



by BRENT E. DICKSON

EFFECTS OF CAPITAL PUNISHMENT ON THE JUSTICE SYSTEM

Reflections of a state supreme court justice

The responsibilities and work of a state court of last resort are significantly affected by the presence of capital punishment as a sentencing option in the state penal code. The effects are most apparent in decisional workload, administrative functions, and public perception of the judiciary generally.

The Indiana legislature reinstated the death penalty in 1977,¹ following the United States Supreme Court decision in *Gregg v. Georgia*, 428 U.S. 153 (1976). During the ensuing 27 years, Indiana trial courts ordered the death penalty for 90 defendants. These cases produced 148 Indiana Supreme Court majority opinions, 45 reversals of the sentence with the defendant no longer eligible for the death penalty, but now serving a sentence other than death (life imprisonment without parole or for a specific term of years), and 16 executions. In the course of the 16 cases resulting in an execution, there were 33 state trial court proceedings (including trial, re-trial, and post-conviction hearings), 44 state supreme court majority opinions and substantive orders, and 25 federal court opinions.

Since 1990, death penalty cases in Indiana have been governed by a specialized rule regarding the appointment, qualifications, and compensation of trial and appellate

counsel in capital cases. This rule was promulgated by the Indiana Supreme Court, which has exclusive original appellate jurisdiction in capital cases. Because trial and

Capital cases not only impose significant burdens, but also shape public knowledge, trust, and confidence in the judicial system.

appellate counsel for almost all capital defendants in Indiana are appointed at public expense, Indiana's judicial experience with capital cases is best viewed in light of the practice, procedure, and results observed following the implementation

of these rules.

Between the time of the rule changes in 1990 and November 15, 2005, the death penalty has been sought in Indiana trial courts against 174 defendants, of which 4 were acquitted or the charges dismissed before trial, and

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1. The Indiana statute presently provides that, upon a conviction for murder, a defendant may be sentenced to a term of years, life imprisonment without parole, or death. The death sentence must be separately sought by the prosecution by alleging and proving in separate penalty phase trial proceedings the existence of one or more specified aggravating factors established by statute. Ind. Code § 35-50-2-9 (2004).

30 were sentenced to death. Of these 30 defendants, 3 have been executed and 9 death sentences have been reversed with the defendant now serving a sentence other than death. Eighteen of the 30 death sentences remain in appellate review or are awaiting new trials.

Over the most recent 10-year period, from 1995 through 2004, capital opinions in Indiana (including cases on direct appeal and collateral review) accounted for approximately 7 percent of the total number of signed majority opinions issued by the court.² During this

year and issued an average of about 137 signed opinions per year, of which an average of 10 were capital cases opinions.

Judicial time and effort

Each of the court's capital case opinions represented a substantially disproportionate investment of judicial time and effort. Judicial opinions in death penalty cases are characteristically more extensive than those in non-capital criminal appeals. Because of the finality of the sentence, both defense counsel and the reviewing court endeavor to be par-

adding to the burden of appellate review in capital cases, it is not unusual for the trial record in the initial appeal of a capital sentence to consist of 3,000 to 5,000 pages, or more. And the record presented in subsequent collateral review appeals is usually about twice that amount.

Appellate review in capital cases typically involves a particularly intensive review of mitigation issues, which are often quite fact specific and require detailed examination of the record. It is also not uncommon for such claims to involve expert testimony on medical and social science issues, particularly when mitigating consideration is sought for concerns related to impaired mental health or abusive childhood, which are matters not readily researched by lawyers and often require special attention.

These kinds of appellate issues usually arise not only when claims assert the ineffective assistance of trial counsel in offering evidence of mitigation, but also arise in Indiana where the state supreme court has made a separate and independent determination regarding the appropriateness of the death sentence.⁴ These issues of mitigation and appropriateness in capital cases typically require a greater investment of judicial time in research, analysis, and writing than in non-capital cases.

Capital cases also take more time because of the extensive use of collateral proceedings by defense counsel. Under the Indiana Rules of Procedure for Post-Conviction Remedies, a defendant, following the affirmance of the trial court's sentencing judgment on the initial direct appeal, may again seek relief by filing a petition for post-conviction relief to assert certain types of claims not resolved on direct appeal. The resolution of such post-conviction relief petitions usually requires a full evidentiary proceeding

Appellate review in capital cases involves an extensive review of mitigation issues

same period, however, the number of capital cases decided accounted for only 0.92 percent of the total number of cases decided by the court (including those on which review was denied by order). Thus, capital cases account for less than 1 percent of the court's caseload, but more than 7 percent of its number of written opinions. In the past 10 years, our court has decided an average of about 1,075 cases per

ticularly thorough and comprehensive. Courts are also inclined to address more claims on the merits and to be somewhat more hesitant to apply procedural forfeiture. It is not unusual for capital appeals to present a significantly greater number of issues than would likely be seen in non-capital cases, often including issues on which there is no basis under existing law, but wherein counsel is requesting a reexamination of precedent or seeking to preserve an issue for federal review or in anticipation of possible future modification of the law. In addition, periodic United States Supreme Court refinements in constitutional law applicable to criminal procedure and death penalty jurisprudence require particular attention in the research and crafting of capital case opinions.

To accommodate these many concerns, Indiana permits longer appellate briefs in capital cases.³ Further

2. During this period, the court issued 1,378 majority opinions, of which 99 involved capital cases on direct or collateral review.

3. The 14,000 word limit for an appellant's briefs generally prescribed in Indiana Appellate Rule 44(D) results in our appellants' briefs being limited to approximately 50 pages. In capital cases, however, double this limitation is usually permitted, resulting in appellants' briefs of approximately 100 pages.

4. See, e.g., *Lambert v. State*, 675 N.E.2d 1060, 1065-66 (Ind. 1996), *cert. denied*, 520 U.S. 1255, 117 S. Ct. 2417, 138 L.Ed.2d 181 (1977), and opinion denying leave to file successive petition for post-conviction relief at 825 N.E.2d 1261, 1263-64 (Ind. 2005); *Bivens v. State*, 642 N.E.2d 928, 957 (Ind. 1994), *cert. denied*, 516 U.S. 1077, 116 S.Ct. 783, 133 L.Ed.2d 734 (1996).

before the trial court, replete with extensive pre-hearing discovery, and it is almost inevitably used in every capital case to claim ineffective assistance of trial and/or appellate counsel.

If post-conviction relief is denied by the trial court, the defendant may again appeal to the state supreme court, resulting in a second opinion. And if the denial of post-conviction relief is affirmed by the court, a defendant may request to file a second or successive petition for post-conviction relief, which will be authorized if the defendant's request establishes a reasonable possibility that the petitioner is entitled to relief.⁵ Capital defendants make exhaustive use of these opportunities for collateral review.

Not insignificant is the additional burden upon support staff presented by the management of a capital case. In Indiana, we have assigned one appellate staff attorney to assist the court in a variety of functions related to our death penalty jurisdiction responsibilities. Her functions include tracking capital cases filed in the state trial courts and pending on appeal, answering questions from counsel, assisting with the court's review and disposition of motions, and communicating with the federal courts, the media, and the public, etc. Each year, approximately 120 hours of our staff attorney's time is routinely required for her general duties related to capital cases.

When a capital defendant's appellate recourse is exhausted and the time of execution approaches, there is almost always a further need for the substantial diversion of judicial time and resources to address last-minute requests for consideration of allegedly new or previously overlooked issues, and to do so very expeditiously. In addition to the time needed for judicial consideration, about 160 hours of additional time is spent by our staff attorney in a variety of legal and administrative functions associated with each approaching execution.

The days and hours approaching an execution require additional

preparation and action. Although the exhaustion of appellate recourse is usually followed by a petition for executive clemency, the justices and court staff nevertheless make special arrangements to assure their immediate availability, if necessary, to receive and address any last-minute filings. And special security precautions are provided by the state police to assure judicial safety.

In addition to the enhanced attention required for the resolution of individual capital cases, an overriding systemic concern of the judiciary is the consistent adequacy of legal representation appropriate for the defense of capital cases. While this responsibility may reside with differing branches of government from state to state, the state judiciary must do whatever it can to assist in achieving this goal. In Indiana, we have endeavored to meet this challenge by the promulgation of Indiana Criminal Rule 24, which prescribes special procedures applicable in capital cases, requires that two trial counsel be appointed to represent each indigent capital defendant, specifies minimum qualifications and compensation for lead counsel and co-counsel, and addresses workload limits of appointed counsel. We have also worked extensively with our state legislature regarding the effective allocation of public funds for indigent criminal defense.

Financial impact

The financial impact of Indiana's capital sentencing regime specifically upon the trial and appellate judicial officers has not been quantified. The cost from the capital sentencing law upon other aspects of

government, however, was one of the subjects recently addressed in a comprehensive report issued by the Indiana Criminal Law Study Commission, pursuant to the request of former Indiana Governor Frank O'Bannon and the Legislative Council of the Indiana General Assembly.⁶

Based upon an analysis of 84 cases in which the death penalty was requested by the prosecution, the Commission estimated that government costs for the imposition and execution of each "typical" death sentence is \$667,560. This figure includes costs for law enforcement, prosecution, jury sequestration, defense counsel legal and investigative expenses for trial and appeal, incarceration until execution following exhaustion of appellate review approximately 10.5 years later, and execution.

In contrast, the Commission estimated that in a "typical" life-without-parole case in which (a) the death sentence was never sought, (b) life-without-parole was imposed as the maximum possible sentence, and (c) the offender dies of natural causes during imprisonment 47 years later, the total cost is \$551,016.⁷ The difference, \$116,544, indicates that the cost of a "typical" capital case is 21 percent greater than the cost of a "typical" life-without-parole case and its resulting incarceration.⁸

Effect on the public

Finally, the care with which state courts of last resort discharge their capital sentence responsibilities may have an enormous effect on the public's perception, trust, and confidence in the judiciary generally. It is often solely through media coverage

5. Indiana Post-Conviction Rule PC 1(12) (2006).

6. THE APPLICATION OF INDIANA'S CAPITAL SENTENCING LAW: FINDINGS OF THE INDIANA CRIMINAL LAW STUDY COMMISSION 122A-122F (2002) (available from the Indiana Criminal Justice Institute, One North Capitol, Suite 1000, Indianapolis IN 46204-2038). This report is also available at <http://www.in.gov/legislative/bills/2003/PDF/FISCAL/HB1358.001.pdf>

7. M. Goodpaster, *Cost Comparison Between a Death Penalty Case and a Case Where the Charge and Conviction is Life Without Parole*, in THE APPLICATION OF INDIANA'S CAPITAL SENTENCING LAW, *supra* n. 6.

8. It should be noted, however, that this comparison does not consider the often substantial

further expenses incurred when capital convictions are vacated in collateral proceedings, on appeal, or upon federal review, and remanded for retrial either as to guilt or penalty. This is not an infrequent occurrence. During the period from 1986 through 2005, for example, opinions of the Indiana Supreme Court remanded for such further trial proceedings for 35% (30 out of 86) of the defendants challenging their death sentences. As to four of these defendants, the state subsequently withdrew its request for the death penalty. The financial impact reported by the study also does not reflect the costs related to federal habeas proceedings, the defense costs for which are not borne by Indiana government.

of death penalty cases that many people form their impressions regarding the operation, efficiency, fairness, and reliability of the courts. It is thus especially important for judicial opinions and orders resolving claims in capital cases to fully explain the reasons for the decision, and to do so with the objective of helping not only the parties but also the media and the general public to understand and respect the process and the result, while also fully explaining the court's analysis in the likely event that the defendant seeks recourse in the federal courts. In addition to thoughtful attention to the language of judicial opinions and orders, it can be advantageous to assign court information officers to assist media representatives in understanding substantive and procedural complexities.

ceedings approach and attempts are made to influence popular sentiment. This may well include efforts to portray past judicial proceedings as unfair or incomplete. Such circumstances serve to emphasize the importance of drafting opinions in capital cases in a manner that communicates the reasons for the judicial decision fully and effectively to the public and to the media.

Capital punishment can also affect the justice system when it becomes an election issue affecting judicial retention or election. Public opinions on the general subject of capital punishment, and as to its appropriateness in individual cases, are often intense. When the prosecution seeks the death penalty, an acquittal or imposition of a sentence less than death can often precipitate vindic-

The decision to employ capital punishment as a criminal sentencing option is the prerogative of the state legislature. Officers of the judicial branch, having taken an oath to uphold the constitution and laws of the state and federal governments, are obligated to apply and enforce the laws as enacted. When the ultimate penalty is at stake, trial and appellate procedures must be particularly thorough and meticulous to maximize the ascertainment of truth, to provide procedural fairness, and to assure the reliability of the resulting judgment. While capital sentencing laws impose significant burdens upon state courts of last resort and the judicial systems they oversee, the high visibility of capital cases nevertheless provides an important opportunity for the judiciary to inform, educate, and enhance public trust and confidence in the judicial system by the responsible and attentive administration of the system, and by the thoughtful crafting of informative and understandable written opinions. ☞

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Public trust and confidence can also be undermined when inefficient judicial administration or unnecessary delay is revealed in media coverage of capital cases. State courts of last resort may thus find it important to monitor carefully the progress of capital cases through the judicial system, improving procedures where necessary to eliminate issues of conflicting post-conviction jurisdiction and to assure active and expeditious case management.

The challenge of public perception takes on a different dimension when gubernatorial clemency pro-

active anger from some segments of the public. Likewise, reversing a conviction or setting aside a death sentence on appeal may sometimes also be unpopular.

On the other hand, public demonstrations protesting capital punishment often precede or accompany executions. Not surprisingly, judicial opinions on death penalty cases have become controversial issues in some judicial retention and election contests,⁹ even though basing judicial retention on such issues is wholly inconsistent with principles of judicial independence. Such issue advocacy can obscure public attention to important issues of judicial performance and qualification. The resulting demands upon the time and resources of judges and the judicial system can be enormously burdensome, the consequences unfair to judicial officers, and any resulting removal of an experienced jurist very harmful to the judiciary.

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9. See, e.g., Paul Brace and Melinda Gann Hall, *Comparing courts using the American states*, 83 JUDICATURE 250 (2000) (citing to Hall and Brace, *Toward an Integrated Model of Judicial Voting Behavior*, 20 AM. POL. Q. 147-68 (1992); Brace and Hall, *Integrated Models of Judicial Dissent in State Supreme Courts*, 55 J. POL. 914-35 (1993); Brace and Hall, *Studying Courts Comparatively: The View from the American States*, 48 POL. RES. Q. 5029 (1995)); Traci V. Reid, *The politicization of retention elections: Lessons from the defeat of justices Lanphier and White*, 83 JUDICATURE 68 (1999).