

# DEATH PENALTY FACTS

- ❑ Seventy percent of the world's nations have abolished the death penalty in law or in practice, including 36 nations since 2000.
- ❑ Twenty-nine states, plus the federal government and the military, have the death penalty; twenty-one 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 New Jersey repealed its death penalty in 2007, New Mexico followed suit in 2009, Illinois in 2011, Connecticut in 2012, Maryland in 2013, and New Hampshire in 2019. The Nebraska legislature repealed its death penalty in 2015, but a ballot measure struck down the ban in 2016. In 2016 the Delaware Supreme Court struck down its state's death penalty, and in 2018, the Washington Supreme Court did the same. Four additional states have governor-imposed moratoria on executions: California, Oregon, Colorado and Pennsylvania.

## 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 “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 18 “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 lethal substance or substances. Initially, there was a series of three chemicals: (1) a 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 raised concerns that the barbiturate 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 reviewed Kentucky’s use of this protocol, *Baze v. Rees*, 128 S.Ct. 1520 (2008), and upheld it because the petitioners did not show a substantial risk that the first drug would not be administered in an adequate quantity, and thus did not establish that it was “sure or very likely to

result in needless suffering.” More recently, states including Indiana have had difficulty obtaining barbiturates for use in lethal injections and have changed the drugs they use. After a series of “botched,” prolonged executions in Oklahoma, the Court took a case challenging that state’s use of midazolam as the barbiturate in the cocktail, but rejected the claim, holding that the petitioners did not establish that it was “sure or very likely to result in needless suffering,” and that they did not establish that another, more effective drug is available. *Glossip v. Gross*, 135 S.Ct. 2726 (2015). In 2017, the Indiana legislature’s budget bill contained a provision making the identity of lethal injection drug providers secret. The Indiana Supreme Court has ruled that the Indiana Department of Correction can alter the drug protocol without public review, in order to use chemicals that they are able to obtain, but the issue of secrecy continues to be litigated.

### 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 8<sup>th</sup> 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 *Defendants with Intellectual*

*disability and Defendants with Mental Illness, below)*

- ❑ **Defendants with Intellectual Disability:** In 1994, the General Assembly made individuals with intellectual disability ineligible for death or life without parole. In 2002, in *Atkins v. Virginia*, the U.S. Supreme Court held that executing defendants with intellectual disability is cruel and unusual, in violation of the 8<sup>th</sup> 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 Defendants with Mental Illness*).
- ❑ **Defendants with Mental Illness:** 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 intellectual disability 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. Currently, bills to create this exemption are pending in several states, including Ohio, where a bill was introduced with bi-partisan support after being recommended by the Ohio Supreme Court's Death Penalty Task Force. A coalition formed in Indiana to introduce a similar bill in the 2017 General Assembly. The bill was heard in committee but not called for a vote.

## 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. Of 72 completed capital cases filed since 2000, only 15, or 20%, went to trial. Of those, only 14, resulted in a death sentence. The majority of capital cases are resolved by plea agreement to a sentence of Life Without Parole or less.

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. In the five years from 2000 – 2004, 38 death penalty cases were filed, and 7 of them resulted in death sentences. In the five years

from 2012 – 2016, 14 cases were filed, and 2 resulted in death sentences.

Currently, capital charges are pending against 4 individuals in Indiana.

### **Death Sentences Imposed Since 1977**

- 97- individuals sentenced to death**
- 8- currently under sentence of death**
- 60- 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**
- 1 - sentence reversed; state is seeking new penalty phase**
- 6 - 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

The average length of time that passes from a death sentence being imposed until an individual exhausts their appeals and is executed in Indiana is approximately 16 years. For every individual executed by the State of Indiana after exhausting their appeals, more than three more have had their death sentences reduced to something less.

### **PUBLIC OPINION**

- A 2015 national Gallup poll showed that 61% of Americans support the death

penalty, at least in theory. However, in 2014, when Gallup asked respondents to choose between the death penalty and life without parole, 50% chose the death penalty and 45% chose life without parole. In a 2014 poll conducted by ABC News and the Washington Post, 52% of respondents chose life without parole over the death penalty, and the numbers were the same in a 2015 American Values poll conducted by the Public Religion Research Institute.

- ❑ A December 2015 poll of Hoosier voters conducted by David Binder Research found that 66% supported exempting defendants with serious mental illness from the death penalty, with 26% opposed and 8% unsure. Support was consistently high across the political spectrum and across major demographic subgroups.

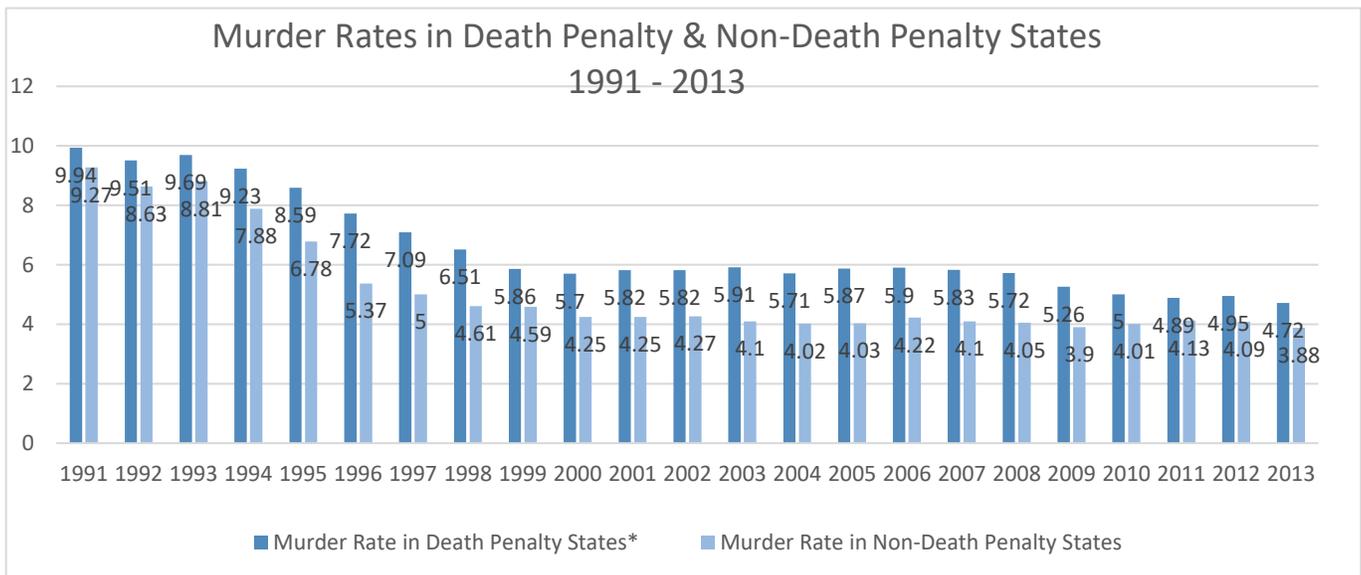
## **COST**

- ❑ A fiscal impact report prepared by the non-partisan Legislative Services Agency for the 2015 Indiana General Assembly found that the average cost of a death penalty trial and direct appeal was \$385,458, nearly ten times more than the \$39,414 cost of trial and appeal of a case in which the prosecution seeks a maximum sentence of life without parole.
- ❑ From 2000 – 2015, just one in five completed death penalty cases in Indiana have resulted in a death sentence. The other 80% have been resolved by agreement with a sentence of LWOP or less. According to requests made by county auditors to the Indiana Public Defender Commission for reimbursement, the average cost of these agreed resolution cases is \$212,549, or more than five times more than if the prosecution had simply filed a request for life without parole and taken the case all the way through trial.
- ❑ Even when a death sentence is imposed in Indiana, it is rarely carried out. For every death row prisoner executed by the state of Indiana after exhausting available appeals, three more have had their death sentences set aside along the way. So taxpayers most often pay the additional costs of a death penalty case **plus** the cost of lifetime incarceration.
- ❑ 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 plea agreement for life without parole, the Terre Haute Tribune-Star reported that the county had already spent a half-million dollars on the case. 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.

## PUBLIC SAFETY

- ❑ Based on FBI Uniform Crime Reports from 1991 through 2013, murder rates are consistently higher in death penalty states than in non-death penalty states. They fluctuate along similar trends. See the chart below.



- ❑ 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).

## INNOCENCE

- ❑ Since 1973, more than 160 people in the U.S. have been exonerated and released from death row after being wrongly convicted and sentenced to death.
- ❑ The National Registry of Exonerations issued a 2012 report discussing over 2000 exonerations in all kinds of criminal cases throughout the country, and found that the most common causes of wrongful convictions are perjury and false accusations, mistaken eye witness identifications, official misconduct such as prosecutors hiding evidence, false or misleading forensic evidence, and coerced false confessions.
- ❑ 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 for the murder of two men at a party. On retrial, the two witnesses who had testified against him at his prior trial told jurors that they had lied because they were afraid of the real killer, whom they named.

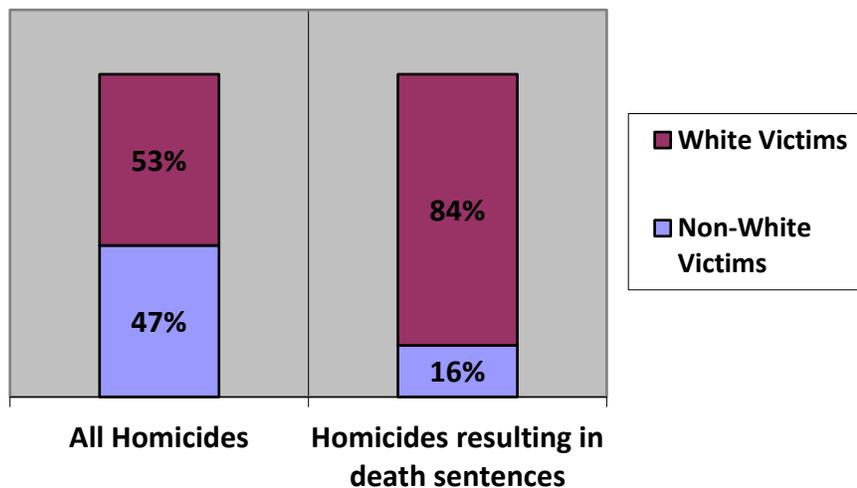
Charles Smith was convicted of murder and sentenced to death in Allen County in 1983 for the murder of a woman during a robbery. In 1989, the Indiana Supreme Court reversed his conviction and sentence due to the poor quality of representation he received from his trial and appellate lawyers. On retrial, Smith's lawyers presented evidence that another man had confessed to the killing and bragged that he had framed Smith.

## RACE AND THE DEATH PENALTY IN INDIANA

- ❑ A 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.
- ❑ Of the 20 men executed in Indiana since the death penalty was re-enacted in 1977, **only one** was convicted and sentenced for killing a non-white victim.
- ❑ Death penalty proponents often suggest the reason that such a small percentage of death penalty cases involve African-American victims is that African-Americans make up a small percentage of the population. However, in 2007, researchers working as part of the ABA Indiana Death Penalty Assessment looked at all murders committed

in Indiana from 1980 – 2000 and determined that the breakdown was nearly equal, with 53% of all murders involving white victims, and 47% involving minority victims. The breakdown was much less even with respect to murders from that same period which resulting in death sentences. White victims were involved in 84% of cases resulting in death sentences, with only 16% involving non-white victims. See the chart below.

### Indiana Homicides: 1980 - 2000



- These same researchers 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 were the odds of a death sentence for cases in which Blacks were 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.

Current information available at Indiana Public Defender Council web-site:  
<http://www.in.gov/ipdc/public/pdfs/Death%20Penalty%20Factsheet.pdf>