

# LINCOLN MEMORIAL UNIVERSITY LAW REVIEW

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VOLUME 2      SPRING 2015

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## TO LIVE OR TO DIE: MONEY IS NOT AN OPTION- COST-BENEFIT EVIDENCE AND ARGUMENTS SHOULD BE HELD INADMISSIBLE IN CAPITAL CASE SENTENCING

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### I. INTRODUCTION

The death penalty has sparked heated debate for centuries. The debate has centered on religious beliefs, constitutional issues, moral values, and cost concerns. The national economic crisis has put the costs of executions at the forefront of the debate in recent years. Courts and juries have begun to consider the cost of execution versus the cost of life in prison without parole in the realm of capital sentencing.<sup>1</sup> These new considerations have no place in death penalty

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<sup>1</sup> See *Judge: Execution, prison costs irrelevant*, UPI, Oct. 15, 2010, available at [http://www.upi.com/Top\\_News/US/2010/10/15/Judge-Execution-prison-costs-irrelevant/UPI-37711287115415](http://www.upi.com/Top_News/US/2010/10/15/Judge-Execution-prison-costs-irrelevant/UPI-37711287115415) (quoting John C. Blue, a Connecticut Superior Court Judge, rejecting the defendant's request to allow testimony on the cost of the state of execution compared to the cost of life imprisonment); Tennessee v. Cobbins, State's Response to Motion to Permit Evidence at Sentencing Relating to Economic Costs of the Death Penalty, Knox County, Tenn. (May 12, 2009), available at <http://web.knoxnews.com/pdf/051309carjack.pdf>.

jurisprudence. One's life, criminal or not, should never be taken – or spared – based on dollars and cents.

Section II of this note presents a scenario in which a defendant has been convicted of murder and is now entering the sentencing phase of his trial. Section III evaluates the available cost studies of executions around the country. Section IV focuses on the actual language used in a recent trial regarding the cost of the death penalty versus life imprisonment.

Section V considers the various constitutional arguments surrounding the consideration of execution costs in the sentencing phase of capital cases. Section VI attempts to balance the positive and negative aspects of considering execution costs from both the prosecution and the defense perspectives. Section VII concludes by evaluating ways to allow the cost considerations while protecting both the defendant's and the state's rights in a capital case.

## II. DOES JOHN DESERVE LIFE IN PRISON BECAUSE IT IS CHEAPER?<sup>2</sup>

Jane, a six-year-old girl, is outside playing on her swing set in the backyard. John, a sixty- five-year-old man, comes out of the woods and starts pushing her on the swing. Jane is thrilled that John is pushing her because her father was killed in a car accident when she was three, leaving her with no father figure in her life. After five minutes on the swing, John asks Jane if she would like to walk with him to see his puppy, Izzy. Jane loves puppies and is excited to meet a new one. Jane goes with John and is not seen again for ten years.

For those ten years, John keeps Jane in a storm cellar on his property a little over ten miles from Jane's childhood home. He rapes Jane on the first day and continues to do so at least twice a week, sometimes more. He keeps her handcuffed to the floor of the cellar for the next several years, and feeds her soup and crackers once a day. John tortures Jane, burning her with his cigarette or making small slits in her tiny arms with his hunting knife.

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<sup>2</sup> This story is fictional and describes a horrific crime the author wants readers to consider throughout the note.

Jane screams for help for the first few days until John binds her mouth with a dirty oil rag and threatens to kill her "Mommy" if she is not quiet. Jane endlessly shakes with fear every time she hears a noise at the cellar door. Jane is living her own hell, at the age of six, with no end in sight.

One day, after ten years of being tortured and raped, Jane decides that she has to find a way out of the cellar and away from John. She waits until she hears John's old truck start up and back out of the driveway. She slowly comes out of the cellar, which John stopped locking a few months before, and smiles at the sight of daylight for the first time in ten years. She begins to walk toward the road not knowing fully what her plan is once she sees another person. Jane gets about half a mile down the road when she hears John's old truck coming back. She tries to run but her legs are so fragile that she has a hard time getting her footing. She falls down right as John gets to her.

John gets out of the truck yelling, grabs Jane by her matted hair, and slings her in the bed of his truck like a ragdoll. A young woman, Julie, drives by and sees the exchange between John and Jane and notices Jane is crying hysterically. She does not stop but watches as John pulls into his driveway and around the back of his house. Julie calls the local police department and describes to them what she has just witnessed and tells them the location of John's home.

John takes Jane back to the cellar and is so angry he begins to strike her with his belt. Jane is crying hysterically which makes John even more upset and he begins to strike her with his fists and kick her. When she does not stop crying, John takes Jane's head and bashes it up against the cellar wall until she is no longer crying and her body goes limp.

John crawls out of the cellar, with a smile on his face, and begins walking back to his house at the same time law enforcement is pulling into his driveway. Law enforcement sees that he is covered in blood, immediately places him under arrest, and begins looking for the young girl described by Julie. They find a gruesome bloody scene in the cellar with Jane's limp body lying on the floor. John has finally allowed Jane to escape her hell. She is dead.

John eventually confesses to the kidnapping, torture, rape, and murder of Jane. He gives law enforcement chilling details of the last ten years and shows no remorse for his

actions or for killing the sixteen-year-old Jane. After being convicted of first degree murder, along with other crimes, John sits in the courtroom for his sentencing.

The judge gives the jury its instructions and explains to them the process of determining whether John should be sentenced to death or life in prison. The defense has asked the judge to include an instruction detailing the costs of executing John and the costs of sentencing John to life in prison. This instruction is important to the defense because the statistics show that it is cheaper to allow John to live in prison for the rest of his life than to execute him, and the defense believes that the jury will spare John's life because it is the cheaper option for society during the tough economic times.

This story is a horrific description of the brutal murder of a young sixteen-year-old girl, who was taken from her childhood home at the age of six. A young girl, tortured and raped repeatedly over ten years, and then brutally beaten when she tried to escape. A man, who has no remorse for taking the life of such an innocent child, and is going to live or die based on, among other things, the jury's feelings about money and the cost-benefit of the death penalty versus life imprisonment. Money should not be relevant when determining whether John lives or dies.

### III. STATISTICS SHOW EXECUTIONS ARE MORE EXPENSIVE THAN LIFE IMPRISONMENT.

This note is not simply about the actual costs of execution, the actual costs of life in prison or primary based on statistics. This note is about whether these costs should be allowed to be a deciding factor in determining when a person should live or die. With that being said, it is still important to evaluate the costs of each and assess the costs both nationally and state by state.<sup>3</sup>

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<sup>3</sup> The following states have abolished the death penalty: Alaska, Connecticut, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. *See* ALASKA STAT. § 12.55.125(a) (2013); CONN. GEN. STAT. ANN. § 53a-46a (West 2014); HAW. REV. STAT. § 706-656(1) (2013); IOWA CODE ANN. § 902.1 (West 2013); ME. REV. STAT. tit. 17-A, § 1251

There is no national consensus for the cost of capital punishment.<sup>4</sup> A number of states have never even evaluated their costs associated with capital punishment.<sup>5</sup> “Of the states where reliable estimates are available, the differing methodologies used, assumptions made, and applicable statutes make generalizations difficult.”<sup>6</sup> The 2009 Report from the Death Penalty Information Center puts the numbers in perspective:

The high costs to the state per execution reflect the following reality: For a single death penalty trial, the state may pay \$1 million more than for a non-death penalty trial. But only one in every three capital trials may result in a death sentence, so the true cost of that death sentence is \$3 million. Further down the road, only one in ten of the death sentences handed down may

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(2013); MD. CODE ANN., CRIM. LAW § 2-201(b) (West 2014); MASS. GEN. LAWS ANN. ch.265, § 2 (West 2013) *invalidated by* Commonwealth v. Colon-Cruz, 470 N.E.2d 116 (Mass. 1984) (declaring death penalty statute unconstitutional); MICH. COMP. LAWS ANN. § 750.316(1) (West 2013); MINN. STAT. ANN. § 609.185(a) (West 2013); N.J. STAT. ANN. § 2C:11-3 (West 2013); N.M. STAT. ANN. § 31-18-14 (West 2013); N.Y. CRIM. PROC. LAW § 400.27 (McKinney 2013) *invalidated by* People v. LaValle, 817 N.E.2d 341 (N.Y. 2004) (declaring death penalty statute unconstitutional); N.D. CENT. CODE § 12.1-32-01 (2013); R.I. GEN. LAWS § 11-23-2 (2013); VT. STAT. ANN. tit. 13, § 2303 (West 2013); State v. Provost, 896 A.2d 55 (Vt. 2005) (declaring death penalty statute unconstitutional); W. VA. CODE § 61-2-2 (2013); WIS. STAT. ANN. § 973.0135(1)(B), § 940.01(1) (West 2013). See also NPR Staff and Wires, *Illinois Abolishes the Death Penalty*, NPR (March 09, 2011), available at <http://www.npr.org/2011/03/09/134394946/Illinois-abolishes-death-penalty>.

<sup>4</sup> Richard C. Dieter, *Smart on Crime: Reconsidering the Death Penalty in a Time of Economic Crisis – A Report from the Death Penalty Information Center* (2009) page 17, available at <http://www.deathpenaltyinfo.org/documents/CostsRptFinal.pdf> (last visited Mar. 3, 2014) [hereinafter *Dieter*].

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

result in an execution. Hence, the cost to the state to reach that one execution is \$30 million.<sup>7</sup>

All studies that have been conducted regarding the cost of capital punishment have concluded that execution is much more expensive than sentencing a person to life in prison; a capital trial, due to many factors but most notably the length of capital trials, is much more extensive and expensive, and there is, generally, far more appellate and other post-conviction review of death penalty cases than cases seeking only life imprisonment.<sup>8</sup> According to the Death Penalty Information Center, there are several ways one can approach how much capital punishment actually costs.<sup>9</sup> First, the costs of each individual step in a capital case could be calculated, including the investigation, trial, and appeals; however, this number would only include a minority of the cases that actually go through the whole system.<sup>10</sup> A second approach is to “measure the extra cost to the state of arriving at one death sentence or one execution.”<sup>11</sup> Lastly, the total extra costs to the state for maintaining a capital punishment system could be assessed on a yearly basis.<sup>12</sup>

Each of the above approaches has its own pros and cons. In the first approach, by evaluating each individual step of a capital case, researchers would be able to break the statistics down further to determine the most costly step in the process. This further evaluation would allow legislatures to target costly areas within the process and take steps to facilitate lowering the costs of capital cases within their state. However, as stated above, this evaluation method only calculates cases that go through the entire process and not all capital cases. The second approach would allow states to evaluate capital cases on a case by case basis and determine the exact price of one execution. This method, however, limits the calculation to one death sentence when a state may have

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<sup>7</sup> *Id.* at 14 (internal citations omitted).

<sup>8</sup> *Id.* at 6.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

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

numerous executions that cost the state a tremendous amount of money.

The third approach allows a state to evaluate costs on a yearly basis which would give the state the ability to budget more efficiently. The problem with this method is that not every state will have an execution every year. Rather, if a state goes without an execution for several years and then has a person sentenced to death, the extra money needed for that sentence may not be available within the budget. The third approach is also too broad in calculating all extra costs associated with a capital case. Out of the three, the first method seems to encompass the entire realm of capital case expenses in its calculations and may be the best evaluation method.

Several states have conducted research regarding the cost of their executions. California spends \$137 million per year on the death penalty, system wide, while life in prison costs only \$11.5 million per year.<sup>13</sup> Since 1977, California has averaged less than one execution every two years making the actual cost per execution over \$250 million.<sup>14</sup> New York had no executions but spent \$170 million over a nine-year period of time prior to abolishing capital punishment.<sup>15</sup> New Jersey had no executions but spent \$253 million over a twenty-five year period of time prior to abolition.<sup>16</sup> Between 1978 and 1999, Maryland spent \$186 million on capital cases but only had five executions, thus, each execution cost \$37 million.<sup>17</sup>

Different features of a capital punishment system are also telling of the exponential cost associated with having this system over a system only offering life in prison as a maximum punishment. Maryland sought, but did not impose, the death penalty in 106 cases which cost the state \$71

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<sup>13</sup> See California Commission on the Fair Administration of Justice, *Report and Recommendations on the Administration of the Death Penalty in California*, at 10 (June 30, 2008), available at <http://www.ccfaj.org/documents/reports/dp/official/FINAL%20REPORT%20DEATH%20PENALTY.pdf> [hereinafter *California Commission*].

<sup>14</sup> *Id.*

<sup>15</sup> Dieter, *supra* note 4, at 14 n.40.

<sup>16</sup> *Id.* at 14 n.41.

<sup>17</sup> *Id.* at 15 n.42.

million.<sup>18</sup> “The average cost for the defense at trial in a federal death case is \$620,932, about eight times that of a non-capital federal murder case.”<sup>19</sup> In Kansas, the trial costs for capital cases are about sixteen times greater than for non-capital cases, while the appeal costs are twenty-one times higher.<sup>20</sup> California spends over \$60 million annually to house 670 inmates on death row.<sup>21</sup>

These staggering numbers reflect several things. First, there are more people on death row than ever before and each individual on death row costs an additional \$90,000 above what it would cost to house them for a life in prison sentence.<sup>22</sup> Second, despite the reinstatement of the death penalty in 1976, since then, there have been fewer executions per year.<sup>23</sup> Third, correctional facilities now have higher overall operating costs.<sup>24</sup> All of these factors taken together contribute to a higher cost per execution.<sup>25</sup> Since capital punishment was reinstated in 1976, “the country has spent about \$2.5 billion beyond the costs that would have been incurred if life in prison was the most severe penalty.”<sup>26</sup>

#### IV. CONSTITUTIONAL PROTECTIONS FOR DEATH ELIGIBLE DEFENDANTS OUTLINED BY THE SUPREME COURT

Over time, the Supreme Court has developed numerous constitutional protections for death penalty eligible

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<sup>18</sup> *Id.* at 16 n.47.

<sup>19</sup> J. Gould & L. Greenman, OFFICE OF DEFENDER SERVICES OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS, *Update on Cost, Quality, and Availability of Defense Representation in Federal Death Penalty Cases* at 25 (2008), available at

<http://www.uscourts.gov/FederalCourts/AppointmentOfCounsel/Publications/UpdateFederalDeathPenaltyCases.aspx>.

<sup>20</sup> Legislative Division of Post Audit State of Kansas, *Performance Audit Report - Costs Incurred for Death Penalty Cases: A K-GOAL Audit of the Department of Corrections* at 13 (2003), available at <http://www.kslpa.org/docs/reports/04pa03a.pdf>.

<sup>21</sup> *California Commission*, *supra* note 13, at 70.

<sup>22</sup> *Dieter*, *supra* note 4, at 15.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 17.

defendants because death is different from any other punishment that a criminal defendant may face. Capital defendants are afforded protection against arbitrary and capricious death sentences. Evidence considered during the sentencing phase must be both relevant and reliable. The sentencing phase of a capital trial is subject to the harmless error doctrine and should all but guarantee a capital defendant an errorless sentence of death. These constitutional safeguards are critical to capital sentencing and do not leave room for consideration of economic evaluations regarding the cost of execution versus life imprisonment.

#### A. DEATH IS DIFFERENT

The United States Supreme Court has long recognized that “death is different.”<sup>27</sup> In 1972, the Supreme Court, for the first time, emphasized that death is exceptional in terms of punishment for crimes.<sup>28</sup> In his concurring opinion, Justice Brennan stated “death is ... an unusually severe punishment, unusual in its pain, in its finality, and in its enormity.”<sup>29</sup> In another concurring opinion, Justice Stewart stated that the death penalty differed “from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability.”<sup>30</sup>

The Supreme Court has also noted several times that death is “qualitatively different.”<sup>31</sup> In *Woodson v. North Carolina*, the Court noted that “[d]eath, in its finality, differs

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<sup>27</sup> See, e.g., *Lankford v. Idaho*, 500 U.S. 110, 125 (1991); *Clemons v. Mississippi*, 494 U.S. 738, 750 n.4 (1990); *Booth v. Maryland*, 482 U.S. 496, 509 n.12 (1987); *Solem v. Helm*, 463 U.S. 277, 289 (1983); *Enmund v. Florida*, 458 U.S. 782, 797 (1982); *Beck v. Alabama*, 447 U.S. 625, 637-38 (1980). See also, Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 Harv. L. Rev. 355, 370, 397-401 nn.200-206 (1995) (collecting cases for the proposition that “death is different”).

<sup>28</sup> *Furman v. Georgia*, 408 U.S. 238, 287 (1972) (Brennan, J., concurring).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 306 (Stewart, J., concurring).

<sup>31</sup> *California v. Ramos*, 463 U.S. 992, 998-99 (1983); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

more from life imprisonment than a 100-year prison term differs from one of only a year or two.”<sup>32</sup> The Court summed up why death is different in its opinion in *Gardner v. Florida*:

[F]ive Members of the Court have now expressly recognized that death is a different kind of punishment from any other which may be imposed in this country. From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.<sup>33</sup>

Death is deliberate. Death is final.

#### B. A SENTENCE OF DEATH CANNOT BE HANDED DOWN IN AN ARBITRARY & CAPRICIOUS MANNER

Since “death is different,” the Supreme Court has developed a “greater level of scrutiny of the capital sentencing determination.”<sup>34</sup> Courts must strive to make sure executions are not handed out in an arbitrary or capricious fashion.<sup>35</sup> A sentence of death is to be reviewed by appellate courts to avoid arbitrary or unfair application of the death penalty.<sup>36</sup>

The Supreme Court has developed two general conditions to minimize the risk of arbitrary action in capital

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<sup>32</sup> *Woodson*, 428 U.S. at 305.

<sup>33</sup> *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977) (internal citations omitted).

<sup>34</sup> *Ramos*, 463 U.S. at 998-99.

<sup>35</sup> *Id.*

<sup>36</sup> *See Hopper v. Evans*, 456 U.S. 605, 611 (1982) (and cases cited therein).

sentencing.<sup>37</sup> First, courts must set boundaries on the sentencer's judgment to "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder."<sup>38</sup> Second, sentencers must be allowed "to consider any relevant mitigating factor" that might prevent the sentencer from imposing the death penalty.<sup>39</sup>

i. THE CLASS OF PERSONS DEATH ELIGIBLE MUST BE  
NARROWED

States must adopt statutes and courts must implement procedures that distinguish between those defendants who deserve to be executed and those who do not.<sup>40</sup> The statutes and procedures should also guide juries in deciding on which factors support a sentence of death and those factors which do not.<sup>41</sup>

At the sentencing phase, narrowing occurs when the sentencer is required to determine whether aggravating circumstances justify imposing the death penalty.<sup>42</sup> A defendant cannot receive a death sentence unless the trier of fact convicts the defendant of murder and finds at least one aggravating circumstance at either the guilt or penalty phase.<sup>43</sup> An aggravating circumstance must be narrowly tailored

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<sup>37</sup> *Zant v. Stephens*, 462 U.S. 862, 877 (1983); *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 246 (2007).

<sup>38</sup> *Zant*, 462 U.S. at 877; see also *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (plurality opinion).

<sup>39</sup> *Abdul-Kabir*, 550 U.S. at 246.

<sup>40</sup> *Godfrey*, 446 U.S. at 427 (quoting *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (quoting *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring))).

<sup>41</sup> *Kansas v. Marsh*, 548 U.S. 163, 173-74 (2006) (a state statute for capital sentencing must: "(1) rationally narrow the class of death-eligible defendants; and (2) permit a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime.")

<sup>42</sup> *Zant*, 462 U.S. at 878 (statutory aggravating circumstances "circumscribe the class of persons eligible for the death penalty").

<sup>43</sup> *Brown v. Sanders*, 546 U.S. 212, 216 (2006).

enough that it does “not apply to every defendant convicted of a murder. . . .”<sup>44</sup>

A statute can be effective in limiting the sentencer’s discretion if the statute provides: (1) “clear and objective standards”; (2) “specific and detailed guidance”; and (3) “an opportunity for rational review of the process for imposing a sentence of death.”<sup>45</sup> The Court in *Woodson* noted procedures that do not give credence to the character of an individual defendant or the particular offense “treats all persons convicted of a designated offense not as uniquely individual human beings, but as *members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.*”<sup>46</sup>

## ii. JURIES MUST BE ALLOWED TO CONSIDER MITIGATING EVIDENCE

As noted above, the Supreme Court has time and time again stated that juries must be allowed to consider mitigating evidence that may excuse the imposition of death on a defendant.<sup>47</sup> The Eighth and Fourteenth Amendments give a defendant the right to present mitigating evidence in capital cases.<sup>48</sup> In *Lockett*, the Court held a sentencer is obliged to think about mitigating evidence the defendant offers concerning “any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.”<sup>49</sup>

All relevant mitigating evidence must be allowed to be presented to juries in capital cases and the defendant must be afforded wide latitude to present the mitigating evidence.<sup>50</sup>

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<sup>44</sup> *Tuilaepa v. California*, 512 U.S. 967, 972 (1994).

<sup>45</sup> *Godfrey*, 446 U.S. at 428 (quoting, respectively, *Gregg*, 428 U.S. at 198; *Coley v. Georgia*, 204 S.E.2d 612, 615 (Ga. 1974); *Proffitt v. Florida*, 428 U.S. 242, 253 (1976); and *Woodson*, 428 U.S. at 303 (opinion of Stewart, Powell, & Stevens, JJ.)).

<sup>46</sup> *Woodson*, 428 U.S. at 304 (plurality opinion) (emphasis added).

<sup>47</sup> *Abdul-Kabir*, 550 U.S. at 246. *See also* *Sumner v. Shuman*, 483 U.S. 66, 81-82 (1987); *Eddings v. Oklahoma*, 455 U.S. 104, 111-12 (1982); *Gregg*, 428 U.S. at 197.

<sup>48</sup> *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

<sup>49</sup> *Id.*; *see also* *Marsh*, 548 U.S. at 173-74.

<sup>50</sup> *Roper v. Simmons*, 543 U.S. 551, 568 (2005). *See also* *Abdul-Kabir*, 550 U.S. at 264 (statutory requirement that jury consider only

Sentencers in capital cases “must give independent weight” to each mitigating circumstance.<sup>51</sup> However, when evaluating mitigating factors, the sentencer does not have free discretion.<sup>52</sup> In *Brown*, the Court upheld the trial court’s instruction warning the jury to not be swayed by “mere sympathy” when making the determination to give a death sentence.<sup>53</sup> The *Brown* Court concluded that a reasonable juror would interpret the instruction to mean that he or she should ignore emotional responses that are not rooted in the aggravating and mitigating evidence and that states may prohibit juries from basing their sentencing decisions on factors not presented at the trial.<sup>54</sup>

It is imperative that capital sentencing juries avoid an arbitrary and capricious application of the death sentence. If the above statistics were to swing the other direction and show that executions were less expensive than imprisoning a person for life, juries allowed to consider these cost evaluations may begin to arbitrarily put defendants to death because it is cheaper for society to do so. By allowing these costs to be considered, regardless of the side to which the pendulum swings, courts open themselves up to a direct violation of the Supreme Court’s rule against arbitrarily applying the death penalty.

Allowing juries to consider the cost of execution versus the cost of life in prison without parole does not meet the Supreme Court requirement of narrowing the class of death eligible persons. To consider the statistics as they are now, juries would not sentence any defendants to death because it is cheaper for society to keep them in prison for the rest of their

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particular kinds of mitigating evidence was unconstitutional); *Brewer v. Quarterman*, 550 U.S. 286, 289 (2007) (sentencer may not be precluded from “giving meaningful effect to mitigating evidence”); *Lockett*, 438 U.S. at 608 (plurality opinion) (sentencer cannot be precluded from considering character or circumstance of defendant’s record).

<sup>51</sup> *Lockett*, 438 U.S. at 605 (plurality opinion); *Hitchcock v. Dugger*, 481 U.S. 393, 398-99 (1987).

<sup>52</sup> *California v. Brown*, 479 U.S. 538, 542-43 (1987).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* (The jury in *Brown* had been instructed not to be swayed by “mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling.”).

lives. It is understandable why a defendant would want to offer the statistics as mitigating evidence. However, the purpose of aggravating and mitigating evidence is to allow the jury to evaluate the individual defendant and the crime itself. Even though the statistics would be an extremely powerful mitigating argument to keep the defendant alive, the statistics do not go toward the individual defendant or the murder itself and should not be considered by a jury when determining whether to impose a sentence of death.

### C. SENTENCING EVIDENCE MUST BE RELEVANT AND RELIABLE

The Eighth Amendment demands any part of a capital case be analyzed under a higher level of scrutiny if that part of the case affects the sentencing determination.<sup>55</sup> A heightened standard of reliability is required when determining whether death is the most appropriate punishment.<sup>56</sup> Constitutional standards “require inquiry into the reliability, relevance, value, and prejudicial effect of sentencing evidence to preserve fundamental fairness and protect the rights of both the defendant and the victim’s family.”<sup>57</sup> Unless the evidence is both relevant and reliable, it should not be considered during the sentencing phase of a capital case.

The Federal Rules of Evidence demand that only material that relates closely to the facts of a case be considered by the trier of fact.<sup>58</sup> Rule 402 clearly states that relevant evidence is admissible while irrelevant evidence is not.<sup>59</sup> Relevant evidence means “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”<sup>60</sup> Trial judges are also given the discretion to find relevant evidence inadmissible if the probative value of the evidence is outweighed by the danger of unfair prejudice, confusion of the issues, or

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<sup>55</sup> *New York v. Arthur*, 673 N.Y.S.2d 486, 493-94 (N.Y. 1997).

<sup>56</sup> *Id.* at 494.

<sup>57</sup> *Tennessee v. Sims*, 45 S.W.3d 1, 14 (Tenn. 2001).

<sup>58</sup> FED. R. EVID. 401, 402, & 403.

<sup>59</sup> FED. R. EVID. 402.

<sup>60</sup> FED. R. EVID. 401.

misleading to the jury.<sup>61</sup> The United States Supreme Court has stated that mitigating evidence is admissible in capital cases and only has to meet a low threshold test for relevance to be admitted.<sup>62</sup>

Execution cost-benefit evidence does not meet the relevance test under either the Federal Rules of Evidence or precedent. This evidence is irrelevant because it does not have a tendency to make the existence of any fact that is of consequence more probable or less probable than it would be without the evidence. Jurors can make the same sentence determination with this evidence as they would without the evidence. Also, this evidence does not relate to the “existence of any fact that is of consequence” but only relates to how much a state may pay for its capital punishment system to be implemented.

Even if the cost-benefit evidence is found to be relevant, courts should still find it inadmissible under Rule 403. By allowing parties to discuss the cost of executions during the sentencing phase of a capital trial, juries may confuse the issues involved in this phase. The issue in the sentencing phase of a capital trial is to determine whether the defendant receives the death penalty or a lesser punishment. The issue is not one of how much an execution may cost and it is critical that jurors not be allowed to confuse these two issues at such a crucial part of a capital case.

The cost of an execution versus the costs of life imprisonment has no relevance to a capital sentencing phase. Only relevant aggravating and mitigating evidence that reflects on the individual defendant or the crime itself should be considered in the penalty phase of a capital case. A Connecticut Superior Court Judge recently dealt with the relevance of these costs evaluations and stated:

Economic arguments tailored to specific individuals are not only irrelevant but perverse. From an economic view, it will thus be more expensive to incarcerate the younger defendant

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<sup>61</sup> FED. R. EVID. 403.

<sup>62</sup> *Roper*, 543 U.S. at 568; *see also* *Tennard v. Dretke*, 542 U.S. 274, 284-88 (2004) (rejecting the Fifth Circuit’s test for “constitutional relevance”).

for the remainder of his life and – in strict economic terms – more cost-effective to execute him. . . . This argument plainly makes no moral sense.<sup>63</sup>

Overall, statistics tend to be an unreliable source of information. “Statistics is as much an art as it is a science.”<sup>64</sup> One author, Darrell Huff, has coined statistical manipulation as “statisticulation,” or in other words the use of statistical information to misinform society.<sup>65</sup> Statistics are vulnerable to various manipulations and distortions.<sup>66</sup> “The secret language of statistics, so appealing in a fact-minded culture, is employed to sensationalize, inflate, confuse, and oversimplify.”<sup>67</sup> “A well-wrapped statistic is better than Hitler’s “big lie”[;] it misleads, yet it cannot be pinned on you.”<sup>68</sup>

To illustrate how easy it is to manipulate the same statistics to fit one’s agenda, Huff proposes the following example:

You can, for instance, express exactly the same fact by calling it a one percent return on sales, a fifteen percent return on investment, a ten-million-dollar profit, an increase in profits of forty percent, or a decrease of sixty percent from last year. The method is to choose the one that sounds best for the purpose at hand and

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<sup>63</sup> *Judge: Execution, prison costs irrelevant*, UPI, Oct. 15, 2010, available at [http://www.upi.com/Top\\_News/US/2010/10/15/Judge-Execution-prison-costs-irrelevant/UPI-37711287115415](http://www.upi.com/Top_News/US/2010/10/15/Judge-Execution-prison-costs-irrelevant/UPI-37711287115415) (quoting John C. Blue, a Connecticut Superior Court Judge, rejecting the defendant’s request to allow testimony on the cost of the state of execution compared to the cost of life imprisonment)(internal quotations omitted).

<sup>64</sup> Darrell Huff, *HOW TO LIE WITH STATISTICS* 120 (W.W. Norton & Company 1954) available at <http://www.horace.org/blog/wp-content/uploads/2012/05/How-to-Lie-With-Statistics-1954-Huff.pdf>.

<sup>65</sup> *Id.* at 100.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 8.

<sup>68</sup> *Id.* at 9.

trust that few who read it will recognize how imperfectly it reflects the situation.<sup>69</sup>

Going on this proposition, the statistics regarding the cost of the death penalty and the cost of life in prison without parole are fatally flawed. The statistics that are available are based on a judicial system where the death penalty is the ultimate penalty. If life in prison without parole was the ultimate penalty, the statistics would show that penalty to be much more expensive than the lesser penalty of life in prison with the option for parole. These statistics are developed to promote anti-death penalty arguments and can be skewed in a variety of ways to lend credence to any proposition one may want to propose. To allow a jury to consider statistics that can fluctuate, as needed, while deciding whether or not a defendant lives or dies is absurd.

The individual execution costs will vary depending on the age of the defendant, the execution procedure used by the state in which the execution is carried out, etc. This dynamic shows that the statistical numbers can always be skewed and used in ways that promote whatever policy argument or reasoning one may want to promote. To determine whether one lives or dies based on flawed, irrelevant, unreliable statistics or statistics that can easily be altered should not be allowed in capital cases.

#### D. AN ERROR IN CAPITAL SENTENCING MAY BE CONSTITUTIONALLY HARMLESS BUT IT IS STILL AN ERROR

The harmless error doctrine was first developed by the United States Supreme Court in 1967.<sup>70</sup> In *Chapman*, the Court decided that even though an error is constitutional, that does not render that error resistant to the harmless error analysis.<sup>71</sup> The Court also found that some constitutional errors were so fundamental as to defy harmless error analysis and to thus be automatically reversed.<sup>72</sup> The *Chapman* Court established the rule for determining whether an error was in fact a harmless

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<sup>69</sup> *Id.* at 82.

<sup>70</sup> *Chapman v. California*, 386 U.S. 18 (1967).

<sup>71</sup> *Id.* at 22.

<sup>72</sup> *Id.* at 23.

error: “before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.”<sup>73</sup>

In 1988, the Court held that the *Chapman* test was equally applicable in the penalty phase of a capital case.<sup>74</sup> The Court, in *Satterwhite*, held: “it is important to avoid error in capital sentencing proceedings. Moreover, the evaluation of the consequences of an error in the sentencing phase of a capital case may be more difficult because of the discretion given to the sentencer.”<sup>75</sup> The only time the Court has found automatic reversible error in a capital case is where a juror has been found to be so pro-capital punishment that he is effectively unable to not impose a death sentence.<sup>76</sup>

The purpose of the harmless error test “reflect[s] a balancing of the defendant’s interests in an error-free proceeding against the societal interest in finality and judicial economy.”<sup>77</sup> James Scoville has summed it up nicely: “any error in capital sentencing implicates some constitutional concerns...the constitutionally compelled sentencing discretion in capital punishment proceedings may be undermined by error regardless of whether an independent constitutional right is violated.”<sup>78</sup>

Allowing a jury to consider the cost of execution versus the cost of life imprisonment should be deemed an error. One can call it “harmless error” but it is still an error and it is an error in a case that determines whether a person lives or dies. We should strive for a perfect system and an error in death sentencing is a permanent mistake and is greater than any other mistake allowed in criminal jurisprudence.

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<sup>73</sup> *Id.* at 24.

<sup>74</sup> *Satterwhite v. Texas*, 486 U.S. 249 (1988).

<sup>75</sup> *Id.* at 258.

<sup>76</sup> The term “Morgan Precept” comes from the case of *Morgan v. Illinois*, 504 U.S. 719, 729 (1992).

<sup>77</sup> James C. Scoville, *Deadly Mistakes: Harmless Error in Capital Sentencing*, 54 U. CHI. L. REV. 740, 744 (1987) (quoting *United States v. Hasting*, 461 U.S. 499, 502 (1983) (criticizing lower court for its failure “to strike the balance between disciplining the prosecutor on the one hand, and the interest in the prompt administration of justice and the interests of the victim on the other”)).

<sup>78</sup> *Id.* at 757.

## V. SHOULD JURIES BE ALLOWED TO EVALUATE EXECUTION COSTS IN CAPITAL CASE SENTENCING?

There are valid arguments on both sides regarding these cost evaluations. A juror, as a taxpayer, has a vested interest in the cost of all trials, especially costly capital murder trials. The statistics available calculate the average cost of executions and do not allow jurors to evaluate what the individual trial they are sitting for will cost. There is no national standard or national agency that calculates the cost of executions on average around the nation so the statistics provided are fundamentally flawed since they are not a national average but only an average for a few states.

### A. JURIES HAVE A VESTED INTEREST IN COSTS

As taxpayers, every juror in every trial has a vested interest in the cost of that prosecution. The costs of a trial include the prosecutor's salary, court-appointed defense counsel, the judge's salary, law enforcement salaries, and other various trial costs. These costs are high in a normal criminal trial but, due to many factors such as the length of a capital trial and the cost of mandatory expert witnesses, are exponentially increased in a capital murder trial as shown in the statistics above. As the expense of trials increase, local taxes likely will be increased to cover the extra costs.

When calculated, the actual cost per execution per year to individual taxpayers is actually quite minimal.<sup>79</sup> The United States has spent around \$2.5 billion on capital cases since 1976.<sup>80</sup> Taxpayers spent, on average, thirty-one cents per year on capital cases from 1976 to 2010.<sup>81</sup> Individual taxpayers pay

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<sup>79</sup> To determine the following calculations, the author used the statistics included in Section II and divided them by the individual state and national census figures, respectively. Note only population of eighteen and over was used in these calculations since author intends to calculate taxpayer expense. U.S. DEPARTMENT OF COMMERCE. UNITED STATES CENSUS BUREAU, 2010 Population Estimates, available at <http://www.census.gov>.

<sup>80</sup> Dieter, *supra* note 4, at 15.

<sup>81</sup> \$2.5 billion over 34 years (1976-2010) = \$7,352,411 per year/population of 234,564,071 = \$.31 cents per year.

around \$4.90 a year for capital cases in California.<sup>82</sup> Taxpayers in New York and New Jersey paid less than \$1.50 per year for their capital punishment system prior to their states' abolition of the death penalty.<sup>83</sup> Maryland taxpayers paid around \$2.00 per year for their capital punishment system.<sup>84</sup> These figures show that the actual cost to individual jurors, as taxpayers, is nominal and goes to show that jurors do not have the vested interests that one might think when looking at the larger overall state costs.

While the jurors may have a vested interest as taxpayers, the "death penalty itself is not on trial" when it comes to cost evaluations.<sup>85</sup> The better venue to evaluate the cost of execution compared to the cost of life in prison without parole is within the legislature, whether it is on a federal or an individual state level. Leland Price, Tennessee Assistant District Attorney General, recently stated, "public debate among our policy makers concerning the economic costs of the death penalty is one thing, presenting such evidence to a capital jury trying to make an individualized sentencing decision is another."<sup>86</sup>

By allowing jurors, as taxpayers, to evaluate the cost of execution versus life in prison without parole, courts allow the jurors' personal finances to come into the sentencing equation. A capital murder trial is not the place for personal finances to have such a huge impact on whether or not the defendant lives or dies. In times of economic hardship, the decision to render the death penalty would shift in light of individual jurors' financial situations instead of being evaluated in terms of the individual convicted of murder and the circumstances surrounding the crime itself.

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<sup>82</sup> *California Commission*, *supra* note 13 (\$137 million per year/population of 27,958,916 = \$4.90 per year).

<sup>83</sup> *Dieter*, *supra* note 4 at, 15-16 (New Jersey: \$252 million over 20 years = \$10,080,000 per year/population of 6,726,680 = \$1.50 per year; New York: \$170 million over 9 years = \$18,888,888 per year/population of 15,053,173 = \$1.25 per year).

<sup>84</sup> *Id.* at 17 (\$186 million over 20 years = \$9,300,000 per year/population of 4,420,588 = \$2.10 per year).

<sup>85</sup> *Tennessee v. Cobbins*, 2009 WL 2115350, State's Response to Motion to Permit Evidence at Sentencing Relating to Economic Costs of the Death Penalty, Knox County, Tenn. (May 12, 2009).

<sup>86</sup> *Id.*

## B. NO CASE BY CASE STATISTICS ARE AVAILABLE

There are no individual death penalty trial cost statistics available. Each case is different in facts, investigation methods, trial strategy, appeals, and post-conviction procedures. Therefore, the cost of each capital murder case differs from the next and can differ tremendously.

In *Lockett*, the Supreme Court determined that the jury in a capital murder trial is to make a decision appropriate for the individual defendant in light of the crimes he has committed.<sup>87</sup> The Court reasoned “[g]iven that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases.”<sup>88</sup>

To allow non-individualized cost evaluations to play a part in a jury’s decision to determine whether the defendant lives or if the defendant is executed is contrary to Supreme Court capital murder jurisprudence. The Court has made clear that capital case sentencing determinations are to be made on an individual defendant and individual crime basis. Since individual case statistics are unavailable in the death penalty arena, courts should not allow juries to consider the difference in execution and life in prison without parole in terms of cost. Juries should only be allowed to consider the characteristics of the individual defendant and the circumstances of the individual crime committed.

## C. NO NATIONAL STANDARDS FOR EVALUATION OF COSTS

No national evaluation standard exists for evaluating the cost of executions and life in prison without parole in each state. With no national evaluation standard in place, all fifty states could implement a different method of evaluation. If different evaluation methods are used, the number of variables considered during the statistical analysis can make

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<sup>87</sup> *Lockett*, 438 U.S. at 605. See also *Sims*, 45 S.W.3d at 29 (holding that evidence regarding the nature and circumstances of the crime or relating to the defendant’s character and background is admissible in order to meet the constitutional requirement that sentencing be conducted in an individualized manner.).

<sup>88</sup> *Lockett*, 438 U.S. at 605.

the eventual statistics inconsistent among the various states. The different parts that would have to be pieced together to gather a comprehensive economic picture on the costs of execution will vary widely from jurisdiction to jurisdiction depending on the evaluation method.

As mentioned above, not all death penalty states have statistics available regarding the cost of execution or the cost of life in prison without parole. If death penalty states want to begin to allow juries to consider the costs of executions during the sentencing phase of capital cases, they should develop a national committee to determine how these costs are calculated and the variables that must be considered when making these calculations. These steps would make the statistics more reliable and allow juries to make true determinations regarding the actual costs involved instead of relying on fluffed numbers as they stand now.

## VI. HOW DO WE AVOID THE TROUBLES OF FLAWED STATISTICS THAT MAY DETERMINE WHETHER ONE IS SENTENCED TO LIFE OR TO DEATH?

Courts have three options in determining how cost-benefit evidence is admitted into the sentencing phase of a capital trial: (1) courts may allow only the capital defendant to present the evidence; (2) once a defendant offers the statistical evidence, the courts may choose to allow the prosecution to respond to the argument; or (3) courts may choose to completely exclude any cost-benefit evidence or arguments. While each of these options have their benefits, ultimately courts should follow the latter and not allow execution cost-benefit evidence or arguments at the sentencing phase of capital cases.

### A. ONLY THE CAPITAL DEFENDANT CAN PRESENT STATISTICAL EVIDENCE OF EXECUTION COST

Courts may decide to only allow the defense to admit the information regarding cost of execution versus life imprisonment. This information can be a valuable asset to a capital defendant and potentially spare the defendant's life.

Defense attorneys owe a duty to each client to protect their constitutional rights and freedoms. This duty does not become less important when a client is charged with capital murder. If anything, the duty becomes more important to spare the life of the client. Defense counsel must attempt to sway the jury to spare the life of his or her client and make jurors aware of any information that may possibly sway their sentencing decision in favor of life in prison. To this point, it is imperative for defense counsel to take all avenues available to avoid a sentence of death and offering this statistical information for jury consideration is an avenue that must at least be attempted.

A capital defendant has a valid argument that these statistics are a form of mitigating evidence that should be considered by the jury during the sentencing phase. As the statistics stand now, the defendant can make a powerful argument to the jury to sentence him to a term of life in prison because that sentence would save the jurors, as taxpayers, a tremendous amount of money. If a court finds this argument to be persuasive and determines the information to be mitigating, defendants around the country could be spared from execution.

If one's life is being determined by twelve people, those people should be allowed to consider anything and everything while making their determination to take the life of another. Human nature and compassion seems to say that courts should not deny a defendant the right to plea for his life in any manner necessary. If this plea includes using statistical data that may curtail a jury from sentencing a defendant to death, then so be it.

#### B. ONCE THE DEFENDANT OPENS THE DOOR, THE PROSECUTION CAN RUN THROUGH IT

Courts may decide to allow the defendant to admit the information regarding the cost of execution first and then allow the prosecution to counter the information with their own arguments. It would only seem fair to allow the prosecution to counter any arguments made by the defendant, especially statistical arguments.

Since the statistics are in favor of the capital defendant, the only avenue the prosecution has available is to tug at the

emotions of the jury. They may remind the jury of how heinous the defendant's actions were. The prosecution may also introduce the costs to the victim and the victim's family. They may agree the cost of executing the defendant is high; however, that cost can in no way outweigh the cost of losing a relative.

Why should the defendant be given the chance to live based on the cost of executions when the defendant took the life of an innocent person? How low do the costs have to drop before you will deliver justice for the innocent life taken by the defendant? The judicial system is supposed to seek justice; are you going to allow money to alter what the system is designed to do? These are all questions the prosecution may ask the jury when trying to counter a capital defendant's arguments regarding the cost of execution.

A prosecutor may focus on the fact that the cost of a punishment should never matter, especially when a person's life has been taken by another. Cost of punishment may be a valid consideration in misdemeanor or lower felony cases when the options are limited to incarceration or probation or community service. However, the cost of execution versus the cost of life imprisonment has no place in capital sentencing.

A prosecutor may explain to the jury that the majority of these costs are sunk costs that, in reality, never affect the individual jurors as taxpayers. The trial costs, including prosecutorial salaries, law enforcement salaries, judge salaries, are costs that are going to be paid whether those individuals are working on a capital case or on a misdemeanor case. These individuals do not receive overtime pay for the extra time put into a capital trial. Therefore, the jurors should not put a tremendous amount of faith into a defendant's arguments based on execution costs.

### C. EXECUTION COST-BENEFIT EVIDENCE AND ARGUMENTS SHOULD BE INADMISSIBLE IN CAPITAL CASES

Courts should not allow the information regarding the cost of execution and life in prison without parole into the realm of death penalty jurisprudence. The courts have juggled the many constitutional safeguards surrounding the death penalty along with the moral realms of the death penalty for

years. To allow economic evaluations to come into play is opening death penalty jurisprudence up to further attack.

Death *is* different. The decision of whether or not to take a person's life is the ultimate decision a capital juror has to make. This decision will forever weigh on a juror's mind.

Allowing parties to present execution cost arguments to a capital jury is arbitrary and capricious in and of itself. Today, if used, the statistics could potentially allow all capital defendants to escape execution. The statistics may drastically change tomorrow and potentially allow all capital defendants to receive a death sentence because it is cheaper for society to execute. Depending on the statistics of the day, you live or you die. This is the exact thing the Supreme Court has tried to avoid in developing the protections afforded by defendants from arbitrary and capricious actions by the courts.

By allowing cost-benefit evidence and arguments into the sentencing phase of a capital case, courts will make the decision a personal decision for the jurors to make instead of a decision based on the circumstances surrounding the crime and the individual defendant. The purpose of the sentencing phase is to allow the jury to determine one's punishment based on aggravating and mitigating circumstances. Execution statistics do not fit under either of those categories and should not be admissible in the sentencing phase of a capital trial. The punishment decision is not a personal decision; it is a decision to be made based on the evidence submitted at trial regarding the crime itself and the character of the defendant - nothing more, nothing less.

One could go on for days about the relevance and reliability of statistics. Suffice it to say, the statistics offered above are neither relevant nor reliable and have absolutely no business being admitted into a capital case. The cost statistics are completely irrelevant to the crime of murder or any circumstances that might surround the crime. The statistics are also irrelevant to the character or background of a capital defendant. These statistics can be twisted to promote one public policy and twisted again to meet another. A famous quote sums up the reliability of statistics nicely: "There are three kinds of lies: lies, damned lies, and statistics."<sup>89</sup> The cost

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<sup>89</sup> Former British Prime Minister Benjamin "Disraeli would often apply with justice and force: "There are three kinds of lies: lies,

of execution statistics are irrelevant and unreliable and should not find their way into death penalty jurisprudence.

Since capital trial errors are evaluated under the harmless error doctrine, it would likely be impossible for appellate courts to properly evaluate the effects of allowing this statistical information and determine if a harmful error had actually occurred. With the cost-benefit evidence being questionable, at best, trial courts should avoid putting appellate courts in the predicament of trying to guess what jurors are thinking as they make sentencing determinations.

As previously stated, the admittance of execution cost evidence should be deemed an error. Harmless or harmful, an error is still an error. The judicial system should strive to be a perfect system even if that goal seems unattainable at times. An error of this magnitude can easily be avoided by courts holding that cost-benefit evidence and arguments regarding executions are inadmissible.

## VII. CONCLUSION

The death penalty has been under attack for many years and the resulting debate has focused on various topics that put people's values into play. To allow an economic element into the sentencing phase of capital cases will only open the death penalty up for further criticism. Money should not be an option when determining whether a person lives or dies.

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damned lies, and statistics.'" MARK TWAIN, CHAPTERS FROM MY AUTOBIOGRAPHY- XX 471 (1907), *available at* <http://www.gutenberg.org/files/19987/19987-h/19987-h.htm>.