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Submitted to the Judiciary Committee
Delaware House of Representatives
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Senate Bill 19, Repeal of the Death Penalty

The Criminal Justice Legal Foundation is an organization formed to protect the rights of victims of crime and law-abiding public in the criminal justice system. We respectfully submit this statement regarding Senate Bill 19, which would repeal the death penalty in Delaware.

It is somewhat surprising that the repeal effort has gotten as far as it has in Delaware. In several states, opponents of the death penalty have succeeded in convincing legislatures to abandon justice in the worst murder cases despite the view of the overwhelming majority of the people that death is the just punishment for these cases. However, Delaware does not have the problems that tipped the scales in these other states.

- Unlike New Jersey, the state supreme court has not rendered the death penalty ineffective by bending over backwards to reverse death sentences on the most strained reasoning imaginable.¹ Quite the contrary, the Delaware Supreme Court has been a model of judicial fairness that the state can be proud of.
- Unlike Connecticut, Delaware's death penalty has not been rendered ineffective by state courts that take so long to decide a capital case as to effectively commute it to life in prison. For Delaware executions to date, the median time from sentence to execution has been only 7.3 years.
- Unlike Illinois – specifically Chicago – Delaware has no history of innocent people being sentenced to death because of police misconduct. Indeed, even the so-called “innocence list,” with its notoriously loose definition of who is considered “innocent” or “exonerated”² does not list a *single case* from Delaware.³

An Effective and Just Death Penalty

Legislators in some states have thrown in the towel and accepted watered-down justice because their states have not had an effective death penalty at any time the modern era,⁴ and they have concluded there is no realistic possibility of making the death penalty effective. This is definitely not the case in Delaware.

From 1992 through 2001, the State of Delaware was a model for the nation in its delivery of fair, effective justice in the worst murder cases. During this period, Delaware executed 13 of its worst murderers. Comparing this number with the murders in a ten-year span representing the

period in which most of the murders were committed, this works out to executing 4% of the murderers.⁵ This small but significant percentage is consistent with the goals of maintaining the death penalty as a credible deterrent while still reserving it for the “worst of the worst.”

The crimes for which murderers have been executed in Delaware are crimes that thoroughly deserved the penalty. The death penalty was properly given to William Flamer and Andre Deputy, who butchered an elderly couple, stabbing them 79 and 66 times. The penalty was properly imposed on David Laurie, who stabbed his wife to death and then set fire to a house with four children in it, killing three of them. These are crimes for which any lesser penalty is not justice.

Whatever may be the situation elsewhere, Delaware has never, in the modern era, executed anyone guilty of only a mitigated homicide, for which a death sentence would be an injustice. Nor has Delaware sentenced to death any innocent person. Opponents do not have a single case of an unjust Delaware death sentence in the modern era that they can point to.⁶

Beginning in 2002, Delaware’s ability to deliver justice was impaired by two national developments, both of which are temporary. First, contrary to the usual principle of respecting judicial precedent, the United States Supreme Court struck down a procedure for imposing capital sentences that it had expressly approved 12 years earlier, accepting exactly the same argument it had earlier rejected.⁷ This about-face by the Supreme Court caused delays, and regrettably some well-deserved sentences had to be reversed, even though they had been properly imposed under the law in effect at the time of the trial.⁸

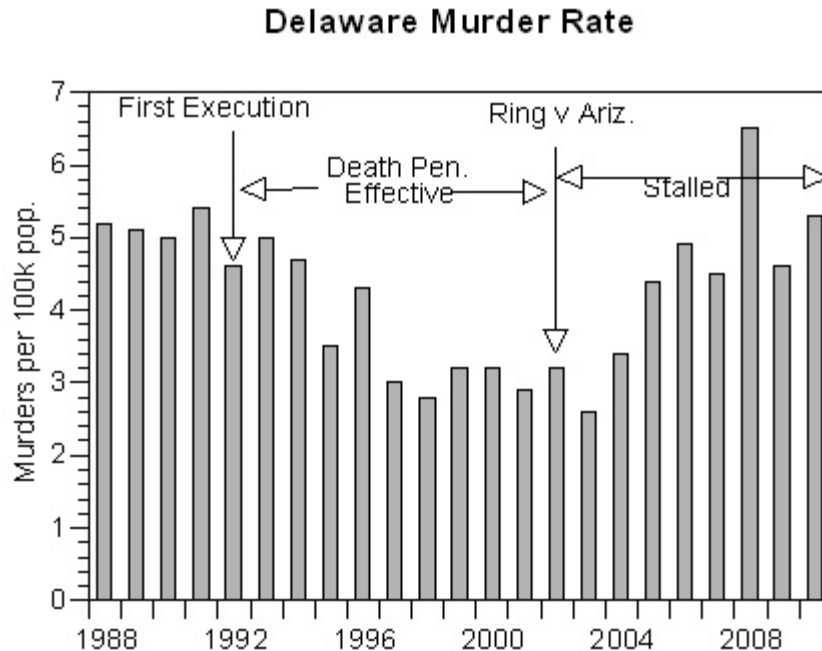
The second development was the challenge to the three-drug method of lethal injection that had been in use for many years. The U.S. Supreme Court rejected the primary challenge in 2008 in a case from Kentucky,⁹ and the U.S. Court of Appeals for the Third Circuit rejected the attack on Delaware’s protocol in 2010.¹⁰

These problems are resolved and unlikely to recur. Although the United States Supreme Court tinkered with capital sentencing procedure for many years in the 1970s and 1980s, it largely completed that process many years ago. The relatively recent *Ring* case was an anomaly, resulting from the Supreme Court’s reworking of jury trial rights in noncapital cases. Other recent limitations that the Supreme Court has placed on capital punishment have been to exclude discrete categories of defendants who were rarely sentenced to death anyway.¹¹ These kinds of restrictions have little impact on the state’s ability to enforce its death penalty generally, as the vast majority of death-row inmates obviously do not qualify for them. The problems with the three-drug protocol have been eliminated in many states simply by eliminating the problematic second and third drugs and using a single-drug protocol.

Punishing people is never pleasant, particularly when a severe punishment appropriate for the worst crimes is in order. Even so, Delaware can justifiably be proud of its record in delivering effective justice in the worst murder cases during a time when the opponents of justice

had succeeded in stalling it elsewhere. Delaware can readily return to the effective delivery of justice with only minor adjustments to its procedures.

Deterrence



As the chart above illustrates, Delaware's murder rate fell precipitously during the period when the death penalty was being regularly enforced and has risen during the period that enforcement has been stalled. Crime is complex, and many factors are relevant, so a simplistic argument claiming a conclusive result from a simple correlation in one variable is not valid.¹² The decline in the 1990s is attributable in part to a general, nationwide decline in crime in that period, but the rise since *Ring* cannot be explained by national trends. Although simple, this chart sounds a note of caution that the deterrent effect of the death penalty should not be casually dismissed.

At one time, it was common for opponents of the death penalty to claim that deterrence had been conclusively disproved. No responsible, informed person claims that today. Beginning in the late 1990s, a new generation of econometric studies showed a deterrent effect. One well-known study estimated that each execution saves 18 innocent lives.¹³ Another well-known study made a more modest but still significant estimate of five lives saved per execution.¹⁴ Since then, there have been critiques of these studies and responses by the authors explaining that their results remain valid even after taking into account the criticisms.¹⁵

The one proposition not in dispute is that studies of this type cannot *conclusively* prove the case *either way*. We simply cannot do controlled experiments of the kind that, for example, drug companies do when testing a new drug for effectiveness. Given that we have a substantial body of research showing that a death penalty that is actually enforced *may* deter some of the potential murderers and save a substantial number of innocent lives, the question is whether we can turn our back on this deterrent and take the risk.

As a matter of common sense, a credible threat of severe punishment will produce some reduction in the number of people who choose to commit the punished act. Legislatures rely on that principle every time they raise the penalty for any behavior they wish to deter. Those claiming that the death penalty does not deter are claiming that there is something unique about this punishment, making it different from all others. There is no empirical or logical basis for such a conclusion

If the death penalty is a deterrent, and we fail to use it, innocent lives are lost as a result. If the death penalty is not a deterrent, and we do use it, we are enforcing a penalty that is independently justified as the just deserts for those who commit the most heinous crimes. The burden of proof should therefore be on those who wish to risk innocent lives in order to spare the worst murderers from the punishment they deserve. Beyond question, they have not carried this burden.

Fairness

Opponents of the death penalty are fond of saying that “capital punishment is only for those without capital.” But it is not true, and Delaware has shown that it is not true. Thomas Capano was justly sentenced to death for murder, and all his wealth and political connections could not keep him off death row.¹⁶ He got off death row, not because of his wealth or connections, but in the same way hundreds of other murderers have gotten off – because the U.S. Supreme Court changed the rules of procedure years after the trial.¹⁷ As noted above, large-scale procedural changes of this type are unlikely to happen in the future.

Opponents regularly claim that the death penalty is imposed in a racially discriminatory manner. The basis of these claims crumbles upon inspection. First, and most importantly, the contention that the black defendants are punished more severely than white defendants for similar murders is consistently refuted *by the opponents’ own studies*.¹⁸

With the type of discrimination of greatest concern refuted by their own studies, the opponents fall back on a claim that people who murder black victims are less likely to receive the death penalty than people who murder white victims in similar circumstances. Even if that were true, it would not be an argument for denying justice in the white-victim cases. It would be an argument for seeking justice more diligently in the black-victim cases. A claim that we should *deny* justice to all victims equally is hardly a compelling argument. But the claim is not true. The result we see in study after study is that when the other legitimate variables are properly

accounted for, the so-called race-of-victim bias either disappears completely or is relegated to a factor vastly less important than the legitimate factors in the cases.¹⁹

Cost

After many years of failing to convince the American people with the arguments refuted above, the opponents have recently attempted to exploit the financial crisis facing state and local governments. The argument is that we should accept watered-down justice for the very worst crimes because we simply cannot afford real justice.

The question is not whether a capital trial costs more than a noncapital trial for the same crime. Of course it does. The question is whether the total cost to the system of retaining capital punishment is so vastly greater than the total cost of abolishing it is to have a major impact on other budget priorities. To make this argument, the opponents rely on studies that leave out important components of the picture. In addition, some important items of costs cited in other states have been and should continue to be substantially less in Delaware.

Sentencing a murderer to life with absolutely no possibility of parole instead of death incurs a very substantial future cost in healthcare. As is well known, the cost of healthcare escalates sharply with age. Using data compiled by the court-appointed receiver for California's prison system, I calculated that keeping the state's death row inmates to the end of their lives would cost an additional \$1.28 million per inmate. The actual cost may be higher, as the true costs of inmates with dementia are only now beginning to be understood.

The additional cost of incarceration, including healthcare, that would result from a sentence of life in prison instead of the death penalty would be greater in Delaware than in other states because Delaware has a history of executing its capital sentences more quickly. For this reason, a study from a state where the death penalty has been obstructed, such as Maryland or California, is not necessarily valid in Delaware because the study assumes that the cost of death-row incarceration is the cost while appeals drag out for 20 or 30 years. Indeed, a widely cited, highly partisan study in California listed the cost of incarceration on death row as the number-one cost of the death penalty,²⁰ based on the assumption that efforts to expedite the appeals will fail.

Nearly all of the studies claiming a sharply higher cost for the death penalty completely ignore the offsetting savings resulting from cases that end in a plea, a life sentence, and a waiver of appeals. We regularly read in the newspapers of murder defendants who plead guilty and accept a life sentence in order to avoid the death penalty. In a state with no death penalty, they would either go to trial or bargain for a sentence that allows them to be released at some point in the future. In a study in 2009, I estimated that counties in states with a death penalty disposed of 18.9% of all murder cases with a plea and a life or very long sentence, compared to only 5% of cases in counties in states with no death penalty.²¹ For a state to abolish the death penalty and still sentence to life in prison all of the murderers that it is presently sentencing to life in prison or

death, it would have to pay for a significantly increased number of murder trials and subsequent appeals.

There is no pot of gold at the end of the death penalty abolition rainbow. Savings in reduced trial and appeal costs for cases that presently result in death sentences will be offset to a large extent by the costs for additional trials and the costs of life incarceration and healthcare. Whatever the difference in total costs may be, it is not sufficient to justify the denial of justice in the very worst criminal cases.

Conclusion

Delaware can and should return to its exemplary role in providing effective justice in the worst murder cases. The Legislature has already fixed the *Ring v. Arizona* problem. The Department of Corrections should follow the lead of other states to adopt a single-drug protocol for lethal injection. The rule on successive petitions should be tightened up so that in most cases the state courts are finished with a case after one direct appeal and one state collateral review. Any further reviews of a case should be limited to claims of actual “got the wrong guy” innocence, which are rare in capital cases.

Notes:

1. See Statement of Kent Scheidegger to the New Jersey Death Penalty Study Commission (Oct. 24, 2006), <http://www.cjlf.org/files/NJDPTestimony.pdf>
2. See *Kansas v. Marsh*, 548 U.S. 163, 189-197 (2006) (Scalia, J., concurring); Campbell, Exoneration Inflation, *Journal of the Institute for the Advancement of Criminal Justice* 49 (Summer 2008).
3. Death Penalty Information Center, The Innocence List, <http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row> (as of Apr. 18, 2013).
4. That is, since the restoration of capital punishment in *Gregg v. Georgia*, 428 U. S. 153 (1976).
5. Online data from the U.S. Bureau of Justice Statistics, <http://bjs.gov/ucrdata/Search/Crime/State/TrendsInOneVar.cfm>, show 327 murders and voluntary manslaughters in the span 1986-1995, a span with approximately the same median as the crimes in the cases executed from 1992 to 2001.
6. On April 19, 2013, I searched the web sites of the Delaware Citizens Opposed to the Death Penalty and the ACLU of Delaware and did not find any claim of an actual Delaware case where a death sentence was unjustly imposed.
7. *Ring v. Arizona*, 536 U.S. 584 (2002), overruling *Walton v. Arizona*, 497 U.S. 639 (1990).
8. See, e.g., *Capano v. State*, 889 A.2d 968 (Del. 2006).
9. *Baze v. Rees*, 553 U.S. 35 (2008).
10. *Jackson v. Danberg*, 594 F.3d 210 (3d Cir. 2010).
11. *Atkins v. Virginia*, 536 U.S. 304 (2002) (persons with mental retardation); *Roper v. Simmons*, 543 U.S. 551 (2005) (persons under 18 at the time of the crime).
12. We hear such arguments from opponents of the death penalty all the time, though. In debates, death penalty opponents regularly make a bogus, simplistic argument based on murder rates in states that do or do not have the death penalty, as if the states did not vary on any other relevant variable.
13. Dezhbakhsh, Rubin, & Shepherd, Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data, *American Law & Economics Review*, vol. 5, no. 2, pp. 344-376 (Fall 2003).
14. Mocan & Gittings, Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment, *Journal of Law and Economics*, vol. 46, no. 2, pp. 453-478 (October

2003).

15. See, e.g., Cloninger & Marchesini, Reflections on a critique, *Applied Economics Letters*, Vol. 16, No. 17, pages 1709 - 1711 (Nov. 2009); Dezhbakhsh & Rubin, From the 'econometrics of capital punishment' to the 'capital punishment' of econometrics: on the use and abuse of sensitivity analysis, *Applied Economics*, Vol. 43, Issue 25, pages 3655-3670 (2011).

16. See *Capano v. State*, 781 A.2d 556 (Del. 2001).

17. See *Capano v. State*, 889 A.2d 968 (Del. 2006).

18. See Scheidegger, Rebutting the Myths about Race and the Death Penalty, 10 *Ohio State Journal of Criminal Law* 147, 154, 160 (2012), <http://moritzlaw.osu.edu/students/groups/osjcl/files/2012/12/6.-Scheidegger.pdf>

19. See *id.* at 155, 158-163.

20. Alarcón & Mitchell, Costs of Capital Punishment in California: Will Voters Choose Reform this November?, 46 *Loy. L.A. L. Rev.* S1, S30 (2012).

21. Scheidegger, The Death Penalty and Plea Bargaining and to Life Sentences (2009), <http://www.cjlf.org/papers/wpaper09-01.pdf>.