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# COMMISSION ON CRIMINAL AND JUVENILE JUSTICE

## SUBGROUP REPORT:

Death Penalty Working Group

## Commission on Criminal and Juvenile Justice: Death Penalty Working Group (2017)

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<sup>1</sup> Paul Boyden retired from his position as Deputy District Attorney after the working group completed its work, but before the report was finalized.

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This paper originates from a Utah Commission on Criminal and Juvenile Justice (CCJJ) working group's discussions regarding the death penalty. In June 2016, CCJJ directed the creation of a working group to study the death penalty in Utah. CCJJ tasked the working group with examining: (1) current statutory aggravators; (2) costs; (3) public attitude; (4) victims' rights; and (5) other available data. Drawing on the knowledge and experience of the working group members, and the data and documents provided by working group members and CCJJ staff, this report reviews the elements outlined by CCJJ.

## STATUTORY AGGRAVATORS

### BACKGROUND

Although the U.S. Supreme Court (the "Court") originally interpreted the Eighth and Fourteenth Amendments to the United States Constitution as permitting the death penalty, during the 1960s its legality came under scrutiny. In 1971, the Court addressed issues associated with the role of jurors and their unlimited discretion in capital cases. The death penalty was struck down in 1972 by the Court in *Furman v. Georgia* based on the Eighth and Fourteenth Amendments' prohibition against cruel and unusual punishment and the death penalty's seemingly random, inconsistent application.<sup>4</sup> During this time, the analysis by the Court resulted in its finding 40 state death penalty statutes unconstitutional.<sup>5</sup> That said, the constitutionality of the death penalty itself never became an issue.<sup>6</sup>

Response to the death penalty moratorium after the *Furman* decision was twofold—some states made the death penalty mandatory, which was subsequently struck

down in *Woodson v. North Carolina* (1976), and other states, including Utah, created new death penalty statutes instructing jurors to consider a list of aggravating factors in sentencing.<sup>7</sup> Revisions that the post-*Furman* legislatures enacted, implementing guided discretion, were upheld by the Court's decision in *Gregg v. Georgia* (1976).<sup>8</sup> Georgia's revised death penalty statute included ten aggravating factors juries had to consider<sup>9</sup>—the Court noted that the role of aggravating factors is to narrow the group of individuals that are death-eligible, and to quell the death penalty's "arbitrary or capricious" use.<sup>10</sup> The Court has left the narrowing factors applied to determine "the few cases in which [capital punishment] is imposed from the many in which it is not" up to the legislatures to define.<sup>11</sup> Legislators were to create this meaningful determination for when to take life and when to spare it, alleviating the Court's concerns regarding the constitutionality of states' death penalty statutes.<sup>12</sup>

After the *Gregg* ruling, the *Godfrey* (1980) decision reasoned that "if a state wish[ed] to authorize capital punishment it has the

<sup>4</sup> *Furman v. Georgia* 408 U.S. 238 92 S. Ct. 2726 33 L. Ed. 2<sup>nd</sup> 346 1972 U.S. Lexis 169 (Case Summary)

<sup>5</sup> Utah Law Review 1994 Number 3; Kathleen D. Weron, Comment, Rethinking Utah's Death Penalty Statute: A Constitutional Requirement for the Substantive Narrowing of Aggravating Circumstances, 1994 Utah L. Rev. 1107, 1168 (1994).

<sup>6</sup> *Gregg v. Georgia*, 428 U.S. 153; 96 S. Ct. 2909; 49 L. Ed. 2<sup>nd</sup> 859; 1976 U.S. Lexis 82. pp. 5 & 11.

<sup>7</sup> Utah Law Review 1994 Number 3; Kathleen D. Weron, Comment, Rethinking Utah's Death Penalty Statute: A Constitutional Requirement for the Substantive Narrowing of Aggravating Circumstances, 1994 Utah L. Rev. 1107, 1168 (1994).

<sup>8</sup> *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859, 1976 U.S. LEXIS 82 (U.S. July 2, 1976). p. 25.

<sup>9</sup> *Id.* p. 10.

<sup>10</sup> *Id.* p.14

<sup>11</sup> *Id.* p.14

<sup>12</sup> *Id.* p.14



constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty.”<sup>13</sup> Based on the Court’s decisions, a significant aspect of statutory aggravators is to define the scope of capital punishment.<sup>14</sup> Since 1973, however, aggravators for capital murder have experienced continual growth. Immediately after *Furman*, Utah’s death penalty statute contained eight categories of aggravating circumstances.<sup>15</sup> Utah currently includes over 60 circumstances (including subcategories) that qualify an individual for this penalty,<sup>16</sup> and the list continues to grow.<sup>17</sup> At one point, some of the Utah Supreme Court justices commented on the expanding scope of Utah’s capital punishment statute.<sup>18</sup>

#### NARROWING FUNCTION

*The narrowing function of the Utah death penalty statute is meant to occur by limiting the statutory definition of capital homicide to intentional killings accompanied by at least one aggravating factor. Defendants convicted under these circumstances become death-eligible—subject to the death penalty.*<sup>19</sup>

<sup>13</sup> *Id.* p.14

<sup>14</sup> *Godfrey v. Ga.*, 1980 U.S. LEXIS 99, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (U.S. May 19, 1980) p. 2

<sup>15</sup> 1973 Utah Laws ch. 196 (codified as Utah Code Ann. 76-5-202 (Supp. 1973)).

<sup>16</sup> Utah statute 76-5-202

<sup>17</sup> In Process for the 2018 Utah Legislative session--Aggravated Murder Amendments and Felony Fleeing Amendments; H.B. 433 Penalty for Targeting Law Enforcement Officer (2017) Enrolled; H.B. 433 Penalty for Targeting Law Enforcement Officer (2017) Enrolled; H.B. 37 Violent Offenses Amendments (2009) Enrolled; H.B. 228 Penalty for Homicide of a Child (2007) Enrolled; H.B. 93 Capital Offenses Amendments (2007) Enrolled; Aggravated Murder Amendments (2005) Enrolled; H.B. 283 Substitute Antiterrorism Amendments (2002) Enrolled

<sup>18</sup> *State v Young*, 853 P. 2d 327, 350 (Utah 1993) See remarks by Justice Zimmerman, Justice Stewart, and Justice Durham

<sup>19</sup> *Id.* at 55

The working group reviewed studies related to aggravating factors for capital sentencing statutes. The first study considered was *Death Eligibility in Colorado: Many are Called, Few are Chosen*, which is a recent study of Colorado's first degree murder, aggravating factors, and death penalty law. The authors concluded that Colorado's death penalty law applies to almost all first degree murders, but is imposed so infrequently that it fails to provide the kind of careful narrowing required by *Furman*. The study reviewed all first degree murder cases in Colorado between 1999 and 2010. It found that 92% of the 544 first-degree murder cases in that time span contained at least one aggravating factor that made the defendant eligible for the death penalty, but almost none were sentenced to death. Currently, Colorado is one of four states with a moratorium on executions.<sup>20</sup>

The working group also examined a similar article, *The California Death Penalty Scheme: Requiem for Furman?* (1997). This report provides an overview of the role of statutory eligibility factors in capital cases, discusses recommendations to eliminate eligibility factors, current practice in this area, and the implications of expanding death penalty statutes.

Although the above studies and other articles show that overbroad lists of aggravators may be unconstitutional (not narrowing the majority of offenders who are death-eligible), the U.S. Supreme Court has not taken up whether states' lists of aggravating factors accurately measure the

<sup>20</sup> Tabak, Ronald. Capital Punishment, Chapter 22, p.302-304. Governor John W. Hickenlooper (a supporter of the death penalty in his 2010 campaign for governor) issued a temporary reprieve of Nathan Dunlap's execution—stating "The fact that ... defendants [who committed similar or worse crimes than Dunlap's were sentenced to life in prison instead of death underscores the arbitrary nature of the death penalty in this state, and demonstrates that it has not been fairly or equally imposed."

actual death-eligibility rate produced by a particular statute.<sup>21</sup> Some lower courts have noted that a statute could potentially include so many aggravators that the narrowing requirement is violated. Most courts have based their rejection of violations of the narrowing requirement on an inability to measure whether a state statute was overly broad.<sup>22</sup>

The working group examined two more law review articles. One study is from 2006 (*Casting a Wider Net: Another Decade of Legislative Expansion of the Death Penalty in the United States*), and the other is from 2011 (*The Most Deserving of Death: The Narrowing Requirement and the Proliferation of Aggravating Factors in Capital Sentencing Statutes*). These are not as state-specific as the Colorado and California articles, but generally, discuss whether the number of aggravators is so high that the death penalty is no longer a narrow sentence as required under *Furman*. The latter report mentions a rejected challenge to Utah's death penalty law in which the appellant attempted to challenge the law by counting the number of

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<sup>21</sup> Sharon, Chelsea, *The most Deserving of Death: Narrowing Requirement and the proliferation of Aggravating Factors in Capital Sentencing Statutes* <sup>22</sup>, p. 9. (footnote 100) “Ballard, 794 N.E.2d at 826 (McMorrow, J., concurring) (suggesting that, if future statistics demonstrated high death-eligibility rates, statute might be unconstitutional); Steckel, 711 A.2d at 13 n.11 (‘noting that “too many aggravating circumstances may violate the principles enunciated in *Furman*’ but concluding that such a ‘limit has not yet been reached in Delaware’); Crittenden, 885 P.2d at 933-34 (Mosk, J., concurring) (expressing concern about California's high death-eligibility rate and reserving the question of whether this violates the Eighth Amendment); Young, 853 P.2d at 413 (Zimmerman, J., concurring in part and dissenting in part) (‘This legislative lengthening of the list of aggravating circumstances has created a real danger that some of these factors will not make reasonable qualitative distinctions between those murders that are eligible for the death penalty and those that are not, thus violating the standards fixed by the federal constitution for imposing the death penalty.’).”

aggravating circumstances and comparing them to other state statutes.<sup>23</sup> Regarding the issue of overbroad lists of aggravators, the report notes:

*Because the number of aggravating factors does not necessarily correlate with the rate of death eligibility, courts that count aggravators often reject narrowing challenges because they cannot discern a constitutionally derived ‘threshold’ above which the number of aggravators becomes unacceptably high.*<sup>24</sup>

Justice Stewart, concurring with Justice Zimmerman in Utah’s *State v. Young* case, states:

*I also agree with Justice Zimmerman that the propensity of the [Utah] Legislature to continually add new aggravating circumstances to the definition of capital homicide raises difficult problems for the courts and that a judicial narrowing of some of those aggravating circumstances may be constitutionally necessary, but I do not believe that the Utah capital homicide statute is unconstitutional.*<sup>25</sup>

Other aggravating factor materials that the working group reviewed are as follows: (1) state aggravating and mitigating factors statutory text; (2) state comparison of number of aggravators; (3) state recent enactments and ballot initiatives; and (4) proposed amendments to the Utah Code.

After a thorough examination of aggravating factors, the working group did not come to a

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<sup>23</sup> *The Most Deserving of Death: The Narrowing Requirement and the Proliferation of Aggravating Factors in Capital Sentencing Statutes*) p.9

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

<sup>25</sup> *State v Young*, 853 P. 2d 327, 350 (Utah 1993)

consensus on further limiting or changing the aggravating factors for capital punishment sentencing. As noted by other working groups and studies, states rarely remove aggravating factors from their statutes; rather, more often—although this trend has recently slowed nationally—aggravating factors are added.<sup>26</sup> Post-*Furman* additions to death penalty aggravators have been attributed to addressing current political issues<sup>27</sup> and "[e]mpirical studies reveal that 80-90 percent of the defendants who were death-eligible before *Furman* temporarily invalidated the death penalty would still be eligible for capital punishment today."<sup>28</sup>

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<sup>26</sup> Kirchmeier, J., *Casting a Wider Net: Another Decade of Legislative Expansion of the Death Penalty in the United States*. Pepperdine University School of Law. p. 11-12. As discussed by Kirchmeier, it is risky for publicly elected politicians remove factors when there is always the possibility that a factor that was removed may have later covered some future crime. A number of states have recently commissioned studies (Governor Mitt Romney, Massachusetts (2003) and Governor Ryan, Illinois, (2002) both commissioned a Council on Capital punishment recommending no more than six aggravating factors to make a person eligible to be guilty of capital murder—both states have abolished the death penalty.

<sup>27</sup> Kirchmeier, J., *Casting a Wider Net: Another Decade of Legislative Expansion of the Death Penalty in the United States*. Pepperdine University School of Law. p. 10.

<sup>28</sup>

<sup>28</sup> <http://www.constitutionproject.org/pdf.MandatoryJusticeRevisited.pdf> The Constitution Project, based in Washington, D.C., develops bipartisan solutions to contemporary constitutional and governance issues. In 2000, the Constitution Project created a blue-ribbon committee to guide its new Death Penalty Initiative. The Committee's members were supporters and opponents of the death penalty. They were Democrats and Republicans, conservatives and liberals.

## DEATH PENALTY COSTS

### DEFINITIONS AND SUMMARY OF CURRENT COST LITERATURE

Estimating the full costs associated with capital murder is a complicated process. Cost studies on the death penalty are often comparative with the focus on estimating marginal or average taxpayer costs.<sup>29</sup> Taxpayer costs are tangible costs imposed on the criminal justice system and involve expenditures related to prosecution and defense, court time, jails and prisons, and execution.<sup>30</sup> The research question centers on whether a case that seeks the death penalty imposes more cost on the system than a case where the death penalty is not sought. Some studies then use the marginal estimates to produce aggregate expenditures of the death penalty. The economic argument for a capital sentence, in comparison to a life without parole sentence, is the cost avoidance associated with incarceration.<sup>31</sup> Because a capital conviction involves execution, capital convictions shorten the time of, and thereby expenditures associated with a life-long prison incarceration.<sup>32</sup> The main economic argument against the death penalty includes the increased expenditures related to the trial and the lengthy appeal process.<sup>33</sup>

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<sup>29</sup> Another type of cost is victim costs. These include both tangible and intangible costs, such as the pain and suffering of the families involved.

<sup>30</sup> It should be noted that these studies do not concern themselves with the moral or constitutional arguments in favor for or against the existence of the death penalty.

<sup>31</sup> While some argue that there is a deterrence effect associated with the death penalty, empirical evidence in support of such claim has been minimal.

<sup>32</sup> It should be noted that while an offender convicted of a capital offense serves less years in prison on average, the cost of a bed on death row exceeds the cost of a regular bed in a maximum-security prison.

<sup>33</sup> This also includes appellate costs imposed on the Federal Defenders Office.

Conducting empirical cost analyses comes with many challenges. These challenges are enlarged as agency-specific databases often live in a silo and tend to be designed for administrative purposes. Additionally, because cases are unique and few, sample sizes tend to be small. Despite these challenges, several states representing the nation's geographical regions have in the past decade estimated expenditures related to the death penalty.<sup>34</sup> In recent years, this includes states such as Oklahoma (2017), Oregon (2016), Washington (2015), Colorado (2013), and California (2012). While methodologies vary across states, these studies share a unity in finding an increased cost associated with seeking the death penalty. This cost increase was highlighted by Collins, Hickman, and Boruchowitz (2017), who systematically reviewed 15 studies published between 2000 and 2016, converting each estimate to 2017 dollars.<sup>35</sup> The authors concluded that the average *additional* cost associated with seeking the death penalty in comparison to a first degree murder case was \$708,000. (See appendix A)<sup>36</sup> It should be emphasized that the expenses included vary across studies, and there is (arguably) a positive association between the comprehensiveness of the study and the cost estimate produced. The conclusion that may be drawn from the summary by Collins and colleagues is that costs are higher when the death penalty is pursued.

The different cost estimates in this review are displayed in Figure I. This figure shows

the vast disparity in (additional) costs across studies, ranging from \$136,000 to \$1,972,680 (Colorado and Arizona on the low end and Maryland on the high end). As noted by Collins and colleagues, the comparative cost study in Maryland is one of the most rigorous studies to date and included criminal justice associated expenditures at each stage of the process.<sup>37</sup> A more recent study by Collins et al. (2015), which is included in Figure 1, examined costs associated with the death penalty in the state of Washington. The authors looked at a total of 147 aggravated first degree murders incorporating a wide array of criminal justice costs, including costs associated with jails and appeals. As expected, the only reduction in costs for when a capital sentence was sought was related to post-conviction incarceration.<sup>38</sup> The authors concluded that capital offenses cost an additional \$1.2 million in comparison to cases where the death penalty was not pursued. As seen in Figure 1, the Washington study produced the fourth highest cost estimate of the 15 studies included in the summary by Collins and colleagues.

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<sup>34</sup> The merit of these reports takes on various form, some being published in peer-reviewed journals while others are written by agency experts, legislative analysts, or non-profit organizations.

<sup>35</sup> The inclusion criteria required that the study use a comparison group, produce a unit cost, and have a *rigorous* study design.

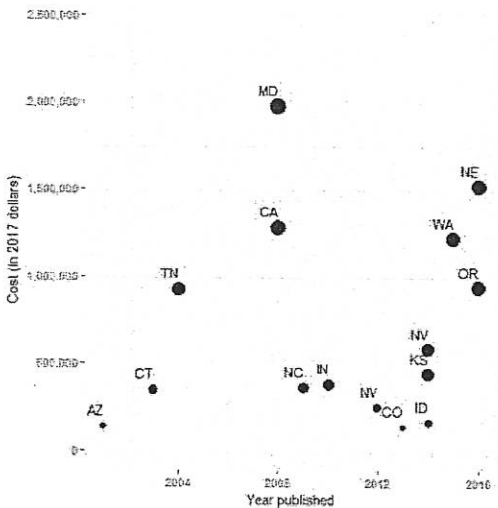
<sup>36</sup> Estimates reported in these studies tend to be conservative in nature and at times exclude costs such as appeal expenditures associated with prosecution.

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<sup>37</sup> The full report is available at: <<https://deathpenaltyinfo.org/files/pdf/CostsDPMaryland.pdf>>.

<sup>38</sup> While the cumulative cost of post-conviction incarceration was less for capital convictions, expenditures did not decrease enough to offset the large increase in the cost of prosecution, defense, court time and jail stays.

**Figure 1.** Cost estimates of 15 state studies as summarized by Collins et al. (2017)



A state at the lower end of the cost spectrum is Colorado. A primary reason behind this relates to the study’s sole focus on expenditures related to court time. More specifically, Marceau and Whitson (2013) analyzed spending associated with the death penalty in Colorado focusing their analysis on the comparative differences in days spent in court. The authors found that time spent in court was significantly higher among capital cases than cases not seeking the death penalty, at an excess of four years. The study concluded that due to the extensive costs associated with court time, no tangible benefits of the death penalty would be sufficient to offset these costs. While the state of Utah has produced some reports about the costs associated with capital offenses, no rigorous comparison study has been done to date.<sup>39</sup>

<sup>39</sup> While Utah lacks a rigorous comparative cost study, there is no evidence that Utah is significantly different from other states in terms of the costs imposed on the criminal justice system as a result of when the death penalty is sought.

SUMMARY OF PRIOR UTAH DEATH PENALTY ESTIMATED COST REPORTS

The most complete recent attempt to quantify the cost of the death penalty in Utah was completed in 2012,<sup>40</sup> including estimates of costs at both the State (e.g., Attorney General, Courts, Corrections, Board of Pardons and Parole, and General Fund expenditures related to the Post Conviction Indigent Defense Fund) and local (prosecution and defense costs, jail/incarceration costs, and costs paid by most counties to the State Indigent Defense Capital Trust Fund) levels. This analysis estimated that the incremental impact of one death penalty case from trial to execution (compared to a life without parole sentence) was \$527,100 at the State level and \$1,133,800 at the local level, for a total additional cost of \$1,660,900.

A more recent report used cost estimates from the 2012 report along with some additional costs (e.g., a more fine-grained estimate of costs incurred by the Salt Lake Legal Defenders Association related to capital defense) in the context of all death-eligible cases and new death sentences in a 20-year period (1997-2016).<sup>41</sup> This analysis estimated that over this period, State and local expenses totaled almost \$40 million for 165 death-eligible cases, only two of which have resulted in death sentences (at the time of the report).<sup>42</sup> This number is interpreted in various ways, including as \$237,900 per

<sup>40</sup> Gary Syphus, Office of the Legislative Fiscal Analyst, State of Utah, *Capital Punishment Fiscal Costs*, August 15, 2012.

<sup>41</sup> Ralph Dellapiana, Chair, Capital Case Committee, Utah Association of Criminal Defense Lawyers, *Supplemental Report on Cost of Death Penalty in Utah*, presented to CCJJ Death Penalty Study Group, 2017.

<sup>42</sup> The report also notes that there have only been two executions in the 20-year period of analysis, both of which were sentenced prior to 1997.



case above the cost of a first degree murder case.<sup>43</sup>

#### OTHER UTAH FINANCIAL DATA RELATED TO DEATH PENALTY ACTUAL COSTS

An internal analysis was also completed of State financial records related to the actual payments made between July 1, 2010 and June 30, 2017 (the last seven fiscal years), from the Post Conviction Indigent Defense Fund (funded by the State General Fund) and the State Indigent Defense Capital Trust Fund (ICDF; assessed to participating counties<sup>44</sup>).<sup>45</sup> Over this seven-year period, a total of \$677,265 (an average of \$96,752 per year) was paid from the State General Fund through the Post Conviction Indigent Defense Fund on behalf of eleven individuals previously convicted of a capital offense and sentenced to death. It should be noted that a 2008 change authorized the statutory maximums to be exceeded under certain circumstances and since that time this has occurred. (Additionally, a total of \$3,207,880 (an average of \$458,269 per year) was paid from the ICDF on behalf of 21 individuals for capital defense costs in counties participating in this program. The ICDF is assessed from participating counties based on population and other factors – the total amount assessed from counties in 2017 was \$505,184,<sup>46</sup> with a range of \$1,736 (Wayne) to \$146,874 (Davis).

<sup>43</sup> Based on the 165 total death-eligible cases in this time period.

<sup>44</sup> Excludes Salt Lake, Summit, Utah, and Weber counties.

<sup>45</sup> Data provided by the Division of Finance, State of Utah.

<sup>46</sup> This most recent number is significantly higher than the number used in used in the 2012 report (\$363,000).

## PUBLIC ATTITUDE

### NATIONAL

Support for the death penalty in the United States is the lowest since 1972. Currently, 55% are in favor of the death penalty for convicted murderers, which is the lowest since March 1972.<sup>47</sup> This forty year low indicates a trend toward diminished death penalty support. Many states have issued a moratorium on carrying out executions or eliminated them altogether.<sup>48</sup> The support for the death penalty grew steadily after legislatures rewrote state laws addressing concerns the law was applied unfairly.<sup>49</sup> During the mid-1990's Americans named crime as the most important problem facing the nation, and at that time support for the death penalty peaked at 80%.<sup>50</sup> Currently however, support for the death penalty is lower than it has been in 45 years.<sup>51</sup>

### UTAH

The public's recent attitude in Utah has been generally favorable toward the death penalty. In the past three years, five separate surveys have been conducted in Utah that included questions regarding the death penalty in the State. Three of the polls were conducted by Dan Jones & Associates<sup>52</sup>, a local polling firm in Salt Lake City (November 2015, February 2016, and September 2016). Two were conducted by Public Policy Polling (PPP)<sup>53</sup>, an out-of-

<sup>47</sup> Jones, Jeffery., Gallop News, U.S. Death Penalty Support Lowest Since 1972, October 26, 2017 <http://news.gallup.com/poll/221030/death-penalty-support-lowest-1972.aspx>

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> Data provided through personal communication with Patricia Jones.

<sup>53</sup> Public Policy Polling (PPP) is based in Raleigh, NC, and conducted these surveys on behalf of Utahns for Alternatives to the Death Penalty (2016) and the Utah

state polling firm that generally conducts automated<sup>54</sup> phone surveys on elections and policy issues (February 2016 and January 2017).

While each poll had questions that were worded somewhat differently (see Table 1), the results of the three Dan Jones surveys fairly consistently showed public support for the death penalty in Utah, with over one-half to two-thirds or more respondents favoring options that were supportive of the death penalty (67%, 52%, and 71% favorable for the three polling periods).

Alternatively, the two PPP surveys consistently showed less support for the death penalty (see Table 1) and more support for changing the penalty for such cases to life in prison without the possibility of parole (50% and 54% in favor of replacing the death penalty). In addition to the question about support for eliminating the death penalty, each PPP poll also included a question about several options in cases currently involving the death penalty, including one to replace it with life without parole and a requirement to work in prison and pay restitution to victims that 47% of respondents endorsed in both surveys (other options included simply life without the possibility of parole (8%/9% in 2016/2017); life in prison with a possibility of parole after 40 years (10%/8%); and keeping the death penalty (30%/29%)). It should also be noted that, in addition to methodological

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Justice Coalition (2017); the survey questions were the same in both years.

<sup>54</sup> It should be strongly noted that the Dan Jones & Associates methodology is generally considered the “gold standard” for public polling (i.e., live interviewer calls to landlines and cell phones, sometimes supplemented with an online sample), while PPP’s use of automated (pre-recorded, “robopolls”) survey techniques is generally considered a step below this standard, even if supplemented with an online sample. Thus, methodological differences would be one major concern when looking at the discrepancy between the results across the two firms who have polled on this issue locally.

issues<sup>55</sup> between the two firms that could explain some of these discrepancies, some aspects of the question wording in the PPP polls could have slightly influenced the results<sup>56</sup>. Across polling firms and formats, respondents who were male, older, and more conservative were consistently most supportive of the death penalty.

In summary, with somewhat discrepant recent results such as these, it is probably reasonable to suggest simply that public support for the death penalty in Utah is declining over previous highs, based on national data cited above and consistently lower support from younger respondents in the Utah polls (Table 1).

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<sup>55</sup> See previous footnote.

<sup>56</sup> First, the PPP question summarized in Table 1 was worded such that supportive answers were for replacing the death penalty, while in the most similar non-PPP question (Sep 2016/DJA) was worded such that supportive answers (approve in this case) was *for* the death penalty. In general, there is a slight agreeability bias (giving the supportive answer) in public polling. Second, the same question in both PPP polls also included information about how much the death penalty is estimated to cost in Utah (“The legislature’s fiscal analyst has estimated this would save more than \$1.6 million per case”). This information, not present in the other polls, may have biased some respondents concerned with the fiscal impact toward support for replacing the death penalty.

**Table 1.** Utah polling data on public attitudes toward the death penalty.

Date of Poll	N	Firm#	Favorable*	Unfavorable*	Favorable Response						
					Male	Female	18-44	45 or older	Conservative	Moderate	Liberal
Nov 5-14, 2015	624	DJA	67%	26%	71%	64%	61%	71%	82%	65%	32%
Feb 10-15, 2016	625	DJA	52%	40%	61%	44%	45%	57%	62%	53%	28%
Feb 16-17, 2016	627	PPP	44%	50%	50%	40%	40%	47%			
Sep 12-19, 2016	820	DJA	71%	22%	75%	67%	59%	76%	83%	66%	41%
Jan 13-15, 2017	784	PPP	41%	54%	49%	34%	36%	44%			

Nov 2015: Do you favor the death penalty in Utah, or do you oppose the death penalty and believe instead that Utah should have life in prison without parole for capital offenses?

Feb 2016/DJA: Do you believe capital crimes in Utah, such as homicide, should be punished with... (Life in prison without parole/The death penalty/Other)

Sep 2016: Do you approve or disapprove of Utah's death penalty in capital cases?

Feb 2016 & Jan 2017/PPP: Would you strongly support, somewhat support, somewhat oppose, or strongly oppose replacing the death penalty with a sentence of life in prison

with no possibility of parole? (note that this question followed a statement about the cost estimate of \$1.6 million per case that would be saved)

# DJA = Dan Jones & Associates; PPP = Public Policy Polling

\* Responses favorable to the death penalty included: Strongly or somewhat approve (Nov 2015); The death penalty (Feb 2016/DJA); Favor the death penalty (Sep 2016);

Strongly or somewhat oppose (changing to LWOP; Feb 2016 & Jan 2017/PPP)

Responses unfavorable to the death penalty included: Strongly or somewhat disapprove (Nov 2015); Life in prison without parole or Other (Feb 2016); Oppose the death

penalty (Sep 2016); Strongly or somewhat support (changing to LWOP; Feb 2016 & Jan 2017/PPP)

Note: Percentages of favorable/unfavorable will not add up to 100% due to options including "don't know" and "prefer not to answer"



## VICTIMS' RIGHTS

The Utah Constitution guarantees certain procedural rights to all victims in criminal cases. Victims have a right to be "treated with fairness, respect, and dignity, and to be free from harassment and abuse through the criminal justice process."<sup>57</sup> Victims also have a right to notice of criminal proceedings and have a right to attend hearings and be heard.<sup>58</sup> Victims in non-capital cases have a right to give reliable information without the normal restraints of the rules of evidence to a sentencing judge. This right, however, is not available to victims in a capital case. A victim in Utah does not have a right to a specific result in sentencing. Capital case victims have fewer rights than non-capital cases.

Yet all crimes have ramifications on victims and capital crimes are no exception. As English (2006) notes, much beyond that is more difficult to assess.<sup>59</sup> Acker and Karp sum up much of the current literature regarding the victims (referred to as covictims) of crime in their book, *Wounds That Do Not Bind: Victim-Based Perspectives on the Death Penalty*.<sup>60</sup>

*Acker and Karp begin their edited volume with a stark and obvious observation: Covictims cannot anticipate the catastrophe that befalls them. They are tragically unprepared for the emotions that they will feel and the frustrations that they will experience. Thus, covictims recount emotions and*

<sup>57</sup> Utah Const. article I, sec. 28.

<sup>58</sup> *Id.*

<sup>59</sup> Peter English California State University, Fresno - Book Review: Acker, J. R., & Karp, D. R. (Eds.). (2006). *Wounds That Do Not Bind: Victim-Based Perspectives on the Death Penalty*. Durham, NC: Carolina Academic Press. ix, 453

<sup>60</sup> *Id.*

*experiences that are both surprising and contradictory. We learn that what we think we know about the purposes of the death penalty—that it remedies a grievous offense against society and for covictims it provides closure—are unproven assumptions. As several of the pieces illustrate, what represents closure for one covictim does not begin to represent closure for another. Whether the death penalty is capable of placating either the needs of society or of covictims is not easily resolved. If any lesson could be drawn, it is that the process of dealing with murder and capital punishment is different for every covictim. There is no single formula for recovery nor is there any guarantee that it will ever be achieved.*<sup>61</sup>

Throughout each of the topics addressed by the working group, how the capital punishment process affects victims (and does so differently for each individual) was a reoccurring theme in the discussion—with no concrete conclusions drawn.

## Other Available Data

Some states that historically have implemented the death penalty are no longer sentencing people to death. Recently, six states have ended their use of the death penalty.<sup>62</sup> New York's law was vacated by the state's highest court after the court found a key provision unconstitutional and which their legislature did not correct.<sup>63</sup> In December of 2007, New Jersey abolished the death penalty.<sup>64</sup> Both New Mexico and

<sup>61</sup> *Id.*

<sup>62</sup> Tabak, R., Capital Punishment, *The State Criminal Justice 2017*, Chapter 22, p. 297 & 304.

<sup>63</sup> *Id.* at 297

<sup>64</sup> *Id.* at 297

Illinois abolished it prospectively in March of 2009.<sup>65</sup> Connecticut's legislature repealed the death penalty prospectively, but did not override their current Governor's veto.<sup>66</sup> The newly elected Governor signed a repeal law passed by Connecticut's legislature in April of 2012 and the Connecticut Supreme Court reaffirmed that capital punishment violates its State constitution—preventing executions from occurring prospectively.<sup>67</sup> Maryland repealed the death penalty prospectively, only to have their legislation challenged by a citizen referendum.<sup>68</sup> The referendum, however, got too few signatures to qualify for the ballot—and in 2015 the outgoing Governor commuted the remaining death sentences.<sup>69</sup> These six states have abolished capital punishment completely; however, there are other states that although they have the death penalty on the books, are no longer executing people.

There are presently four states with current statutes authorizing the death penalty that have moratoriums on execution.

## CONCLUSION

The working group concluded its study on July 20, 2017—its work revealed many of the fundamental difficulties inherent in analyzing death penalty policy. As stated in the introduction, the working group's main aim was to examine (1) current statutory aggravators; (2) costs; (3) public attitude; (4) victims' rights; and (5) other available data.

This paper has highlighted many of the complications in limiting aggravating factors, and the working group did not come to a consensus on further restricting or

changing the aggravating factors for capital punishment sentencing in Utah.

Also, challenges related to conducting empirical cost analyses of the death penalty make stating definitive costs problematic. However, it was noted that among all reviewed national studies, the cost of a death penalty sentence exceeded that of a sentence of life without parole. And although cost studies that specifically analyze the death penalty in Utah are limited, the cost research that has been completed is consistent with the national findings.

With recent public polling results somewhat discrepant, it is probably reasonable to suggest simply that public support for the death penalty in Utah is declining over previous highs, based on national data and consistently lower support from younger respondents in the Utah polls.

As mentioned earlier in the report, throughout each of the topics addressed by the working group, how the capital punishment process affects victims (and does so differently for each individual) was a reoccurring theme in the working group's discussions—with no concrete conclusions drawn.

Lastly, there is evidence to suggest that the national trend is away from the death penalty. Some states that historically have implemented it in statute no longer are and others with current statutes authorizing the death penalty have issued moratoriums on execution.

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<sup>65</sup> *Id.* at 297

<sup>66</sup> *Id.* at 297

<sup>67</sup> *Id.* at 297

<sup>68</sup> *Id.* at 298

<sup>69</sup> *Id.* at 298

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## APPENDIX A

**Figure 1.** Cost estimates of 15 state studies as summarized by Collins et al. (2017)

Year	State	Cost (in 2017 dollars)
2001	Arizona	136,003
2003	Connecticut	346,540
2004	Tennessee	926,239
2008	California	1,277,452
2008	Maryland	1,972,680
2009	North Carolina	359,936
2010	Indiana	380,904
2012	Nevada	246,013
2013	Colorado	135,778
2014	Idaho	159,710
2014	Kansas	439,916
2014	Nevada	579,365
2015	Washington	1,214,127
2016	Oregon	935,597
2016	Nebraska	1,520,644
Average cost		\$708,727