice.”

The aura of infallibility associated with forensic science is quite pervasive. *See generally*, Kent, Oral Testimony, Tr. at 80 (“the problem with forensic science is that it looks objective, it looks infallible, it looks like it cannot be wrong”). This may be the result of fictional characterizations of forensic infallibility in movies and television. *See generally*, William Thompson & Rachel Dioso-Villa, *Turning a Blind Eye to Misleading Scientific Testimony: Failure of Procedural Safeguards in a Capital Case*, 18 Alb. L.J. Sci. & Tech. 151, 153 (2008) (“Television dramas like the popular 'CSI' series have highlighted the importance of forensic science in criminal investigations. .... Ironically, while television has been glorifying crime labs, there has been growing skepticism about some of the claims that forensic scientists have been making in court.”)<sup>135</sup> Whatever the cause, the net effect is that forensic evidence that may eventually be discredited can wrongfully outweigh evidence of innocence. To think that all currently accepted forensic processes used to send defendants to Death Row will remain in good stead in years to come would be presumptuous and, we fear, might encourage some to retain the death penalty and gamble with innocent lives.

#### ***F. Legal Complexities and Prohibitive Defense Costs***

The prospect of state execution of an innocent person is the primary reason for the elaborate administrative process of the death penalty. The complexities of the administrative process for capital cases can, however, work hardships on defense counsel. As such,

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<sup>135</sup> *See also* Scheck, Oral Testimony, Tr. at 75. (“Every serious student of forensic evidence knows it is not CSI—on the contrary. The more our knowledge has advanced, right, the more we realize the problems.”)

administrative protections in capital cases have assuredly contributed to reversible, constitutional errors and may, paradoxically, increase the risk of wrongful executions in some cases.

The essence of the testimony by numerous witnesses is that capital cases are far more demanding, complex, costly, and protracted than all other types of criminal cases.<sup>136</sup> Deborah Fleischaker, former Director of the American Bar Association ("ABA") Death Penalty Moratorium Implementation Project, explained that in order to defend a capital case effectively, defense counsel must invest hundreds of hours in preparation, hire investigators and experts, such as mental health professionals and forensic scientists, and have a thorough understanding of the highly specialized body of death penalty law.<sup>137</sup> Focusing just on the sentencing or penalty phase of the trial reveals how challenging and costly this type of legal work is. The scope of potential mitigating evidence and its importance in the sentencing decision requires defense counsel to conduct an exhaustive life history investigation with the assistance of a multi-disciplinary team of professionals.

Effective representation in a capital case will be measured according to the ABA's *Guidelines for the Qualification and Performance of Defense Counsel in Death Penalty Cases*. These guidelines are demanding, to say the least. They total 131 pages and are based upon U.S. Supreme Court rulings.<sup>138</sup>

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<sup>136</sup> See, e.g., testimony by Deborah Fleischaker, Donald Zaremba, Harry Trainor, Bill Brennan, and Stuart Simms, just to name a few.

<sup>137</sup> See Fleischaker's Written Testimony, at 2 ([M]any of the legal issues involved in death penalty cases, and in particular the constitutional doctrines, are unique to capital cases. Competent representation at the different stages of a capital case—trial, appeal, and post-conviction review—requires specialized training, significant experience and intense preparation.)

<sup>138</sup> The Supreme Court's recent ruling in *Wiggins v. Smith*, 539 U.S. 510 (2003) contains a clear message regarding the application of the ABA guidelines in Maryland—"if Maryland attorneys in capital cases do not fully adhere to these hundreds of pages of standards, we can expect that convictions and/or sentences in death penalty cases will ultimately be reversed and sent back for retrial and re-sentencing. The fact that the Court used a Maryland case to

Attorneys sometimes fall short of meeting the ABA's demanding guidelines, and some witnesses forecast that this would become the norm. Mr. Simms presented written testimony that "[t]he trial and sentencing phases of the case must be legally perfect and in this day and age, it is almost impossible to avoid any type of legal error." Testimony from Ms. Fleischaker and Harry J. Trainor, Jr., a member of the Capital Defense Panel in Maryland, addressed two Maryland cases involving ineffective representation, showing that Maryland is not immune from this problem.<sup>139</sup> Perhaps not surprisingly, the ABA has concluded that the problem of ineffective defense representation in capital cases is a consistent and systemic problem throughout death penalty jurisdictions. *See* Fleischaker Written Testimony, at 3.

The correlation between effective representation and risk of errors in capital cases is undeniable. As the ACLU's written testimony noted, the "issue of competent counsel is inextricably intertwined with the reliability of Maryland's capital punishment system."<sup>140</sup> Ineffective representation can lead to mistakes that are fatal to defendants, some of whom may be innocent.

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make that ruling only further highlights the fact that even in Maryland our defense system needs improvement." *See* Written Testimony of Harry J. Trainor, Jr., at 4.

<sup>139</sup> The witnesses highlighted the cases of Kevin Wiggins and Flint Gregory Hunt. In the *Wiggins* case, the U.S. Supreme Court reversed Kevin Wiggins' death sentence on the basis of inadequate representation by his original trial attorney for failing to conduct a minimally adequate mitigation investigation.

Hunt was executed in 1997 for the murder of a police officer in Baltimore City. Three private attorneys were assigned to represent Hunt at his original trial. Two of the three were real estate lawyers who were later disbarred for stealing client trust money. The third lawyer was recruited by the other two just a few weeks before trial. The third lawyer had experience trying felony cases, but did not have death penalty experience. None availed themselves of the materials available at the Public Defender's Office. The defense never raised the fact that Hunt was high on PCP when the murder occurred, which might have countered the prosecution's argument that the murder was pre-meditated and thus death-eligible.

<sup>140</sup> *See* the ACLU's Written Testimony. *See also* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime But for the Worst Lawyer*, 103 Yale L. J. 1835 (1994), which the ACLU cites in its written testimony.

The risk of mistakes is exacerbated by the extraordinary case load placed upon public defenders. Donald Zaremba, Deputy District Public Defender in Baltimore County, testified that death penalty cases are given to public defenders in his office with pre-existing case loads of approximately 180 cases. Because capital cases require so much work, the capital defense unit of the State Public Defender's Office is often required to ask private defense counsel to represent capital defendants.

Compounding the difficulties presented by competing cases, complex laws, and demanding guidelines is the fact that Maryland pays just fifty dollars (\$50) per hour up to a capped amount to private attorneys handling death penalty cases,<sup>141</sup> and provides some additional fees for experts. This is the second lowest<sup>142</sup> pay rate in the country, allowing for only 400 hours of work—a far cry from the time lawyers typically need to spend on such cases.<sup>143</sup> A capital case that results in a guilty plea requires 1200 hours; 1900 hours are needed to take a capital case to trial.<sup>144</sup> Nor is the compensation scheme adequate for engaging critical investigators and experts. Mr. Trainor testified that he is aware of “one expert who refuses to

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<sup>141</sup> See “A 2003 State-by-State Overview of Compensation Rates for Court-Appointed Counsel in Capital Cases.” This report, conducted by the Spangenberg Group for the American Bar Association, details compensation rates paid to court-appointed counsel who handle death penalty trial cases in the 38 states that permit imposition of the death penalty. The report also provides information on the primary system each state uses to deliver indigent defense services for capital trial cases.

<sup>142</sup> See Written Testimony of Harry J. Trainor, Jr., at 2.

<sup>143</sup> According to a recent defense motion filed in Lee Edward Stephens' capital case, Maryland's compensation rate would allow defense attorneys to dedicate 400 hours of work to the case, “less than a third of what attorneys arguing federal capital cases receive.” (Fleischaker Written Testimony, at 4 (citing Nicole Fuller, *Capital Case Lawyer Pay Called Low*, The Baltimore Sun (June 17, 2008)). Fleischaker's testimony essentially says that Maryland's statutory pay rates presented Mr. Stephens' lawyers with an impossible choice: either represent Mr. Stephens to the best of their ability and face financial ruin, or neglect Mr. Stephens' case to pay the bills and book their client a bunk in Death Row.”

<sup>144</sup> See Written Testimony of Donald Zaremba, Esquire, at 2 (citing a 1998 study by the Judicial Conference of the United States entitled, *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation*).

work for the state on these cases anymore because the hourly rate is so low.” Trainor, Written Testimony, at 3.

Mr. Trainor testified that he was unable to meet his obligations to his client in a recent death penalty case and, at the same time, meet his financial obligations to his law partners. As a result, he decided to remove himself from his firm's payroll while he was trying the case. He said that because the trial consumed 100% of his time, he was unable to accept new clients paying normal legal fees. He testified that “from a financial standpoint, virtually every private attorney accepting a capital appointment in Maryland will suffer much the same way.” Mr. Trainor and another member of the Capital Defense Panel, Bill Brennan, opined that in the future no competent lawyers from the private sector will take capital appointments in Maryland when higher-paying federal appointments are available.<sup>145</sup>

Mr. Trainor perhaps put it best when he concluded, “A system that puts a person's life on the line cannot hang its hopes on the sheer luck that a few extraordinary good Samaritans will always be there and be willing to make these kinds of sacrifices.” Trainor, Written Testimony, at 3. We agree with Mr. Trainor's sentiments, and accordingly we recommend abolition of the death penalty.

### ***G. Erosion of Public Trust and Confidence in the Judicial System***

Finally, we note that the numerous exonerations and reversals in capital cases in recent years have led to a decline in public support for the death penalty<sup>146</sup> and have eroded the trust

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<sup>145</sup> They reasoned that lawyers who do take cases in Maryland will undoubtedly fail (because of the low pay) to satisfy the ABA Guidelines for effective representation in capital cases. In contrast to Maryland, the federal system pays defense counsel in appointed capital cases \$170 per hour with no cap for all work in and out of court.

<sup>146</sup> See Jeffrey Fagan, Walter C. Reckless Memorial Lecture, *Death and Deterrence Redux: Science, Law and Causal Reasoning on Capital Punishment* (April 2005). This article recognizes a decline in public support for the

and confidence of some citizens in the judicial system. This lack of faith in the justice system is deeply troubling. As Mr. Simms observed, one of the “most important components in our democracy” is the legitimacy of our nation’s criminal justice system. This is rooted in the fact that the public observes the justice system, is subject to it, and seeks to use it. *See* Stuart Simms, Written Testimony dated August 5, 2008 (quoting scholar Mark Moore of the Kennedy School of Government).

Bryan Stevenson, Founder and Executive Director of the Equal Justice Initiative of Alabama and Professor of Clinical Law at New York University School of Law, also stressed the significance of the public’s perception of fairness in the criminal justice system. Mr. Stevenson noted that the death penalty is reflective of the ultimate power of the criminal justice system. According to Mr. Stevenson, in order to avoid fostering despair and psycho-social problems throughout entire societal groups, the death penalty must be exercised fairly. While Mr. Stevenson was primarily speaking to unfairness in terms of race and socio-economic status, his comments apply to any sort of unfairness, including the worst of all injustices—execution of an innocent person.

The risk of executing innocent people was a common theme in testimony from members of the public,<sup>147</sup> and was often cited as a reason for abolition of the death penalty. One individual explicitly recognized the inverse correlation between the number of exonerations in capital cases and the credibility of the criminal justice system. *See* July 28, 2008 Oral Testimony

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death penalty following numerous exonerations and reversals and cites the following publication as containing a similar observation: Samuel R. Gross, *et al.*, *Exonerations in the United States, 1989 Through 2003*, 95 J. Crim. L. & Criminology 523, 527 (2005).

<sup>147</sup> *See, e.g.*, the testimony of the following individuals: Doctor Johnnie Jones; Kathy Garcia; Mike May; Arnold Gasper; Steven Dalsheim; Jane Henderson; Rick Stack; and Virginia Smith.



of Rick Stack, Tr. at 256 (“[A]s long as the death penalty is on the books we run the risk of executing the innocent. .... While the stakes are life and death and zero tolerance for mistakes must be the norm, for every seven executions nationwide, one inmate is exonerated. Such near misses diminish the criminal justice system's credibility. Snuffing out human life makes moot any subsequent possibility of unearthing exonerating evidence.”). (Emphasis added.) Jane Henderson, Executive Director of Maryland Citizens Against State Executions, made a similar point when she called Kirk Bloodsworth “living and breathing proof that Maryland can and does get it wrong” and warned that “the system that got it wrong [for Mr. Bloodsworth and other exonerees] is the same one that still sentences people to die.” See Written Testimony of Jane Henderson.

Decreasing public confidence in the capital process is, we submit, a reason in and of itself to abolish the death penalty. The reasons prompting the decline in the public's confidence (i.e., false confessions, eyewitness misidentifications, limitations of science, shoddy legal work, and widespread exonerations) additionally support abolition, as discussed throughout this Report.

## **ISSUE 7: THE IMPACT OF DNA EVIDENCE IN ASSURING FAIRNESS AND ACCURACY IN CAPITAL CASES**

*Finding: DNA testing has improved fairness and accuracy in capital cases. DNA is regarded as a highly reliable source of information and serves as a powerful tool for proving guilt and innocence. Nevertheless, while DNA testing has become a widely accepted method for determining guilt or innocence, it does not eliminate the risk of sentencing innocent persons to death since, in many cases, DNA evidence is not available and, even when it is available, is subject to contamination or error at the scene of the offense or in the laboratory.*

*(Results of Commission Vote on Finding: AGREE = 16; DISAGREE = 4)*

### ***DISCUSSION CONCERNING THE IMPACT OF DNA EVIDENCE IN ASSURING FAIRNESS AND ACCURACY IN CAPITAL CASES***

#### ***A. Role of DNA Evidence in Investigations, Prosecutions, and Exonerations***

DNA evidence was first used in 1987 to exclude a suspect in a rape case, and shortly thereafter was used by prosecutors to obtain a conviction in another rape case.<sup>148</sup> DNA continues to be used primarily for identification of suspects in rape and homicide cases, as these cases often rely on biological material left at the scene of the crime. DNA evidence is also used for post-conviction testing. Post-conviction DNA testing is the primary evidence relied on in the exoneration investigations undertaken by various Innocence Projects around the country.<sup>149</sup>

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<sup>148</sup> Tonja Jacobi & Gwendolyn Carroll, *Acknowledging Guilt: Forcing Self-Identification in Post-Conviction DNA Testing*, 102 Nw. U. L. Rev. 263, 267-68 (Winter 2008) [hereinafter, *Acknowledging Guilt*]. Once the value of DNA in criminal cases was discovered, the FBI began utilizing DNA testing in cases at the pre-trial, but often post-indictment, stage. In cases where the primary suspect was under indictment, DNA testing resulted in the exclusion of the suspect approximately one-third of the time. The sure-fire implication is that without DNA testing, many of these suspects would have gone to trial and some number of them would have been wrongfully convicted. See Oral Testimony of Barry Scheck, Tr. at 7-8.

<sup>149</sup> Jacobi & Carroll, *Acknowledging Guilt*, 102 Nw. U. L. Rev. at 268.

The first DNA exoneration in the United States took place in 1991 in the case of Bruce Nelson of Pennsylvania.<sup>150</sup> The second occurred in 1993 in the case of Commissioner Kirk Bloodworth.<sup>151</sup> As of early October 2008, there have been 221 post-conviction DNA exonerations in the United States.<sup>152</sup> Seventeen of the 221 people exonerated through DNA served time on Death Row.<sup>153</sup> Commissioner Bloodworth was the first person to be exonerated after spending time on Death Row.<sup>154</sup>

Clearly, DNA evidence and testing is remarkable in its capacity for ensuring that the criminal justice system targets the correct perpetrator. It is not, however, a panacea that has assured or will assure fairness and accuracy in all capital cases. This is so for a number of reasons. First, and most importantly, the majority of criminal cases do not include biological evidence that definitively determines the identity of the perpetrator through DNA testing. Additional reasons, some of which are related to or contribute to the first, include: the possibility of contamination of samples and other errors in the field or lab; the weight that fact finders and others involved in the criminal justice system give to DNA test results, even when they arguably do not show a match between a suspect and a sample from the crime scene and especially when paired with circumstantial evidence pointing toward the suspect; and, finally, the scope and history of DNA laws. As explained in greater detail below, this Commission accepts Mr. Scheck's conclusion that the existence of DNA technology is "just not a solution to the

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<sup>150</sup> See <http://www.innocenceproject.org/know/Browse-Profiles.php>, last visited Dec. 6, 2008.

<sup>151</sup> *Id.*

<sup>152</sup> See <http://www.innocenceproject.org/Content/351.php#>. See also The Justice Project's Policy Review entitled, IMPROVING ACCESS TO POST-CONVICTION DNA TESTING.

<sup>153</sup> See Scheck Written Testimony, at 3.

<sup>154</sup> See The Justice Project's Policy Review entitled, IMPROVING ACCESS TO POST-CONVICTION DNA TESTING, at 1.

problem”<sup>155</sup> and that “there are so many causes of wrongful convictions...that DNA will do nothing to cure.”<sup>156</sup>

### ***B. Scarcity of Credible DNA Evidence***

It is estimated that credible DNA evidence exists in only ten to fifteen percent (10% - 15%) of death penalty cases. Oral Testimony of Barry Scheck, Tr. at 10 (“[P]erhaps the most important fact to focus on is that it's estimated that in ten to fifteen percent of cases there's biological evidence that you can do a DNA test on and determine the identity of the culprit.”). Mr. Scheck based these figures on various studies that have been performed over the years. *See* Sept. 5, 2008 Hearing Transcript at 65.

On the other hand, Commissioner Shellenberger argued in his October 7, 2008 oral testimony that “in the homicide cases in Baltimore County we're seeing [DNA] in the area of sixty to seventy-five percent.” Oct. 7, 2008 Hearing Transcript at 121. Commissioner Shellenberger also surmised that the types of crimes covered by Maryland's death penalty statute are nearly always going to produce DNA.<sup>157</sup> He provided no statistical support for his surmise. Even assuming the correctness of this latter assertion, it does not take into account the potential for contamination or all other manner of error<sup>158</sup>—factors that substantially reduce the number of

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<sup>155</sup> *See* Scheck, Tr. at 72-3.

<sup>156</sup> Scheck, Tr. at 15.

<sup>157</sup> Commissioner Shellenberger, Tr. at 83 (“When you look at Maryland death penalty statutes you need a murder plus more. And the plus more...[e.g., a] second offense of kidnapping, a robbery—those are all contact type crimes—crimes that are going to, more than likely, to give you DNA evidence, that you're going to leave DNA behind.”).

<sup>158</sup> We note that just one other witness, namely, current State's Attorney for Harford County Joseph Casilly, seemed to share Commissioner Shellenberger's sentiments on the issue of the prevalence of DNA evidence in capital cases. Citing the last death penalty case he prosecuted as an example, Mr. Casilly opined that prosecutors “are now taking the most ironclad proof-laden cases that they can” and, *ergo*, “when we say, well, we're concerned about the wrong

*credible* DNA samples that can be derived from the larger pool of DNA samples that might be taken at today's crime scenes.

**C. “DNA is a Hard Science”<sup>159</sup>**

One category of error surrounding DNA relates to the testing procedures. The issues here are twofold—first, testing procedures (and, along with them, relevant laws) have evolved considerably since DNA testing was invented in 1984,<sup>160</sup> and are still evolving. Second, there is a considerable difference (even today) in the science of “calling a match” versus “calling an exclusion.”

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person on Death Row I think that in this age of science and forensics that it [is] not a possibility any longer." Casilly, Tr. at 51-2. Mr. Casilly elaborated on this point later in his testimony in response to a question from Commissioner Campbell:

COMMISSIONER CAMPBELL: ...I thought I heard you say that it's not possible, or you don't believe it's possible, to convict an innocent anymore with the advances in DNA and other science, was that what you said?

MR. CASILLY: Yes.

COMMISSIONER CAMPBELL: And how long has that been the case?

MR. CASILLY: ...[W]hat I think is that if there is any doubt in a juror's mind, with regard to that, then they're not going to impose—I mean, that's an argument not to impose the death penalty. All right? That's the advantage of having jurors impose the death penalty. Jurors are going to want to be comfortable with that decision. [Casilly, Tr. at 63-4.]

We do not agree that jurors' doubts are a sufficient check on wrongful convictions, especially in light of the "aura of infallibility" oftentimes associated with forensic science. For more on this point, see the Section of this Report entitled, "(E.ii.) Misplaced Emphasis on Flawed Science."

<sup>159</sup> September 5, 2008 Oral Testimony of Barry Scheck, Tr. at 74-5 ("What I was really trying to tell you is that DNA is a hard science. I mean, mistakes can be made in its application.").

<sup>160</sup> British geneticist Alec Jeffreys invented the technique of DNA testing in 1984. See Lisa Carrabino, Note, *The Admissibility of DNA Typing and Statistical Probability Evidence*, 29 Suffolk U.L. Rev. 473, 474 (1995).

Earlier generations of commonly-employed DNA testing procedures required *substantial* amounts of DNA, which often was not present at crime scenes.<sup>161</sup> As Commissioner Shellenberger stated, “in the early '80's, DNA testing required a tremendous amount of exchange of body fluids....either blood, semen, or whatever. Back then they didn't even know you could do saliva. .... By 1993, you only needed a speck. And now, we don't even need a speck. You can take DNA off of [a small sample of skin cells].” Shellenberger's Oct. 7, 2008 testimony before the Commission, Tr. at 100-01.

Advances in DNA science can only do so much, however, to exonerate Death Row inmates who were wrongfully convicted when DNA technology was not available or was not available in its present state of sophistication. Testable DNA, even measured under today's standards, may not have been collected or preserved in some of those cases. An obvious reason for this is the lack of awareness of DNA science. *See, e.g.*, Shellenberger (“Back then they didn't even know you could do saliva.”). We note that the offenses in three of the five active Maryland capital cases took place in 1983—*before* the invention of DNA testing in criminal cases. *See* “Attorney General's Synopsis of Active Maryland Capital Cases,” available at <http://www.goccp.org/capital-punishment/capital-cases.php> (last visited November 16, 2008) (offenses in Grandison, Evans, and Booth-El cases all occurred in 1983).

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<sup>161</sup> An alternate and less prevalent form of DNA testing known as the PCR method is described in a 1995 law review note (and thus was available at that time). The PCR method requires only a small amount of DNA, but is particularly susceptible to contamination. *See Carrabino, supra*, 29 Suffolk U.L. Rev. at 474. Maryland's statute governing the admissibility of DNA profiles does not include PCR evidence among the types of DNA techniques that Maryland courts presume to be generally accepted. Md. Code Ann., Cts. & Jud. Proc. § 10-915 (2008).

Another reason why testable DNA might be lacking is that laws governing the use of DNA databases<sup>162</sup> were not as well developed in years past as they are now. Legal issues are explained more fully in Section E below. Suffice it to say that biological material suitable for comparison/exoneration purposes may not exist in “cold cases” because the law in effect at the time had not evolved to require collection or preservation.

Putting aside legal developments and “cold cases,” an issue of significance in all capital cases involves the distinction in the science of DNA matches and DNA exclusions. Failing to declare a match between a suspect's DNA and the DNA in an unknown sample taken from a crime scene does not require, or necessarily lead to, a declaration that a suspect can definitively be excluded. *See, e.g.*, Statement by Commissioner O’Donnell, Oct. 22, 2008 Tr. at 182 (“[T]here is a tremendous difference between excluding someone and matching someone.”).<sup>163</sup>

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<sup>162</sup> DNA evidence has limited value as an identification tool without the utilization of a computer database. *See*, Robert W. Schumacher II, Note, *Expanding New York's DNA Database: The Future of Law Enforcement*, 26 Fordham Urb. L.J. 1635, 1644 (May 1999). “A DNA database is a computerized collection of DNA profiles capable of being used for criminal identification purposes. DNA profiles are ideal for such storage because the information can be stored in numeric code, thereby requiring minimal technology. Essentially, a DNA test result derived from a crime scene sample can be checked against the digital profiles stored in the database. Any matches made with database profiles can then be used as probable cause to obtain a sample from a suspect for further testing. This procedure guards against sampling errors that could have occurred during data entry.” *Id.*

<sup>163</sup> This statement was part of the following exchange between Commissioner O’Donnell and Commissioner Shellenberger, Tr. at 180-81:

COMMISSIONER SHELLENBERGER: .... And I do agree there's a differen[ce] between an exoneration, where there's match, and [that there] can be debate as to whether there's a match and what that match means.

COMMISSIONER O'DONNELL: Exactly. And I guess that's what I mean, because I think you and I have had much more experience than many of the folks here probably had with actually the nuts and bolts of DNA. And I just don't want anyone on the Commission to be misle[d]—that there is a tremendous difference between excluding someone and matching someone. ....

COMMISSIONER SHELLENBERGER: .... "There can be a debate on what match is. There typically is not a debate on what an exclusion is."

As Mr. Scheck explained, innocent defendants might not be excluded where there are multiple contributors of DNA detected in the sample from the crime scene:<sup>164</sup>

Apparently what was going on in the laboratory is that they were finding extraneous DNA from analysts and evidence handlers in the cases. They didn't realize that it was coming from analysts or evidence handlers. In a situation like that, not only is law enforcement going to fail to apprehend the guilty because somebody else's DNA is in the mix and they're saying, oh, well, this suspect is being excluded because we found somebody else's DNA in the semen stain or the blood stain, or on skin cells in the clothing that would be analyzed, but there will be situations, many, I assure you, where the analyst's DNA will be in a mixed stain or a mixture of cells on clothing, and the person, *the suspect can't be excluded because there's extraneous DNA there. I see this all the time in cases.* So this kind of error, probably will lead to more guilty people going free but it will surely lead to innocents being convicted. *And there you would even have DNA evidence where they would say, well, there's extraneous DNA here, the defendant can't be excluded, we've done a DNA test, this probative blood stain, this probative piece of clothing that was left at the crime scene doesn't exclude this defendant. He could have been a contributor to the mixture. And the next thing you know, that person could be executed.*

Scheck, Tr. at 24-26 (emphasis added).

Mixed DNA samples that neither match nor exclude a defendant may be viewed as highly incriminating by juries. This is so *regardless of how exculpatory* the evidence might seem to certain experts. *See, e.g., William Thompson & Rachel Dioso-Villa, Turning a Blind Eye to Misleading Scientific Testimony: Failure of Procedural Safeguards in a Capital Case*, 18 Alb.

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<sup>164</sup> *See also* William Thompson & Rachel Dioso-Villa, *Turning a Blind-Eye to Misleading Scientific Testimony: Failure of Procedural Safeguards in a Capital Case*, 18 Alb. L.J. Sci. & Tech. 151, 157-58 (2008), which describes how this phenomenon played out in a 1999 case called *Lovitt v. Virginia*, 537 S.E.2d 866 (Va. 2000). The basic facts concerning the initial DNA tests in *Lovitt* were as follows: "DNA tests were also conducted on two bloodstains on the scissors [used to stab the victim]. The state's DNA analyst testified that...a second stain higher on the blade contained a mixture of DNA from more than one person. The DNA profile of the primary donor [matched the victim]. However, the stain contained an additional genetic allele...that could not have come from [the victim], but *could* have come from [the defendant, although not necessarily]. Because only a single allele profile was found, rather than a complete profile, the DNA analyst testified that she could not say conclusively whether [the defendant's] profile was or was not consistent with that of the second contributor to the DNA mixture. Nevertheless, [the defendant] possessed the additional allele and therefore could not be eliminated as a possible contributor." The defendant was convicted of capital murder, but was successful in his clemency petition one day prior to his execution because a clerk improperly destroyed biological material in the case and thus prevented post-conviction re-testing. *Id.*, 18 Alb. L.J. Sci. & Tech. at 188.



L.J. Sci. & Tech. 151, 204 (finding the DNA evidence in the *Lovitt* case, described in a *supra* footnote, mildly exculpatory to the defendant). As a result, the scientific distinction between matches and exclusions could be a matter of life or death for some innocent defendants in capital cases.

#### ***D. DNA Labs Are Not Error-Free***

Contamination of DNA samples and other processing and interpretive errors at labs have been widely documented and discussed at length elsewhere in this Report. *See* Sections E.i. and E.ii. of the Innocence Chapter of this Report, which draw heavily on the examples cited by Patrick Kent, Barry Scheck, and others.

Mr. Kent's point (discussed in Section E.i. of the Innocence Chapter) that "the perfect science in imperfect hands will always lead to imperfect results and tragedy" nonetheless bears repeating here. Sept. 22, 2008 Tr. at 73. Besides the Houston lab scandal and the story of Earl Washington, Jr. (discussed in Sections E.i. and C of the Innocence Chapter, respectively), Mr. Kent offered this especially distressing example of laboratory contamination in our State: "And in yet another Maryland crime laboratory, what we're looking at is a device that they put together to literally vacuum out DNA from items of evidence. And you may ask, 'Why is it yellow?' Well, it's not supposed to be yellow. It's yellow because they've never changed it. They've used the same tube for years. It used to be clear. It's never been cleaned. It's never been sterilized." Kent, Sept. 22, 2008 Tr. at 80.

Mr. Scheck also cited an example, not of contamination but of careless mistake, that strikes terribly close to home. According to Mr. Scheck, who assisted, through the Innocence Project, in Commissioner Bloodsworth's DNA-based exoneration, "We came very close to having him [Commissioner Bloodsworth] not exonerated at all because the first [r]ound of

testing they didn't get adequate results, and then—and the analysts did not even see a very, very big stain on the item of evidence, and we had to send it to another scientist, out in California, who was very good at his work, and he found it. And I just see that again, and again, and again.” Scheck, Tr. at 70-1.

The examples of problems with forensics labs that were presented to the Commission show why “the rejoinder that DNA is different”<sup>165</sup> is insufficient and why Mr. Kent was correct in concluding that, even in the age of DNA, we cannot be assured that only the guilty are executed. This is because “in the end, we are human. We can take our best analysts, our best crime laboratories, our best sciences—they will always be performed by those of us who are imperfect.” Kent, Tr. at 87.

### ***E. DNA Laws in Maryland***

The Maryland General Assembly is to be commended for encouraging the use of DNA technology fairly and judiciously in criminal cases through its recent enactment of various amendments to Maryland’s DNA laws.<sup>166</sup> The amendments will take effect on January 1, 2009, just after the release of this Report. In a nutshell, the amendments broaden the universe of persons from whom DNA samples must be collected and expand post-conviction access to collected DNA evidence. Under the new law, a DNA sample will be collected from every

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<sup>165</sup> Mr. Kent raised this rejoinder rhetorically in his testimony on September 22, 2008: “But surely the rejoinder is that DNA is different. It is the perfect science. The perfect science in imperfect hands will always lead to imperfect results and tragedy.” Sept. 22, 2008 Oral Testimony of Patrick Kent, Tr. at 73.

<sup>166</sup> The amendments are codified in Md. Code Ann., Crim. Proc. § 8-201 (re: post-conviction review) (amendment effective Jan. 1, 2009); Md. Code Ann., Public Safety Article §§ 2-501 – 2-512 (collection, storage, recordation and transport of DNA samples) (amendments effective January 1, 2009). Other laws that govern the use of DNA in Maryland include Md. Code Ann., Health-Gen., §§ 17-2A-01 – 17-2A-12 (2008) (sets forth standards and licensing requirements for forensic laboratories; enacted in 2007); Md. Code Ann., Cts. & Jud. Proc. § 10-915 (2008) (admissibility of DNA profiles); Md. Code Ann. Art. 41, § 4-301 (2008) (governing establishment and administration of Maryland’s DNA Technology Fund); COMAR §§ 29.05.01.01 - 29.05.01.15(2008) (regulations governing preservation of DNA evidence by crime labs, among other things).

individual charged with commission of a crime of violence, burglary, or attempted commission of those crimes. The State retains the DNA sample only in the event of a conviction.<sup>167</sup> The 2009 amendments also allow the filing of a petition for DNA testing of evidence that the State possesses related to the conviction or for a search of law enforcement databases to identify the source of physical evidence used for DNA testing. Md. Code Ann., Crim. Proc. § 8-201(b) (amended version). A petitioner may also move for a new trial “on the grounds that the conviction was based on unreliable scientific identification evidence and a substantial possibility exists that the petitioner would not have been convicted without the evidence.” Md. Code Ann., Crim. Proc. § 8-201(c) (amended version). Finally, the 2009 amendments place greater burdens on the State not only to collect DNA evidence, but to preserve it for future use.<sup>168</sup>

The new law is expected to increase the number of “hits” or matches between DNA evidence from unknown perpetrators left at crime scenes and DNA from known offenders in the statewide DNA database. The principle that “more samples will lead to more matches” has proven true in the year leading up to the passage of the new legislation due to tremendous efforts by the Maryland State Police to close a backlog of more than 24,000 DNA samples.<sup>169</sup>

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<sup>167</sup> Md. Code Ann., Crim. Proc. § 8-201 (amendment effective Jan. 1, 2009). There does not appear to be any time limit on petitioning for post-conviction DNA evidence, nor does there appear to be any limit on the number of times a petitioner may petition for access to DNA evidence. The current law is narrower in that it only mandates collection of DNA samples from those convicted of violent crimes after a certain date and confined in correctional facilities after a certain date.

<sup>168</sup> Under the new law, if the State is unable to produce DNA evidence that should have been preserved, the court must hold a hearing to determine whether the failure to produce the evidence was the result of intentional destruction. If the court determines that the failure to produce was intentional, the court must order a post-conviction hearing and infer that the results of post-conviction testing would have been favorable. Md. Code Ann., Crim. Proc. § 8-201(j)(3) (amended version).

<sup>169</sup> Through the creation of DNA Stat (part of a crime reduction program modeled on efforts undertaken in New York), the O’Malley-Brown Administration eliminated this tremendous backlog of DNA samples from the State crime lab. *See* May 13, 2008 press release at <http://www.gov.state.md.us/pressreleases/080513.asp> (last visited on Oct. 26, 2008). The May 2008 press release states, “Since we began DNA Stat in March 2007, we’ve made 330 DNA matches, or hits—a 46% increase in the total hits ever made with CODIS in Maryland. Over 32,000 samples

Accordingly, we should see a rise in new convictions once the new legislation takes effect. At the same time, greater post-conviction access to the expanded group of DNA samples should increase the number of exonerations of persons wrongfully convicted. Fairness and accuracy in capital cases should thus improve as a result of the 2009 amendments to Maryland's DNA laws.

The newly amended DNA laws cannot, however, ensure a fair process and a just result in every case, nor can they prevent all wrongful convictions or exonerate every person who has been wrongfully convicted in Maryland. It is important to remember that the new laws will only affect cases in which DNA has been preserved and kept free of compromise.

The scope of the new laws also highlights deficiencies in pre-existing law. The recently amended § 2-504 and § 8-201 were only enacted in 1999 and 2001, respectively. Maryland's DNA evidence collection efforts did not begin in earnest until considerably later.<sup>170</sup> That means that even in face of the recent amendments, for crimes occurring in Maryland in the 1990's and earlier, the availability of potentially exonerating DNA evidence will remain low. Given that a substantial percentage of those currently sentenced to death were convicted before mandated

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have been uploaded, doubling the size of Maryland's CODIS database and eliminating the convicted offender database." The release further states that "crucial positions in the State crime lab that had been vacant and unfunded for years have been filled, and \$800,000 has been spent to fund long-term equipment needs."

Progress at county-level crime labs, however, appears much slower: "They may have cleaned up some backlogs for the state crime lab, but there are backlogs in the county level in the state of Maryland, for testing DNA, which is the best thing we have [in terms of exonerating evidence]. There is not enough emphasis of getting DNA from crime scenes into the system. There are backloads of six to nine months." Scheck, Tr. at 27-8 (emphasis added).

By way of background, CODIS stands for "Combined DNA Index System." This is a computer software program that enables local, State, and national law enforcement crime laboratories to compare DNA profiles electronically, thereby linking serial crimes to each other and identifying suspects by matching DNA profiles from crime scene evidence with profiles from convicted offenders and arrestees. See MARYLAND DNA TRAINING CONFERENCE RESOURCE GUIDE, Governor's Office of Crime Control and Prevention (September 2008).

<sup>170</sup> See generally [www.nga.org/Files/pdf/0805SENTENCEPRES9.PDF](http://www.nga.org/Files/pdf/0805SENTENCEPRES9.PDF) (last visited on Nov. 17, 2008).

collection of DNA evidence, the current laws – although admirable in their breadth and scope – may be too late.<sup>171</sup>

### ***F. Conclusions Relating to DNA***

For all of the foregoing reasons, DNA testing is an excellent tool for improving, but not necessarily guaranteeing, fairness and accuracy in capital cases. The most important lesson that DNA-based exonerations have taught us about the risk of wrongful convictions—that they are really possible—also forces us to conclude that this remarkable science is not infallible. In sum, we agree with Mr. Scheck that DNA has taught us “to have some humility about the risk of error.” *See* Scheck, Tr. at 16 (“And we sit there and we say to ourselves [when assisting with DNA testing through the Innocence Project], ah, this guy has got to be innocent because I see all these problems in the case. And then we say, oh, this guy is going to turn out to be guilty because, look, there's all this other evidence that plainly points towards guilt. And we're wrong! We're wrong a lot. And what I've learned from this very peculiar journey that I've had through

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<sup>171</sup> Additionally, some have argued that the new law is insufficient because it retains a potentially impossible monetary hurdle for poor but innocent defendants. Specifically, petitioners must pay the cost of DNA testing upfront. If the results of the post conviction DNA testing are favorable to the petitioner, the State must repay the cost of testing. *See* § 8-201(g). Critics have argued that the State should front the money and be reimbursed later by guilty petitioners. A logical counter to that point is that a costless chance at freedom (on the front-end, at least) through post-conviction DNA testing is attractive to the innocent and the guilty alike. *See* Jacobi & Carroll, *Acknowledging Guilt*, 102 Nw. U.L. Rev. at 266 (“Whereas most states have responded to the flood of petitions for post-conviction DNA testing by imposing monetary costs on all petitioners, three states—Maryland, Missouri, and Utah—make those penalties conditional on showings of guilt. Conditioning monetary penalties on showings of guilt is an improvement on across-the-board monetary costs for petitions because it does not discriminate against poor but innocent petitioners.”).

Critics have also disparaged § 8-201 for not giving indigent petitioners an express right to representation in post-conviction proceedings seeking to obtain DNA evidence. However, in *Trimble v. State*, 157 Md. App. 73, 849 A.2d 83 (2004), the Maryland Court of Special Appeals concluded that there was no right to counsel in post-conviction DNA testing proceedings. *See also* *Blake v. State*, 395 Md. 213, 909 A.2d 1020 (2006) (no right under § 8-201 to appointed counsel to pursue a petition for post conviction DNA testing). Recently, in *Arey v. State*, 400 Md. 491, 929 A.2d 501 (2007), the Court of Appeals recognized that there was no constitutional or statutory right to counsel at the time a petitioner files the petition for post-conviction testing, but found that a court has the inherent power to appoint counsel at any stage of proceedings under this section.

the criminal justice system is that I don't know. I get these things wrong all the time. And I've got to believe that judges and prosecutors and others of us involved in the system, we have to have some humility about the risk of error. That's what DNA has taught us.”) (emphasis added).

## OTHER ISSUES

### *Deterrence*

***Finding: The Commission finds that there is no persuasive evidence that the death penalty deters homicides in Maryland.***

***(Results of Commission Vote on Finding: AGREE = 17; DISAGREE = 4)***

The three traditional rationales for sentencing offenders are:

- Deterrence
- Incapacitation
- Retribution

They are not unrelated.

One witness paraphrased Harvard Law School Professor Cass Sunstein who pointed out that if the death penalty deters murders – that is, if it saves lives – as a society, we would be morally obligated to embrace it.<sup>172</sup> Certainly the Commission would give great weight to evidence, if it were persuasive, that executing murderers had a deterrent effect on Maryland’s homicide rate.

Two expert witnesses testified before the Commission specifically to address the question of whether the research supports the hypothesis that the death penalty deters homicides.

The first was Professor Brian Forst from American University. He has spent much of his academic career studying this question. He did not come before the Commission as an advocate for or against the death penalty. He said that there are valid factual and moral arguments both supporting and opposing the efficacy of the death penalty.<sup>173</sup>

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<sup>172</sup> September 5, 2008 Oral Testimony of Jeffrey Fagan, Tr. at 216.

<sup>173</sup> September 5, 2008 Oral Testimony of Brian Forst, Tr. at 207 – 208.

His testimony on deterrence, however, was clear: “There is, in short, no convincing evidence that the death penalty deters homicide ... this had become clear by the mid-1980’s and it has been confirmed and re-confirmed in subsequent analyses.”<sup>174</sup> Professor Forst’s research has convinced him that the accumulated scientific evidence simply does not support the proposition that capital punishment deters homicides. He went on to say that the research does support the existence of some deterrent value to swift and efficient criminal justice policies but that generally “the risk of arrest is a stronger deterrent for all crimes than is the conviction. And the risk of conviction is a stronger deterrent than the severity of the term of incarceration. The severity of the punishment tends to have a smaller deterrent effect than the risk of punishment.”<sup>175</sup>

Professor Forst testified that starting in the nineteen sixties, a series of studies attempted to make use of the so-called “natural experiment” by comparing the homicide rates of death penalty states to homicide rates in non-death penalty states.<sup>176</sup> The most significant of these was conducted by Thorsten Sellin who found no systemic differences that could be attributed to a deterrent effect of capital punishment.<sup>177</sup> In his testimony, Professor Forst reported that a number of studies by scholars demonstrate Sellin’s findings to be robust and sound.

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<sup>174</sup> *Id.*, at 213.

<sup>175</sup> *Id.*, at 257 – 258.

<sup>176</sup> *Id.*, at 208.

<sup>177</sup> *Id.*



According to Professor Forst, the first study to claim that the death penalty deters homicides was conducted by Isaac Ehrlich in 1974.<sup>178</sup> Ehrlich used both longitudinal and cross-sectional studies, traditionally relied upon by researchers.

Ehrlich's longitudinal study covered the period from 1933 – 1969. Professor Forst noted that Ehrlich's results were driven heavily by the facts that the death penalty was suspended in this country in the nineteen sixties and that the homicide rate increased during that decade.<sup>179</sup> Thus, the question is whether there is a causal nexus between the suspension of the death penalty and the rise in homicides in the sixties, or whether the rise in the homicide rate was attributable to other factors such as the sharp increase in the population of 18 to 24-year olds.<sup>180</sup> Ehrlich estimated that each execution between 1933 and 1969 prevented eight homicides.<sup>181</sup>

Ehrlich's cross-sectional study, however, which compared homicide rates in death penalty states with non-death penalty states, found a deterrent effect in only two years, 1940 and 1950.<sup>182</sup>

Many scholars have analyzed the Ehrlich study. Professor Forst testified that the overwhelming scientific consensus is that Ehrlich's study cannot withstand scientific scrutiny.<sup>183</sup> Professor Forst stated that Ehrlich's findings are not robust; that is, they hold up only with a particular set of assumptions and collapse with analyses based on different models employing

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<sup>178</sup> *Id.*, at 208 – 209.

<sup>179</sup> *Id.*, at 209 – 210.

<sup>180</sup> *Id.*, at 210.

<sup>181</sup> Jeffrey Fagan, *Death and Deterrence Redux: Science, Law and Causal Reasoning on Capital Punishment*, Ohio State Journal of Criminal Law, vol 4:255 at 256 (2006).

<sup>182</sup> Forst testimony, *supra*, at 210.

<sup>183</sup> *Id.*, at 209, 214 – 215.

different, equally plausible assumptions about how other factors – such as the availability of guns – should be accounted for. Ehrlich’s findings in both his longitudinal and cross-sectional studies held up only with a fairly restrictive set of model specifications and were contradicted by the research of other prominent scholars.<sup>184</sup>

Professor Forst himself set out to address the question of deterrence and conducted a study designed to determine whether the states that lost the presumed deterrent effect of the death penalty in the sixties experienced a larger increase in homicides than states that did not employ capital punishment in 1960. His study tested the deterrence theory by focusing on key variables throughout the decade for all fifty states.<sup>185</sup>

He asked: did states that repealed the death penalty have a larger increase in murder rates than states that had no death penalty? He found no systemic deterrent effect associated with the use of the death penalty. He found that *conviction rates* may deter crime across the board and he found that states with the largest decline in conviction rates had the highest increases in their homicide rates.<sup>186</sup>

Professor Forst observed that “people who do the actual murdering do not reason in the manner that those who set policies about the death penalty think they do.”<sup>187</sup>

Professor Forst also told the Commission about his review of the widely read work of Donohue and Wolfers published in the *Stanford Law Review* in 2006.<sup>188</sup> Recognized as

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<sup>184</sup> *Id.*, at 209 – 210.

<sup>185</sup> *Id.*, at 210 – 211.

<sup>186</sup> *Id.*, at 211 – 212.

<sup>187</sup> *Id.*, at 213.

<sup>188</sup> John J. Donohue and Justin Wolfers, “Uses and Abuses of Empirical Evidence in the Death Penalty Debate,” *Stanford Law Review*, vol. 58 (2006), pp. 791 – 845.

thorough and rigorous,<sup>189</sup> the Donohue and Wolfers article concluded that the studies claiming that the death penalty deters homicides are fundamentally flawed.<sup>190</sup>

Over the past decade, there have been occasional studies, primarily by economists, supporting Ehrlich's claim that executions deter murders. These studies contradict each other in their estimate of lives saved by the death penalty: one says each execution saves about three lives (Shepherd, 2004); another says each execution saves about five lives (Mocan and Gittings, 2003); another says each execution saves as many as 14 lives (Zimmerman, 2004); another says the unofficial moratorium in Texas in 1996 -1997 caused a loss of 90 victims to murder (Coninger and Marchesini).<sup>191</sup> Some scholars claim that a pardon of someone on Death Row, or the release of a condemned person because he is exonerated, actually increases the murder rate.<sup>192</sup>

Professor Jeffrey Fagan, professor of law and public health at Columbia University, agreed with Professor Forst. Professor Fagan testified that the dozen or so studies published since 2000, supporting Isaac Ehrlich's claim that the death penalty is a deterrent, are flawed.<sup>193</sup> In his own published work, Professor Fagan has found the capital homicide rate to be flat over time, unaffected by periods of numerous executions versus periods of few or no executions.<sup>194</sup>

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<sup>189</sup> Forst testimony, *supra*, at 214.

<sup>190</sup> *Id.*, at 214 – 215.

<sup>191</sup> Maryland Commission on Capital Punishment: Deterrence Resources.

<sup>192</sup> Fagan, *supra*, *Ohio State Journal of Criminal Law*, at 263 ff.

<sup>193</sup> September 5, 2008 Oral Testimony of Jeffrey Fagan, Tr. at 218.

<sup>194</sup> *Id.*, at 222 – 223.

Professor Fagan made the following observations about the more recent studies echoing Ehrlich's conclusions:

- These studies cannot be replicated. This is a serious flaw.<sup>195</sup>
- These studies come to erratic, widely variable, internally inconsistent results.<sup>196</sup> For example, Professor Joanna Shepherd, who has written that executions save between three and 18 lives,<sup>197</sup> also wrote that executions deter murder in six states, have no effect on murders in eight states, and actually increased the murder rate, because of a “brutalization effect,” in 13 states.<sup>198</sup> A student of Ehrlich reviewed Ehrlich's data and concluded that instead of deterring eight homicides, each execution really deterred 18.<sup>199</sup>
- These studies fail to take into consideration factors that are widely accepted by scholars as influential on murder rates: the heroin epidemic in the sixties, the cocaine epidemic in the seventies and the crack epidemic in the eighties.<sup>200</sup>
- These studies do not take into account the fact that in most states executions are relatively rare events, and rare events have little influence on behavior.<sup>201</sup>
- These studies do not take into account what, if any, effect life without parole has on homicide rates, even though life without parole has become a widespread alternative penalty for homicide.<sup>202</sup>
- These studies do not take into account the research suggesting it is the risk of being caught that has deterrent value.<sup>203</sup>

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<sup>195</sup> *Id.*, at 221, 224. Efforts to replicate the studies that claim the death penalty deters homicide have concluded that those studies are fragile and the claims of deterrence are inconsistent. “Depending on commonplace methodological adjustments, regression models can just as easily show that executions increase murder or reduce murder.” Fagan, *supra*, *Ohio State Journal of Criminal Law*, at 315.

<sup>196</sup> *Id.*, at 223 – 224.

<sup>197</sup> Fagan, *supra*, *Ohio State Journal of Criminal Law*, at 259.

<sup>198</sup> *Id.*, at 263 – 264.

<sup>199</sup> Radelet and Akers, *Deterrence and the Death Penalty: The Views of the Experts*, *The Journal of Criminal Law and Criminology*, vol. 87, 1 – 16 (1996).

<sup>200</sup> Fagan testimony, *supra*, at 224 – 225.

<sup>201</sup> *Id.*, at 231.

<sup>202</sup> *Id.*, at 232 – 234.

<sup>203</sup> *Id.*, at 234.

- These studies assume that homicidal behavior is rational, but murderers are often anti-social, or suffer from various emotional or mental pathologies.<sup>204</sup>

Professor Fagan has noted elsewhere that the studies claiming that executions deter homicides are econometric studies by economists, and that the economists' assumptions lead to mistaken conclusions.<sup>205</sup> They view punishment as a cost of crime to the criminal and therefore assume a deterrent effect.<sup>206</sup> Professor Fagan re-emphasized a conclusion he had previously reached: "The only scientifically and ethically acceptable conclusion from the complete body of existing social science literature on deterrence and the death penalty is that it is impossible to tell whether deterrent effects are strong or weak, or whether they exist at all."<sup>207</sup>

The Commission considered other evidence supporting the logic of what Professors Forst and Fagan described as the better, well-respected scholarship:

- The death penalty is unpredictably applied, with similar cases treated differently, even in a small state like Maryland.
- In Maryland, less than one percent of convicted murderers receive the death penalty, and less than half of one percent are executed, means that, logically, if a murderer is rationally assessing the odds of being executed, those odds are remote: a murderer has a 99.5% of avoiding execution if caught and convicted.
- Many capital murders are crimes of impulsive, irrational violence, often by persons with drug and alcohol abuse problems, and people with severe emotional and mental illnesses.
- There is insufficient data to judge whether executions deter murder in any state.<sup>208</sup>

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<sup>204</sup> *Id.*, at 223, at 230 – 231.

<sup>205</sup> Fagan, *supra*, *Ohio State Journal of Criminal Law*, at 317.

<sup>206</sup> *Id.*, at 317.

<sup>207</sup> *Id.*, at 315.

<sup>208</sup> Richard Berk, *New Claims About Executions and General Deterrence*, *Journal of Empirical Legal Studies*, vol. 2, 303 – 330 (2005).

Another question is whether the death penalty deters prison violence committed by persons serving life sentences, or, as Harford State’s Attorney Joseph Cassilly testified, whether the absence of the death penalty means that a person serving a life sentence who murders someone in prison faces “no punishment at all”<sup>209</sup> and is not deterred from committing further murders.<sup>210</sup>

The research, presented in the testimony of Professor Robert Johnson, is unrebutted: there is no evidence that lifers are in fact more likely than other prisoners to commit violent offenses.<sup>211</sup>

Professor Fagan also testified that there is no evidence to suggest institutional murders are lower in death penalty states; rather, the evidence correlates lower institutional murder rates with higher investment in safe and well-managed prisons.<sup>212</sup>

Calvin Lightfoot, with a 30-year career in corrections, told the Commission that his experience working in and managing prisons has taught him that the death penalty has no deterrent effect on prison violence.<sup>213</sup>

Professors Forst and Fagan are not voices in the wilderness. The staff made available to us a survey of scholars in the field of criminology who are on the record on the issue of deterrence. The survey was conducted by two well-respected scholars: Michael Radelet and Ronald Akers. They noted that the entire faculty of the University of Florida in 1984 released a

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<sup>209</sup> August 19, 2008 Oral Testimony of State’s Attorney Joseph Cassilly, Tr. at 52.

<sup>210</sup> See Joseph Cassilly Written Testimony at 2.

<sup>211</sup> See Professor Robert Johnson Written Testimony at 2.

<sup>212</sup> Fagan Oral Testimony, *supra* at 270 – 272.

<sup>213</sup> Oral Testimony of Calvin Lightfoot, Tr. at 176 – 177.

statement that “there is no credible scientific research that supports the contention that the threat or use of the death penalty is or has been a deterrent to homicide.”<sup>214</sup>

Akers and Radelet surveyed 70 prominent criminologists, former presidents of the Academy of Criminal Justice Sciences, the American Society of Criminology and the Law and Society Association. Eighty-six percent (86%) agreed that abolition of the death penalty would not have any significant effects on the murder rate. Eighty percent (80%) disagreed that increasing the frequency of executions would deter homicides. So there is wide consensus among America’s top criminologists that the death penalty does and can do little to reduce rates of criminal homicide.

The staff also provided the Commission with a report of a 1995 survey by Hart Research Associates of 386 randomly selected chiefs of police.<sup>215</sup> Over two-thirds of the police chiefs surveyed, who serve on the front line combating crime, rank the death penalty as the least important tool for reducing crime, and do not believe the death penalty has a deterrent effect. The survey shows police chiefs believe, instead, that swift and sure punishment is the most effective deterrent, that reducing drug abuse, reducing joblessness, simplifying court rules, imposing longer sentences when appropriate, putting more cops on the street, and reducing the availability of guns are all more important to crime reduction than the death penalty. Most of the police chiefs said they did not believe murderers think about the range of possible punishments when they kill.

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<sup>214</sup> Michael Radelet and Ronald Akers, “Deterrence and the Death Penalty: the Views of the Experts,” *The Journal of Criminal Law & Criminology*, vol. 87, pp. 1 – 16 (1996).

<sup>215</sup> Richard Dieter, “On the Front Line: Law Enforcement Views on the Death Penalty” (1995).

The Commission also notes that the New Jersey Commission on Capital Punishment addressed specifically “whether the death penalty rationally serves a legitimate penological intent such as deterrence” and found that “[t]here is no compelling evidence that the New Jersey death penalty rationally serves a legitimate penological intent.” The New Jersey Commission found that “[t]he published studies on whether the death penalty functions as a deterrent to other murders are conflicting and inconclusive.”<sup>216</sup>

In sum:

- the experts who testified before us,
- the materials from other experts compiled by our staff,
- the consensus of top police and top criminology scholars around the country,

all agree that there is no persuasive evidence that executions deter homicides.

For these reasons, we find that there is no persuasive evidence that the death penalty deters homicides in Maryland.

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<sup>216</sup> New Jersey Death Penalty Study Commission Report, June 2007, at 24.



## ***A Religious Perspective on Capital Punishment***

***The following section was contributed by Rabbi Mark Loeb and Bishop Denis Madden.***

When the General Assembly chose to set aside three of the Commission's seats for representatives of the state's faith communities, it did so, we believe, with the expectation that the occupants of those seats would reflect both religious belief and attitudes of pastoral care for the human family.

While the Commission is duty bound to report to the legislature on the legal, pragmatic and policy issues relating to the imposition of the death penalty, the undersigned also feel a duty to examine some of the moral and ethical questions that relate to the imposition of the death penalty. From our perspective, views on these issues may be even more determinative as to whether capital punishment is an appropriate penalty under the law.

The religious leaders who contributed to the work of the Commissions recognize that, even in a pluralistic society such as America, the majority of mainstream religious denominations *share a common opposition to the death penalty*. That should not be surprising since these groups share a common source of spiritual guidance, namely, the Bible, with its profound insistence on the sanctity of human life. That belief leads many to a simple conclusion, namely, that a society that cherishes such an ideal cannot respond to an act of murder by committing a second act of homicide, albeit in the name of justice.

Even though some biblical sources do affirm the validity of the death penalty in biblical times, these sources are clearly understood by both Jews and Christians as being part of a progressive spiritual heritage that preaches *constantly evolving standards of human decency*. Thus, for example, when the Bible speaks in the imagery of "an eye for an eye, a tooth for a tooth," etc. it does so to teach the concept of distributive rather than retributive justice, seeing

equal justice as critical, and thereby opposing the spirit of unbridled vengeance, seeing it as something to be transcended rather than endorsed as was true in the past.

Another example of evolved standards of justice is seen in the faithful declaration by Christians that a culture whose punitive ethic is based on the impulse for revenge cannot reflect the spiritual legacy of Jesus of Nazareth who preached forgiveness and reconciliation.

Jews who revere the biblical tradition are wont to assert the *theoretical* validity of capital punishment as an appropriate response to murder. However, Talmudic sources make it very clear that ancient Jewish sages circumscribed the death penalty with stringent procedural safeguards that made it virtually impossible to apply, another intimation of an evolved ideal.

The message of all of these views is that we live in a time of continually evolving moral and ethical standards. We do not tolerate the torture of people in the name of the law. We do not mutilate criminals or hang the bodies of the condemned in the public square. We are beyond such cruelties, and we believe that capital punishment is also a standard of societal behavior whose time has come and gone, noting that it persists mostly in societies with which we hesitate to identify ourselves.

As Commissioners, we have heard many arguments as to the viability and non-viability of the death penalty, as well as concerns as to errors in its application, inequalities and other issues. There remain those who with personal integrity argue that, if it could be applied absolutely without possibility of error, then capital punishment should remain the law of the state. *We humbly and respectfully disagree.* We would argue that legalistic and legislative overhauling is an insufficient response to what we see as a fundamental moral question: Are we, God's people, at liberty to take the life of one of our own, really one of God's own? The teachings of our faiths, applied to our time and place, tell us that when other punishment options

are available to government, we should not resort to the death penalty, not even in the case of one who takes the life of another human being and, by doing so, denies not only his and his victim's human dignity, but God's dominion as well.

In light of our faith-based beliefs, and consistent with them, we endorse without reservation the central recommendation of the Commission and urge state lawmakers to enact legislation to abolish Maryland's death penalty.

## ***The Risk to Correctional Officers***

It is true that law enforcement and correctional officers face a more dangerous environment in upholding the law than the environment that the average citizen faces and that correctional officers face a dangerous environment in our correctional institutions, but there was no evidence presented that the death penalty makes either environment less dangerous or less difficult. Training, equipment and the exercise of care, are more important to the safety of our law enforcement officers than attempting to prevent or eliminate those dangers by pursuing the death penalty in those few cases where a homicide tragedy has occurred.

Offenders sentenced to life in prison without the possibility of parole pose minimal risk to correctional officers and other inmates. Primarily, this is because a prisoner under a life sentence settles into the prison environment and is among the most well-behaved of all prisoners. Prisoners who serve life sentences follow the rules as a matter of self-interest to preserve whatever small benefits can be obtained by following the rules. Commissioner Maynard, who is also the Secretary of the Department of Public Safety and Correctional Services, presented information to the Commission regarding the dangers posed by inmates who serve life, life without parole, and those who are housed on Death Row:

Oh, life without parole? Well, generally, they -- and I've seen this in several systems -- generally, they, over a period of time -- it takes, I think, a while -- a year or two for adjustment, for people to realize that they're going to be there for the rest of their life. And, generally, they settle down and live in the facility and make the best of their situation. But we typically have few problems with the lifers or life without parole, or Death Row, as far as that goes.<sup>217</sup>

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<sup>217</sup> October 7, 2008 Oral Testimony of Commissioner Maynard, Tr. at 14-15.

Life imprisonment without the possibility of parole—which, the Commission emphasizes, is a severe penalty in its own right, one sometimes referred to “death by incarceration”<sup>218</sup>—comes with far fewer burdens to society than does capital punishment. Not only does life without parole avoid the horror of the state executing an innocent defendant while still gravely punishing the guilty defendant, it also comes at a fraction of the time and expense as a death sentence.

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<sup>218</sup> For example, *see* Johnson, R. (2008). Life without parole, America's other Death Penalty: notes on life under sentence of death by incarceration. *The Prison Journal*, 88(2), 328-346.

### ***Juror Issues: Comment Arising from Jury Composition and Qualification***

Jury bias as it pertains to all capital cases was explored by Thomas Brewer. He testified that he has found through his own research, that, cognitively, jurors form opinions and then process all subsequent information heard at the trial according to these preconceived opinions. In fact, he found that one out of three jurors decided on a death sentence before the sentencing phase even began. This suggests that jurors are using outside information to form their opinions regarding the culpability of the defendant and disregarding the mitigating factors presented during sentencing proceedings.

The bias in capital trials, Thomas Brewer explains, actually occurs from the jury selection stage. In capital cases, jurors must be “death qualified” which means that they cannot completely oppose the death penalty. This process results in a jury that is more likely to convict, disregard mitigating factors, and return a death sentence, and less likely to question the prosecution, as compared to the general population. In addition, the actual process by which death qualified jurors are chosen is problematic because it biases the jury by beginning the trial process with questions regarding the death penalty—in essence, beginning the trial with the sentencing phase. Thomas Brewer explains that although the process of selecting a jury is supposed to also select jurors who are “life qualified,” who would consider a punishment less than death, the actual process is not effective at eliminating jurors who are not life qualified.<sup>219</sup>

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<sup>219</sup> July 28, 2008 Oral Testimony of Professor Thomas Brewer, Tr. at 162 – 196.

## **APPENDIX A: Report of the Victims' Subcommittee<sup>220</sup>**

As victim members of the Commission, we have been asked to reduce our collective thoughts to writing. While there are rights on paper and services in some areas, we know that those required brochures and notices are not provided to all victims or their surviving family. Justice for victims and especially survivors must include full implementation, compliance, and enforcement of victim services and rights.

### ***Brief Overview of the advancement of Maryland's victim services and especially the needs of survivors of homicide victims***

#### ***Victim Services in Maryland***

Victim Services has come a long way in facilitating equality and justice to survivors of homicide victims in the criminal court process through the work of legislation and the work of governmental, nonprofit, and faith-based organizations. Existing legislation, including the Constitutional amendment for victims' rights and the crime notification process, grants survivors the right to be informed of criminal court proceedings involving the defendant(s) in their case, the right to be present during criminal court proceedings and the right to be heard through victim impact statements in the court. Victim Information Notification Everyday ("VINE") provides survivors with the right to be notified about the location and movement of a defendant(s) in the criminal justice system. The Criminal Injuries Board of Maryland allots funds for potential reimbursement of funeral costs, medical expenses, crime scene clean-up, dependency, and some minor assistance for counseling services.

Every State's Attorney's office within Maryland has a victim services program that offers a variable level of services that may or may not include court status information, court

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<sup>220</sup> The Victims' Committee is comprised of Oliver Smith, Vicki Schieber, and Rick Prothero.

accompaniment, referrals and support. Some law enforcement agencies provide services, but many do not. Some of the prosecutors' offices may have grief support groups that assist survivors along their painful, life-long journeys – others may not provide any services. The Maryland Crime Victims' Resource Center, Inc., ("MCVRC") is one example of a nonprofit organization that serves all victims of crime.<sup>221</sup> MCVRC provides statewide victim services including services to the survivors of homicide victims. These free, comprehensive services include sensitive victim advocates who offer information and referrals, court accompaniment, mediation, and follow-up contacts; a clinician, who provides individual and family counseling, and facilitates a support group; and legal services to enhance services to survivors. MCVRC attorneys also represent victims during criminal court proceedings to ensure the protection of their rights and to advocate for restorative justice on their behalf.

### ***Victim Services in the Future for Maryland***

#### **I. Statewide Uniformity**

Despite the great strides to provide survivors rights in the criminal justice system, there is a need to have statewide uniformity in enforcing victims' rights laws that already exist. Some jurisdictions utilize the laws to ensure that survivors' voices are heard and that they are informed and present during the criminal court proceedings, but some jurisdictions fall by the wayside in carrying out these rights. Periodically, if not annually, the State needs to conduct needs, rights, and services assessment for victims. Only if this occurs and resources are provided to address the gaps will victims obtain and maintain reasonable expectations that their interests are not ignored by the justice system.

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<sup>221</sup> For more information on resources for victims in Maryland, please see the Governor's Office of Crime Control and Prevention Victim Services website: <http://www.goccp.org/victim/index.php>.



## II. System Based Services - Law Enforcement and Prosecution

Training for law enforcement both at the entry-level and in-service training for experienced officers must explicitly include dealing with survivors of homicide, and the rights of crime victims. Under Public Safety Article, section 3-207(6), there are training provisions for rape and sexual offenses, however it is important that these provisions be expanded to include homicide offenses, and contact and treatment of homicide survivors. Law enforcement personnel often are the first contact. They need to have applicable services in place to address the initial trauma that occurs, and then training on how to refer victims to appropriate victim service providers in non-profit and prosecutor based programs. In this way, survivors will receive a continuity of services and support while maneuvering through a foreign criminal justice system. Victim witness staff in prosecutor's offices need to be more than assistants to the prosecutor who do nothing more than coordinate schedules. They must receive adequate training to provide meaningful assistance to victims. Moreover, as system based advocates, they will be subject to the State's discovery obligations to defendants, and the survivors must be assured that their communications with service providers regarding therapy, support groups, need for treatment, etc. is confidential and privileged.

## III. Non-Profit Based Services

While there are many non-profits that provide services to domestic violence and sexual assault victims, there are few non-profit service providers who provide services to survivors of homicide victims. It is critical that there be an expansion of services available from non-profits. Non-profits should have adequately trained social workers and attorneys who can provide privileged services to survivors. Services and rights are essential to the holistic needs of survivors of homicide victims. Localized services are imperative for victims. Victims may need

creditor intercession, employer intercession, compensation assistance, and other varied legal and social services assistance. Expansion and/or emulation of effective services also must occur to properly assist survivors of homicide. To that end, the Victims' Subcommittee recommends that the State support and fund non-profit organizations that specialize in assisting the families of homicide victims.

#### IV. Compensation

While the emotional impact of homicide may be overwhelming, the financial consequences of crime may further devastate the survivors. Maryland does provide criminal injuries compensation benefits, but the levels of those benefits for homicide survivors have not been updated for years. For example, the compensation under Criminal Procedure Article, section 11-811 for crime scene clean-up is limited to \$250, counseling \$1,000 per person and \$5,000 total, funeral expenses to \$5,000, and dependency benefits to \$25,000 regardless of the number of eligible beneficiaries; however, awards are reduced from any life insurance benefits in excess of \$25,000. While an additional award of \$25,000 is available for a permanent disability claim, a similar benefit is not provided for a dependency claim. Moreover, more than fifty percent (50%) of the claims to the Board are denied, often without a hearing, and survivors do not have access to legal services to challenge the denial of their claims in court. Expanding benefits to survivors will only increase the amount of federal funds to the State as the federal government provides a sixty percent (60%) federal match of State dollars expended. These levels must be increased and services must be provided to allow survivors due process when their claims are denied.

#### V. Finality

Survivors have a desire for finality in homicide cases, but the existing structure, even with life without parole, does not provide that to victims. Defendants may file for a reconsideration of sentence and the court has up to five years to determine whether to reduce the sentence. Even beyond the five years, offenders may develop a substance abuse problem while incarcerated and file for a substance abuse release any time. The Governor may pardon or commute a sentence. Diminution credits, some of which are “earned” up front, reduce sentences. For homicide cases, there should be exceptions to give the finality that the abolition of the death penalty is intended to provide victims. There must be truth-in-sentencing at least for homicide cases.

#### VI. Awareness and Education

An awareness and educational campaign is needed to ensure that victims are not denied their lawful rights, and that the community, the bench, the bar, social service entities, law enforcement and other interested parties fully understand their roles and obligations to victims and survivors of homicide. We believe it is imperative that all parties understand the time phases following a murder in order to guarantee the coordination of services for the victims’ family members:

- Immediate phase – shock and disbelief accompanied by a multitude of emotions and questions requiring law enforcement training for provision of victim information and support;
- Near term phase – support often comes from a social network structure of relatives, friends, faith community, work place counseling, etc. to deal with funeral, counseling services, and financial compensation issues which neither may be known about nor available to all victims; and
- Long term phase – continued support services needed as victims’ families often become involved in and consumed with investigation, arrests and prosecutions of the assailant. Months and even years of support services are needed as there may be neither identification nor an arrest of the person responsible for the murder.

The advancement of the interests of crime victims has on paper changed the support system to better provide justice to all. It is time that what has been promised is delivered in reality to all victims and survivors in Maryland.

## VII. Funding

All victim survivors need to obtain first-rate comprehensive services. Maryland currently does not use general funds for victims' services. Funding for victim services from the federal level derives from assessment on federal offenders under the Victims of Crime Act ("VOCA"). In Maryland, these funds are administered through the Department of Human Resources ("DHR"). In recent years, funding from VOCA to states has decreased. Maryland has a Maryland Victim of Crime Fund ("MVOC"), which is likewise funded by costs assessed against criminal defendants. MVOC to date provides only start-up funding, and not sustainability funding. Maryland has a need to expand victim services for survivors of homicide victims to a consistent level statewide and to have a sustainable funding source to maintain those services to victims in the future.

If the death penalty is abolished in Maryland and financial savings are realized as anticipated, those savings need to be dedicated directly to assist victims by providing and enforcing victims services, rights, and compensation. Any Maryland legislation introduced shall have provisions that require that the Governor include any general fund savings as an additional appropriation into MVOC to create and maintain urgently needed resources for crime victims.

Additionally, we recommend that the administration of VOCA funds be transitioned from DHR to the Governor's Office of Crime Control and Prevention ("GOCCP"). Given GOCCP's close relationships with the victims' community, the State's Attorney's offices, sheriffs and

municipal law enforcement, we believe that GOCCP could more effectively administer the VOCA funds.

### *Conclusion of the Victims' Subcommittee*

We, as victim members of the Commission, believe that the above recommendations are imperative for inclusion in any draft legislation that may follow the report. There needs to be a holistic approach to victims' interests. Any savings from a repeal action should be targeted to assist the victims of crime, and especially the survivors of homicide. The results of the Commission's recommendation cannot be a façade to victim/survivor concerns. The Commission's recommendations must be clearly articulated to ensure that any legislation introduced will be dedicated to the interests of victims.

In spite of all our efforts to collect data to assist with meaningful recommendations on state-wide service availability, services training costs, benefits and compensation for survivors, awareness and educational opportunities, etc. we were not able to draw any valid conclusions from the information we did obtain. We agree from our meetings and conversations with service providers and recipients, law enforcement personnel, prosecutors and public defenders that the following is true:

- Services are not uniformly offered in Maryland
- Many available programs are under funded and under staffed
- There are large discrepancies in public vs. non-profit resources
- Most homicide victims services costs are not separated from rape/assault and domestic violence counseling services, and
- Awareness and education is needed for all parties in the service system.

We believe that a comprehensive statewide survey needs to be undertaken to identify these information deficits so that the funds can be properly targeted. We have attached a chart that we recommend be completed for the determination of future service needs and costs, and we have

already begun the process. Our goal is to deliver this information early in the 2009 legislative session.

## *Victims' Subcommittee Chart*

### Organizations Arranged by the Service they Provide\*

#### Counseling Services

ORGANIZATION PRIMARY LOCATION & COUNTIES COVERED	NONPROFIT OR STATE AGENCY	CONTACT PERSON	CONTACT INFORMATION (PHONE AND E-MAIL)	TYPE OF SERVICE(S) PROVIDED	AMOUNT/ SOURCE OF FUNDING	NUMBER/ GEOGRAPHY OF PEOPLE SERVED	AMOUNT CHARGED FOR SERVICES

#### Legal Services

ORGANIZATION PRIMARY LOCATION & COUNTIES COVERED	NONPROFIT OR STATE AGENCY	CONTACT PERSON	CONTACT INFORMATION (PHONE AND E-MAIL)	TYPE OF SERVICE(S) PROVIDED	AMOUNT/ SOURCE OF FUNDING	NUMBER/ GEOGRAPHY OF PEOPLE SERVED	AMOUNT CHARGED FOR SERVICES

#### Financial Services

ORGANIZATION PRIMARY LOCATION & COUNTIES COVERED	NONPROFIT OR STATE AGENCY	CONTACT PERSON	CONTACT INFORMATION (PHONE AND E-MAIL)	TYPE OF SERVICE(S) PROVIDED	AMOUNT/ SOURCE OF FUNDING	NUMBER/ GEOGRAPHY OF PEOPLE SERVED	AMOUNT CHARGED FOR SERVICES

**\* This chart does NOT include organizations that provide services without a trained social worker or psychologist trained to deal with patients suffering from traumatic grief nor any organizations whose primary goal is advocacy.**

## **APPENDIX B: Commission Member Biographical Information**

### **Chair of the Commission**

**Benjamin R. Civiletti**, Ben Civiletti served as the United States Attorney General from 1979 to 1981, during the Carter Administration. During his tenure he argued several high profile cases on behalf of the United States, including arguing before the International Court of Justice on behalf of Americans held captive in Iran during the Iran Hostage Crisis, and arguing before the U.S. Supreme Court in support of the government's right to denaturalize Nazi war criminals. He was an Assistant U.S. Attorney from 1962 to 1964, before joining the Baltimore law firm of Venable, Baetjer & Howard. In 1977, he left private practice to join the U.S. Department of Justice. He served as Deputy U.S. Attorney General from 1977 to 1979, before becoming Attorney General in 1979. He received his bachelor's degree in psychology from the Johns Hopkins University and received his Juris Doctor from the University of Maryland School of Law in 1961. He is the recipient of several awards, including the Baltimore Urban League's Equal Justice Award, and was a founding Chair of the Maryland Legal Services Corporation. He is a member of the National Honorary Campaign Committee, National Law Enforcement Officers Memorial Fund. He currently works as a senior partner at Venable, LLP, in Baltimore and formerly served as chair of the firm.

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The following is a list of members appointed by Governor O'Malley to the Maryland Commission on Capital Punishment – and the groups they represent, as required by the law establishing the Commission:

**Chief Bernadette DiPino**, Representing the Maryland Chiefs of Police – Chief DiPino is a resident of Worcester County and serves as Chief of Police for the Ocean City Police Department. She is a fourth-generation police officer who has been in law enforcement for 23 years. Chief Dipino currently serves as 2nd Vice President of the Maryland Chiefs of Police Association and is a member of the International Chiefs of Police Association. She graduated from the FBI National Academy's 204th session in March 2001.

**Percel Odel Alston, Jr.**, Representing the Maryland Fraternal Order of Police – Detective Alston is the Immediate Past President of the Prince George's County Fraternal Order of Police Lodge 89 and presently serves as the Legislative Chairman for the Maryland State Lodge Fraternal Order of Police. Mr. Alston served in the Prince George's Police Department for 24 years. A great portion of his career was spent in the narcotics division as an undercover drug officer. Mr. Alston has testified in federal, circuit and district court cases as an expert on narcotics. Mr. Alston is a 1983 graduate of Howard University.

**Noel Lewis Godfrey**, Mr. Godfrey is a Correctional Officer at Patuxent Institution, Jessup Maryland. He is a Shop Steward and Vice President of Local 1319. Mr. Godfrey was a delegate at the 38th International Convention in San Francisco July 27 - August 1, 2008. He is a Program Board member of the Institute for Caribbean Studies. He just returned from a week of meetings on Capitol Hill, where he participated in the National Legislative Conference on the Caribbean. Keynote speakers included Rep. Barbara Lee of California and Yvette Clark representative of the



11th district of Brooklyn N.Y. A resident of Pikesville Maryland, Noel has been serving the citizens also in the areas of Life Insurance and financial services since 1986. Prior to migrating to the United States Mr. Godfrey held several positions in the field of banking and finance. He was also the Assistant Branch Manager of Victoria Mutual Building Society in Kingston, Jamaica. Mr. Godfrey is a graduate of the Jamaica Institute of Management Education. He also studied Management at the University of the West Indies and Sir George William University in Montreal, Canada. Mr. Godfrey is currently an Associate Minister at New Antioch Baptist Church of Randallstown Md.

**Kirk Noble Bloodsworth**, Former State Prisoner who was Exonerated – Mr. Bloodsworth is a former Marine who was convicted of sexual assault, rape, and first degree premeditated murder and sentenced to death in 1985. Mr. Bloodsworth's case was the first Capital conviction overturned as a result of DNA testing in the United States. He served 2 years on Death Row and a total of 9 years in prison and after numerous appeals and after DNA testing in the case, it was determined in 1993 that his DNA did not match what was found at the crime scene and he was finally released as a result. Currently, Mr. Bloodsworth serves as a program officer for the Justice Project and the Justice Project Education Fund.

**Reverend Alan M. Gould, Sr.**, Representing the Religious Community – Reverend Alan Gould, Sr. of Dorchester County has been a member of the clergy for the A.M.E. Church since 1978. He is a pastor at the Allen Chapel African Methodist Episcopal Church in Silver Spring, and has served in numerous business and communal capacities throughout his career.

**Bishop Denis J. Madden**, Archdiocese of Baltimore, Representing the Religious Community – Bishop Denis Madden is an Auxiliary Bishop in the Archdiocese of Baltimore and oversees approximately 97 parishes and 67 schools in Baltimore City, Baltimore County and Harford County. Bishop Madden is a licensed clinical psychologist in the State of Maryland and the District of Columbia. He has edited a book and written a number of journal articles in the field of psychology dealing with violence. Bishop Madden lived in Jerusalem for 9 years at Tantur, an interfaith and ecumenical institute of the Vatican. There he worked on peace initiatives and humanitarian relief projects on behalf of the Holy See.

**Rabbi Mark G. Loeb**, Beth El Congregation, Representing the Religious Community – Rabbi Mark Loeb is currently Rabbi Emeritus at Beth El Congregation in Baltimore County. Rabbi Loeb also served as Chair of the Committee on Government Relations for the Baltimore Jewish Community Relations Council, and served 4 years on the Clergy Interfaith Roundtable as Chair.

**Rick N. Prothero**, Brother of Victim, Representing Family Member of Murder Victim – Mr. Prothero is a resident of Harford County and is a physical therapist with his own clinic in Havre De Grace. Mr. Prothero's brother was a Baltimore County Police Officer who was working as an off-duty security guard when he was shot and killed during a robbery in February of 2000 in Pikesville.

**Vicki A. Schieber**, Mother of Victim, Representing Family Member of Murder Victim - Mrs. Schieber has a background in financial and management roles and has been active in non-profits dedicated to literacy programs that serve the elderly, disabled and low-income residents of Washington, D.C. Mrs. Schieber serves as Chair of the Murder Victims' Families for Human

Rights, a national group. In 1998, her daughter was raped and murdered while finishing her first year of graduate school at the Wharton School at the University of Pennsylvania.

**Oliver Smith**, Father of Victim, Representing Family Member of Murder Victim – Mr. Smith is a resident of Prince George's County with over 35 years of experience in the telecommunications field. In 1997, Mr. Smith's son, a Metropolitan police officer, was shot and killed, execution-style, outside of his home during a robbery attempt. Since this tragedy, Mr. Smith has dedicated his life to bringing awareness to the public, police and the judicial system about victimization issues. He is a founding member of the Washington, D.C. chapter of Concerns of Police Survivors (COPS).

**Matthew Campbell**, Representing Member of the Public - Mr. Campbell is legal counsel for the Market Regulation Department of the Financial Industry Regulatory Authority, where he does securities regulation, investigation, and litigation. Prior to that, he served as Deputy State's Attorney for the Howard County State's Attorney's Office. He also served in the Montgomery County State's Attorney's Office as a white collar crime investigator, an Assistant State's Attorney, and Deputy State's Attorney.

**David Kendall**, Partner, Williams and Connolly LLP, Representing Member of the Public – Mr. Kendall, a Montgomery County resident and partner at Williams and Connolly, LLP, in Washington, has practiced law for over 30 years. After clerking on the U.S. Supreme Court for Justice Byron R. White, Mr. Kendall spent five years as Associate Counsel for the NAACP Legal Defense Fund, Inc. In that capacity, in 1977, Mr. Kendall argued the case of Coker v. Georgia before the Supreme Court – in which the Supreme Court declared the death penalty for the rape of an adult woman unconstitutional where the victim's life had not been taken. He has written several scholarly articles on constitutional media and criminal law and has taught at Columbia University's School of Law and Georgetown Law Center.

**Delegate Sandy Rosenberg**, District 41, Baltimore City, Representing Member of the Public – Delegate Rosenberg currently serves as Vice Chair of the Judiciary Committee and has been a member of the General Assembly for 26 years. He is also an adjunct professor at the University of Baltimore and University of Maryland Law Schools.

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The following members were appointed by Senate President Thomas V. "Mike" Miller to the Maryland Commission on Capital Punishment:

**Senator Jamie Raskin** – Senator Raskin has been a member of the Maryland State Senate since 2007. He represents Silver Spring and Takoma Park and is currently a member of the Judicial Proceedings Committee. He is also a Professor of Constitutional Law at American University's Washington College of Law and has taught criminal law and procedure. He is a former member of the Hate Crimes Commission in Montgomery County, and a former member of the Gun Policy Task Force for the City of Takoma Park. Senator Raskin served on President Clinton's Justice Department transition team.

**Senator James N. Robey** – Senator Robey has been a member of the Maryland State Senate since 2007. He is currently the Assistant Deputy Majority Leader, and a member of the Budget

and Taxation Committee, and the Public Safety, Transportation & Environment Subcommittee. He served as County Executive for Howard County from 1998 to 2006. He was Chief of Police for Howard County from 1991 to 1998 and a police officer from 1966 to 1991.

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The following members were appointed by Speaker of the House Michael Busch to the Maryland Commission on Capital Punishment:

**Delegate Adrienne A. Jones** – Delegate Jones has been a member of House of Delegates since 1997, and Speaker Pro Tem since 2003. She is a member of the Appropriations Committee. She is currently the Executive Director for the Office of Fair Practices and Community Affairs in Baltimore County. She also served as Director for the Office of Minority Affairs for Baltimore County from 1989 to 1995.

**Delegate William Frank** – Delegate Frank has been a member of the House of Delegates since 2003, and has served as Chief Deputy Minority Whip since 2005. He is a member of the Judiciary Committee. He is a development and marketing consultant for the Archdiocese of Baltimore.

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The following members will be representing various legal and public safety entities, as required by the law establishing the Commission:

**Shanetta J. Paskel**, Representing Attorney General Douglas Gansler – Ms. Paskel is an Assistant Attorney General and Director for the Office of Legislative Affairs in the Maryland Attorney General's office. Prior to that she served as Assistant Attorney General for the District of Columbia from 2005 to 2007. She also worked for the Prince George's County Office of Child Support Enforcement from 2003 to 2005.

**Katy C. O'Donnell**, Representative of the Office of the Public Defender – Ms. O'Donnell is the Chief Attorney of the Maryland Office of the Public Defender's Capital Defense Division. The Capital Defense Division coordinates the delivery of statewide legal defense services in capital murder cases. Ms. O'Donnell has been with the Office of the Public Defender for over 23 years and has been involved in capital litigation exclusively since 1991.

**Scott Shellenberger**, State's Attorney who has prosecuted a death penalty case – Mr. Shellenberger has been the Baltimore County State's Attorney since 2007. He has worked for the Law Office of Peter G. Angelos, and has served as Supervising Attorney in the Baltimore County State's Attorney Office.

**The Honorable William Spellbring**, Former Member of the Judiciary as Appointed by Chief Judge Bell – Judge Spellbring was a Circuit Court Judge for Prince George's County from 1992 until his retirement in 2007. Prior to that, he was a lawyer at O'Malley & Miles. He began his legal career as an Assistant State's Attorney from 1971 to 1976. He served in the United States Army Americal Division in the Republic of Vietnam from 1969 to 1970.

**Secretary Gary Maynard**, Secretary of Public Safety & Correctional Services – Secretary Maynard has served as Secretary for the Department of Public Safety and Correctional Services since 2007. Prior to that he was the Director for the Iowa Department of Corrections, from 2003 to 2007. From 2001 to 2003, he was the Director of the Department of Corrections for South Carolina. He served as Secretary for Veterans Affairs for the State of Oklahoma from 1993 to 1995 and was the Director of the Southwestern Region for the Oklahoma Department of Corrections.

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The work of the Commission was aided by several staff members:

**Rachel Philofsky**, Director of the Maryland Statistical Analysis Center, Governor’s Office of Crime Control and Prevention.

**Ráchael Powers**, Statistical Analyst, Maryland Statistical Analysis Center, Governor’s Office of Crime Control and Prevention.

**Patty Mochel**, Director of Communications, Governor’s Office of Crime Control and Prevention.

**Danette Edwards**, Associate Attorney, Venable LLP.

**Heather Mitchell**, Associate Attorney, Venable LLP.

**Nathaniel Berry**, Summer Associate, Venable LLP.

**Uyen Pham**, Summer Associate, Venable LLP.

## APPENDIX C: Testimony List

The Maryland Commission on Capital Punishment held five public hearings between July 28, 2008 and September 22, 2008. Thirty-six experts and fifty-two members of the public presented testimony to the Commission.<sup>222</sup> The experts were invited based on recommendations from Commissioners. If a Commissioner felt there was an expert witness that was essential for the Commission to hear testimony from, they were encouraged to the name of the expert they would like the staff to invite to testify before the Commission.<sup>223</sup> Once a Commissioner submitted a request to solicit testimony from a specific expert, the Chairman reviewed the request, and upon the Chairman's approval, the staff invited the expert to testify at one of the public hearings. Please see Table 1 for the list of expert testimony organized by hearing date.

Members of the public were encouraged to testify as well. Logistical information on testimony was provided on the Commission website.<sup>224</sup>

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<sup>222</sup> The Commission received written testimony from many other experts and members of the public which are too numerous to list here.

<sup>223</sup> The Commission staff received specific requests for expert testimony from the following members of the Commission: Chairman Civiletti, Commissioner Bloodsworth, Commissioner Madden, Commissioner Loeb, Commissioner Shieber, Commissioner Campbell, Commissioner Kendall, Commissioner Rosenberg, Commissioner Raskin, Commissioner Jones, Commissioner O'Donnell and Commissioner Shellenberger.

<sup>224</sup> Protocols listed on the Commission website regarding public testimony at the Commission hearings: If you are a member of the public and wish to testify, you must sign up between 2:30 - 3:00pm on the day of the hearing. Sign-ups are on a first come first serve basis and will be made available at a table directly outside of the Joint Hearing Room. Members of the public must limit their testimony to a maximum of 3-5 minutes. Although it is encouraged that your testimony be representative of your candid opinions on or experiences with capital punishment, inappropriate or offensive language will not be tolerated. Please be mindful that the hearings are a public forum. Also, if possible, please provide a written copy of your testimony to the staff at the sign-up table or via email. Website: <http://www.goccp.org/capital-punishment/index.php> accessed on December 4, 2008.

Table 1: Expert Testimony by Hearing Date

Hearing Date	Name	Title/Organization	Subject	Position/POV
7/28/2008	Bill Babbitt	Brother of Manny Babbitt	Disparities: Personal Experience	CJ system has failed the mentally ill; brother was executed despite illness
7/28/2008	Bryan Stevenson	Executive Director, Equal Justice Initiative	Disparities: Research	Minorities and low SES are treated unfairly in CJ system
7/28/2008	David Baldus	Professor, University of Iowa	Disparities: Research	Racial and SES disparities found in MD; DP is not solely based on legal factors
7/28/2008	David Kaczynski	Brother of Ted Kaczynski	Disparities: Personal Experience	CJ system is too subjective and not impartial; great ordeal after turning in his brother
7/28/2008	Deborah T. Poritz	Former Chief Justice, Supreme Court of New Jersey	Issues of Law	Experience as the Former Chief Justice of the Supreme Court of New Jersey
7/28/2008	Ray Paternoster	Professor, University of Maryland	Disparities: Research	Race of victim matters; jurisdictional disparities in MD found
7/28/2008	Thomas Brewer	Professor, Kent State University	Disparities: Research	Bias and problems in capital cases throughout the process from jury selection to sentencing
8/5/2008	Deborah Fleischaker	Previous Director, ABA DP Moratorium Imp. Project	Issues of Law	Death is different; the process is complicated and can lead to ineffectual representation
8/5/2008	Harry Trainor	Maryland Attorney	Issues of Law	Defending capital cases is different, requires specialized expertise, and is costly
8/5/2008	Stuart Simms	Former State's Attorney in Balt. City	Issues of Law	The amount of resources involved in capital cases takes away from other areas of the CJ system
8/5/2008	William Brennan	Maryland Attorney	Issues of Law	Defending capital cases is different, requires specialized expertise, and is costly
8/19/2008	Andrew Sonner	Associate Judge, Courts of Maryland	Moral Standpoint	Death penalty is morally wrong
8/19/2008	Edwin O'Brien	Archbishop of Baltimore	Moral Standpoint	Death penalty is morally wrong; official statement of the church against DP
8/19/2008	Eugene Sutton	Episcopal Diocese of Maryland	Moral Standpoint	Death penalty is morally wrong; official statement of the church against DP
8/19/2008	Joe Cassilly	President of National District Attorneys Association	Cost: Research	Refutes findings in Roman study; DP is necessary for society to function
8/19/2008	John Roman	Urban Institute	Cost: Research	Death penalty is Maryland is very costly, more than non-capital cases
8/19/2008	John Schol	Bishop, Washington-Baltimore Conference	Moral Standpoint	Death penalty is morally wrong; official statement of the church against DP
8/19/2008	Judith Catterton	Attorney	Issues of Law	Capital cases require extensive resources and expertise; impossible to meet standards
8/19/2008	Kathy Garcia	Center for Traumatic Grief	Victim Impact: Personal Experience	Capital cases are too stressful for victim's family
8/19/2008	Marc Mauer	The Sentencing Project	Disparities: Research	There is racial bias throughout the sentencing process in all criminal cases
9/5/2008	Barry Scheck	Co-director, Innocence Project	Innocent Risk: Research	Risk of mistake is unacceptable; DNA has exonerated wrongfully convicted

9/5/2008	Brian Forst	Professor, American University	Deterrence: Research	No evidence that DP is a deterrent for the general population
9/5/2008	Glenn Ivey	State's Attorney: Prince George's County	Cost: Personal Experience	Capital cases require too many resources to warrant pursuing
9/5/2008	Jeffrey Fagan	Professor, Columbia University	Deterrence: Research	No evidence that DP is a deterrent for the general population
9/5/2008	Jennifer Thompson	Rape Victim, Advocate	Innocent Risk: Personal Experience	Eyewitness testimony is faulty and relied on too much in trials
9/5/2008	Jonathan Gradess	Director, New York State Defenders Association	Cost: Research and Personal Experience	Capital cases cost much more than non-capital cases
9/5/2008	Kirk Bloodsworth	Wrongfully convicted	Innocent Risk: Personal Experience	Personal experience being wrongfully convicted for murder
9/5/2008	Michael Millemann	Professor, University of Maryland	Issues of Law	Death penalty is not fixable because of errors, cost, and disparities
9/5/2008	Richard Dieter	Executive Direction, Death Penalty Information Center	Issues of Law	US is moving away from death penalty; public support in MD is declining
9/22/2008	Donald Zaremba	Office of the Public Defender, Baltimore County	Issues of Law	Mitigating factors are not a safeguard in capital cases because it is very hard to uncover them
9/22/2008	James Abbott	Police Chief; Member of the NJ Commission	Victim Impact: Personal Experience	The death penalty process is too hard on the victim's family
9/22/2008	John Deckenbeck	Reverend, United Church of Christ	Moral Standpoint	The death penalty undermines respect for human life
9/22/2008	Joseph Tydings	US Senator from Maryland	Cost: Personal Experience	It costs too much to fund adequate counsel to avoid mistakes in capital cases
9/22/2008	Kenneth Stanton	Professor, University of Baltimore	Cost: Research	Affirmed Urban Institute's study; costs could be allocated elsewhere in the system
9/22/2008	Patrick Kent	Office of the Public Defender in Maryland	Innocent Risk: Research	Science is fallible and can lead to wrongful conviction
9/22/2008	Peter Nord	Presbytery of Baltimore	Moral Standpoint	The death penalty undermines respect for human life

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# MARYLAND COMMISSION

ON

## CAPITAL PUNISHMENT

### *MINORITY REPORT*

#### **INTRODUCTION**

The Maryland Commission on Capital Punishment was created by a 2008 Act of the Maryland General Assembly for the purpose of studying all aspects of capital punishment as currently and historically administered in the State.

Pursuant to subsection (j) of the Act, the undersigned Commissioners present their Minority Report.

At the outset, we take this opportunity to thank our Chairman for his outstanding leadership and fair, open-minded approach to this complex and difficult issue. At all times, opposing points of view were heard and time was afforded to all who wished to speak. The fairness of this process was due to the leadership of our Chairman, Benjamin Civiletti.

To our fellow Commissioners, we thank you for your frankness, point of view and the unique life experiences you have brought to this discussion. While we can all agree to disagree on this very complex issue, it is with the deepest respect for your opinions that we thank you for serving with us.

To the Commission staff from the Governor's Office of Crime Control and Prevention Statistical Analysis Center, we thank you for providing us with complete, thorough information which enabled us to reach our conclusions on these issues.

The current Death penalty Statute was enacted in 1978. The United States Supreme Court and Maryland's highest court have upheld its constitutionality. As required by the

holdings of the Supreme Court, it is a statute of guided discretion, a statute that prescribes what types of murders are punishable by death, what type of aggravating factors a jury must find to impose a sentence of death, and how mitigating factors are weighed against those aggravating factors before a jury can consider the imposition of a sentence of death.

The Maryland legislature is elected to express the will of the people of Maryland. A Washington Post poll in 2007 found that 52% of Maryland adults favored life without parole for the crime of murder, while 43% supported the death penalty. A similar finding by Gonzales Research and Marketing Strategies in January of 2008 was that 42% supported death while 48% supported life without parole. Significantly, these polls do not address the question of the percentage of Maryland residents who oppose the death penalty.

In January of 2008, the Baltimore Sun conducted a poll to measure support for and opposition to the death penalty. This poll found that 57% of Maryland residents supported the death penalty, 33% opposed it and 10% were not sure. It is important to note that no poll finding more Maryland residents oppose the death penalty than favor it has been brought to the Commission's attention.

This position has been echoed in our Maryland legislature that, for the past two years, has rejected efforts to repeal the death penalty. We believe the will of the citizens of Maryland should be honored and the death penalty should remain a sentencing option for the worst murders.

This Commission was charged with examining seven areas regarding the death penalty. Approximately thirty-four witnesses designated as experts testified before the Commission. Thirty-two of these experts recommended abolishing the death penalty in Maryland. Many of those who recommended the repeal of the death penalty statute did so without making a single reference to the questions the Senate Bill creating the Commission required be addressed.

Clearly, many of the experts had a bias against the death penalty, which prevented them from speaking to the specific areas of inquiry the General Assembly charged the Commission to review.

The Commission sat for hours watching as the organized opposition to the death penalty brought witnesses from all over the country who know precious little about the death penalty as it is applied in Maryland. The watchdog of a community is most effective when it is from the community. The legal community in Maryland has been vigilant in the care taken in death penalty cases.

It was said repeatedly during each of the Commission hearings and in many Appellate decisions that “death is different”. This was stated to remind all involved that when imposing the ultimate sanction, extra care and precaution must be taken and exacting standards must be followed to ensure a just result.

The death penalty as applied in Maryland since the current statute was enacted in 1978 is different. Comparing the use of the death penalty in Maryland to its use in other States is instructive.

Executions in Texas -	<u>414</u>	Maryland -	<u>5</u>
Those on death row in California -	<u>667</u>	Maryland -	<u>5</u>

These numbers alone demonstrate that Maryland is more judicious in seeking the death penalty than other States.

There is also a marked contrast between the use of the death penalty prior to the enactment of the current statute and its use after a more rigorous guided discretion process was put in place:

Number of executions before 1978 -	<u>306</u>
Number of executions after 1978 -	<u>5</u>

Modern Maryland is more judicious and selective in seeking and imposing the death penalty than other States are currently and than Maryland was in the past.

Witness after witness testified about the reforms needed and proposed in other States that have recently studied the death penalty. Maryland's statutory scheme already embraces every suggestion from every commission examining death penalty reform. Specifically, in Maryland we have:

- 1) Execution only for the crime of murder
- 2) Execution for limited kinds of murder cases, specifically only those which contain an aggravating circumstance
- 3) Direct automatic appeal to the State's highest court
- 4) Special Counsel qualified to defend death penalty defendants
- 5) Specially trained Judges
- 6) Post Conviction DNA testing
- 7) Private counsel undertaking post convictions
- 8) A Capital Litigation Division in the Office of The Public Defender
- 9) A highly particularized death penalty verdict sheet of guided discretion
- 10) No death penalty for those under eighteen
- 11) No death penalty for those who are mentally retarded

If one examines the list of eighty-five changes which were suggested in Illinois, Maryland already embraces most of them. Our legislature, courts and legal community are light years ahead of other jurisdictions when it comes to the jurisprudence of the death penalty.

The Commission heard from Professor Raymond Paternoster who released a study of the Maryland death penalty in 2003. When examining the numbers in Professor Paternoster's study, it is clear that Maryland's limited Death Penalty Statute already significantly narrows those eligible for that sentence. Only 22% of all murders met the statutory requirements that made those crimes eligible for the death penalty. That is without a single prosecutor exercising one ounce of discretion. After prosecutors have exercised the discretion mandated by the statute, the death penalty is sought in only 14% of the eligible murders in Maryland. Ultimately, the death penalty is imposed in only 6% of death eligible murders committed in Maryland, or less than two tenths of one percent of all the murders committed in Maryland.

When considering the death penalty in Maryland, as applied, it is important to look at the facts of the actual cases in which the death penalty has been carried out. The reported decisions of these cases can be found on the Death Penalty Commission's website. These reported opinions detail the heinous crimes committed and the due process each defendant was afforded here in Maryland.

John Thanos – Killed three people in two separate incidents in a span of four days. Included in Thanos' spree was the execution of two teenagers who were working at a gas station.

Steven Oken – Killed two victims in Maryland and one in Maine. The appellate opinion contains the description Oken gave to his psychiatrist of the brutal murder of Dawn Garvin. Please read the opinion. It is beyond chilling. Oken was executed fourteen years after his sentence, hardly a rush to judgment. His conviction and sentence were not reversed by a single court. His guilt was never in doubt.

Review the remaining cases: Flint Hunt who executed a police officer, Wesley Baker who killed a grandmother in front of her grandchildren, Tyrone Gilliam who ruthlessly planned and carried out the murder of a young woman. When one reviews the facts of these crimes and

the protections afforded these five defendants, one can only conclude that the death penalty as applied in Maryland is fair and judicious. We urge citizens to look further at the cases of the five murderers who are currently on death row. The descriptions of their crimes and the history of their court battles are also on the Commission's website.

Twenty-five years ago, Anthony Grandison and Vernon Evans ordered and carried out the execution of witnesses to a crime. One wonders, would Maryland citizens be in the dangerous situation we are in now with regard to witness intimidation if the word had gone out that those who kill witnesses will suffer the ultimate sanction? There can be no question that the execution of witnesses strikes at the heart of the legal system and the community rightfully demands that those who make that choice should face the ultimate sanction.

It is interesting to note, that despite all the witnesses who testified against the death penalty, not one raised any possibility that any of the five men who are on death row, or the five who were executed, were innocent of the crime for which they were convicted. The lack of testimony on this issue speaks volumes about the death penalty as applied in Maryland. Look at the endless appeals, the multiple post conviction proceedings, and the limitless habeas corpus petitions afforded in each of these cases. In Maryland, defendants are afforded every protection.

The death penalty in Maryland must be viewed in its proper historical and jurisprudential context. For hundreds of years, Maryland and every State in this Union, have recognized the fundamental human right of self-defense.

The taking of a life is always to be avoided, but we in society accept it under certain circumstances where it is legally justified:

- Police are allowed to use deadly force to protect themselves or others
- Citizens are allowed to use deadly force in their homes to defend themselves or their families

The law recognizes that these split second decisions are justified and no one contests the sound basis of those laws. When a terrible crime is committed against our community, we ask the community not to seek vigilante justice. We ask them to allow a neutral body of twelve, constrained by an elaborate system embodying due process and the law to mete out justice. We ask the community not to take justice into their own hands, but to allow a system, not motivated by revenge or passion, but guided by the dispassionate hand of the law to impose a sentence justified by the crime. We involve in the quest for justice a judge, a jury, highly qualified counsel, a specialized verdict sheet, direct appeals, collateral attacks and due process at every single stage to provide for our community the same basic right of self defense that is afforded each of its individual members. The death penalty is the State exercising its right to defend itself and her citizens against the worst of the worst.

We received information by way of several studies as to the deterrent affect of the death penalty. Some of the studies find the death penalty is a deterrent and others say it is not. There is no question it is a deterrence of one. Thanos, Oken, Gilliam, Baker and Hunt, the five murderers executed since 1978 under Maryland law, will never murder again. Those who work in our correctional system can take some solace in that fact.

Indeed, the death penalty is a valid means of protecting the lives of those charged with the responsibility of guarding these criminals. The correctional officer, the nurse and the warden can breathe just a little easier knowing this is so. There should be no murders in Maryland that go unpunished, particularly with regard to our correctional officers and police officers. What deterrent can there possibly be, what punishment can there possibly be, for a murderer serving a sentence of life or life without parole? You can only serve one life sentence.

One cannot analyze the Death Penalty Statute in isolation. The entire process must be considered. The legislature enacted this statute decades ago and refuses to repeal it. The

majority of citizens support it. It is a tool prosecutors need to protect the public and serve their communities. As citizens, we can trust our Maryland juries, Circuit Court Judges, Court of Appeals and the Federal District Court to be sure the decision that is made is just and appropriate. Furthermore, Maryland's current Chief Executive, the Governor, is a man who will intelligently and thoughtfully consider clemency if the case should warrant.

The statute that created this panel directed us to examine specific areas of concern for the legislature. We will now address the issues assigned by the legislature in the creation of this Commission.

### **RACIAL DISPARITY**

There is, quite simply, absolutely no proof of any racial bias in any of the decisions to seek the death penalty in any case in the state of Maryland.

A discussion about the death penalty must first look at the jurisdiction that has been at the center of the debate – Baltimore County.

In the late 1970's when death penalty law was just developing, then State's Attorney Sandra O'Connor looked at the Supreme Court cases and decided the best way to avoid claims of racial disparity was to file a death penalty notice in every case that was eligible under Maryland law. Mrs. O'Connor's argument was that the best way to avoid any allegation, or appearance of prejudice, was to file in every case that met the criteria set out by the legislature. Since discretion was not being used, there could never be a finding that discrimination influenced Mrs. O'Connor's death penalty decisions. As a result, Baltimore County accounted for the most death penalty filings.

The Commission heard testimony from Harford County State's Attorney Joe Cassilly, former Montgomery County State's Attorney Andrew Sonner, former State Attorney General Joseph Curran, and former Baltimore City Deputy State's Attorney Stuart Simms, all of whom



agreed that Mrs. O'Connor's decisions in death penalty cases were not motivated by a discriminatory purpose. This testimony was uncontroverted. In Baltimore City, where Booth and Hunt faced the death penalty, the decision to file was made by then State's Attorney Kurt Schmoke, who Mr. Simms acknowledged did not make those decisions with a discriminatory purpose in mind.

When you examine the actual conclusions of the original Paternoster study upon which the majority relies so heavily, it is clear that Paternoster found no evidence that the filing of a death penalty notice was affected in any way by the race of the defendant. The Court of Appeals in Evans v. State (396 Md. 256, 2006) went on to hold that the Paternoster study did not establish a purposeful discriminatory policy in Baltimore County. The only area where there is a statistical affect when considering race is when you combine the race of the victim with that of the defendant. That statistical affect, however, is explained by a practical jurisdictional reality.

When considering the effect of the race of the victim in the application of the death penalty in Maryland, one must acknowledge the fact that some jurisdictions seek the death penalty and some never do. If Baltimore County files, and there are more Caucasian victims of murder in Baltimore County than in other jurisdictions, it stands to reason there will be proportionally more cases filed with Caucasian victims, especially if those jurisdictions with more African-American victims do not seek the death penalty.

One cannot ignore the fact that in two of Maryland's largest jurisdictions where most of the victims of murder are African American, Baltimore City and Prince Georges County, the death penalty is rarely sought. It stands to reason then that by eliminating this entire group of homicide victims, the statistics are skewed in favor of Caucasian victims, not because of discrimination, but because the jurisdictions with the majority of African-American victims do not seek the death penalty. It does not follow, however, that the race of the victim has been the

motivation or reason for seeking or imposing the death penalty. These jurisdictional differences, and not any racial motivation, are what account for the skewed numbers that are found in the Paternoster study.

In addition, one cannot ignore the fact that while a majority of Marylanders believe in capital punishment, the majority of African Americans do not share this belief. This fact is supported by the recent Baltimore Sun polling. Therefore, even in those jurisdictions that seek the death penalty if the victim's family is permitted to have input into the death penalty decision, the family of an African American victim is more likely to be opposed to the death penalty and thus the State will not seek it.

In fact, during Professor Paternoster's testimony before the Commission, he admitted that his pure number analysis with regard to the race of the victim, did not factor in the wishes of the victims' families. He agreed that this could account for any disparity that may exist when examining the race of the victim in death penalty cases.

The other study that the majority relies upon to support their racial disparity argument is the one done by Professor Baldus. Professor Baldus' study in Georgia was discredited by the United States District Court in McCleskey v. Zant, 580 F.Supp. 338 (ND GA. 1984). When the McCleskey case reached the Supreme Court of the United States, the justices assumed the validity of the Baldus study and still ruled that the study was insufficient to pose a constitutional defect in the implementation of the Georgia death penalty statute. McCleskey v. Kemp, 481 U.S. 279 (1987). Professor Baldus' analysis is clearly flawed and not supportive of a claim of racial disparity in the implementation of the death penalty in Maryland.

In sum, there is no proof of racial discrimination as the death penalty is applied in Maryland. If there is racial disparity, it is not due to any systemic or individual bias, but due to jurisdictional differences in both population and ideology.

## **JURISDICTIONAL DISPARITY**

The issue of jurisdictional disparity has been addressed by Maryland's highest court in Evans v. State, and based upon sound legal principles, the Court rejected the validity of arguments against the death penalty based on jurisdictional disparity.

What Professor Paternoster and the witnesses who have testified here have called geographic disparity, is in reality local government in action and a reflection of the will of local communities.

At the outset, it should be noted that different sentences in different counties for the same kind of crime are legal and constitutional. Disparities in sentencing exist in each county across the entire spectrum of crimes committed in Maryland.

The sentence a defendant receives for drug distribution in Baltimore County is different than that received in Baltimore City versus Harford County versus Cecil County. Under our system of prosecution in this State, local prosecutors and not one centralized State system prosecute crimes. It has been that way for hundreds of years. Local government rule is the foundation upon which this country is based. We elect prosecutors in this State by county, and if the people of Baltimore County want to elect a State's Attorney who seeks the death penalty, that is their choice under our democratic system. If the people of another jurisdiction want to elect a State's Attorney who does not seek the death penalty, that is their choice. Jurisdictional disparity is actually an example of representational democracy, an elected official following the will of the people.

While the Constitution and laws of this country rightly guard against racial disparity, this country was founded upon the principles of local rule. Remember, it is those citizens who live in

that county who make up the juries who actually impose the death penalty. The right of elected officials to reflect the will of their community should not be a reason to repeal the death penalty.

Baltimore County itself is an example of the role that local electorates have in shaping death penalty policy. The 2006 contested election for State's Attorney in Baltimore County pitted a candidate who pledged to continue Sandra O'Connor's death penalty policy against a candidate who pledged a more contemplative approach. The latter candidate, the lead author of this report, won the election, ushering in a new era in death penalty prosecution in Baltimore County.

It is interesting to note, that despite all of the controversy about Baltimore County and the death penalty, only two defendants now on death row committed their crimes in that jurisdiction and those two arose from the same incident.

We find that while jurisdictional differences may exist, it is not illegal or wrong, but just an example of local government reflecting the will of the people.

## **COST**

It is more expensive to try a death penalty case than a life without parole case or any other murder prosecution. Would anyone suggest differently? This cost is incurred to afford extraordinary protection to the accused. Every motion must be litigated. Every avenue of investigation must be explored. Every defense must be raised. This time and this expense are completely warranted in death penalty prosecutions.

Although the issue of cost is not disputed, there is a dispute regarding the methodology used by the witnesses who presented cost testimony to the Commission. That methodology assigned a cost to each participant in a death penalty trial. Thus, the cost of a judge, prosecutor, defense counsel or any courtroom personnel was multiplied by the number of days it took to present the trial. The economists then arrived at a figure and did an economic lost opportunity

analysis due to the use of these resources for a death penalty trial. In the court system, there is always the next case. The professional in the criminal justice system works until the case is done and then moves to the next case. There is no lost opportunity. The concept and testimony of “opportunity costs” may have wide application as an economic theory in other areas of study, but it is completely irrelevant when used to analyze the realities of the death penalty as applied here in Maryland.

The Urban Institute study that puts the cost of the death penalty at \$186 million over twenty years is, at best, inflated and at worse, ridiculous. That study put the cost of prosecution of these cases at 20% of the \$186 million total. That amounts to some 39 million dollars. The State’s Attorneys for Baltimore and Harford Counties both testified that number is not grounded in reality. The Assistant State’s Attorneys and staff who prosecute death penalty cases are not paid more or less based upon the type of cases tried or the amount of time spent on the case. It is instructive to look not at opportunity costs, but real costs in a real Maryland death penalty case.

In 2007, the Baltimore County State’s Attorney’s Office prosecuted the John Gaumer case, the so-called “My Space” murder case. Gaumer, a student at UMBC, viciously raped, murdered and dismembered a young woman he met on the Internet. The State sought the death penalty. The case lasted three weeks and had all of the pretrial motions, voire dire and component parts described in the Urban Institute’s cost study. The only actual out-of-pocket expense to the Baltimore County State’s Attorney’s Office in that case was \$2,500, which was the cost to retain an expert witness. The two prosecutors who tried the case had been employed in the office for over twenty years. They do their jobs and they get paid the same salaries regardless of the sentence they are seeking in a particular case. None of their cases suffered and no cases were dismissed because they were trying a death penalty case. No opportunities were lost because the death penalty was pursued. Mr. Cassilly of Harford County echoed this same

real cost testimony when his office tried a death penalty case. The testimony regarding the real costs associated with a death penalty prosecution was uncontraverted.

The same can be said for the judge, the court clerk, the bailiff and all court personnel. They get paid no matter what type of case they are trying. There is simply no evidence that any civil cases were dismissed because a judge was trying a death penalty case.

The courtroom where the Gaumer case was tried was built in the 1970's and if there was not a death penalty proceeding in that courtroom for those three weeks, or if it sat empty and dark, it would not change that construction cost in any way. The concept that the courtroom could be rented out instead of being used for a death penalty case is not a serious argument.

The suggestion that suddenly there will be a large pot of money available to use for victim services or for additional police if the death penalty is repealed is a fallacy. The extra money spent in death penalty cases is almost entirely for the defense. We do not begrudge the defense one penny. In the State's 2009 budget, \$950,000 was appropriated to the Capital Litigation Division of the Office of the Public Defender. This is a justified expense for the work they perform. The experts hired, background investigations performed, and records obtained are all appropriate for the proper defense of these cases. It does not amount in any way to \$186 million. The simple fact is that if the death penalty is repealed, no prosecutor, judge, clerk or public defender will lose their job. Not one actual dime will be saved. The only money that will be immediately saved that the State has the authority to spend, will be the aforementioned Capital Litigation Division appropriation.

The Urban Institute Study also ignored the reality of a sentence of life without parole. The study decries the countless litigation in a death penalty case, but there is endless litigation anytime a defendant faces the most severe sanction available to a prosecutor. The repeal of the

death penalty would only shift these costs to trials involving a possible sentence of life without parole.

The Gaumer murder is a case in point. The day the jury spared Gaumer's life, his family and lawyers celebrated on the courthouse steps. Twenty-eight days later, they filed an appeal. Ten years from now, twenty years from now, Gaumer will still be filing motions to get out of jail and attorneys, judges and court clerks will still be working on his case. The costs of endless litigation will continue.

The repeal of the death penalty will save very little money. No matter what the maximum sentence is for murder in the State of Maryland, every lawyer, including those in the Public Defender's Office, will always fight for something less than the maximum. That is their job. That is the nature of the court system. Currently, a defendant facing the death sentence has an incentive to plead guilty to a sentence of life without the possibility of parole. Guilty pleas do, in fact, save money because they significantly decrease the possibility that a defendant will succeed on appeal. The repeal of the death penalty will mean the end of guilty pleas to sentences of life without parole.

There will not be millions to spend on victim services if the death penalty is repealed. Each State's Attorney's Office is funded by their respective county. Getting rid of the death penalty will not free up a large amount of funds for the State to direct to other services or programs. We applaud the Victim Witness Subcommittee and fully adopt their recommendations for expanding services to those who have lost a loved one. We believe this a laudable endeavor that should be supported. But extensive victim and witness services can be provided concurrently with the availability of the death penalty. It is simply a choice each jurisdiction makes based on its own budgetary considerations and on the will of the electorate.

While death penalty prosecutions do cost more, the actual costs are justified and are not substantial, and do not warrant a repeal of the death penalty. Finally, the minority poses this question – is cost analysis ever the sole valid consideration when justice is the goal?

### **SOCIO-ECONOMIC DISPARITY**

This is an issue on which we heard little, if any evidence. There is no evidence that the socio-economic status of the defendant has influenced any death penalty decisions in Maryland.

To the extent that socio-economic factors impact the quality of legal representation afforded to a criminal defendant, a review of all the death penalty cases completed and pending shows that the representation of these defendants has been outstanding. The Public Defender's Capital Litigation Unit offers the highest quality of representation and provides excellent support and advice to private counsel.

There is no evidence that there are any socio-economic disparities in Maryland's death penalty system.

### **PROLONGED COURT CASES**

There was mixed testimony regarding the effects of the prolonged court cases involving capital punishment and those involving life without parole. Most witnesses on this issue said that the numerous court appearances were very difficult for the family of the victim. However, some of the witnesses said they would endure whatever the cost in order to see justice for the victim. The emotional cost to the surviving family should, and appears in practice to be a relevant consideration to prosecutors in forming the decision whether to pursue the death penalty.

There is no question that the delays between conviction and execution are difficult for victims' families. Ms. Bricker, whose parents, the Bronsteins, were the victims of John Booth,



told us of twenty-five years of anguish. She lost her parents to a brutal murder, has withstood three jury trials, countless appeals and delays, and yet she still seeks justice. Time cannot diminish her entitlement to justice!

Should not a victim's family have the right, after full disclosure of the facts, to say yes, I am willing to endure this process? Must the State tell victims because this lawful and constitutional punishment will only be achieved after a long and arduous process, that we are going to limit the justice that can be sought for their loved one? The answer to concerns about the length of the process is a meaningful reform of the time during which a defendant can appeal his sentence, or more rigid enforcement of the time limiting provisions that are already in place.

The majority of the people of Maryland still believe in capital punishment. Victims should have the right to choose to endure whatever delay is reasonably necessary to achieve justice for them and for their community. A certain amount of delay is important to make sure justice has been achieved, but delay alone is no reason to abandon a just, legal sentence. This is especially so when those who cite delays in the death penalty process and subsequent added hardship for the victim's family as a reason for its repeal, are the very people who are responsible for the delay.

We recommend that every prosecutor, before making a decision concerning the death penalty, give a fair and reasoned accounting to the survivors so that they know what their future will hold and take their feelings into account when making their decision. The prolonged nature of death penalty proceedings is difficult and arduous, but is not a reason to repeal a lawful and just sentence.

### **THE RISK OF INNOCENT PEOPLE BEING EXECUTED**

As long as human beings implement any system, there will always be a possibility of error. Maryland re-enacted the death penalty in 1978. Since that time, five men have been

executed and five remain on death row. Not one shred of evidence was offered to this Commission concerning the possible innocence of anyone executed in Maryland or currently on death row. If there were any argument to be made regarding the possibility of innocence for any one of these men, would that testimony not have been presented? Instead, the witnesses testified to the theoretical specter of an innocent person being executed. The most ardent advocate of this position was our fellow Commissioner, Kirk Bloodsworth.

To our fellow Commissioner Kirk Bloodsworth, we cannot presume to stand in your shoes. What you had to endure was unfair, unjust and just plain wrong. You should not have had to spend two years on death row, nor an additional seven years in jail. We applaud how you have taken a negative that many of us could not have endured and channeled it into an articulate movement for change. While we may disagree on this matter, we have nothing but respect for you and your compelling personal story. We thank you for offering us unique evidence on this issue.

What all Marylanders need to remember is that Mr. Bloodsworth's case is not an example of the failure of the death penalty system in Maryland, but an example that the death penalty system in Maryland works. Kirk Bloodsworth was not on death row when he was exonerated. Because he had a direct appeal to Maryland's highest court and because that court immediately reversed his conviction, he was granted a new trial. After a second trial, his conviction resulted in a life sentence.

Because Maryland is so judicious in imposing the death penalty and in reviewing it when it is imposed, Mr. Bloodsworth was alive when DNA technology evolved to the point where it was possible to test the evidence in his case. There is a reason for the high reversal rate by Maryland's highest court. The Court of Appeals thinks death is different and they reverse to ensure that the trial of the defendant was compliant with every aspect of the law. While Mr.

Bloodsworth was wrongly convicted a second time, the second fact finder had enough doubt as to his guilt to not impose the death penalty.

Mr. Bloodsworth is an example of how the system in Maryland works. He was not on death row at the time he was exonerated. When technology caught up to the jurisprudence, the State released the biological evidence to his very competent post conviction counsel immediately upon request. Once the testing was verified, he was released. Eventually, that same evidence established the identity of the actual killer.

Although Mr. Bloodsworth's case predates this, Maryland recently added new post conviction DNA reforms to add additional protections for Defendants who want to challenge their convictions with new scientific tests.

Hundreds of years of jurisprudence have stood for the principle that it is better for ten guilty men to go free than one innocent man to be convicted. The courts in Maryland fully embrace this principle in all aspects of the death penalty review.

While there is always a chance that an innocent person could be sentenced to death, we do not believe that mere chance is an appropriate reason to abandon a just and lawful punishment. Advances in technology and Maryland's painstaking review process have reduced that chance as far as is humanly possible.

### **THE IMPACT OF DNA EVIDENCE IN ASSURING FAIRNESS AND ACCURACY**

One merely needs to look at Mr. Bloodsworth's case to assess the impact of DNA evidence on capital litigation. The crime for which Mr. Bloodsworth was convicted occurred in 1984. The DNA technology that would ultimately exonerate him did not exist in 1984. When the technology evolved, it was used to exonerate him in 1994. The same DNA technology that exonerated him would catch the real killer in 2003.

It is disingenuous that Barry Scheck and Paul Kent acclaim DNA is the greatest evidence in the world when it exonerates people like Mr. Bloodsworth, yet challenge it when it puts people in jail who are guilty. You cannot have it both ways. Since 1994, great advances have been made in DNA testing, expanding the types of tests that can be done and the number of people in the database.

If Governor O'Malley's new DNA Bill and modern technology had existed at the time Mr. Bloodsworth was arrested, we would have caught the real murderer and spared Mr. Bloodsworth his ordeal. That is how far DNA has advanced.

DNA technology is one of the most powerful tools to be used in death penalty cases. We challenge Mr. Scheck when he states there is DNA in only 10-20% of murder cases. This claim was not supported by evidence or what we know of the amazing recent advances in DNA technology.

Again, we must, as we are charged by the General Assembly, talk about Maryland's Death Penalty Statute. Look at the aggravators in Maryland's statute. These are circumstances that must exist before a prosecutor can consider the death penalty. A defendant must have committed a murder as a principal in the first degree, as well as another crime, such as kidnapping, sexual assault, rape, or robbery. All these aggravators are likely to cause contact between the defendant and the victim, and with contact, you get the increased likelihood of the presence of DNA evidence.

DNA is a powerful tool that advances the cause for justice – both for the State and the defense. The impact of DNA evidence increases with the advance in science, which is a science that is more accurate and more sensitive, and can be performed on smaller samples. The present technology permits findings which could not have been achieved twenty years ago, or even ten years ago.

DNA advances over the last twenty plus years have greatly enhanced the fairness and accuracy of convictions and reduced the likelihood that an innocent person will be sentenced to death. To be sure, we must be ever vigilant and demand that the facilities and the employees who oversee scientific evidence be held to the highest standards.

We recommend that money continue to be devoted to DNA training and technology. We believe that the existence of present day DNA technology is both a shield and a sword, and will further ensure that only the guilty are convicted.

### **ADDITIONAL CONSIDERATIONS**

Some commissioners believe that if there is action to repeal the death penalty, that it is extremely important to at a minimum, retain it for the murder of police officers or correctional officers. This aspect of the death penalty is important to ensure that those who protect us and keep us safe can do so with the knowledge that their killers can still face the ultimate sanction.

Should the death penalty be abolished in Maryland as recommended by the majority opinion, some of the undersigned commissioners believe it is imperative that those inmates currently on death row receive a sentence of life without parole to be served in a maximum security institution such as Supermax or its equivalent to minimize contact with correctional personnel or other inmates.

### **CONCLUSION**

When a crime is committed that would make a defendant eligible for the death penalty, there are enormous costs – the loss of victims, the loss of a feeling of personal safety, and a loss of the community’s belief in its own safety. There is also a cost to the community to support the best defense possible for a defendant facing the death penalty. Even if the death penalty is rarely

used over the forthcoming years, history has shown that man will again perform an act against his fellow man that demands the ultimate punishment. Any lesser penalty only diminishes the tools the State, and therefore the people, have in carrying out a just punishment.

If the death penalty is abolished, what deterrent is there to someone serving a sentence of life without parole who then kills in prison? Would the economists who testified before us then argue that this killer should not be charged or put on trial since there could be no further punishment? What would they tell the family of the correctional officer, or the nurse who was murdered by a prisoner serving a life sentence?

Unless our community says the cost of justice and safety are too high to bear, we must shoulder the burden and continue to seek justice as demanded by our community.

We, the undersigned Commissioners, oppose a repeal of the death penalty.

Respectfully submitted,

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**PERCEL ODEL ALSTON, JR.**

Retired Prince George's County Police Officer  
Representing the Fraternal Order of Police

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**HONORABLE JAMES N. ROBEY**

Maryland State Senate  
Howard County District 13

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**HONORABLE WILLIAM FRANK**

Maryland State Delegate  
Baltimore County

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**HONORABLE WILLIAM SPELLBRING**

Retired Prince George's County  
Circuit Court Judge  
Representing the Maryland Judiciary

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**RICK PROTHERO**

Family Member of a Murder Victim

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**SCOTT D. SHELLENBERGER**

State's Attorney for Baltimore County

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**OLIVER SMITH**

Family Member of a Murder Victim

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**BERNADETTE DIPINO**

Police Chief  
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