



MISSOURI ASSOCIATION OF PROSECUTING ATTORNEYS

Position Paper on the Death Penalty

2011

MISSOURI ASSOCIATION OF PROSECUTING ATTORNEYS
Summary of Position on the Death Penalty

- ***Prosecutors support the death penalty.*** The Missouri Association of Prosecuting Attorneys supports the continued use of the death penalty as the appropriate penalty for a small number of truly heinous murders.
- ***Only a handful of murders qualify for the death penalty.*** Only a small subset of first degree murders is even eligible for the death penalty. The death penalty is an extraordinary punishment that is sought and imposed only against the worst of the worst defendants.
- ***Death penalty defendants receive extraordinary due process guarantees.*** No death sentence is imposed unless twelve unbiased jurors unanimously agree to recommend the sentence, which must then be imposed by a trial judge. Appellate courts then rigorously scrutinize the case—often on multiple occasions—before a defendant faces execution. If there was any error at any stage of the trial, the case must be retried.
- ***The death penalty saves lives.*** A dozen recent studies reveal that the death penalty has a significant deterrent effect. A leading study published in the American Law and Economics Review collected data from 3054 counties over a 20-year period. Using sophisticated statistical analysis, the study concluded that, on average, each execution results in 18 fewer murders.
- ***The death penalty is fairly administered.*** Some have suggested that black defendants are more likely to receive the death penalty than whites. This is untrue. In fact, African-Americans arrested for murder are actually less likely to receive a capital sentence than whites.
- ***Defendants receive effective representation.*** The Capital Defense Unit of the Missouri Public Defender Office provides free representation to any defendant who cannot afford his own attorney. Even a severe critic of the death penalty in Missouri admits that “the lawyers in the Capital Defense Unit handle only three or four cases at a time, with often a year or more to prepare a case, and are generally recognized as some of the best defense litigators in a reasonably well-funded public defender system.”
- ***No innocent person has been executed in recent times.*** Law professor and former judge Paul Cassell has reviewed contested death penalty cases and concluded there is no credible evidence of the execution of an innocent person in at least the last 70 years.
- ***A death penalty moratorium would cost innocent lives.*** MAPA opposes a moratorium of the death penalty. A death penalty moratorium would have real consequences. According to the studies cited above, the consequences would be the deaths of more innocent citizens.
- ***In summary:*** The death penalty is the appropriate sentence for a small percentage of especially awful murders. Prosecutors take the decision to pursue death cases very seriously. Criminal defense attorneys have access to unprecedented resources to defend suspects in capital crimes. Juries comprised of unbiased citizens hear the evidence and must decide whether to recommend a death sentence. Finally, trial and appellate courts rigorously scrutinize every step of the process to ensure that only truly guilty defendants who deserve the death penalty.

MISSOURI ASSOCIATION OF PROSECUTING ATTORNEYS

Position Paper on the Death Penalty

Executive Summary

The Missouri Association of Prosecuting Attorneys (MAPA) believes that imposition of the death penalty in Missouri as it is currently administered is appropriate. The death penalty is an extraordinary punishment that is sought and imposed for the most heinous crimes, only after a defendant is afforded exceptional due process guarantees.

Studies of the death penalty have already been conducted across the nation, and their verdict is clear: the death penalty is fairly administered; today's defendants received effective representation; and any errors during the investigation or trial are uncovered in the appellate process.

More importantly, a growing number of studies indicate something that should not be overlooked: the death penalty saves lives. These studies reveal that the death penalty has a significant deterrent effect.

On one hand, we can continue to carry out death sentences. In so doing, we will execute only those defendants who have been found guilty by unanimous juries that have taken the extra step to recommend a death sentence. The executions will occur only after the defendants have exhausted their rights of appeal and been afforded every possible due process right.

On the other hand, we could halt executions that have been handed down for the most brutal and shocking murders. In so doing, the scientific evidence indicates that for each defendant we refuse to execute, we will condemn innocent people to random and violent deaths without any due process whatsoever.

MAPA opposes a moratorium on the death penalty and encourages the active education of legislators, policy makers and the general public regarding the need for a death penalty and the extraordinary safeguards that the legal system mandates in these exceptional cases.

A Case Study

All too often forgotten in the rancor over the death penalty are the names of Missouri victims of crime. It is vital to remember that for every defendant who faces the death penalty, at least one other human being—and often more than one—had his or her life stolen by that defendant. It is imperative that society not forget the names of these victims of murder. Any rational discussion of the merits of the death penalty must include the names of the persons whose lives were taken from them. MAPA will strive to always associate a victim's name with the discussion of any particular death row defendant.

The following case is but one example of the heinous crimes in which the death penalty is sought and administered in Missouri. As in every case, the names which are important in these cases are not the names of the murderers, but the names of the victims.

The Death of Eva Washington and her daughter Zandrea

On October 23, 2000 a police emergency operator received a 911 call. When she answered, she heard a scream, and then the phone went dead. There was no answer when the operator tried to call back.

She immediately dispatched officers to the residence associated with the number. The Edmundson officers were very familiar with the residence. They had responded to that address several times recently for domestic violence calls involving Richard Strong and Eva Washington.

Eva lived at the address with her daughter two-year-old daughter Zandrea and a three-month-old daughter fathered by Strong. Officers responding to the front door received no answer but could see Strong inside, heading towards the back of the apartment. Officers arrived at the back door just as Strong was coming out.

Strong was breathing hard. He had dark wet stains on his jeans and blood on his hand. Strong first told the officers that Eva was inside with the kids and was OK. Then he said she was at work and no one was inside. Strong then locked and slammed the door shut and started running. The officers chased and caught Strong and as they brought him back to the apartment, he said "...I killed them. Just go ahead and shoot me."

Knowing of Strong's history of violence towards Eva, the officers kicked in the door and found Eva and the children in a back bedroom. Strong's three-month-old daughter was unharmed but lying on a blood-covered bed. Eva and Zandrea were lying on the floor next to the bed, Zandrea in the outstretched arms of her mother. Both had been stabbed to death.

Strong was 6'3" tall and weighed 276 pounds. He stabbed and slashed Eva and Zandrea with a 12-inch chef's knife. The tip of the blade was imbedded in Eva's skull.

Eva suffered 21 stab wounds to the face, head, neck, chest, arms, back, and abdomen. Several of the wounds standing alone would have caused her death. Several of the stab wounds entered her back and penetrated almost to the chest cavity. Several ribs were severed and many internal organs were severely damaged. Her jugular vein had been shredded, and the wound penetrated her neck deep enough to damage her spinal column. She had also been eviscerated. She also suffered six slashing wounds which caused severe injury and pain but alone were not fatal.

Zandrea was 3' tall and weighed 28 pounds. She suffered 9 stab wounds to the neck, back, chest and abdomen, many of which standing alone would have caused her death. Several of her ribs were severed, as was the iliac artery. She also suffered severe damage to many of her internal organs. She was also eviscerated. She was nearly decapitated. Her throat had been cut so deep that her jugular vein, carotid artery, vertebral column and spinal cord had been severed. Based upon the blood spray pattern she was alive though perhaps unconscious at the time this wound was inflicted. She also suffered 12 slash wounds, which caused severe pain and injury but alone were not likely to cause death.

Strong was convicted by a jury and sentenced to death for the murders of Eva and Zandrea.¹

History of the Death Penalty in Missouri

Missouri's first comprehensive criminal code originally allowed for death to be imposed as a punishment for murder, "arson, rape, robbery, burglary or other felony. . . ."² In 1968, the United

¹ The preceding facts were provided by the St. Louis County Prosecuting Attorney's office from the evidence presented at trial.

² Dierker, *MISSOURI CRIMINAL LAW*, 2nd Ed. (Thomson West, 2004) p. 136, *citing* Mo.Rev.Stat. art. II, section 1 (1835).

States Supreme Court found the Georgia death penalty statute to be cruel and unusual punishment.³ This caused states with similar statutes, including Missouri, to place a moratorium on the death penalty until the legislature could amend the statute. In 1976, the United States Supreme Court reviewed revised laws and found those not to be cruel and unusual, and therefore constitutional.⁴ In 1977, Missouri enacted a revised statute conforming to the constitutional requirements as interpreted by the Supreme Court.⁵ Missouri law allows for lethal gas or lethal injection as a method of execution.⁶

Missouri law requires that at least one of seventeen specific aggravating circumstances be proved beyond a reasonable doubt before the death penalty may be imposed. Conversely, the law allows for the defendant to present evidence of statutory mitigating circumstances for the jury to consider.⁷

³ *Furman v. Georgia*, 408 U.S. 238 (1972)

⁴ *Gregg v. Georgia*, 428 U.S. 153 (1976)

⁵ Section 565.001 & .008, RSMo. (1978)

⁶ Section 546.720 RSMo.

⁷ 565.032. 1. In all cases of murder in the first degree for which the death penalty is authorized, the judge in a jury-waived trial shall consider, or he shall include in his instructions to the jury for it to consider:

(1) Whether a statutory aggravating circumstance or circumstances enumerated in subsection 2 of this section is established by the evidence beyond a reasonable doubt; and

(2) If a statutory aggravating circumstance or circumstances is proven beyond a reasonable doubt, whether the evidence as a whole justifies a sentence of death or a sentence of life imprisonment without eligibility for probation, parole, or release except by act of the governor. In determining the issues enumerated in subdivisions (1) and (2) of this subsection, the trier shall consider all evidence which it finds to be in aggravation or mitigation of punishment, including evidence received during the first stage of the trial and evidence supporting any of the statutory aggravating or mitigating circumstances set out in subsections 2 and 3 of this section. If the trier is a jury, it shall not be instructed upon any specific evidence which may be in aggravation or mitigation of punishment, but shall be instructed that each juror shall consider any evidence which he considers to be aggravating or mitigating.

2. Statutory aggravating circumstances for a murder in the first degree offense shall be limited to the following:

(1) The offense was committed by a person with a prior record of conviction for murder in the first degree, or the offense was committed by a person who has one or more serious assaultive criminal convictions;

(2) The murder in the first degree offense was committed while the offender was engaged in the commission or attempted commission of another unlawful homicide;

(3) The offender by his act of murder in the first degree knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person;

(4) The offender committed the offense of murder in the first degree for himself or another, for the purpose of receiving money or any other thing of monetary value from the victim of the murder or another;

(5) The murder in the first degree was committed against a judicial officer, former judicial officer, prosecuting attorney or former prosecuting attorney, circuit attorney or former circuit attorney, assistant prosecuting attorney or former assistant prosecuting attorney, assistant circuit attorney or former assistant circuit attorney, peace officer or former peace officer, elected official or former elected official during or because of the exercise of his official duty;

(6) The offender caused or directed another to commit murder in the first degree or committed murder in the first degree as an agent or employee of another person;

(7) The murder in the first degree was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind;

(8) The murder in the first degree was committed against any peace officer, or fireman while engaged in the performance of his official duty;

(9) The murder in the first degree was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement;

(10) The murder in the first degree was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another;

(11) The murder in the first degree was committed while the defendant was engaged in the perpetration or was aiding or encouraging another person to perpetrate or attempt to perpetrate a felony of any degree of rape, sodomy, burglary, robbery, kidnapping, or any felony offense in chapter 195, RSMo;

(12) The murdered individual was a witness or potential witness in any past or pending investigation or past or pending prosecution, and was killed as a result of his status as a witness or potential witness;

Missouri law specifically provides for automatic proportionality review of the case by the Missouri Supreme Court.⁸ This is in addition to the right of direct appeal of the conviction to the Missouri Supreme Court.⁹ Additionally, Missouri law provides for automatic re-sentencing to life imprisonment without eligibility for parole if the death penalty is found to be unconstitutional.¹⁰

In the summer of 2009, Missouri Supreme Court Chief Justice Ray Price indicated that he did not plan to schedule any executions until legal challenges regarding Missouri's protocol for executions were addressed by the United States 8th Circuit Court of Appeals.¹¹ In November, 2009, the 8th Circuit Court of Appeals rejected the claim of eight death-row inmates that Missouri would not hire competently trained, and professional individuals to carry out executions. Missouri revised its protocol after an earlier legal challenge, and now the Department of Corrections has a written protocol in place for executions. Executions have now resumed in Missouri.

Public Opinion

Despite repeated attempts of death penalty abolitionists to create arguments to support their position, they have been unsuccessful in stemming the tide of public opinion. In 2007, a Gallup poll showed that 69 percent of Americans supported the death penalty, opposed to 27 percent who opposed it.¹² This overwhelming support in favor of the death penalty indicates a strong preference amongst Americans for government to maintain an optional punishment that is appropriate for the most heinous crimes.

(13) The murdered individual was an employee of an institution or facility of the department of corrections of this state or local correction agency and was killed in the course of performing his official duties, or the murdered individual was an inmate of such institution or facility;

(14) The murdered individual was killed as a result of the hijacking of an airplane, train, ship, bus or other public conveyance;

(15) The murder was committed for the purpose of concealing or attempting to conceal any felony offense defined in chapter 195, RSMo;

(16) The murder was committed for the purpose of causing or attempting to cause a person to refrain from initiating or aiding in the prosecution of a felony offense defined in chapter 195, RSMo;

(17) The murder was committed during the commission of a crime which is part of a pattern of criminal street gang activity as defined in section 578.421.

3. Statutory mitigating circumstances shall include the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The murder in the first degree was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The defendant was an accomplice in the murder in the first degree committed by another person and his participation was relatively minor;

(5) The defendant acted under extreme duress or under the substantial domination of another person;

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;

(7) The age of the defendant at the time of the crime.

⁸ Section 565.035 RSMo..

⁹ *Id.*

¹⁰ Section 565.040 RSMo.

¹¹ Interview with Associated Press, Lieb, David, *Jefferson City News-Tribune*, June 24, 2009, article available at http://www.newstribune.com/articles/2009/06/24/news_state/190state21executions.txt.

¹² Paul Cassell, *In Defense of the Death Penalty*, THE PROSECUTOR, Vol. 42, No. 4 (Oct.-Dec. 2008) at 11, citing Jones, *Plurality of Americans Believe Death Penalty Not Imposed Often Enough*, Gallup News Services (Mar. 12, 2003), available at <http://www.gallup.com/poll/7984/Plurality-Americans-Believe-Death-Penalty-Imposed-Often-Enough.aspx>.

Deterrent Effect

There are two distinct aspects to deterrence. The direct deterrence is to deter the specific defendant from killing again by making it impossible for him to do so. This is accomplished on an individual basis by execution and is done in response to the murder committed.

The broader, and general deterrence, is to deter would-be murderers from killing people. The basic premise of rewards and sanctions is the cornerstone of day to day activities in society.¹³ People make decisions every day based upon what likely good or ill will befall them should they take a certain course of action.

At its core, the criminal justice system metes out punishment for behavior which is deemed unacceptable by society. The level of punishment is graduated along the continuum of offenses from low-level misdemeanors up to the most serious felonies. At the top of this continuum lies the most heinous crimes of murder, which have the most final and irrevocable damage to a victim – the loss of life. It stands to reason that an irrevocable punishment is justified for an irrevocable crime that shocks the public conscience.¹⁴ The basic system of rewards and consequences that our society operates on needs the flexibility to impose the death penalty to reinforce the consequences that will result from the most heinous offenses.

National studies have shown that over time, application of the death penalty has a deterrent effect greater than imprisonment and results in the saving of lives:¹⁵

- A 2003 study from professors at Emory University concluded that between 1977 and 1996, each execution resulted, on average, in 18 fewer murders. The study examined data from 3,054 counties in the United States, and showed that, in general, murder rates fell as more murder defendants were arrested, sentenced to death and then executed.¹⁶
- A 2003 study which analyzed every death sentence between 1977 and 1997 (6,143) concluded that there was a “statistically significant relationship between executions, pardons and homicide.” The study found that each execution deters five murders.¹⁷
- A 2002 study by a statistician with the Federal Communications Commission analyzed data from 1978 to 1997 concluded that each execution deters an average of 14 murders per year.¹⁸
- In 2001, a study by professors from the University of Houston found that a moratorium on executions in the state of Texas in 1996 resulted in a statistically significant increase in

¹³ *Id.* at 12, citing Wilson, THINKING ABOUT CRIME (Random House rev. ed. 1983) p. 121.

¹⁴ Cassell, at 16.

¹⁵ *Id.* at 15-16 & nn. 27-30.

¹⁶ *Id.*, citing Hashem Dezhbsksh et al., *Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data* (Fall 2003) 5 American Law and Economics Review 2, pp. 344-376, available at <http://www.cjil.org/deathpenalty/DezRubShepDeterFinal.pdf>.

¹⁷ *Id.*, citing Mocan & Kittings, *Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment* (Oct. 2003) 46 Journal of Law and Economics 2, pp. 453-478, available at <http://econ.cudenver.edu/mocan/papers/GettingOffDeathRow.pdf>.

¹⁸ *Id.*, citing Zimmerman, *State Executions, Deterrence, and the Incidence of Murder*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=354680.

homicides.¹⁹ The study estimated that the moratorium resulted in approximately 220 murders in the state of Texas that would have otherwise been deterred.²⁰

- 8.4% of all prisoners under a sentence of death in the United States had a prior homicide conviction.²¹

In 1935, the state of Kansas decided to reinstate the death penalty.²² This was in response to a killing spree that occurred by individuals who admitted to choosing Kansas as the venue for their crimes so as to avoid the death penalty.²³ One need look no further than this lone sample to know that the mere existence of a death penalty could have saved the lives of the murder victims in those cases.

Indeed, deterrence is an equally powerful tool inside prison walls as well. If a murderer is convicted and sentenced to life in prison without parole, he will never get out, barring escape. However, what incentive is there for this murderer to avoid killing someone while in prison, knowing that he will never be put to death, and knowing that he will never get out of prison? He is an inherent danger to the lives of prison guards and other inmates. This is more than a hypothetical situation. At least three murders of federal prison guards were committed by inmates serving life sentences during the 1980s.²⁴ These guards lives could have been spared, had the inmates been sentenced to death originally and executed.

Ineffective Assistance of Counsel

One common rallying cry for moratoriums on the death penalty is often the claim of ineffective assistance of counsel. Criminal defendants are guaranteed the right to effective assistance of counsel under the United States Constitution.²⁵ Every criminal defendant is afforded the right to a direct appeal of their conviction. In death penalty cases, the rights are even greater. In order for an individual to be sentenced to death and executed, several things must occur, which are safeguards against error.

In Missouri, the public defender system devotes a high level of importance to its death penalty attorneys. Indeed, even a severe critic of the administration of the death penalty in Missouri conceded that “[t]he lawyers in this Capital Defense Unit handle only three or four cases at a time, with often a year or more to prepare a case, and are generally recognized as some of the best defense litigators in a reasonably well-funded public defender system.”²⁶ The “special demands” of death penalty cases have essentially pushed private counsel out of the arena, and placed in the venue of the public defender system.²⁷

¹⁹ *Id.*, citing Cloninger & Marchesini, *Execution and Deterrence: A Quasi-Controlled Group Experiment* (2001) 33 Applied Economics 596.

²⁰ *Id.*, citing Cloninger, *Scientific Data Support Executions' Effect*, Wall Street Journal (June 27, 2002) p. A21.

²¹ Bureau of Justice Statistics, *Capital Punishment*, 2007, Table 8.

²² Cassell, at 14, citing Weld & Cassell, Report to the Deputy Attorney General on Capital Punishment and the Sentencing Commission (Feb. 13, 1987) at p. 28.

²³ *Id.*

²⁴ Cassell, at 14.

²⁵ *U.S. Const. Amend. VI; Strickland v. Washington*, 466 U.S. 668 (1984).

²⁶ May, *Missouri's Death Row Cases*, JOURNAL OF THE MISSOURI BAR, March-April, 2003.

²⁷ Dierker, at 546.

Criminal Charge

A defendant must first be charged with the offense of murder in the first degree, the only offense in the state of Missouri which allows the death penalty. This is accomplished one of two ways. A grand jury, made up of 24 citizens, may issue an indictment. This method is used primarily in urban areas in Missouri. The more common method throughout the state is by way of a complaint. Under this method, a prosecutor files a complaint, and a preliminary hearing is held in front of a judge, at which the defendant has the opportunity to cross-examine witnesses.

The mere charge of murder in the first degree does not allow the death penalty to be sought. There must be at least one statutory aggravating circumstance as allowed under state law, and a notice of intent to seek the death penalty must be filed by the prosecutor.

As with any criminal case, if the defendant is indigent, he is entitled to representation by the Missouri State Public Defender throughout the course of his trial and appeals in state court.

Additionally, the defendant has the right to discovery. This means that the prosecutor must disclose the evidence in its possession or control. As part of the right to discovery in Missouri, the defendant has the right to take depositions of witnesses before the trial. This means that once the defendant and his attorney have reviewed the police reports and other documents, they have the right to question the state's witnesses in person, under oath before the trial. In addition to these general rules of criminal procedure which apply in all criminal cases, there are codified rules in Missouri statute relating to discovery in death penalty cases.²⁸

Trial

A trial must occur, in which twelve people unanimously find beyond a reasonable doubt that the individual is guilty. "Beyond a reasonable doubt" is the highest level of proof in the legal system. It does not mean beyond all doubt, but it does mean that the jury must be "firmly convinced" based upon their "reason and common sense."²⁹ The jury goes through rigorous questioning as part of the selection process. In addition to the usual jury selection questions, the potential jury panel is also questioned under "death qualification" rules to determine whether they can consider both death and life imprisonment as possible punishments.³⁰ A defendant cannot plead guilty in front of a judge and receive the death penalty.³¹ A judge alone cannot impose the death penalty.³² He may only do so upon recommendation of the jury.

After finding the defendant guilty, the jury must then hear evidence relating to punishment. The defendant is also able to present mitigating evidence in an attempt to persuade the jury that life imprisonment is appropriate.

Only a jury of twelve citizens, chosen by both sides and sworn to be fair and impartial, can recommend a sentence of death. The prosecutor may argue for death to the jury, but it must be the jury's decision to make that recommendation to the judge.

²⁸ Section 565.005 RSMo.

²⁹ MAI-CR 302.04

³⁰ See *Gray v. Mississippi*, 481 U.S. 648 (1987); *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

³¹ See *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *State v. Whitfield*, 107 S.W.3d 253 (Mo.banc 2003).

³² *Id.*

Many death penalty abolitionists want to hang their hat on the argument that prosecutorial discretion leads to a disproportionate application of the death penalty. This argument fails to recognize the reality that a prosecutor only has discretion in the filing of a charge and the decision to seek the death penalty. The prosecutor's discretion ends once the case is given to the jury to decide. At that point, it is the jury's discretion. That is why a jury is selected in any criminal case, so that a panel of unbiased and fair citizens can decide upon an appropriate response to criminal activity in their community. It has been determined that "[t]he fact that the prosecutor retains discretion to charge person so as to make them eligible for the death penalty is not a defect in the statutory scheme."³³

If the jury recommends the death penalty, the judge has the authority to instead impose a sentence of life imprisonment if he deems it appropriate.

Appeals

There are many checkpoints in the legal system to ensure that all laws have been followed and that a defendant has the opportunity to seek additional review of his case. This is the appeals process and all defendants have the right to a direct appeal. If the case is reversed, the defendant is entitled to a new trial, in which the state must again prevail at all the previously mentioned stages. In addition to the direct appeal on any errors of law, Missouri law requires the Missouri Supreme to review any sentence of death to determine whether it is "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime, the strength of the evidence and the defendant."³⁴ The proportionality review is "intended to be an independent review" and "imposes upon [the Missouri Supreme] Court an obligation to collect data outside the record."³⁵ This is an extra layer of review in addition to the review of the Missouri Supreme Court to determine any error of law. While the United States Supreme Court has ruled that proportionality review is not a constitutional requirement³⁶, Missouri continues to afford this extra layer of protection to defendants convicted of murder. Missouri's proportionality review has continually withstood legal challenges, both on the state and federal levels.³⁷

Indeed, Missouri's proportionality review protection afforded convicted murderers has resulted in the reversal of one death sentence³⁸ and the setting aside of another.³⁹ These two cases alone are proof that adequate safeguards exist in the appellate review process for criminals convicted of heinous murders.⁴⁰

³³ Dierker, at 555, citing *State v. Amrine*, 741 S.W.2d 665 (Mo.banc 1987), cert. denied 486 U.S. 1017 (1988).

³⁴ Section 565.030 RSMo.

³⁵ Dierker, at 588.

³⁶ *Pulley v. Harris*, 465 U.S. 37 (1984).

³⁷ Dierker, at 589.

³⁸ See *State v. McIlvoy*, 629 S.W.2d 333 (Mo. banc 1982).

³⁹ See *State v. Chaney*, 967 S.W.2d 47 (Mo. banc 1998)

⁴⁰ For more than 17 years, the Supreme Court of Missouri has historically limited its proportionality review to those similar cases in which a death sentence was imposed. See *State v. Ramsey*, 864 S.W.2d 320 (Mo. banc 1993). *State v. McIlvoy*, *supra*, was only the third case to be considered since reinstatement of the death penalty in 1977. The Court noted in its opinion that its proportionality review considered cases in which both life imprisonment and the death penalty had been imposed. It also noted that it considered those cases "now currently available." The simple fact is that at the time of *McIlvoy*, there were not many death penalty cases available to conduct a proportionality review. By the time of *State v. Chaney*, *supra*, the Court had clearly adopted the position that its proportionality review was limited to only those cases in which death sentences were imposed. By this point, there were a sufficient number of death penalty cases to compare pending cases with. This precedent was followed until the decision of *State v. Anderson*, 306 S.W.3d 529 (Mo. banc 2010), in which the Court in a 4-3 decision, reversed its precedent and adopted the practice of comparing death sentence cases to cases in which life imprisonment was imposed.

If the defendant does not prevail in his direct appeal, he then has the right to file a post-conviction motion, challenging the effectiveness of his counsel. This motion is able to be heard with evidence in the trial court. If the defendant does not prevail on his post-conviction motion, he may again appeal this decision to the Missouri Supreme Court.

If the defendant does not prevail on this appeal, he has now exhausted his state remedies, and is able to file habeas corpus claims in the United States District Court. If the defendant does not prevail at this level, he is able to appeal to the United States Circuit Court of Appeals, and again to the United States Supreme Court.

Finally, the defendant is able to petition the governor of Missouri for clemency, and ask the governor to commute his sentence.⁴¹

At each of these levels, the competency of the defendant's attorney is scrutinized in some way. A jury of twelve people must unanimously find him guilty. Trial judges and appeals judges, at both the federal and state level, review the case, often multiple times, for errors. The governor is given the opportunity to review the case as well. Only after these many protective layers of review is an individual allowed to be executed.

No Evidence of Innocents Executed

One common and emerging argument against the death penalty is that innocent people are executed. However, absolutely no evidence exists to prove that an innocent person has been put to death in the United States since under post-*Furman* death penalty jurisprudence.

Abolitionists hang their hats on instances in which individuals who were sentenced to death were exonerated prior to execution.⁴² As Professor Paul Cassell points out:

Such miscarriages of justice are, to be sure, very troubling. These cases deserve careful study to determine what went wrong and what kinds of reforms can correct the problem. But when offered as justification for abolishing the death penalty, these close call cases are unpersuasive.⁴³

The fact that some individuals have been wrongly imprisoned is an affront to justice, and is not condoned by MAPA. However, it must be recognized that in those cases, the appellate review process worked as designed. It is because of the vast safeguards described in this position paper that we can feel secure in application of the death penalty. While it is unfortunate that a small minority of individuals have been unjustly imprisoned and later exonerated, it is a most compelling argument in favor of the death penalty that there exists a credible review process that allows the truth to surface and also allows the appropriate punishment of society's most heinous murderers.

Prosecutor Training

MAPA encourages training of prosecutors who handle death penalty cases. In 2008, the Missouri Office of Prosecution Services sponsored a Capital Litigation Conference which was funded by the National District Attorneys Association and the Bureau of Justice Assistance. This conference trained

⁴¹ *Mo. Const. Art. 4, section 7.*

⁴² Cassell, at 22.

⁴³ *Id.*

71 prosecutors in the area of death penalty procedure. In December of 2009, the Office of State Courts Administrator sponsored a Capital Litigation Initiative training which was attended by public defenders and prosecutors who handle death penalty cases. Trainers included attorneys experienced in death penalty cases from the Missouri State Public Defender System and the Missouri Attorney General's Office. The Missouri Office of Prosecution Services helped to promote attendance by Missouri's prosecutors.

No Racial Disparity

One common argument against the death penalty is that it is racially discriminatory and is disproportionately applied to minority defendants. Statistical analysis shows this claim to be false. A study by the Department of Justice showed that although 48 percent of adults charged with a homicide crime were African-American, only 42 percent of the inmates on death row were African-American. This means that African-Americans arrested for murder are actually less likely to receive a capital sentence than whites.⁴⁴

As of December 31, 2005, there were 46 prisoners under sentence of death in Missouri. Of those 46, 24 were white and 22 were African-American.⁴⁵ In 2008, 37 defendants were executed nationwide.⁴⁶ Of those 37 defendants, 20 were white and 17 were African-American.⁴⁷

A study by the director of research and evaluation for the Missouri Department of Corrections found that "[d]uring the period FY98-FY09 no geographic area sentenced a higher proportion of Blacks to the death sentence than Other Races."⁴⁸ The study also found that metro areas in Missouri "sentenced 3.6% of Blacks to death compared to 8.6% of Other Races" and "[f]irst class counties sentence equally (12%)."⁴⁹

No Cost Savings

There is no logical cost savings analysis to a moratorium on the death penalty. The imposition of a moratorium does not deter a prosecutor from seeking the death penalty in a criminal trial. The associated costs of a death penalty trial will still exist.

Second, there are no cost savings to staff or personnel. Prosecutors and public defenders are paid the same amount of money regardless of whether they are handling a death penalty or non-death penalty case.

Furthermore, there is no cost savings in the appeals or post-conviction process. Regardless of whether a defendant is sentenced to death or not, that defendant still has direct appeal and post-conviction remedy rights which are routinely exercised in every case.

In the final analysis, the concept of justice should not be driven by cost. At its core, government is about providing for the safety of its populace and promoting general welfare. Prosecutors try cases.

⁴⁴ Cassell, at 19; U.S. Dept. of Justice, Bureau of Justice Statistics, Bulletin: Capital Punishment 2005, available at <http://www.ojp.usdoj.gov/bjs/abstract/cp05.htm> .

⁴⁵ Bureau of Justice Statistics Bulletin, Capital Punishment, 2005

⁴⁶ Bureau of Justice Statistics, Capital Punishment Statistics available at <http://www.ojp.usdoj.gov/bjs/cp.htm>.

⁴⁷ *Id.*

⁴⁸ Oldfield and Moore, Death Penalty Sentencing Study provided to Missouri Sentencing Commission Meeting and Prosecutor/Public Defender's Advisory Group Meeting, September, 2009.

⁴⁹ *Id.*

They try the tough cases. Tough may mean expensive, but it is worth it. This is what the public pays prosecutors to do – to protect them. Even if a murder trial brings costs to a county or state, it is worth it to bring the murderer to justice. What message would be sent by not trying a case, or not seeking the death penalty for a murderer/rapist simply because the costs of the trial were not in the budget that year? The wrong message would be sent. No price should be placed on justice for the life of the murder victim.

Conclusion

MAPA is adamantly opposed to a moratorium on the death penalty. The simple truth is that in extreme cases, the death penalty is the only appropriate punishment. The choice of whether or not to pursue the death penalty is vested in the discretion of a prosecuting attorney who is elected by the citizens of Missouri's counties to uphold the values of its local community. Safeguards against any potential abuse of that discretion are built into the criminal justice system. A jury of twelve unbiased and impartial citizens must make two unanimous decisions. First, they must all agree that the defendant is indeed guilty of murder in the first degree. Second, they must all agree that the appropriate punishment is death. Additional safeguards are found in the judges of Missouri and the United States, who review the case thoroughly and several levels not only for mistake of law, but also for incompetence of counsel. Finally, the governor of Missouri is vested with the power to grant clemency if he deems it appropriate.

The trial and appeals process provides so many levels of safeguards that many survivors of crime victims are often frustrated by the length of time it takes for justice to work its course, and run the risk of being continually and further traumatized over time. This being said, MAPA recognizes that justice delayed is not justice denied, and does not advocate change to the current review process. However, MAPA does oppose any moratorium sought to be placed on the death penalty. Missouri's prosecutors are keenly aware of what a powerful sword they possess in capital cases, and they wield it only when appropriate. To that end, MAPA supports and encourages all elected prosecutors to receive training in death penalty cases, but recognizes the need for locally elected prosecutors to maintain final discretion in charging decisions within their community.

There is absolutely no evidence suggesting that under modern jurisprudence, an innocent person has been executed. The lengthy and thorough appeals process protects the rights of defendants, as it should. The critical arguments that seek to advance abolition of the death penalty are not supported by real evidence, only anecdotes. The real evidence exists in the studies which have shown that application of the death penalty saves lives.

Missouri's prosecutors are sworn to uphold the laws of this state and protect its citizens. A moratorium on the death penalty would only lessen the deterrence of murders, and result in less protection for the safety of the general public. For the reasons set forth in this position paper, MAPA opposes a moratorium on the death penalty.