

Episode Fourteen: Legal Process

Hello, and welcome to the Death Penalty Information Center's podcast exploring issues related to capital punishment. In this edition, we will discuss the legal process in death penalty trials and appeals.

How is a death penalty trial different from other trials?

There are several differences between death penalty trials and traditional criminal proceedings. In most criminal cases, there is a single trial in which the jury determines whether the defendant is guilty or not guilty. If the jury returns a verdict of guilty, the judge then determines the sentence.

However, death penalty cases are divided into two separate trials. In the first trial, juries weigh the evidence of the crime to determine guilt or innocence. If the jury decides that the defendant is guilty, there is a second trial to determine the sentence. At the sentencing phase of the trial, jurors usually have only two options: life in prison without the possibility of parole, or a death sentence. During this sentencing trial, juries are asked to weigh aggravating factors presented by the prosecution against mitigating factors presented by the defense.

How is a jury chosen for a death penalty trial?

Like all criminal cases, the jury in a death penalty trial is chosen from a pool of potential jurors through a process called *voir dire*. The legal counsel for both the prosecution and defense have an opportunity to submit questions to determine any possible bias in the case. However, because the jury determines the sentence in capital trials, those juries must also be "death qualified," that is, able to impose the death penalty in at least some cases.

Potential jurors are questioned about their ability to consider both aggravating and mitigating evidence and whether they can fairly render a death sentence. Potential jurors who oppose the death penalty in all cases will be dismissed by the judge, as will those who are not sure they can follow the court's instructions. The defense and prosecution may also remove some jurors without providing a reason.

The process of "death qualification" presents several issues. One side effect of this process is that minorities like African Americans, who tend to oppose the death penalty more than the general population, are likely to be removed from jury consideration more often than other prospective jurors. Women are also more prone to oppose the death penalty, and are thus likely to be excluded more often from participation in the trial. Another side effect is the possible biasing of the jury towards guilt.

Is there any evidence that picking a jury willing to impose the death penalty has an effect on their willingness to find the defendant guilty?

Many studies have explored the effects of the death qualification process on the composition of juries and their verdicts. Researchers Phoebe Ellsworth and Robert Fitzgerald have found that the process tends to select jurors who are predisposed to favor conviction. The Capital Jury Project conducted a similar study, interviewing juries from capital cases in 15 different states. This study found that because the death qualification process involves intensive questioning about the various options for punishment, it plants in jurors an assumption that the defendant is guilty. In addition, if the trial reaches the sentencing phase, death qualified jurors tend to place more emphasis on the aggravating factors that lean towards a death sentence.

What happens during the sentencing phase of a trial?

In the sentencing phase of the trial, the prosecution offers evidence of aggravating circumstances. Each state has a different list of aggravating circumstances, and typical factors include a prior criminal record, a murder of a particularly heinous nature, murder in the act of committing a separate crime, or murder for financial gain.

The defense presents mitigating evidence that implies that the death penalty is not an appropriate punishment, such as the age and mental state of the defendant at the time of the crime, lack of prior criminal involvement, or evidence that the defendant was under duress.

In most states, victim impact statements may be presented. This is testimony by the victim's family and friends about the effect the murder has had on them.

After the evidence is presented and the closing statements are complete, the jury deliberates on a sentence. Generally, the decision of the jury must be unanimous in order to sentence the defendant to death. If the jury cannot unanimously agree on a sentence, the judge can declare the jury deadlocked and impose the lesser sentence of life without parole. In some states, a judge can still impose a death sentence.

In a few states the jury decision is not a binding verdict but rather a recommendation. The presiding judge may be required to give "great weight" to the recommendation of the jury, but ultimately makes the final decision of whether the defendant will be sentenced to death or given life without parole.

What are the stages of appeals?

Death penalty law is much more complicated than ordinary criminal law, creating more issues for review. The first step is the direct appeal after trial, where the state's highest criminal court reviews the conviction and the sentence. Defense attorneys can challenge

mistakes made at trial including the jury selection, admission of evidence, testimony, and instructions to the jury. If relief is denied there, the U.S. Supreme Court may review the case, although this is rare.

There are other review processes in place to ensure that the constitutional rights of the defendant are protected. For example, the 6th amendment guarantees the right to effective legal representation, and the 14th amendment guarantees the defendant due process, including the guarantee that the prosecution will inform the defendant of evidence that could show his innocence or help avoid the death penalty. If the defendant's trial lawyer was ineffective, or the prosecution withheld evidence from the defense, the defendant can raise those issues during post-conviction appeals. Some of this review occurs in state court and some in federal courts. If these claims succeed, the defendant will be granted a new trial or a new sentencing hearing.

States are required to provide a lawyer for defendants who cannot afford one for the original trial and for the direct appeal, but not at post-conviction hearings. The federal government provides attorneys for federal appeals in death penalty cases.

In addition to these processes, defendants may also request clemency, in which a sentence of death is commuted into a lesser sentence such as life without parole. The process for clemency varies from state to state. Sometimes this power rests solely with the Governor, some states require a recommendation of clemency from a board or advisory group, and in three states the determination of clemency is solely in the power of a board or advisory group.

Do lawyers in death penalty cases need special skills or experience?

Perhaps the most important factor in determining whether a defendant will receive the death penalty is the quality of the representation he or she is provided. Each state, and often each individual county, requires different levels of experience and training for an attorney to be considered qualified to represent a defendant in a death penalty case. For example, one county in Texas requires the lead counsel in a death penalty case to have at least 10 years experience in the litigation of complex criminal cases, as well as experience in trying to verdict at least 15 felony cases. The lead counsel must also have served as an assistant counsel in at least one other death penalty case. These requirements can be waived if there are no qualified lawyers available.

The Supreme Court has held that the legal counsel provided to defendants must be "effective." In reality, in many cases the attorneys appointed to defendants are overworked, underpaid, or lacking the trial experience required for death penalty cases. Defense lawyers have failed to call witnesses, prematurely ended investigations, and even fallen asleep during death penalty trials.

Do all death row inmates go through the appeals process?

Inmates can choose to waive at least parts of their appeal and are sometimes called “volunteers” for execution. However, in most states the direct appeal after trial is automatic and does not require the inmate's consent to seek it.

Why do inmates stay on death row so long before they are executed?

The length of stay on death row is typically over ten years. Most non-death penalty cases are settled by a guilty plea with a narrow range of sentencing options, whereas a death penalty case all but ensures a lengthy trial and appeals process. Appellate judges may spend more time on death penalty cases because of the high stakes involved. The multi-stage appeals process, which is necessary to lessen wrongful convictions, means that each case must work its way through several levels of the legal system. Because of the large number of death penalty cases, there is often a backlog of appeals at each level of the appellate courts. In addition, a shortage of experienced post-conviction lawyers compounds this problem. In some states, such as California, inmates must wait years just to be assigned an appellate counsel. Moreover, many death sentences are overturned on appeal, requiring a second sentencing trial, further appeals, and more time before an execution can take place.

Thank you for listening to the Death Penalty Information Center's podcast. To learn more about the legal procedure in death penalty cases, and other issues related to capital punishment, visit deathpenaltyinfo.org.