

# **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  
Ocean City Police Department  
Representing the Maryland Chiefs of Police