

EPISODE 9: READER'S CHOICE PODCAST – PART I

Introduction:

Hello and welcome to the Death Penalty Information Center's podcast, exploring issues related to capital punishment. In this edition, we answer questions submitted by readers of our weekly newsletter. Because of the overwhelming response, we will be devoting two podcast episodes to answer your questions. Part 2 of our Reader's Choice podcast will be released next month. In this edition, we will answer questions related to death penalty procedures. In the upcoming podcast, we will discuss questions about justifications for the death penalty and the outlook for the future.

A respondent from Herndon, Virginia, asked: What is the role of the prosecutor in deciding which cases will become death penalty cases?

Prosecutorial discretion, the concept that it is up to individual prosecutors to decide who is tried for capital murder and who is not, is often cited as one cause of arbitrariness in the death penalty system. Prosecutors have discretion on whether or not to seek the death penalty in cases that fall within the state's capital murder statutes. While the death penalty is theoretically applied to the worst offenders, similar crimes might be tried as capital crimes in one place but not in another. Prosecutors can be influenced by media coverage of a case, financial resources available in their jurisdiction, and their personal views on the death penalty. This can be a potential source of many of the racial and geographic disparities in sentencing.

A few states have addressed the issue of arbitrariness inherent in prosecutorial discretion. In Illinois, a Commission on Capital Punishment recommended that the Attorney General and State's Attorneys Association write recommended procedures for prosecutors to decide whether to seek the death penalty. The Commission also suggested the creation of a statewide review committee for death penalty cases. The first suggested reform was enacted by the state legislature in 2003, but the second reform has not been adopted.

As a follow-up question, does prosecutorial misconduct play a role in exonerations and successful appeals?

Some wrongful convictions in death penalty cases have been caused by prosecutorial misconduct, including the recent case of Anthony Graves in Texas. Graves' conviction was overturned, and the special prosecutor chosen to review his case dropped charges when she found that the original prosecutor had fabricated evidence and manipulated witnesses. Several other recent exonerations involved prosecutors withholding exculpatory evidence, which is evidence that favors the defendant. The Innocence Project, an organization that defends inmates with strong claims of innocence, found that 33 of the first 74 DNA exoneration cases involved prosecutorial misconduct.

An attorney in Cook County, Illinois, asked about how budgetary concerns might affect a jurisdiction's decision to seek the death penalty.

The recent economic downturn has forced budget cutbacks in many vital services and has resulted in decreased funding for both prosecutors and public defenders. The high cost of capital cases has raised the question of whether the money might be better spent elsewhere.

A February 2010 article in the Amarillo Globe-News discussed the factors that Texas prosecutors consider when deciding whether to seek the death penalty. High on the list of factors was the enormous

cost of a capital trial. One capital case in Gray County, which resulted in a life sentence, cost 10% of the county's annual budget. Prosecutors said that they weigh the high cost of a capital trial against the facts of the case in deciding whether to seek the death penalty, choosing to seek it only when they have, as one prosecutor put it, a "dead-bang cinch guilt-innocence case." Similarly, The Advocate, a Louisiana newspaper, found that district attorneys also limited capital charges due to concerns about the costs of the death penalty. Last year, the Cook County, Illinois, public defenders office ran out of funding for capital defense, causing attorneys to file motions asking judges to bar the state from seeking the death penalty. The State's Attorney's office opposed those motions, saying that cost shouldn't determine a defendant's eligibility for capital punishment.

In Georgia, Jamie Ryan Weis asked the state to stop seeking the death penalty when his lawyers were replaced with overworked public defenders due to a budget shortfall. Citing a lack of experience in capital cases and insufficient funding to hire investigators and experts, the public defenders tried three times to withdraw from the case. Weis contended that the change of representation put him at a disadvantage because the prosecution continued to build their case against him, while his new lawyers had to start from scratch on his defense. The United States Supreme Court declined to hear the case.

DNA testing is now an accepted forensic science, so why don't states require that it be used in all death penalty cases?

Although DNA evidence has played a vital role in many convictions and exonerations, DNA evidence is not available in all criminal cases, or even all murder cases. Other evidence, such as eyewitness identification, confessions, or other forensic evidence can be less reliable, but may be the only evidence available. While no states have made the presence of DNA evidence a requirement for all cases to be death-eligible, some states, such as Illinois, disallow the death penalty in cases where the only evidence is a single eyewitness or jailhouse snitch. Maryland has the most stringent requirements for death penalty case, requiring biological or DNA evidence, a videotaped confession, or a videotape linking the defendant to the homicide. A prosecutor can seek the death penalty only if one of those types of evidence exists in the case.

About half of the states have laws mandating the preservation of evidence even after a defendant has been convicted. This allows for later testing, should a question of innocence be raised. In 2004, Congress passed the Justice for All Act, which provides financial incentives for states to preserve evidence – and withholds that money from states that do not adequately preserve evidence.

An attorney from Portland, Oregon, asked: What impact does a death-qualified jury have on the determination of guilt in a capital case?

Death qualification is the process of removing from the jury pool any jurors who cannot follow the law and the judge's instructions about sentencing due to their personal beliefs about the death penalty. This process is intended to remove jurors who are unequivocally opposed to the death penalty, as well as those who believe the death penalty is the only acceptable punishment for murder. In 1968, in *Witherspoon v. Illinois*, the Supreme Court restricted the types of jurors who could be excluded from capital juries.

Death qualification is intended to exclude only those jurors whose personal beliefs would prevent them from following the law in sentencing decisions. However, a 2003 study based on the Capital Jury Project

found that death qualification “over-excludes” by barring jurors who have reservations about using the death penalty, but could impose it under appropriate circumstances, and “under-excludes” by keeping jurors who would not consider mitigating evidence in making their sentencing decision. The study also concluded that the jury in capital cases is skewed to favor the prosecution, and is more likely to convict the defendant. Samuel Gross, in a 1998 article in “Law and Contemporary Problems”, cites similar findings from several other studies in concluding that “The process of questioning jurors about their willingness to impose the death penalty before the trial on guilt or innocence has begun tends to create the impression that guilt is a foregone conclusion and that the only real issue is punishment.”

Despite these findings suggesting that death-qualified juries are more likely to convict, the Supreme Court ruled in *Lockhart v. McCree* in 1986 that death-qualification did not violate the defendant’s right to an impartial jury in the guilt phase of the trial.

A teacher asked: Students in my Capital Punishment class have asked whether there are US citizens on death row in other countries and has anyone been executed. What does the US do in such cases?

The U.S. generally tries to intervene through diplomatic channels prior to the execution of a U.S. citizen in another country. The U.S. even tried to intervene in the caning of a young defendant in Singapore a few years ago. The U.S. might try to have the citizen deported to the U.S. where he or she could face charges here. There are some instances where U.S. citizens have been accused of espionage in another country and faced execution, or a soldier is accused of war crimes. Sometimes there have been negotiated prisoner swaps.

Though it is rare that an American is executed by a foreign government, there have been cases of U.S. citizens receiving the death penalty for crimes committed abroad. For example, serial killer Earle Nelson killed over twenty victims in the United States and Canada before being captured by Canadian police and executed in Winnipeg in 1928.

Thank you for tuning in to this edition of the Death Penalty Information Center’s podcast. Join us again next time when we address more questions sent in by readers of our weekly newsletter.