

# Circuitous Thinking

## DEATH AT ANY PRICE

by Richard Ware Levitt

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Several months ago I made an appointment with a federal judge to request a modest additional authorization for my mitigation expert in a death penalty case, so she could complete her social history report for inclusion in my pre-authorization letter to the U.S. Attorney's Office. Upon arriving in chambers the judge barked to his courtroom deputy, "Why did you let *him* (meaning me) in here?" "He wants additional money for his expert," came the reply. "Denied!" the judge shouted. "Let me explain," I said, and ran through the history of the case, the superb job the mitigation expert was doing, and the efficiency with which she went about her task. "Denied!" he repeated. "Didn't you hear me the first time?" "But judge," I eventually said after some additional explanation, "we're talking about a *life* here." With that the judge stood up, put his hands on the table in front of him and yelled, "This is not my fault! Are you saying it's my fault?" "Of course not," I replied. "But this is a critical stage of the proceedings. I just need a little more money so my expert can complete her report" "Are you going to leave or do I have to call the marshals?" he continued. "Ok," I said. "Thanks for hearing me out." And I left.

Fortunately, this judge's bizarre reaction was not typical – most of the judges who have presided over my federal death penalty cases have been willing to provide the resources we need to do our job. But this judge's stinginess in denying my client a couple of thousand dollars to finish a mitigation report that might nip a capital prosecution in the bud got me thinking about the dollars and cents of death penalty prosecutions, and how much my modest request meant in the scheme of things.

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Whatever one thinks about the death penalty in the abstract, and recognizing the many cases – including in the Second Circuit<sup>1</sup> – that have sustained its use in the post-*Gregg* world, a cost-benefit analysis weighs so crushingly against its continued use that only those who believe in "death at any price" could possibly support it. This is not simply because the raw costs of the death penalty regime are so much higher than the administration of non-death penalty cases, but because the cost-per-execution ("cpe") makes the attainment of death a breathtakingly expensive exercise. So much so that even the most ardent supporters of death would likely have a change of heart if these costs were laid bare before them – costs that come from a finite monetary pie and which could be otherwise put to use in myriad productive ways, including increased law enforcement. Indeed, the costs are so dear that one can reasonably assert that the death penalty actually costs far more lives, through diversion of life-saving resources to the pursuit of death, than it could possibly spare.

Let's take New York as an example. Since the 1995 re-introduction of New York's death penalty statute (declared unconstitutional last year<sup>2</sup>) some \$160,000,000 has been spent to execute exactly... no one.<sup>3</sup> Is there any rational argument that this money was

*(continued on page 4)*

1. E.g., *United States v. Fell*, 360 F.3d 135 (2d Cir. 2004); *United States v. Quimones*, 313 F.3d 49 (2d Cir. 2002).
2. *People v. LaValle*, 3 N.Y.3d 88 (2004).
3. "Costly Price of Capital Punishment—Case Shows Effort Expended Before the State takes a Life," *Albany Times-Union*, Sept. 22, 2003.

well spent? If these same funds had been used to create an annuity earning 5% it would yield \$8 million per year – the total cost of, say, 80 police officers – forever, without ever diminishing the principle.<sup>4</sup>

The costs per execution in other states are no less unsettling. The website, [www.deathpenaltyinfo.org](http://www.deathpenaltyinfo.org), collects financial and other data about the death penalty<sup>5</sup> and reports, among other things, that enforcing Florida's death penalty costs taxpayers \$51 million a year above what it would cost to punish all first-degree murderers with life in prison without parole. Based on the 44 executions Florida had carried out since 1976, the cpe is \$24 million.<sup>6</sup> But these figures positively pale compared to those of financially strapped California, which, according to *The Sacramento Bee*<sup>7</sup>, has spent nearly \$100 million for each of its state's 11 executions.

Here are some statistics from other states:

A May 1993 study found that the death penalty in N.C. costs an additional \$2.16 million per execution over the costs of a system imposing a maximum penalty of life with out parole.<sup>8</sup>

In Kansas, the costs of capital cases are 70% more expensive than comparable non-capital cases, including the costs of incarceration. (Kansas Performance Audit Report, December 2003).

In Indiana, the total costs of the death penalty exceed the complete costs of life without parole sentences by about 38%, assuming that 20% of death sentences are overturned and reduced to life. (Indiana Criminal Law Study Commission, January 10, 2002).

In Texas, a death penalty case costs an average of \$2.3 million, about three times the cost of imprisoning someone in a single cell at the highest security level for 40 years. (*Dallas Morning News*, March 8, 1992).

The most comprehensive study of its kind in the country<sup>9</sup> found that the death penalty costs North Carolina \$2.16 million per execution over the costs of sentencing murderers to life imprisonment. The majority of those costs occur at the trial level. This study, however, is more than ten years old, and comparable figures for contemporary death penalty litigation unquestionably are far higher.<sup>10</sup>

*Recent statistics suggest that the cost-per-execution is not likely to come down either, as jurors remain reluctant to impose the ultimate penalty and courts remain reluctant to affirm its use.*

Here's what the available federal statistics show. Defense costs through trial alone are staggering. Kevin McNally, one of three Federal Death Penalty Resource Counsel, stated in a January 2004 affidavit that he had reviewed the total defense costs in 12 federal cases tried in FY 2000 and 7 cases in FY 2001. He estimated that the average cost was approximately \$400,000, although this estimate is low, since more recent cases have been, on average, far more expensive.

McNally's statistics relate to cases that are tried, but the costs of all death-qualified cases, including those that plead out, are enormous. The May 1998 Report of the Subcommittee on Federal Death Penalty Cases of the Committee on Defender Services of the Judicial Conference of the United States, titled "Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of De-

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4. The District Attorney in Sierra County, California made a similar argument: "If we didn't have to pay \$500,000 a pop for Sacramento's murders, I'd [instead] have an investigator and the sheriff would have a couple of extra deputies and we could do some lasting good for Sierra County law enforcement. The sewage system at the courthouse is failing, a bridge collapsed, there's no county library, no county park, and we have volunteer fire and volunteer search and rescue" (quoted in Dieter, Richard C. *Millions Misspent: What Politicians Don't Say About the High Costs of the Death Penalty*. (Death Penalty Information Center 1994). Viewable at <http://www.deathpenaltyinfo.org/article.php?scid=45&did=385>
  5. Viewable at <http://www.deathpenaltyinfo.org/FactSheet.pdf>
  6. Citing *Palm Beach Post*, January 4, 2000.
  7. S. Maganini, "Closing Death Row Would Save State \$90 Million a Year," *Sacramento Bee*, March 28, 1988, at 1.
  8. P. Cook, *The Costs of Processing Murder Cases in North Carolina* (Duke University May 1993).
  9. Cook, Phillip J. and Donna B. Slawson. *The Costs of Processing Murder Cases in North Carolina* (Terry Sanford Institute of Public Policy, Duke University 1993).
  10. News sources addressing death penalty costs are collected at the website of the National Coalition to Abolish the Death Penalty, viewable at <http://www.demaction.org/dia/organizations/ncadp/news.jsp?key=305&t=>

fense Representation”<sup>11</sup> reported the following regarding defense costs alone at the district court level:

Average total cost of defense representation in federal death penalty-eligible cases that were not prosecuted as death penalty cases: \$55,772.

Average total cost of representation in federal death penalty-eligible cases that were prosecuted as death penalty cases: \$218,112.

It is apparent, therefore, that bringing a federal death penalty case adds at least \$150,000 to the cost of defense representation in the district court.

These costs must be multiplied by the number of cases that are prosecuted as death penalty cases. The Death Penalty Information Center’s report, “The Federal Death Penalty System: A Statistical Survey (1988-2000),”<sup>12</sup> explains that prior to 1995 U.S. Attorneys had authority to determine whether or not to seek approval for death penalty prosecutions. Between 1988 and 1994, approval was sought in 54 cases and obtained in 47 cases. A new protocol adopted in 1995 after passage of the Violent Crime Control and Law Enforcement Act, including the Federal Death Penalty Act, requires that U.S. Attorneys present all death eligible cases to the Justice Department for death penalty consideration whether or not they recommend a death penalty prosecution. As a result, from January 1995 to mid-2000 U.S. Attorneys submitted 682 cases for review to the Attorney General and the A.G. authorized 159 death penalty prosecutions.<sup>13</sup>

Based on these statistics, federal death penalty representation at the district court level costs at least \$150,000 more than non-death penalty representation in similar cases.<sup>14</sup> Multiplying this number by the total number of authorized cases (206) yields a total of approximately \$30,000,000 spent on defense representation of

death penalty defendants in district court. Obviously this sum represents only a fraction of the total costs of such cases because it excludes the increased cost of prosecutorial services at the trial level, omits all costs at the appellate level, and does not account for the increased cost of court time resulting from lengthier pre-trial and trial proceedings, increased security costs in the facilities in which capital defendants are housed, etc. Indeed, the average total cost of prosecuting an authorized federal death penalty case, not including non-attorney investigative costs or the costs of experts and other assistance provided by law enforcement agencies is \$365,000.<sup>15</sup>

Since the reinstatement of the federal death penalty in November 1988, there have been three federal executions: Timothy McVeigh (7/11/01)<sup>16</sup>, Juan Raul Garza (6/19/01) and Louis Jones, Jr. (3/18/03) (previous to the McVeigh execution the federal death penalty was last administered in 1963). This translates roughly into an additional \$10,000,000 spent for defense representation in the district courts for each of the three federal executions.

Recent statistics suggest that the cost-per-execution is not likely to come down either, as jurors remain reluctant to impose the ultimate penalty and courts remain reluctant to affirm its use. On August 14, 2003, when a federal jury in Detroit rejected the death penalty for John Bass, federal capital juries had rejected the death penalty for 20 of the last 21 defendants who had completed trial and 38 of the last 43 since 2000.<sup>17</sup> More recent articles note a clear trend against the death penalty, with a 50% reduction in death sentences and a 40% reduction in executions.<sup>18</sup>

It is said, “justice has no price.” But in truth it does. Because a dollar spent in futile pursuit of an illusory death penalty might be the dollar that could have prevented another innocent death. Declining to spend astronomical sums to obtain a few executions doesn’t diminish the value of the lives lost to violence. Instead it recognizes that a more fitting memorial is to use our limited resources to save lives rather than end them. ■

11. <http://www.deathpenaltyinfo.org/article.php?scid=29&did=147>

12. Viewable at <http://www.deathpenaltyinfo.org/article.php?scid=29&did=196>

13. This new protocol has come under sharp criticism for undermining the informed decisions of local U.S. Attorney offices. See Gleeson, “Supervising Federal Capital Punishment: Why The Attorney General Should Defer When U.S. Attorneys Recommend Against The Death Penalty,” 89 *Virginia Law Review* 1697 (2003)

14. This number represents a comparison of the defense costs in authorized and non-authorized cases. Of course, even in non-authorized cases the costs far exceed those of cases that are not death eligible, as substantial funds are spent on mitigation and other expenses during the pre-authorization stage.

15. Monroe County, New York, District Attorney Howard R. Relin estimated that the cost of prosecuting a murder case triples when the death penalty is sought (Wise, Daniel, “Capital Punishment Proves to be Expensive. Costs are Tough to Pin Down, but Defense Attorney’s Fees Alone Exceed \$68 Million,” *New York Law Journal*, Vol. 227, April 30, 2002)

16. McVeigh is classified as a “volunteer” because he declined to pursue certain relief.

17. See Capital Defense Network, “Recent Developments,” viewable at [http://www.capdefnet.org/fdprc/contents/recent\\_dev/recent\\_developments.htm](http://www.capdefnet.org/fdprc/contents/recent_dev/recent_developments.htm)

18. See, e.g., Editorial, “The Year in Death,” *Washington Post*, Jan. 2, 2005, viewable at <http://www.washingtonpost.com/wp-dyn/articles/A41559-2005Jan1.html> (“Only a few years ago, in 1999, Americans saw 98 people put to death -- a modern record following two decades of steady increases. Since then, however, there has been a precipitous decline in capital punishment”).