

DEATH PENALTY FACTS

- ❑ Nearly two-thirds of the world's nations have abolished the death penalty in law or in practice, including more than 30 in the past decade.
- ❑ 33 states, plus the federal government and the military, have a death penalty statute on their books. Seventeen states do not. New York's death penalty statute was struck down by its state supreme court on procedural grounds in 2004 and it has not been replaced. New Jersey repealed its death penalty in 2007, New Mexico followed suit in 2009, Illinois in 2011, and Connecticut in 2012. Maryland has passed legislation narrowly restricting its use of the death penalty.

INDIANA'S DEATH PENALTY

History

- ❑ In 1972, the U.S. Supreme Court in *Furman v. Georgia* held all state death penalty sentencing statutes were unconstitutional under the Eighth Amendment's cruel and unusual clause because they allowed for arbitrary and capricious imposition of death and left too great a risk that improper factors such as race could affect the sentencing decision. The sentences of the 7 men on Indiana's death row at the time of this decision were all reduced to life in prison.
- ❑ In 1973, the Indiana General Assembly enacted a new death penalty sentencing statute to replace the statute struck down by the U.S. Supreme Court in *Furman*.
- ❑ In 1976, the U.S. Supreme Court in *Woodson v. North Carolina* struck down North Carolina's death penalty sentencing statute, which was similar to Indiana's statute. In *Woodson* and accompanying cases, the Court indicated that sentencing in capital cases requires that the sentencer's discretion be carefully guided and channeled, while at the same time providing for individualized decisions for each defendant.
- ❑ In 1977, the Indiana Supreme Court struck down Indiana's 1973 death penalty sentencing statute based on the U.S. Supreme Court decision in *Woodson*. The death sentences of the 8 men on Indiana's death row were set aside.
- ❑ On October 1, 1977, a new Indiana death penalty sentencing statute, modeled on statutes upheld by U.S. Supreme Court, took effect. With modifications, (see "Other Changes," below) it remains in effect today.

How It Works

In Indiana, the death penalty is available only for the crime of murder, and is available for murder only if the prosecution can prove the existence of at least one of 16 “aggravating circumstances” identified by the Indiana General Assembly. These circumstances are set out in the state’s death penalty statute, at IC 35-50-2-9. In order to seek the death penalty, the prosecutor must allege the existence of at least one of the aggravating circumstances set out in the statute.

If the case proceeds to trial, and the defendant is convicted of murder, the trial proceeds to a second phase to determine the appropriate penalty. The jury hears evidence regarding the existence of the alleged aggravating circumstance(s) and any mitigating circumstances – facts which would lead them to recommend a lesser sentence. They are required to return a special verdict form indicating whether they unanimously find the existence of each charged statutory aggravating circumstance beyond a reasonable doubt. They are not allowed to recommend that the defendant be sentenced to death or life without parole unless they unanimously find that the state has proved the existence of at least one alleged aggravating circumstance beyond a reasonable doubt, and also find that the aggravating circumstance(s) outweigh the mitigating circumstances. If the jury unanimously agrees on their sentencing “recommendation,” the trial court must follow it. If they cannot agree on the sentence, but unanimously agree that an aggravating circumstance exists, the Court is free to sentence the defendant to either a term of years, life without parole, or death.

If a death sentence is imposed, it may be subjected to three levels of appellate review: Direct appeal in the Indiana Supreme Court, focusing on legal issues; state post-conviction review, which can also look at factual issues such as whether trial counsel competently represented the defendant, whether evidence was suppressed, and whether any witnesses have recanted their testimony; and federal habeas corpus review, which focuses on federal constitutional issues. A prisoner may also request clemency from the Governor. The first level of review – direct appeal – is mandatory, but the prisoner may choose to forego the others.

If a prisoner is executed, the State of Indiana will strap him or her to a gurney, insert an IV line, and inject into that line a series of three chemicals: (1) sodium thiopental, an ultra-short-acting barbiturate, to render him or her unconscious; (2) pancuronium bromide, to paralyze voluntary and reflex muscles; and (3) potassium chloride, to stop his or her heart. Defense attorneys and others have raised concerns that the dosage of sodium thiopental may be inadequate or may wear off too quickly, and that the pancuronium bromide, which renders the prisoner unable to move or speak, may mask signs of consciousness and excruciating pain. The U.S. Supreme Court recently reviewed Kentucky’s use of this protocol. *Baze v. Rees*, 128 S.Ct. 1520 (2008). In an opinion with four concurrences and a dissent, the plurality acknowledged that if the first drug were not administered in an adequate quantity, a prisoner could suffer excruciating pain. However, the Court held that absent a showing of substantial risk that the first drug would not be administered in an adequate quantity, the protocol does not constitute cruel and unusual punishment. More recently, states have had

difficulty obtaining sodium pentothal for use in lethal injections, and some have changed the drugs that they use. It remains to be seen what Indiana will do if another execution is scheduled.

Changes Through the Years

- ❑ **Defense Representation:** In 1989, the General Assembly created the Indiana Public Defender Commission to set standards for the appointment and compensation of attorneys appointed to represent persons facing the death penalty, and authorized the Commission to reimburse counties 50% of their expenditures for defense representation. On January 1, 1992, the Indiana Supreme Court's amendments to Criminal Rule 24 setting mandatory standards for the appointment and compensation of trial and appellate counsel in death penalty cases took effect.
- ❑ **Availability of Life Without Possibility of Parole:** In 1993, the General Assembly authorized Life Without Parole as a sentencing option in capital murder cases, and in 1994, prosecutors were given the authority to ask for LWOP without requesting a death sentence.
- ❑ **Method of Execution:** In 1995, the General Assembly changed the method of execution from electrocution to lethal injection.
- ❑ **Jury Decision Making:** Prior to 2002, a capital jury's sentencing decision in Indiana was merely a recommendation which the trial court was not required to follow. The 2002 General Assembly amended our death penalty statute to provide that if a jury unanimously reaches a recommendation, the trial court must "sentence accordingly." This change was made in anticipation of *Ring v. Arizona*, in which the U.S. Supreme Court held that any fact that makes a defendant eligible for the death penalty must be found by a unanimous jury beyond a reasonable doubt.
- ❑ **Age of Eligibility:** In 1987, the General assembly raised the minimum age of eligibility for the death penalty from 10 to 16. In 2002, they raised it from 16 to 18. In 2005, in *Roper v. Simmons*, the U.S. Supreme Court held that executing defendants who were under the age of 18 at the time of their crime is cruel and unusual, in violation of the 8th Amendment, because, as a result of their reduced mental capacity, they are less morally culpable and less capable of being deterred from crime. (See also *Mentally Retarded Defendants and Mentally Ill Defendants below*)
- ❑ **Mentally Retarded Defendants:** In 1994, the General Assembly made mentally retarded individuals ineligible for death or life without parole. In 2002, in *Atkins v. Virginia*, the U.S. Supreme Court held that executing mentally retarded defendants is cruel and unusual, in violation of the 8th Amendment, because, as a result of their reduced mental capacity, they are less morally culpable and less capable of being deterred from crime. (See

also Age of Eligibility and Mentally Ill Defendants).

- ❑ **Mentally Ill Defendants:** After the decision in *Atkins*, a task force of mental health professionals, lawyers and law professors formulated language to define the category of murder defendants with serious mental illness who were similarly situated to those with mental retardation such that they should also be exempted from the death penalty. This definitional language and consequent exemption has been endorsed by the American Psychiatric Association, the American Psychological Association, the National Alliance on Mental Illness, Mental Health America, and the House of Delegates of the American Bar Association. In 2007, the Indiana Senate created a bi-partisan interim study commission, the Bowser Commission, to study this issue, and this commission voted to recommend a bill that would exempt defendants who were identified as having serious mental illness. Although introduced in the 2008 Indiana General Assembly, the bill was not enacted.

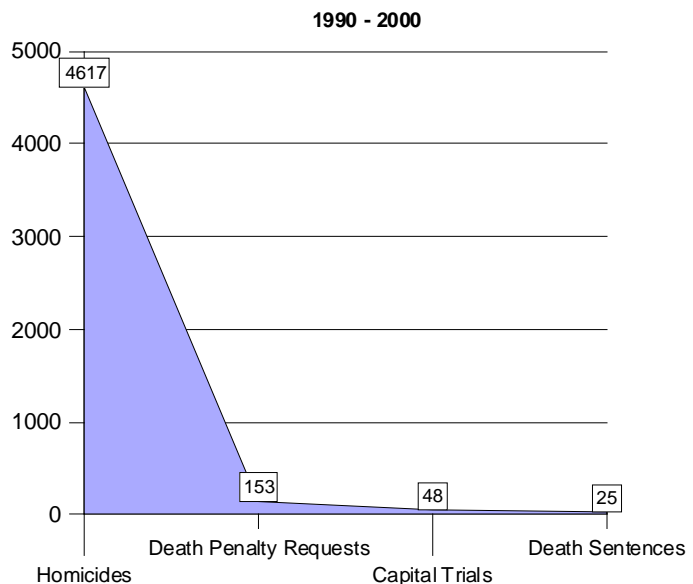
INDIANA'S DEATH PENALTY IN PRACTICE

Charging, Trial, and Sentencing

The prosecution is not required to seek the death penalty in every case in which an aggravating circumstance might exist and the defendant is eligible for death. The determination whether to seek the death penalty against a particular defendant on a particular murder charge is left to the discretion of the prosecuting attorney for each Indiana county.

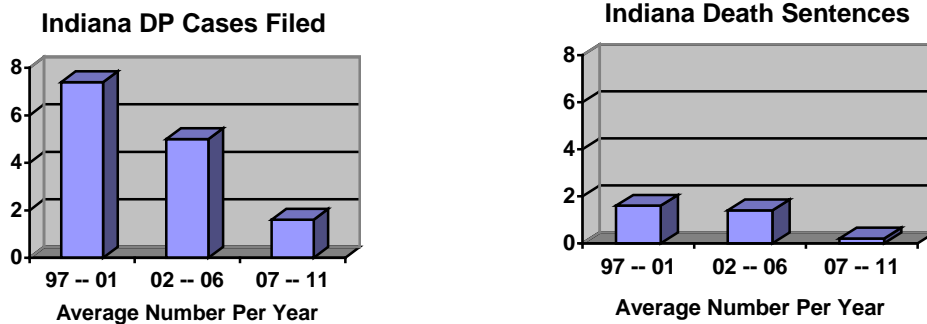
Similarly, not every case in which the death penalty is sought proceeds to trial. As with other cases, prosecuting attorneys are given discretion to enter into plea negotiations, offering the defendant a sentence less than death in exchange for a guilty plea. More capital cases are resolved by plea agreement than by trial.

The chart at the right demonstrates how this works in practice. During the years 1990 through 2000, according to FBI Uniform Crime Reports, there were 4617 murders and non-negligent homicides throughout the state of Indiana. No information is available regarding how many of these homicides were eligible for a death penalty request, meaning that one or more of the 16 aggravating circumstances could be alleged and the defendant



was 18 or older. Prosecuting attorneys actually requested the death penalty in 153 of these homicides, 48 of the cases proceeded to a capital trial, and 25 actually resulted in death sentences.

Both nationally and in Indiana, death penalty prosecutions and death sentences have been declining for a variety of reasons, including the availability of Life Without Parole. Indiana prosecutors did not file a new death penalty case anywhere in the state from August 2006 through December 2007, and from August 2006 to the present, have filed only 8 capital requests, fewer than 2 per year. The following charts show the decline in death penalty requests and death sentences imposed over the past 15 years.



There are currently 4 active trial level death penalty cases in Indiana.

Death Sentences Imposed Since 1977

- 93** - sentenced to death
- 10** - currently under sentence of death: 9 men and 1 woman.
- 52** - no longer on death row due to reversals by the appellate courts, commutation by the governor, or dismissal of the death penalty by agreement of the State of Indiana
- 3 - death sentences vacated in proceedings which the State of Indiana is appealing
- 1 - awaiting a new trial or sentencing proceeding at which death is still a possible penalty
- 5 - died on death row from causes other than execution
- 2 - executed in other states for murders committed there.
- 20** - **executed by State of Indiana:**
 - 4 were executed after waiving non-mandatory appeals:**
 - Steven Judy - 1981
 - William Vandiver - 1985
 - Robert Smith - 1998.
 - Gerald Bivins - 2001
 - 16 were executed after completing all appellate levels:**
 - Gregory Resnover - 1994
 - Tommie Smith - 1996

Gary Burris - 1997
D. H. Fleenor - 1999
Jim Lowery - 2001
Kevin Hough - 2003
Joseph Trueblood - 2003
Donald Ray Wallace - 2005
Bill Benefiel - 2005
Gregory Scott Johnson - 2005
Kevin Conner - 2005
Alan Matheney - 2005
Marvin Bieghler - 2006
David Woods - 2007
Michael Lambert – 2007
Matthew Eric Wrinkles - 2009

More than three times as many individuals have had their death sentences vacated as have been executed by the State of Indiana after exhausting their appeals.

PUBLIC OPINION

- ❑ A 2009 national Gallup poll showed that 65% of Americans support the death penalty, at least in theory. The last time Gallup asked respondents to choose between the death penalty and life without parole, they split fairly evenly, with 47% choosing the death penalty 48% choosing life without parole. In a 2010 poll conducted by Lake Research Partners, a strong majority – 65% -- favored replacing the death penalty with life without parole if the money saved was used for crime prevention programs.
- ❑ A 2007 survey of Indiana citizens conducted for the American Bar Association showed that 61% support a moratorium on executions so that the fairness and accuracy of the process can be studied. Majority support for a moratorium was found in all geographic regions and across party lines.

PUBLIC SAFETY

- ❑ A 2009 national survey of police chiefs found that they ranked the death penalty **last** among effective ways to reduce violent crime, and considered it the **least efficient** use of taxpayers' money. The chiefs ranked expanded training for police officers, community policing, programs to control drug and alcohol abuse, and neighborhood watch programs as much more cost-effective ways to use taxpayers' money. *Smart on Crime: Reconsidering the Death Penalty in a Time of Economic Crisis*, available at <http://www.deathpenaltyinfo.org/documents/costrptfinal.pdf>
- ❑ A study of homicide rates by the New York Times found that “during the last 20 years, the homicide rate in states with the death penalty has been 48

percent to 101 percent higher than in states without the death penalty. The study found that over that period, “homicide rates had risen and fallen along roughly symmetrical paths in the states with and without the death penalty, “ suggesting that the presence or absence of the death penalty has little effect on homicide rates. *States With No Death Penalty Share Lower Homicide Rates*, Raymond Bonner & Ford Essenden, New York Times, Sept. 22, 2000.

- ❑ A 2005 econometric study of the state-by-state deterrent effect of executions in the twenty-seven states where executions had occurred, using a model that attempted to correct for criticisms aimed at previous studies, found that executions may indeed have a deterrent effect in the six states that carry out frequent executions. However, the study found no discernible effect in eight states, and found that executions may **actually increase the number of murders in thirteen states, including Indiana**. The author theorized that each execution has a brutalizing effect on the public, sending the message that it is appropriate to kill those who have harmed us. Only when the number of executions reaches a threshold level do they begin to have a deterrent effect. Thus, the six states that had frequent executions saw a deterrent effect, while states which hold executions only rarely, such as Indiana, did not overcome the brutalizing effect. J.M. Shepherd, *Deterrence Versus Brutalization: Capital Punishment’s Differing Impacts Among States*, 104 U. Mich. L. Rev. 203 (2005).

COST

- ❑ A fiscal impact report prepared by the non-partisan Legislative Services Agency for the 2010 Indiana General Assembly found that the average cost of a death penalty trial and direct appeal was more than \$450,000, compared to \$42,658 for a life without parole case. The cost of a death penalty case pursued through execution was found to be five times the cost of a life without parole case and lifetime incarceration. Available at <http://www.in.gov/ipdc/general/DP-COST.pdf>
- ❑ Fewer than one in five death penalty cases in Indiana result in a death sentence, and even when they do, it is rarely carried out. For every death row prisoner executed, three more have had their death sentences reversed along the way. Yet taxpayers are saddled with the the extra costs of a death penalty case even when it does not result in a death sentence or execution. Death penalty proponents often argue that prosecutors need the death penalty in order to secure plea agreements to life without parole and save the county the cost of a life without parole trial. This benefit seems questionable, however, given that the average cost of a death penalty case that ultimately results in a plea agreement for life without parole is nearly three times the average cost of a full life without parole trial.
- ❑ Parke County officials increased the county income tax rate by .25 percent to pay for the prosecution of capital murder charges against Chad Cottrell for

the murder of his wife and two step-daughters. When the case ended in the spring of 2009 with a guilty plea rather than a trial, the Terre Haute Tribune-Star reported that the county had already spent a half-million dollars on the case. Cottrell was ultimately sentenced to life without parole. Wright, *Cottrell Plea to Save Parke Thousands of Dollars*, Terre Haute Tribune-Star, March 25, 2009.

- ❑ Grant County officials transferred \$500,000 from their county's road and street fund to help pay for the death penalty case of 18-year-old Craig Cain, who was charged with murdering a woman at the request of her 13-year-old granddaughter. Cain pled guilty in exchange for a sentence of life without parole. *Marion Man Admits Killing Woman at Granddaughter's Request*, Associated Press, September 16, 2004.
- ❑ One of the most comprehensive studies of a state's costs for the death penalty was commissioned by the North Carolina Administrative Office of the Courts and conducted by Duke University professors in 1993. The professors concluded that the cost of a capital prosecution through to execution was more than double the cost of a noncapital prosecution *plus* the cost of incarceration. Factoring in the cost of capital cases that did not result in a death sentence or an execution, they found that "the extra cost per death penalty imposed is over a quarter million dollars, and per execution exceeds \$2 million." Cook & Slawson, *The Costs of Processing Murder Cases in North Carolina*, Terry Sanford Institute of Public Policy, Duke University (1993). Available at <http://www.deathpenaltyinfo.org/northcarolina.pdf> More recently, Philip Cook studied the cost of the death penalty in North Carolina over a two-year period, 2005 – 2006, and determined that the state spent \$11,000,000 per year on a relatively small number of capital murder cases, money that could have been put to better use if the state abolished the death penalty. See P. Cook, *Potential Savings from Abolition of the Death Penalty in North Carolina*, *American Law and Economics Review* (2009) Available at <http://www.deathpenaltyinfo.org/documents/CookCostRpt.pdf>
- ❑ In a report from the Judicial Conference of the United States on the costs of the federal death penalty, it was reported that the *defense* costs were about 4 times higher in cases in which death was sought than in comparable cases in which death was not sought. The report pointed out the many reasons why death penalty cases are more expensive, and indicated that the *prosecution* costs in these cases were also high -- two-thirds higher even than the increased defense costs. See Subcomm. on Fed. Death Penalty Cases, Comm. on Defender Services, Judicial Conf. of the U.S., *Recommendations Concerning the Cost and Quality of Defense Representation* (May 1998) (Generally referred to as the Spencer Committee Report). Available at <http://www.uscourts.gov/FederalCourts/AppointmentOfCounsel/Publications/RecommendationsCostQuality.aspx>

INNOCENCE

- ❑ Since 1973, 138 people in the U.S. have been exonerated and released from death row after being sentenced to death. There is no way of knowing how many of the more than 1100 people executed in the U.S. in that time have also been innocent.
- ❑ In Indiana, 2 men have been sentenced to death and later acquitted at new trials.

Larry Hicks was convicted of murder and sentenced to death in Lake County in 1978. Two weeks before his scheduled execution in 1979, Larry Hicks sat on death row without an attorney. An attorney visiting another inmate discovered Hicks and petitioned trial court for new trial. A new trial was granted, and Hicks was acquitted and released.

Charles Smith was convicted of murder and sentenced to death in Allen County in 1983. In 1989, the Indiana Supreme Court reversed his conviction and sentence due to ineffective assistance of trial and appellate counsel. On retrial, Smith, who had come within three days of being executed, was acquitted on all counts.

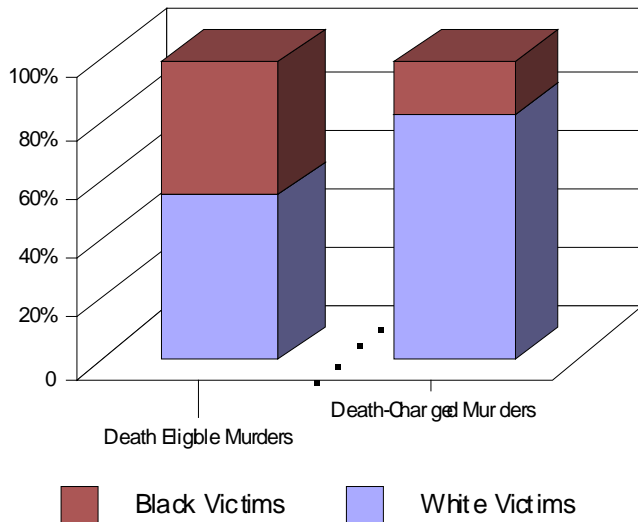
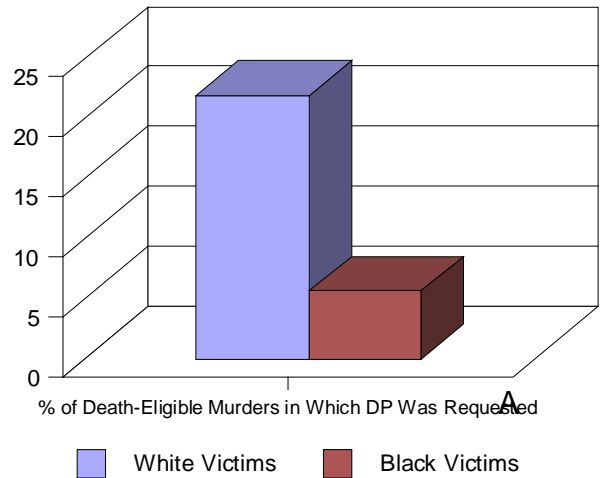
RACE AND THE DEATH PENALTY IN INDIANA

- ❑ Racial statistics for Indiana's death row mirror those of much of the nation's condemned. U.S. Census figures put Indiana's minority groups at less than 10% of the general population, and they make up just over 27% of those currently under a sentence of death in Indiana. More striking, and typical of death rows across the nation, the overwhelming majority (91%) of those under a death sentence in Indiana were sentenced to death for killing White victims.
- ❑ The 2002 study conducted for Gov. O'Bannon found that offenders who kill White victims are more likely to be sentenced to death than offenders who kill non-White victims. The research team indicated that additional research and analyses would help determine whether race-neutral case factors are responsible for this apparent disparity, or whether similar defendants convicted of similar murders are in fact treated differently based upon the race of their victims. No further findings have been released.
- ❑ In 2007, researchers working as part of the ABA Indiana Death Penalty Assessment looked at murders committed in Indiana from 1980 – 2000. They identified race-neutral factors that affected the likelihood of a death sentence, so that they compared similar cases and were able to isolate the impact of race. They found that during this time in Indiana, the odds of a death sentence among homicides with a similar level of aggravation were 16 times higher for cases where Whites were suspected of killing Whites than are the odds of a death sentence for cases in which Blacks are suspected of

killing Blacks. They also found that the impact of race was lessened as more aggravating factors were present, and greater in cases that are less aggravated and present a closer case for prosecutors and jurors. The presence of White victims always places a thumb on the scale in favor of death, but that thumb has less impact when it is surrounded by weighty aggravating factors.

- Data on the race of defendants and victims in all Indiana murders for which the death penalty could be requested is not available. However, attorneys for Gregory Van Cleave studied charging decisions in death-eligible homicides in Marion County for a period from 1979 through 1988. They determined that there were 187 solved, death-eligible homicides during this period in which victims were either black or white. The following charts illustrate their analysis.

Victims in 104 of these death-eligible cases, or 55.6%, were white, while the 23 cases involving white victims made up 82% of the total of 28 cases in which the death penalty was actually sought.



Another way of looking at this disparity is that the death penalty was requested in only 5.7% of death-eligible cases involving black victims, compared to 22% of death-eligible cases involving white victims. This means that the odds of the death penalty being requested for a white victim were 3.8 times higher than the odds of it being sought for a black victim.

Current information available at Indiana Public Defender Council web-site:
www.in.gov/ipdc/general/dpinfo.html