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WORKING WITH A BLANK CHECK: THE COST OF DEFENSE OR THE DEATH PENALTY INDUSTRY?

by COLLEEN THOMAS

The debate over capital punishment is – literally – a matter of life and death. The arguments on both sides are typically moral in substance, but more and more detractors are also introducing economics into the picture. Because the stakes in capital trials are at their highest, the costs for both the prosecution and the defense are equally high. But is every penny spent really necessary?

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In recent years, many states have taken a closer look at the exorbitant costs associated with capital punishment. From the cost of the original criminal trial to the subsequent years of litigation at both the state and federal levels to the cost of the actual execution, the expenses add up.¹ In fact, states like New Jersey² and Illinois³ have abolished the death penalty altogether, due in no small part to the costs of capital punishment. Other states are making a cost-benefit analysis part of the discussion as well.⁴

BY THE NUMBERS

While it is not surprising that a death penalty trial is more costly than a non-capital trial, the actual numbers are staggering. In 2007, New Jersey became the first state to abolish the death penalty after a state-appointed commission deemed the cost of capital punishment too high – both emotionally and financially.⁵ In fact, New Jersey was spending more than \$11 million each year on death penalty cases alone.⁶

In 2011, Illinois followed suit and abolished the death penalty, which had been previously reinstated in 1977.⁷ Although the Illinois House of Representatives initially voted against abolition, the \$20 million annual cost of death penalty cases helped push the measure forward.⁸ The Illinois Capital Punishment Reform Study Committee concluded that the amount of money spent on murder cases designated for capital punishment significantly exceeded the amount the state would have expended had the cases been non-capital.⁹

The death penalty law in California has also recently faced legislative scrutiny.¹⁰ California has spent an estimated \$1.94 billion since 1978 on costs associated with capital punishment cases.¹¹ While the ultimate outcome remains to be seen, one thing is certain: abolitionists are determined and persistent.¹²

Finally, while Maryland has yet to take any official action, abolition remains the recommendation of its Commission on Capital Punishment.¹³ The Commission noted that capital cases are more expensive and exploit more resources than non-capital cases.¹⁴ In fact, adjudication costs for capital cases in Maryland are more than three times greater – or about \$850,000 more per case – than they are for cases in which prosecutors do not seek the death penalty.¹⁵

THE DEATH PENALTY INDUSTRY

Given the significant costs of capital cases, it is not unreasonable to consider where all the money goes. The answer is simple. It goes everywhere.¹⁶ Every stage of a capital case is more time-consuming and expensive than a typical criminal case.¹⁷ Capital cases, by their high-stakes nature, cost an extraordinary amount of money to conduct, money that some argue is intentionally wasted just to make the argument that capital punishment is too costly.¹⁸ This, says King County (Wash.) prosecutor Dan Satterberg, is the “death penalty industry.”¹⁹

One of the largest costs comes from the use of expert witnesses. Some of the more common types of experts that attorneys call in criminal cases specialize in areas such as DNA, mental health, toxicology and ballistics.²⁰ However, in a capital case, the scope far exceeds these well-known areas.²¹ During capital trials, mitigation specialists are often called to investigate the defendant’s past.²² These experts look for explanations behind behavior in an attempt to rationalize or even humanize the person charged with such an inhumane act.²³ Additionally, experts in fields such as human vision, institutional adjustment, hypnosis and social history are called to courts to give their opinions.²⁴

Given the laundry list of uncommon (and sometimes unheard of) fields in which experts are called to testify at capital trials, Satterberg’s remarks are hard to ignore – especially when such expert testimony comes at a great cost. First, the majority of experts require an up-front retainer, often totaling close to \$1,500.²⁵ For their in-court testimony, the average hourly rate of both medical and non-medical experts reaches upward of \$380, with the testimony of some medical experts reaching upward of \$550 per hour.²⁶ In addition, experts make approximately \$250 per hour for the time spent reviewing files and otherwise preparing for trial.²⁷

While these numbers seem excessive, defense and prosecution attorneys alike have come to the defense of attorneys using whatever resources available. Defense attorneys maintain that what is done is necessary when defending death row clients,²⁸ despite the extraordinary cost.²⁹

Former Cook County State’s Attorney Richard A. Devine understands these sentiments. “Defense attorneys will err on the side of inclusion when consider-

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ing experts," he said.³⁰ "You never know what will have an impact on a jury, so many attorneys will utilize anything that comes along."³¹

Nevertheless, recent criticism that defense attorneys have been running up their bills³² suggests that Satterberg's theory of the death penalty industry may not be entirely unfounded or without need of further consideration. Regardless, one thing is for sure. As more and more states are rethinking their stance on capital punishment, its significant costs will certainly remain a focal point of their discussions.

NOTES

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- 4 Ian Urbina, *Citing Cost, States Consider End to Death Penalty*, N.Y. TIMES, Feb. 24, 2009, available at <http://www.nytimes.com/2009/02/25/us/25death.html?pagewanted=all>.
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- 13 Benjamin R. Civiletti et al., Maryland Commission on Capital Punishment, *Final Report to the General Assembly* 44-45 (2008), available at <http://www.goccp.maryland.gov/capital-punishment/documents/death-penalty-commission-final-report.pdf>.
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- 16 RICHARD C. DIETER, DEATH PENALTY INFORMATION CENTER, *SMART ON CRIME: RECONSIDERING THE DEATH PENALTY IN A TIME OF ECONOMIC CRISIS 20-22* (2009), available at <http://www.deathpenaltyinfo.org/documents/CostsRptFinal.pdf>.
- 17 *Id.*
- 18 Dan Springer, *Death Penalty Convictions Decreased in Broke Counties Nationwide*, FOX NEWS, Sept. 1, 2011, available at <http://www.foxnews.com/us/2011/09/01/death-penalty-convictions-decreased-in-broke-counties-nationwide/>.
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- 20 Alarcon & Mitchell, *supra* note 11.
- 21 *Id.*
- 22 Springer, *supra* note 18.
- 23 *Id.*
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