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This paper analyzes cost of Colorado's death penalty in court days. We compare the number of days in court and the actual length of time from charges until sentencing in death prosecutions and first-degree murder cases with similarly egregious facts. We found that death prosecutions require substantially more days in court, and take substantially longer to resolve than non-death-prosecuted first degree murder cases that result in a sentence of life. Moreover, the costs of these prosecutions are not offset by any tangible benefit. Our study shows that not only are death penalty prosecutions costly compared to non-death cases, but the threat of the death penalty at the charging stage does not save costs by resulting in speedier pleas when the defendant wants to avoid the death penalty. In addition, the substantial cost of the death penalty cannot be justified by the possibility of future deterrence insofar as social scientists increasingly agree that the deterrence benefits of the death penalty are entirely speculative. In short, by compiling and analyzing original data, we show that Colorado's death penalty imposes a major cost without yielding any measurable benefits.

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Introduction

There is something unseemly about putting a price tag on justice. It seems that questions of morality and fairness ought to be one area of law where the “narcotic effect” of a cost/benefit analysis is deemed unsuitable.³ But in the realm of constitutional rights it has long been recognized that the costs of absolute rights are prohibitive, and thus that there is necessarily a need to balance the costs of the right against its benefit in a particular situation – that is, there is a disconnect between the ‘ideal’ and the ‘real’ of constitutional rights.⁴ Indeed, the Supreme Court routinely considers the cost of applying a right to a particular circumstance when addressing whether there is a remedy – if the cost of a remedy in real terms is too high, then the ideal of the right is not recognized.⁵ Cost/benefit analysis is no less necessary in the context of evaluating the appropriateness of various forms of punishment. The cost of any particular punishment, both in dollars and in terms of governmental credibility, should be weighed against its benefits.

Accordingly, although philosophical, religious or moral debates about the death penalty may seem more urbane, a mature society that is mindful of economic realities should take seriously the costs of seeking the ultimate punishment.⁶ Just as there are no absolute rights, there ought to be no absolute punishments – cost is always relevant. The Supreme Court has held that a constitutional right is generally undeserving of a remedy if that remedy “cannot pay its way”⁷ – that is to say the benefits of the remedy must be balanced against its costs. The same should be true of the death penalty; we should not blithely accept absolutes without considering the relevant costs.⁸

This essay serves as a reasoned effort to compare the relative costs and benefits of capital punishment in the state of Colorado. Specifically, the essay proceeds in four parts. In Part One,

³ Justice Brennan decried over-reliance on such principles in a famous dissent, explaining that cost/benefit analysis “can have a narcotic effect” and “creates an illusion of technical precision and ineluctability.” *United States v. Leon*, 468 U.S. 897, 929 (1984) (Brennan, J., dissenting).

⁴ Harvie Wilkinson III, *The Dual Lives of Rights: The Rhetoric and Practice of Rights in America*, 98 CALIF. L. REV. 277; see also Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 591 (1983) (describing “Interest Balancing,” a theory of constitutional adjudication in which “remedial effectiveness for victims is only one of the factors in choosing a remedy; other social interests are also relevant and may justify some sacrifice of achievable remedial effectiveness.”). Professor Gewirtz explains that in an interest balancing approach when “evaluating a remedy, courts in some sense ‘balance’ its net remedial benefits to victims against the net costs it imposes on a broader range of social interests. Thus, even if a particular remedy would be the most effective in curing the violation, its costs may be sufficiently high that an Interest Balancing court would choose a less effective remedy.” *Id.*

⁵ See, e.g., *Herring v. United States*, 55 U.S. 135 (2005); *Stone v. Powell*, 428 U.S. 465 (1976).

⁶ Carol Steiker & Jordan Steiker, *Cost and Capital Punishment: A New Consideration Transforms an Old Debate*, 2010 U. CHI. LEGAL F. 117 (2010) (“Moral and political debates about the death penalty have a certain timeless quality. Many of the same arguments and even examples (God’s sparing of Cain!) reappear from generation to generation. It can truly seem that there is nothing new under the sun. Nonetheless, though its novelty has largely escaped notice, the argument for abolition based on the expense of administering a system of capital punishment is a new phenomenon—one that is extraordinarily powerful in current public policy debates, while being virtually nonexistent in the debates of prior generations.”).

⁷ *Herring*, 55 U.S. at 147 (citing *Leon*, 468 U.S. at 908 n.6).

⁸ To be sure, the costs of many rights, for example, the right to Free Speech, may not be purely economic in the way that this paper frames the costs of capital punishment. Instead, pure conceptions of rights often impose costs on other rights or on the social contract more generally.

we provide a brief overview of cost studies in other states, discussing their proliferation as well as their findings. In part Two, we set out the methodology for our original study of the costs of Colorado's death penalty, and in Part Three we set forth and analyze the results of our study. In Part Four we examine two claimed benefits of the death penalty and provide a brief overview of the recent studies on the deterrent effect of capital punishment, which is one of the most commonly identified tangible benefits of the death penalty. In short, this essay provides a platform for weighing the costs of the death penalty, as measured in our study, against the deterrence benefits of capital punishment more generally. Although it is difficult to find reliable estimates about the costs of capital punishment in any given jurisdiction, this essay fills that void for the state of Colorado by providing concrete, easy to understand estimates about the relative costs of a death penalty prosecution in Colorado.

I. Toward An Objective Measurement of Cost

In recent years, it has become commonplace for policymakers and academics to consider the costs of the death penalty. Substantial public attention has been paid to the realization that a single death penalty prosecution can “drain a county’s resources” or leave the state with fewer police officers, fewer drug rehabilitation programs and less training for prosecutors.⁹ And with unsolved violent crimes on the rise,¹⁰ the cost of capital punishment for many ailing state budgets has gained considerable prominence. Few studies have received more attention than the California study, which found, among other things, that the death penalty adds at least \$137 million dollars of cost to the California budget each year, an additional \$308 million per execution.¹¹ Figures like this have led some to conclude that the death penalty is a “luxury item” an unnecessary add-on to a justice system, and one that adds significant cost.¹² Indeed, the cost figures have become so staggering that even conservative pundit Bill O’Reilly recently came out in opposition to the death penalty.¹³

Moreover, the notion that we curtail the opportunities for appeal misses the mark. Many of the procedures provided, such as a review of the adequacy of trial counsel’s representation, are constitutionally required. Moreover, a significant portion of the costs of the death penalty

⁹ See, e.g., Richard C. Dieter, *Millions Misspent: What Politicians Don’t Say About the High Costs of the Death Penalty*, in *THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES* 401, 402-03 (Hugo Adam Bedau ed., 1997) (examining budget cuts in some states requiring massive police layoffs while funding for the death penalty persists).

¹⁰ Some states have unsolved rape and murder rates of roughly 50%. See, e.g., Editorial, *End the Death Penalty in California*, N.Y. TIMES, Nov. 6, 2012, at A28.

¹¹ California Commission on the Fair Administration of Justice, *REPORT AND RECOMMENDATIONS ON THE ADMINISTRATION OF THE DEATH PENALTY IN CALIFORNIA* (June 30, 2008), at 10.

¹² Dieter, *supra* note 9, at 404.

¹³ Ron Briggs, *Why Conservatives Like Bill O’Reilly and Me Support Proposition 34*, FOX AND HOUNDS DAILY (Oct. 25, 2012), <http://www.foxandhoundsdaily.com> (“Opponents of Proposition 34 like to say ‘let’s fix the system.’ Truth is, Republicans have had their hand on California’s judicial death penalty rudder for 25 years. Voters ousted three liberal justices for failing to affirm death sentences and after nearly 20 years on the court, conservative, Republican-appointed Chief Justice Ronald George concluded that the death penalty system is ‘dysfunctional.’ Current Republican appointed Chief Justice Tani Cantil-Sakauye has echoed these remarks, saying the system is ‘not effective.’ Recently retired Justice Carlos Moreno, who believes in the death penalty, supports Proposition 34 because he knows the system can’t and won’t be fixed.”).

occur at the trial level.¹⁴ This fact has not been missed by Colorado’s policy-makers. In a recent op-ed, one district attorney, Stan Garnett, wrote that “[p]rosecuting a death penalty case through a verdict in the trial court can cost the prosecution well over \$1 million dollars (not to mention the expense incurred by the judiciary and the cost of defense counsel, which is almost always funded with taxpayer funds in a death penalty case).”¹⁵ The same district attorney estimated that the death penalty prosecution of a single case, including the trial and appeals to date, has cost some \$18 million.¹⁶ The problem, however, is that these dollar figures are somewhat imprecise and anecdotal because of the complexity of figuring out how exactly to assign systemic costs of the death penalty across individual cases. Recognizing that the costs of the death penalty are spread among many different agencies and across a long period of time, the Board of Governors of the Washington State Bar Association recently explained:

The costs of pursuing the death penalty are significant, but cannot be calculated with precision. Murder cases are generally among the most complex and challenging cases for lawyers to try and for courts to handle. When the death penalty is sought additional layers of complexity enter the case, both in terms of presentation of evidence and procedural requirements. Because of the ultimate and irrevocable nature of the penalty, numerous extra steps are required by statute, case law, court rules and the standard of practice in death penalty cases. In a capital case, extraordinary responsibility is placed upon the attorneys defending the accused, and also upon the prosecutors and the courts.¹⁷

All of these same considerations are present in Colorado. The costs of the death penalty are substantial, but because they are spread across numerous steps and procedures, it is difficult, perhaps unrealistic, to generate a single demonstrably correct price tag for the death penalty relative to other first degree murder prosecutions. But the question -- “how much more does it cost to prosecute a death penalty case?” -- can be answered with some precision if we focus on a comparison of the time costs of a murder case and a capital murder case.

Thanks to the work of those involved in the data collection for a recent empirical study of the constitutionality of Colorado’s death penalty, the Colorado Death Penalty Eligibility Study (CDPES), we have access to public court documents regarding every murder case filed in Colorado for the twelve year period from 1999 through 2010.¹⁸ Specifically, by relying on this dataset we are able to quantify the amount of time involved in a Colorado capital prosecution as compared to a Colorado life-without-parole prosecution.¹⁹ We don’t make estimates about how

¹⁴ Dieter, *supra* note 9, at 405.

¹⁵ Stan Garnett, *Death penalty not practical for Colorado*, BOULDER DAILY CAMERA, Dec. 16, 2012, http://www.dailycamera.com/guest-opinions/ci_22194910/da-death-penalty-not-practical-colorado.

¹⁶ *Id.* (discussing the Nathan Dunlap case).

¹⁷ WASH. STATE BAR ASS’N, FINAL REPORT OF THE DEATH PENALTY SUBCOMMITTEE OF THE COMMITTEE ON PUBLIC DEFENSE 14 (Dec. 2006), adopted by the Washington State Bar Association Board of Governors Apr. 13, 2007.

¹⁸ Justin Marceau, Sam Kamin & Wanda Foglia, *Colorado Capital Punishment: An Empirical Study*, U. COLO. L. REV. (forthcoming 2013) (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2210040). There are a handful of non-death-prosecuted murder cases in which the district court has sealed the file from public view, but there is no reason to believe that those few cases would change the results of either the CDPES or this cost analysis.

¹⁹ This approach has been taken by other studies that seek to estimate the costs of a death penalty prosecution. . For example, the Washington State Bar Association Report suggested analysis of the number of additional days required for a death penalty case: “Some information is available on the cost of operation of the trial court. The Administrative Office of the Courts (AOC) analyzed the personnel costs for a superior court judge and courtroom

much a day in court costs; however, we are able to provide objective information on exactly how much more, as measured by days in court, a death penalty prosecution costs the State.²⁰ Thus, although we do not have set dollar figure, the cost figures measured in days in this study are objectively verifiable, not subject to any contradiction, and provide similarly forceful support for the conclusion that the death penalty is a comparatively very expensive system, even relative to prosecutions resulting in a sentence of life without the possibility of parole.

II. Methodology

Using the court docket entries gathered for the CDPES, we quantified the time cost of prosecutions by calculating the number of court days spent in the four categories: (1) pretrial proceedings; (2) voir dire; (3) trial, and, if applicable, (4) sentencing. By comparing the number of days required by a capital prosecution to those of a first degree murder resulting in a sentence of life without parole, we are able to get a relative sense of the cost of Colorado's death penalty.

We used the following basic procedures for calculating the number days for each of the four categories. First, for purposes of simplicity, if any proceedings were conducted in court on a particular day, that day was counted as a court day even if the proceeding did not take the entire day. If, however, two proceedings occurred on the same day, for example, the final day of a trial and the first day of sentencing), we did not double count. Instead, when the sentence was imposed on the last day of trial, it was treated as a trial day (and not a sentencing day). By contrast, if the sentence was imposed on a separate day, that was counted as a full day even if the sentencing did not take a full day.²¹ In addition, if a case was re-tried following a mistrial, the second round of pretrial hearings, voir dire, and trial was added to the first round for a total figure in each category for the case. Finally, in calculating the total time required for the resolution of a case, *infra* Figure 3, the charge date and final sentence date were used, but any appeals or post-conviction proceedings were not considered.²²

Because our study is limited to the docket sheets and court information gathered for the CDPES, we only considered the costs of cases prosecuted between January 1, 1999 and December 31, 2010. During this twelve year period of time there were twenty-two death penalty prosecutions. Thirteen of these death penalty prosecutions lead to a completed trial of guilt-innocence, or a sentencing trial, or both, while nine resulted in a plea bargain to either first

staff and concluded that the staff cost to the counties for operating one trial court is \$2,332 per day. (This cost analysis does not include the general costs of operating the court facilities, such as utilities, maintenance and security.) If an aggravated murder case takes 20 to 30 days longer to try as a capital case than as a non-capital case, then the extra cost in terms of trial court operation would be \$46,640 to \$69,960." Washington State Bar Association, *supra* note 17, at 18.

²⁰ It is beyond the scope of this analysis to say what a day in court "costs" the State of Colorado, or the individual jurors, family members, and others who attend and/or participate in the proceeding.

²¹ Because an automatic LWOP sentence is required for a first degree murder conviction, counting a sentencing as a full day of court tends to exaggerate the costs of an LWOP murder conviction and thus understate the relative amount of time costs imposed by a death penalty sentencing proceeding.

²² Given that there is a statutory right to counsel in Colorado state court for post-conviction proceedings when a death sentence has been imposed, and on federal habeas review for death penalty defendants, the amount of time and cost for post-conviction litigation would also be considerably higher for death penalty cases as compared to other murder convictions.

degree murder or a lesser offense (including one plea bargain entered during the guilt-innocence trial).²³ We compare the time required by the trials and pleas of death penalty cases to the time required for the prosecution of the most serious of the first-degree murders during this timeframe. We used the most serious first-degree murders because we assumed that these cases, in general, would consume more time than second degree or less serious first degree murder cases and would therefore enable us to most closely isolate the additional costs associated with pursuit of the death penalty. In order to identify the most serious first-degree murders, we relied on findings made in the CDPES. Specifically, we analyzed 148 first degree murder convictions since 2005 that resulted in a trial rather than a plea and had one or more aggravating factors.²⁴ In short, we compared the 148 most serious cases resulting in an LWOP conviction to the death penalty prosecutions during this same period.

III. Results: Costs of the Death Penalty

A. Cost of Death Penalty Cases that go to Trial

During the relevant time period there were thirteen death prosecutions that resulted in either a completed guilt phase or sentencing phase trial. (See Appendix 1).²⁵ Eight of the thirteen occurred prior to the United States Supreme Court's 2002 decision that rendered Colorado's judge-sentencing proceedings unconstitutional.²⁶ These "pre-Ring" cases – named after the 2002 Supreme Court case, *Ring v. Arizona* -- arose prior to the constitutionally-mandated return of jury sentencing in Colorado in 2002,²⁷ and thus are less instructive as to the

²³ See Appendix 1 and Figures 1, 2, 4 and accompanying text, *infra*. For purposes of this analysis, these were divided into (1) trial and plea cases, and (2) cases that arose under the former Colorado judge-sentencing scheme, and those that arose following the return of jury capital sentencing in 2002. See *infra* note 27 and accompanying text.

²⁴ The purpose of the CDPES was to examine the murder cases in Colorado and determine whether one or more aggravating factors applied. Marceau et al., *supra* note 18.

²⁵ In one of the thirteen, the death penalty was barred because, prior to the trial, the defendant was found to have mental retardation and was thus ineligible for the death penalty. *People v. Jimmy Vasquez*, No. 2002CR2231 (Adams Cnty.). In another of the thirteen, the death penalty was barred after the trial, but before the judge-sentencing proceeding was scheduled to begin; in the interim, the United States Supreme Court decided *Ring v. Arizona*, 536 U.S. 584 (2002), which declared judge-sentencing proceedings unconstitutional. *People v. Hagos*, No. 99CR2738 (Denver Cnty.); the General Assembly passed a law designed to subject Hagos to a death penalty jury sentencing proceeding, but that law was held to violate the Colorado Constitution's prohibition on special legislation. See *People v. Hagos*, 110 P.3d 1290 (Colo. 2005). In addition to these thirteen completed trials, there was one case that resulted in a mid-trial guilty plea. *People v. Cong Than*, No. 1999CR2325 (Denver Cnty.). This case is treated more appropriately as a guilty plea case and so is not included in the thirteen cases involving a completed trial or sentencing proceeding.

²⁶ *Ring v. Arizona*, 536 U.S. 584 (2002). See *Woldt v. People*, 64 P.3d 256 (Colo. 2003) (declaring Colorado's three-judge capital sentencing statute unconstitutional); *People v. Montour*, 157 P.3d 489 (Colo. 2007)(same, as applied to a defendant who enters a guilty plea rather than going to trial).

²⁷ 536 U.S. 584 (2002). The General Assembly responded to *Ring v. Arizona* with passage of Laws 2002, 3rd Ex.Sess., Ch. 1, § 2, eff. July 12, 2002, which restored jury capital sentencing proceedings to Colorado.

present cost and projected future cost of capital prosecutions under Colorado’s current jury sentencing scheme.²⁸

Accordingly, for purposes of this study we examined the costs of five death penalty cases that resulted in trial; there were three cases that went to a jury trial for the guilt phase and the sentencing phase (Bueno, Ray, and Owens),²⁹ one that went to trial and resulted in an acquittal (Perez)³⁰ and one that is currently pending a capital jury sentencing proceeding following a guilty plea that was reversed on appeal and remanded for resentencing (Montour).³¹

The breakdown of how we count days is straightforward. One of the four jury trials – Perez – resulted in an acquittal; for this case, pretrial and guilt phase trial data are available and we have calculated the time costs using this information alone. Another one of the four trials – Bueno – resulted in a jury LWOP verdict, and for this case we included cost totals for pretrial, jury selection, guilt phase, and the sentencing phase. Two other cases – Owens and Ray – resulted in jury verdicts of death following a trial, and for these cases cost information from pretrial, jury selection, guilt phase, and sentencing are included. The fifth case included in this study – Montour – is an active case with a pending jury sentencing proceeding. Montour pleaded guilty in 2002 and was sentenced to death following a judge sentencing proceeding, but is now pending a jury re-sentencing proceeding following a successful appeal. For this case, there is no information about the time costs for a guilt phase trial because such a trial has never occurred; however, data on pretrial proceedings relating to the re-sentencing is current as of January 2013, and data for voir dire and sentencing is projected, based on the district court’s scheduling orders, which provide a projected estimate of the time that the court anticipates for each proceeding (which has been added to the time spent in the first proceeding). In Ray and Montour, the figures include retrial days: in Ray, a mistrial occurred after several weeks of jury selection and in Montour, the sentence was reversed on appeal. In sum, all of the capital trials since the return of jury capital sentencing in 2002 are included in this study. Figure 1 summarizes our findings.

Figure 1. Days of Court Required for Five Colorado Death Penalty Trials, by Stage of Proceeding

Judicial District	Defendant	Pretrial hearing court days	Voir Dire court days	Guilt Phase Trial court Days	Sentencing court Days	Result
18 th	Owens	74	25	27	27	Jury DP

²⁸ The eight “pre-Ring” cases are: *People v. Paige*, No. 99CR2029 (Denver Cnty.); *People v. Hagos*, No. 99CR2738 (Denver Cnty.), *People v. Anthony Jimenez*, No. 00CR178 (Teller Cnty.), *People v. Manuel Melina*, No. 00CR1675 (Adams Cnty.), *People v. John Sweeney*, No. 00CR634 (Adams Cnty.), *People v. Jesse Wilkinson*, No. 09CR638 (Adams Cnty.) and *People v. Allen Bergerud*, No. 02CR457 (Weld Cnty.). Only one of them – *People v. Paige* -- resulted in a sentencing proceeding; it resulted in an LWOP verdict from a three-judge panel.

²⁹ *People v. David Bueno*, No. 05CR73 (Lincoln Cnty.), *People v. Robert Ray*, No. 06CR697 (Arapahoe Cnty.), and *People v. Sir Mario Owens*, No. 06CR705 (Arapahoe Cnty.).

³⁰ *People v. Alejandro Perez*, No. 05CR74 (Lincoln Cnty.).

³¹ *People v. Edward Montour*, No. 02CR782 (Douglas Cnty.). In *Montour*, a judge-sentencing proceeding followed the entry of a guilty plea in 2003, but the sentence was reversed on appeal in 2007 and the case is now pending a jury resentencing proceeding. See *People v. Montour*, 157 P.3d 489 (Colo. 2007).

						verdict
18 th	Bueno	49	30	13	6	Jury LWOP verdict
18 th	Perez	62	6	10	n/a	Acquittal
18 th	Ray	108	52	23	35	Jury DP verdict
18 th	Montour	109	29 (projected)	n/a	37 (projected)	Pending now
	average days in court	80.4	28.4	18.25	26.25	

As illustrated in Figure 1, on average, a death penalty trial case consumes approximately 153 days in court, not including any post-conviction proceedings or appeals. This consists of approximately 80 court days of pretrial hearings, 28 days of voir dire, over 18 days of presentation of evidence at the trial to determine guilt or innocence, and an additional 26 days for the jury sentencing proceeding.

In order to have a useful comparison, we gathered data about all post-2004 first degree murder cases that resulted in a trial, a conviction, a sentence of LWOP, and a finding by the CDPEs that there were one or more aggravators in the case.³² Specifically, we studied one hundred and forty-eight (148) post-2004 LWOP cases that were in this posture.³³

As illustrated below in Figure 2, the comparison between the number of days spent prosecuting a death penalty case and the number of days spent prosecuting a LWOP case, even though the defendant is in fact death eligible,³⁴ is stark. There is a marked savings in time and resources when the State opts to pursue LWOP instead of a sentence of death. The LWOP cases required only an average of 24½ total days in court, as follows: 14 court days of pretrial hearings, 1.5 court days of voir dire, 8 court days of trial, and less than a day of court sentencing proceedings. The comparison between the court days required for death prosecutions and for LWOP cases is reported in Figure 2.

Figure 2.

³² Again, we use the post-2005 cases because only these cases fairly represent the likely costs imposed by a trial insofar as prior to this date jury sentencing was not required in capital cases and the length of the sentencing trials and total number of court days was likely lower.

³³ The 148 cases represent seventeen (17) counties throughout the State of Colorado and include the vast majority of such cases in the state between January 1, 2005 and December 31, 2010.

³⁴ The existence of an aggravating factor makes the defendant who is guilty of first-degree murder death eligible. See Marceau et al., *supra* note 18.

**Comparison of Average days in court for death prosecution and LWOP prosecutions,
cases commenced after 2004**

Type of case	Average Pretrial hearing court days	Average Voir Dire court days	Average Guilt Phase Trial court days	Average Sentencing court days	Average Total Court days
Death prosecutions that went to jury trial/sentencing proceedings³⁵	80.4	28.4	18.25	26.25	153.30
LWOP prosecutions that went to jury trial	14	1.5	8.2	0.78	24.48

On average, a death prosecution has required over six times more court days than the LWOP prosecution. The differences at each stage of the case are striking. Voir dire in an average LWOP case takes about a day and a half, but for an average death prosecution the jury selection takes more than 28 court days. Similarly striking is the cost of a capital sentencing hearing as opposed to an LWOP proceeding. A capital sentencing proceeding takes between a month and six weeks (an average of almost 26 days in court), but because a first-degree murder conviction carries a mandatory sentence of LWOP, the LWOP sentencings are almost always simultaneous with the jury’s rendering of a verdict of guilty and take less than a day.

B. Total Length of Time Between Charge and Imposition of Sentence

Another way that some studies have expressed “cost” of death penalty prosecutions is by reporting the length of time that it takes to resolve a death prosecution as compared with an LWOP prosecution.³⁶ Victim’s families, attorneys, jurors, judges and others experience financial and other hardships when cases take a very long time to resolve. One national organization, Murder Victims’ Families for Reconciliation, has explained that “[t]he death penalty delays justice and it delays the healing process. Capital cases often take 25 years or more to reach completion, all the while keeping victims’ families stuck in the system much longer than is the case with non-capital trials.”³⁷

Because our study of costs is focused on data relating to the days required to complete a trial and sentencing, we cannot draw firm conclusions about the total length of time needed to bring a death penalty case to “completion.” However, our trial level data confirm the theory that

³⁵ These cases included Owens, Bueno, Perez, Ray, and Montour. Montour is included because, even though he pleaded guilty, he faces a full jury sentencing proceeding, which in all important respects “costs” the same.

³⁶ See, e.g., Terance D. Miethe, *Estimates of Time Spent in Capital and Non-Capital Murder Cases: A Statistical Analysis of Survey Data from Clark County Defense Attorneys*, Department of Criminal Justice, University of Nevada, Las Vegas (Feb. 21, 2012), available at <http://aclunv.org/files/clarkcostreport.pdf>.

³⁷ MURDER VICTIMS’ FAMILIES FOR RECONCILIATION, <http://www.mvfr.org/how-it-causes-harm/> (last visited Feb. 7, 2013).

Colorado death prosecutions take longer to resolve than an LWOP prosecution. In fact, as Figure 3 demonstrates, death prosecution cases took dramatically longer to resolve – even in the trial court, and even if a death sentence did not result.

Figure 3. Comparison of Delay in Death Sentencing cases and LWOP Cases, 1999-2010

Type of case	Total Days to Sentence	Difference of total days in length of time to resolution, compared to LWOP prosecution
LWOP prosecution – trial	526 days	--
Death prosecution – plea	621 days	+ 95 days for death prosecution
Death prosecution – trial	1128 days	+ 602 days for death prosecution

Figure 3 illustrates that a death penalty trial prosecution takes a total of 1,128 days, or almost two calendar years longer in district court than a trial prosecution for LWOP. Even when the death prosecution results in a guilty plea, the total length of delay is about three months longer than in a LWOP trial prosecution.³⁸

C. Total cost of maintaining Death Penalty System

As illustrated above, the per-case cost of a death penalty trial and sentencing compared to a LWOP trial and sentencing is staggering. The total amount of delay and the number of court days required for an LWOP conviction are a fraction of those required for a death prosecution. Moving beyond the per-case costs, we wanted to know the total scope of the resources (as measured in court days and length of proceedings) that Colorado “spends” on death penalty prosecutions. In other words, we wanted to look at how many total death prosecutions have been funded by the criminal justice system, with what results.

³⁸ Even though our focus of this study is on delay in trial court proceedings, we can offer some general observations about the added delay to appeals caused by a death prosecution. Two relatively recent developments in Colorado law have had a dramatic impact on the number of years it takes to resolve a death prosecution. The first was in 1997, when Colorado adopted a unique system for death penalty appeals, which requires defendants to file their post-conviction claims before the appeal can even begin. COLO. REV. STAT. ANN. § 16-12-201 (West 1997). The practical effect of this reform has been to delay the filing of a direct appeal for several years. Second, in 2002, for the first time, Colorado amended its statute to provide for a remand for resentencing in the event that a death sentence is reversed on appeal. COLO. REV. STAT. ANN. § 18-1.3-1201(7) (West 2002). Previously, when a death sentence was reversed, the automatic penalty was LWOP. While only one case has been through this new process so far (Montour), the impact on delay of the case can already be seen. Montour’s case was reversed on appeal in 2007, but instead of the automatic imposition of a sentence of life imprisonment without parole, the case was remanded for resentencing. As of this writing in 2013, the case was still many months or perhaps even a year or more away from the resentencing hearing, and more than ten years have passed since the killing that spurred the death penalty prosecution.

The total number of death prosecutions from January 1, 1999 to December 31, 2010 is twenty-two (22). These are listed in Appendix 1.³⁹ Of those, only five resulted in a death penalty sentencing proceeding, as shown in Figure 4.

Figure 4. Colorado Death Prosecutions commenced since 1999, by procedure and result

Type of proceeding	Number of cases	Sentencing hearings held	Death Sentences Resulting
Plea to first degree murder prior to trial – no sentencing hearing ⁴⁰	4	0	0
Plea to lesser charge prior to trial – no sentencing hearing ⁴¹	4	0	0
Plea to first degree murder during trial – no sentencing hearing ⁴²	1	0	0
Plea to first degree murder prior to trial – capital sentencing hearing ⁴³	1	1	Resentencing proceeding pending in 2013
Guilt-innocence trial held	12 ⁴⁴	4	2

Thus, Colorado paid for twenty-two new death prosecutions between January 1, 1999 and December 31, 2010, but (as of this writing in January 2013), has to show for it only two possible future executions -- Ray and Owens -- and the right to continue to seek the death penalty against Montour. Those three cases alone, including the court days scheduled for Montour's upcoming capital sentencing proceeding, consume a total of 546 days. Given the average number of days required for a LWOP trial prosecution (24.48 days), the system could fully prosecute 22 LWOP cases -- those three cases plus 19 additional cases -- in the number of

³⁹ There were three additional death penalty proceedings within the period 1999-2010, however, all three were commenced prior to the study period. The three cases -- Canister, Owens, and Washington -- all involve the same multiple homicide in Arapahoe County that occurred on September 10, 1998, just outside the study period. Stephanie Hindson, Hillary Potter & Michael L. Radelet, *Race, Gender, Region and Death Sentencing in Colorado, 1980-1999*, 77 U. COLO. L. REV. 549 (2006). No death sentences resulted from any of the prosecutions.

⁴⁰ Ramirez, Albert, Lee, and Rubi-Nava. See Appendix 1. Ramirez could be considered as a plea to a lesser charge, because he was charged with murdering two people but pleaded guilty to only one murder.

⁴¹ Palomo, Lopez, Medina, and Brown. See Appendix 1.

⁴² Than pleaded guilty during trial to two first degree murders and received two LWOP sentences.

⁴³ Edward Montour pleaded guilty in 2002, but the judge-imposed sentence was reversed on appeal in 2007. His case is pending a jury resentencing hearing. Montour pleaded guilty in 2002 but not in exchange for an agreement on sentencing. As of January 2013, the prosecution continues to seek the death penalty. The case is slated for a jury sentencing proceeding, which entails pretrial motions, a capital voir dire, and a full jury trial that includes information about the murder itself, as well as everything else that is typically involved in a capital sentencing.

⁴⁴ See Appendix 1. In two cases, the death penalty was no longer sought at the time of the final trial: in Vasquez (Adams County 2000CR2231), the trial judge dismissed the death penalty prior to trial because the defendant had mental retardation and was therefore ineligible; in Bergerud (Weld 2002CR457), after the first jury hung, the prosecutor dropped the death penalty for the retrial, which resulted in a conviction and sentence of LWOP. In five additional trials (Jimenez, Sweeney, Wilkinson, Perez, and Melina), the defendant was convicted of a lesser charge or acquitted altogether. Thus, there were only four prosecutions (other than Montour, mentioned above), which resulted in a capital sentencing proceeding: two resulted in LWOP sentences (Paige and Bueno) and two resulted in death sentences that are as yet untested by appeal (Ray and Owens).

days devoted to these three capital cases. The cost of death prosecutions in Colorado is high, and the death sentence yield is extraordinarily low.

While it was beyond the scope of this cost report to analyze all death prosecutions since *Furman v. Georgia*,⁴⁵ investigation already performed confirms that there is a long history in Colorado of spending resources on many death prosecutions, but coming up with almost no death sentences and even fewer executions.⁴⁶ Since 1980, Colorado has paid for well over 100 death prosecutions, but executed only one man, Gary Davis.⁴⁷ Perhaps because of the complex procedures involved in attempting to ensure that only the guilty and the deathworthy are executed, most death sentences in Colorado have contained legal, procedural, or constitutional errors such that they had to be reversed on appeal or by later trial court proceedings. Out of a dozen death sentences imposed since 1976, only three case were not reversed on appeal: that of Gary Davis (who was executed in 1997), Frank Rodriguez (who died of natural causes on death row), and Nathan Dunlap (whose case is still in the appeal process as of January 2013).⁴⁸ Thus, the fact that a Colorado case may initially result in a jury verdict of death is not a reliable predictor of whether the defendant will, in fact, ever be executed.

It may be a matter of subjective judgment whether the execution rate (less than 1 execution out of over 100 prosecutions), or the reversal rate (9/12, or 75%) should be regarded as a failure. Even if the death penalty machinery does not produce any executions, it is possible that there is some societal value or good generated by the system (other than executions). But if the point of paying for and maintaining a death penalty system is to produce executions, it can hardly be disputed that Colorado has failed miserably in that regard. Whatever else Colorado's death-prosecution money is buying, it is not buying executions.

Given the undisputable fact that Colorado's death penalty money is not buying executions, it is reasonable to query whether there is some other "commodity," other than executions, that can be attributed to maintenance of Colorado's death penalty system, and that makes the enormous expenditures worth it even though the system does not result in executions. There are only two possible arguments that have been offered to justify maintenance of a death penalty system that results in almost no executions: leverage in negotiations for swift plea bargains, and general deterrence. In the next sections, we offer a cost-benefit assessment of both of those claims.

IV. Benefits of the Death Penalty: Guilty Pleas and Deterrence

In order to properly appreciate the value of death penalty prosecutions, it is necessary to compare the costs of such prosecutions, as identified in this study, with the benefits of the death

⁴⁵ 408 U.S. 238 (1972).

⁴⁶ See, e.g., Hindson et al., *supra* note 44, at 594. As noted, there were three death prosecutions immediately preceding the study period, and another shortly after; however, none of the four cases resulted in a death sentence.

⁴⁷ Hindson et al., *supra* note 44, identify 110 death prosecutions between 1980 and 1999. There have been an additional thirteen death prosecutions since the conclusion of their investigation.

⁴⁸ *Id.* Two additional death sentences were untested by an appeal, but did not result in a Colorado death sentence, because in one the defendant committed suicide (Johnnie Arguello), and in the other the defendant waived his Colorado appeals and was executed by another State (Steven Morin).

penalty prosecutions. On one end of the scale, as our study shows, the costs of the death penalty in Colorado are strikingly high. The benefits, however, appear to be illusory.

Although there exists a wide range of moral arguments that one might level in favor of capital punishment,⁴⁹ just as we limit our discussion of costs to quantifiable costs, so too do we limit our examination of benefits. We consider the potential savings associated with the death penalty because of the rise in number and efficiency of plea bargains in cases where death is charged, and we consider the deterrence benefits of the death penalty.

A. Does the Death Penalty Save Money by Resulting in Swift Guilty Pleas?

To test the assumption that the threat of the death penalty prompts swift guilty pleas and thus reduces the costs of prosecution, we examined death prosecutions that resulted in guilty pleas.

The death penalty was rarely used as an explicit threat in a case that resulted in a plea of guilty to first degree murder.⁵⁰ As seen in Figure 4, there were only 5 such cases out of 22 death prosecutions – and one of those occurred during the jury trial itself. An additional 4 cases resulted in plea bargains to lesser offenses, for a total of 9 plea bargain cases that can be used to assess the relative cost of a death penalty prosecution/plea bargain case as compared to a LWOP prosecution/trial case. This comparison can be used to answer the question: does the death penalty save money by inducing or coercing swift guilty pleas?

To answer this question, we begin with the 1999-2010 death prosecutions that resulted in guilty pleas (“death penalty prosecution/plea bargain cases”) and compare them with the same set of LWOP cases examined above, *i.e.*, the post-2004 aggravated first degree murder cases that could have been, but were not, prosecuted as death penalty cases and which resulted in convictions for first degree murder and LWOP sentences (“LWOP prosecution/trial cases”). Figure 5 reports the results. Even though there are many reasons a defendant might enter a guilty plea, and in any given case the plea may not be the result of a defendant’s fear of receiving a sentence of death, we examined all guilty pleas without regard for the motivation behind it; in other words, we essentially “credit” the death penalty prosecution with having produced the guilty plea, even if the plea was entered for completely independent reasons.

Figure 5. Comparison of average number of days required for death prosecution/plea bargain cases and LWOP prosecution/trial cases, 1999-2010

Type of case	Average Pretrial	Average Voir Dire	Average Guilt Phase	Average Sentencing	Average Total
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⁴⁹ Of course, moral arguments for and against the death penalty all presume a system that results in executions, not a system like Colorado’s, which primarily results in process, not executions.

⁵⁰ To be sure, the prosecution may have threatened a sentence of death in other cases even though they did not explicitly notice the case as a death penalty case. However, there is no way to measure exactly how common such threats are. Nor is there a way of knowing how plausible a death prosecution was in such cases when the prosecution did not even identify one or more aggravating factors in the required charging instrument. Notably, the aggravating factors and the decision to seek death must be made within 60 days of the preliminary hearing. Crim. P. Rule 32.1(b).

	hearing court days	court days	Trial court days	court days	court days
Death prosecution/plea bargain cases ⁵¹	19.5	.25	1.25	--	21
LWOP prosecution/trial cases	14	1.5	8.2	0.78	24.48
Total average court days “saved” in death prosecution/plea bargain cases	-5.5	1.25	6.95	0.78	3.48

As a per-case average, the LWOP prosecution/trial cases take fewer court days, but only about three and a half days fewer per case. These findings substantially undermine the claim that death prosecutions are more efficient because the threat of a death sentence induces or coerces a swift and less expensive guilty plea. The court records show that there is a very small difference between the court days required for a death prosecution that *results in a plea* – which takes an average of 21 days – and the court days required if the case *goes to trial* as an LWOP case – which takes an average of 24½ days. That is to say, a death prosecution guilty plea costs about the same as an LWOP trial, as measured in court days required.

It can hardly be said that justice or efficiency is best served by a system that discourages trials in our most serious cases for a mere savings of three and a half days. A 2012 analysis of empirical data from Georgia suggests that the benefit of induced plea bargains resulting from the threat of execution is illusory at best:

The empirical findings in this article suggest that the threat of the death penalty has a substantial *causal* effect on the likelihood that a defendant accepts a plea agreement. Nevertheless, the magnitude of the effect is clearly insufficient to offset the substantial administrative and financial costs arising from the occasional capital defendant taking her chances at trial (or, in some instances, even the capital case that incurs significant pre-trial or pre-penalty phase cost prior to a plea agreement). The government’s use of the death penalty to obtain convictions quickly and cheaply appears to fail on both of these dimensions—and this may be particularly true in marginal cases because the likelihood of trial, a non-death sentence, or a reversal on appeal is particularly high.⁵²

As Thaxton notes, the marginal costs or savings in the death prosecution/plea bargain cases must include the cost of not merely those cases themselves, but also the cost of maintaining the entire death penalty machinery, without which there is no credible threat of execution which, as the theory goes, is a prerequisite to inducing the guilty plea. Thus, the costs of the entire system

⁵¹See Figure 4 and notes 45-49, *supra*. The 9 plea bargain cases include Ramirez, Than, Albert, Palomo, Lopez, Brown, Lee, Medina, Rubi-Nava. Information on the number of court days in the Rubi-Nava case has been sealed by the district court, so that case utilized an average from the other eight cases. Montour is not included because his guilty plea was not the result of a sentencing agreement. There will still be a full jury sentencing proceeding, which entails almost all of the costs associated with a death penalty trial prosecution.

⁵²Sherod Thaxton, *Leveraging Death*, at 52 (August 30, 2012), J. CRIM. L. & CRIMINOLOGY (forthcoming), available at <http://ssrn.com/abstract=2138627>.

must be placed into the mix, including the cost of the “failed” death penalty trial prosecutions – *i.e.*, the cases that are pursued right up to or through trial, and sometimes even through a capital sentencing proceeding, but without a death sentence resulting.

In Colorado, during the study period, there were 10 “failed” death penalty cases that went through trial (and in two cases, through a capital sentencing proceeding), even though no death sentences resulted. (In 5 of the 10, the trial did not even result in a first degree murder conviction).⁵³

Figure 6 shows the comparison between the average number of court days required to litigate a LWOP prosecution/trial case to conclusion, as compared to a “failed” death penalty prosecution – *i.e.*, one that does not result in a death sentence.

Figure 6. Comparison of average number of days required for “failed” death prosecution/trial cases and LWOP prosecution/trial cases

Type of case	Average Pretrial hearing court days	Average Voir Dire court days	Average Guilt Phase Trial court days	Average Sentencing court days	Average Total court days
LWOP prosecution/trial cases	14	1.5	8.2	0.78	24.48
Failed death penalty prosecution/trial cases ⁵⁴	38.7	9.9	17.5	1.7	67.80
Total additional average court days for failed death prosecution/trial cases	24.7	8.4	9.3	0.92	43.32

The failed death penalty prosecutions require substantially more court days than do the LWOP trial prosecutions: on average, 43.32 *more* days in court are required for the failed death penalty prosecutions over an average LWOP trial. This is in marked contrast to the mere 3.48 *fewer* court days required on average when a death penalty prosecution results in a plea bargain instead of trial.

Using actual data from the cases, it is possible to confirm these results. We can now answer the question whether the court days saved by inducing plea bargains (n=9)⁵⁵ exceed the additional court days required for the failed death penalty prosecutions (n=10).⁵⁶ The aggregate totals for Colorado death penalty prosecutions are shown in Figure 7.

Figure 7. Additional court days spent in death penalty “failure” trials, as compared to court days saved in death prosecution/plea bargain cases, 1999-2010.

⁵³ See Appendix 1. The 10 cases included here are Paige, Hagos, Jimenez, Vasquez, Melina, Sweeney, Wilkinson, Bueno, Perez, and Bergerud’s first trial.

⁵⁴ See note 58, *supra*.

⁵⁵ See note 56, *supra*.

⁵⁶ See note 58, *supra*.

Type of case	Total court days, all cases
death prosecution/plea bargain cases (n=9) ⁵⁷	189
failed death penalty prosecution/trial cases (n=10) ⁵⁸	678
Net cost (in court days) of death prosecution	489

During the study period, setting aside the two death verdicts and the pending Montour case, prosecuting the death penalty in Colorado has required 489 more court days than it has “saved” by inducing guilty pleas. It is apparent that the marginal savings of the death penalty plea bargain cases (189 court days) are overwhelmed by the marginal costs of the failed death penalty trial cases (678 court days).

Assessment of the potential for future coerced plea bargains must take into account the impact of Colorado’s return to jury sentencing in 2002.⁵⁹ Since 1999, most of the Colorado death penalty prosecutions that resulted in plea bargains to either first degree murder or a lesser offense were at a time when the law provided no right to a jury determination of the sentence. Figure 8 shows the distinction between plea bargaining in death cases prior to, and after, the return to jury sentencing:

Figure 8. Number of death prosecution resulting in trials or plea bargains, before and after *Ring v. Arizona*, 1999-2010

Offense date	Death Penalty Prosecutions not barred before trial	Plea bargains	Guilt-innocence trials held while death penalty still sought ⁶⁰
Pre- <i>Ring</i> (1999-June 2002)	12	6	1
Post- <i>Ring</i> (after June 2002)	8	3	5

Because the majority of Colorado jury sentencing proceedings result in a verdict of LWOP rather than a verdict of death,⁶¹ given these figures, it is entirely possible that Colorado’s

⁵⁷ See note 56, *supra*.

⁵⁸ See note 58, *supra*.

⁵⁹ See note 30-31 and accompanying text, *supra*.

⁶⁰ In two cases, the death penalty was either barred (Hagos) or dropped (Bergerud) after trial. See Appendix 1.

⁶¹ According to the statistics reported by Hindson et al., *supra* note 44, of 33 jury sentencing proceedings between 1980 and 1999, a death sentence was returned in only nine cases, five of which were reversed on appeal. Most of

return to jury sentencing has reduced the effectiveness of the threat of the death penalty as a tool with which to coerce a guilty plea. If so, Colorado may be in the situation in which the only murder prosecutions in which the threat of execution can still induce a guilty plea are those in which either the defendant wants to die and has committed the crime in the first place to facilitate his own execution, or those in which the evidence is so overwhelming in favor of guilt that the prosecution could probably obtain a LWOP sentence faster by simply taking the case to trial.

A final question remains, however: in spite of the fact that the Colorado death penalty scheme does not result in executions and is vastly more expensive (even accounting for induced guilty pleas), is there some clear benefit that overwhelms the enormous cost of the system? Proponents of the death penalty sometimes argue that it deters other people from preventing murder. That potential benefit is explored next.

B. Does the Death Penalty Deter Future Murders?

Although it is commonplace to assert that the death penalty is an effective deterrent, recent independent studies undermine this conclusion. Stated differently, although the costs of the death penalty in Colorado are high, the deterrence benefits appear to be entirely speculative.

For decades, scholars have produced conflicting empirical research regarding the effect of capital punishment as a deterrent for homicide; for each article finding a deterrent effect at least one paper finding no such effect was published. In the face of such conflicting empirical conclusions, the National Research Council convened an independent committee to study whether the available data supports the conclusion that the death penalty has a deterrent effect.⁶² The findings of this committee, published by the National Academy of Sciences in 2012, are that it is impossible to conclude that the death penalty serves as a meaningful deterrent. Specifically, the committee summarized its findings and conclusions by saying:

The committee concludes that research to date on the effect of capital punishment on homicide is not informative about whether capital punishment decreases, increases, or has no effect on homicide rates. Therefore, the committee recommends that these studies not be used to inform deliberations requiring judgments about the effect of the death penalty on homicide. Consequently, claims that research demonstrates that capital punishment decreases or increases the homicide rate by a specified amount or has no effect on the homicide rate should not influence policy judgments about capital punishment.⁶³

the reversals (4 out of 5) related to jury instructional problems or jury misconduct. During that same period, no less than 13 death prosecutions resulted in jury verdicts for less than first degree murder. It is reasonable to see why a defendant might prefer a jury trial/sentencing to a plea bargain to first degree murder.

⁶² NAT'L RESEARCH COUNCIL, DETERRENCE AND THE DEATH PENALTY 33 (Daniel S. Nagin and John V. Pepper eds., 2012), available at <http://www.heinz.cmu.edu/download.aspx?id=3271>.

⁶³ *Id.* at 102.

The most current, comprehensive, and neutral study of the deterrent effect of capital punishment, therefore, concludes that there is no evidence that the death penalty provides a marginal deterrent benefit above a long prison sentence.⁶⁴

Notably, other recent academic studies have gone even further in suggesting that there is no connection between the death penalty and deterrence. For example, a recent study reported that 88% of the country's top criminologists surveyed do not believe the death penalty acts as a deterrent to homicide.⁶⁵ It is safe to say that there is a consensus among leading researchers that the death penalty either does not deter, or that there is no evidence that it deters.

It is worth pointing out, moreover, that any conclusion about the limited deterrence value of the death penalty in general is particularly salient in Colorado where the rate of executions is staggeringly low. Since the reinstatement of the death penalty in *Gregg v. Georgia*,⁶⁶ Colorado has only executed one person.⁶⁷ If one accepts that actual executions are required in order to generate a meaningful deterrent, then even assuming capital punishment is capable of deterring homicides elsewhere, in Colorado the non-existence of actual executions may have stripped the death penalty of any deterrent value.⁶⁸ We do not suggest that the absence of executions in Colorado proves that the state's death penalty is without any deterrent benefit, but it is worth pointing out that whatever deterrent effect the death penalty might have in other states is probably even more attenuated in Colorado.⁶⁹ And given that the most current research does not find any deterrent effect for the death penalty across the United States, the prospect of a deterrent benefit in Colorado seems particularly illusory.

Conclusion

This essay summarizes the quantifiable costs of the death penalty. We do not assess the argument that these sentences impose a moral injury on society, and likewise, in summarizing the benefits of the death penalty we have focused exclusively on quantifiable benefits and

⁶⁴ Notably, the committee also notes that it is unable to conclude that the death penalty has no deterrent effect. Simply put, the findings are that there is no evidence in support of a deterrence thesis; the studies to date have failed to show that the death penalty deters or does not deter crime. *Id.* at 4 (“A lack of evidence is not evidence for or against the hypothesis.”).

⁶⁵ Michael L. Radelet and Traci L. Lacock, *Do Executions Lower Homicide Rates?: The Views Of Leading Criminologists*, 99 J. CRIM. L. & CRIMINOLOGY 489, 505-506 (2009). Eighty-seven percent concluded that the abolition of the death penalty would not have a significant effect on murder rates and 75% believe that “debates about the death penalty distract Congress and state legislatures from focusing on real solutions to crime problems.”

⁶⁶ 438 U.S. 153 (1976).

⁶⁷ Hindson et al., *supra* note 44, at 580, 587 (describing case of Gary Davis).

⁶⁸ NAT'L RESEARCH COUNCIL, *supra* note 67, at 33 (“Among states that provide authority for the use of the death penalty, the frequency with which that authority is used varies greatly. . . . [S]ince 1976 three states—Florida, Texas, and Virginia—have accounted for more than one-half of all executions carried out in the United States, even though 40 states and the federal government provided the legal authority for the death penalty for at least part of this period. Constructing measures of the intensity with which capital punishment is used in states with that authority is a particularly daunting problem.”).

⁶⁹ *Id.* at 29 (“The theory of deterrence is predicated on the idea that if state-imposed sanction costs are sufficiently severe, certain, and swift, criminal activity will be discouraged.”). *But see id.* at 34-35 (“[A]ctual frequency of executions may not alter would-be murderers perceptions of the risk of execution and therefore not alter behavior even if there is a deterrent effect.”).

avoided arguments about the moral imperative of the death penalty. Our findings are unequivocal: Colorado's death penalty imposes tremendous costs on taxpayers and its benefits are, at best, speculative, and more likely illusory.

Specifically, we found that death prosecutions require substantially more days in court, and take substantially longer to resolve, than non-death-prosecuted first degree murder cases that result in a sentence of LWOP. The costs of these prosecutions are not offset by any tangible benefit. Our study shows that not only are death penalty prosecutions costly compared to non-death cases, but the threat of the death penalty at the charging stage does not save costs by resulting in speedier pleas when the defendant wants to avoid the death penalty. The difference in court days between plea bargains in death penalty cases and complete trials in LWOP cases is negligible and overwhelmed by the exponentially-increased number of days required for failed death penalty prosecutions that result in neither a plea bargain nor a death sentence.

The substantial cost of the death penalty cannot be justified by the possibility of future deterrence insofar as social scientists increasingly agree that the deterrence benefits of the death penalty are largely non-existent in general, and the deterrent value is likely even less in Colorado where there has been only one execution in three decades. In short, the death penalty imposes a major cost without yielding any measurable benefits.

APPENDIX 1: Death Prosecutions in Colorado, 1999-2010

Capital Prosecutions for which there was no jury Sentencing Proceeding Held

Denver	1999CR189	Omar Ramirez	Plea – M1	LWOP
Denver	1999CR2325	Cong Than	Plea - M1 (2 counts)* *plead during trial	LWOP
El Paso	1999CR3818	Anthony Albert	Plea – M1	
Morgan	2000CR200	Cruz Palomo	Plea – M2	48 years
Adams	2000CR1491	Leandro Lopez	Plea - Conspiracy	28 years
Arapahoe	2001CR1744	Edward Brown	Plea – M2, M1 attempt	80 years
El Paso	2006CR5870	Marco Lee	Plea – M1	LWOP
Rio Grande	2005CR65	Michael Medina	Plea – child abuse/result death (F2)	48 years
Douglas	2006CR636	Jose Rubi-Nava	Plea	LWOP* *Court data not available
Denver	1999CR2029	Donta Paige	Trial	LWOP (judge sentencing)
Denver	1999CR2738	Abraham Hagos	Trial	DP barred after trial
Teller	2000CR178	Anthony Jimenez	Trial	convicted of lesser charge
Adams	2002CR2231	Jimmy Vasquez	Trial	DP barred before trial
Adams	2000CR1675	Manuel Melina	Trial	convicted of lesser charge
Adams	2000CR634	John Sweeney	Trial	convicted of lesser charge
Adams	2000CR638	Jesse Wilkinson	Trial	convicted of lesser charge
Weld	2002CR457	Allen Bergerud	Trial	Hung jury; death penalty dropped before retrial. At retrial, convicted & sentenced to LWOP.
Lincoln	2005CR74	Alejandro Perez	Trial	Acquitted of all charges

Capital Prosecutions that resulted in a jury sentencing proceeding

Arapahoe	2006 CR 705	Sir Mario Owens	Trial	Jury death verdict
Lincoln	2005CR73	David Bueno	Trial	Jury LWOP verdict
Arapahoe	2006CR697	Robert Ray	Trial	Jury death verdict
Lincoln-Douglas	2002CR782	Edward Montour	Plea	After judge-sentencing death verdict was reversed on appeal, Def. is presently facing a re- sentencing proceeding