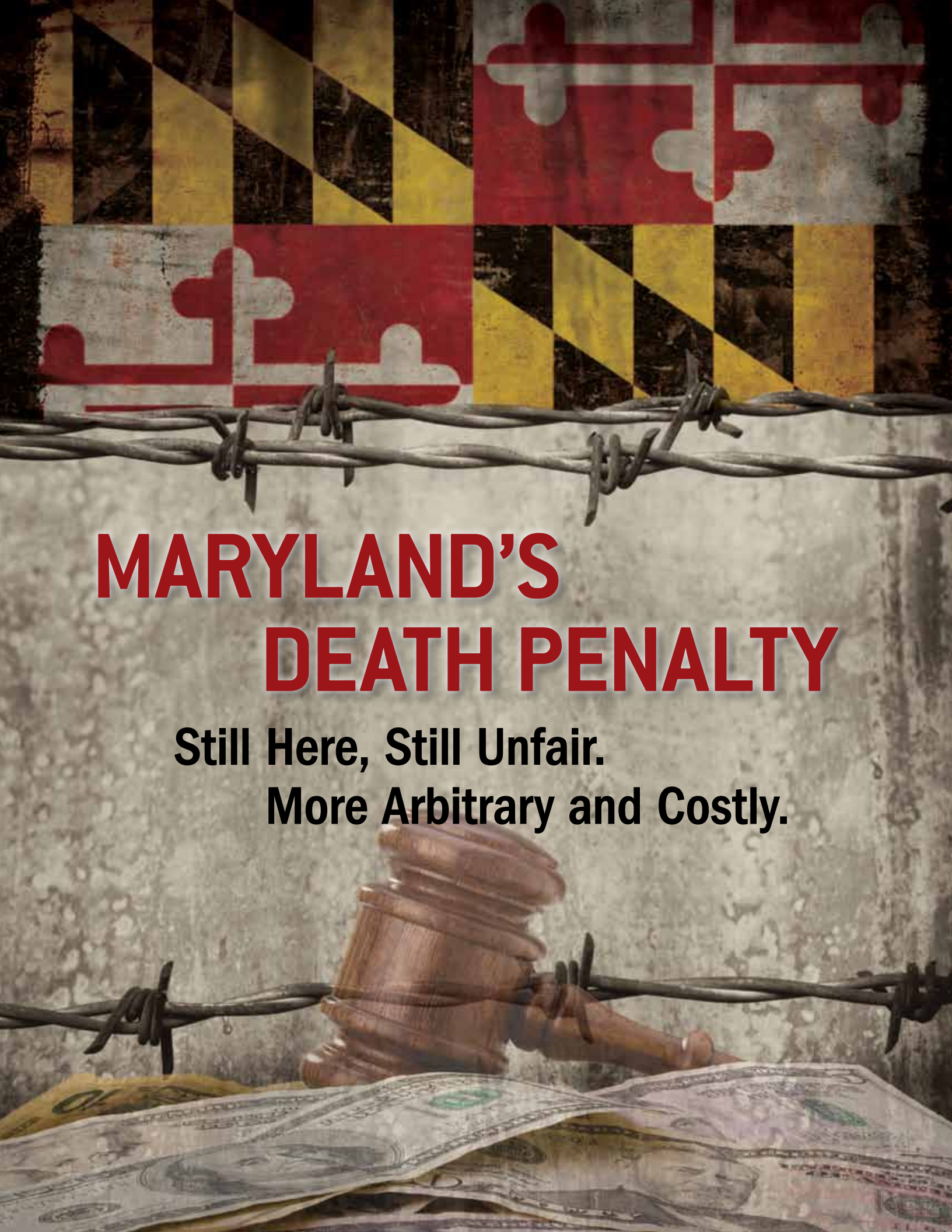

MARYLAND'S DEATH PENALTY

Still Here, Still Unfair. More Arbitrary and Costly.

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To the Maryland

February 2012

We, the undersigned attorneys in Maryland, urge you to repeal the death penalty in our state. We have diverse legal experiences—including as prosecutors, defense attorneys, public defenders, litigators, judges, state officials and law professors—but we agree that Maryland would benefit from ending capital punishment.

As attorneys, we are committed to fostering a system that is fair and impartial and provides equal justice for all. We have reached the conclusion that our death penalty system undermines this promise. We have different personal views on the morality of capital punishment. But as practitioners of the law, we conclude that the death penalty should be abandoned.

The Maryland Commission on Capital Punishment, created by the General Assembly, carefully studied the death penalty in 2008, identified a series of persistent problems with its use, and recommended repealing it.

Likewise, the Maryland State Bar Association has also taken a formal position in favor of repeal of the death penalty in Maryland law.

The General Assembly came close to a repeal vote in 2009 but instead, recognizing the risk of executing an innocent person, passed legislation that added new restrictions on the evidence required to pursue a death sentence. Nearly three years later, it is clear that the new law has not eliminated this risk or other problems with the death penalty. And in some ways, the new law has actually made our system less effective. Meanwhile, the capital punishment system slowly grinds on as new death cases are prosecuted. As other states are finding, efforts to address wrongful convictions and other failings in the adjudication of capital punishment inevitably lead to higher costs and only prolong the legal process that the families of murder victims must endure.

We hope the following report, *Maryland's Death Penalty: Still Here, Still Unfair. More Arbitrary and Costly,* will help rekindle legislative debate about this ultimate criminal sanction.

We believe it is an impossible task to keep trying to seek a foolproof death penalty. The time has come to give up on "fixing" the system.

The General Assembly has not debated and voted up-or-down on the death penalty since 1978. We urge that 2012 be the year that the legislature takes up the issue. The economic recession's immense strain on the state budget only makes the issue that much more immediate.

We strongly support plans to include an appropriation in the 2012 death penalty repeal bill that uses some of the savings from repeal to aid murder victims' families. Passage of this bill will heed both of the Commission's on Capital Punishment's recommendations and further advance the administration of justice.

Sincerely,

General Assembly

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Harry R. Hughes
Maryland Governor (1979–1987)

Stephen H. Sachs
Maryland Attorney General (1979–1986)

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Executive Summary

In 2009, the Maryland General Assembly passed legislation that created new requirements for the evidence required to seek the death penalty. Specifically, the law restricts death penalty eligibility to those cases where there is:

1) biological evidence linking the defendant to the murder,

2) a voluntary videotaped interrogation and confession of the defendant to the murder, or

3) video that conclusively links the defendant to the murder.

It was a well-intentioned effort to limit executions to those cases where the evidence was foolproof. Unfortunately, none of these evidentiary restrictions are, in fact, foolproof.

The 2009 law also unleashed a wave of unintended consequences, ignoring and sometimes exacerbating a significant set of additional problems with the death penalty, including its cost, arbitrariness, ambiguity, impact on the families of murder victims, and racial and geographic disparities. This attempt to fix one facet of the death penalty has only added to the burdens already borne by the victims' families and taxpayers.

This attempt to fix one facet of the death penalty has only added to the burdens already borne by the victims' families and taxpayers.

Many of these problems were raised as factual findings by the 2008 Maryland Commission on Capital Punishment. The Commission, chaired by former U.S. Attorney General Benjamin Civiletti, recommended: (1) repeal of the death penalty, and (2) using the resulting state savings to improve and increase services for the families of murder victims.

Some, particularly death penalty supporters, have declared that this 2009 law was the end of the punishment in our state. In reality, Maryland's death penalty is still very much here. Prosecutions go on. Currently, four death notices are active: two cases pending in Anne Arundel County, one in Prince George's County, and one in Baltimore County. The first case to go through the new sentencing procedure resulted in a life sentence in November. There is every reason to believe there will continue to be death notices filed. Each of these cases will lead to significantly higher costs to the criminal justice system, lead to years of litigation, and hold out a false promise to the family members of murder victims, who will wait in limbo for finality of sentence.

An analysis follows of the status of Maryland's death penalty system three years after passage of the 2009 law—looking at what the law has not solved, what it may have made worse, and what problems it has completely ignored. The factual findings of the 2008 Commission are used as the main inventory for this examination.

The report includes the following sections:

1. **Ongoing Risk of Executing an Innocent Person**
   The amended law has not achieved its main goal of eliminating the risk of executing an innocent person.

2. **"Struck by Lighting" in Maryland**
   The new law has made the application of the death penalty in Maryland more arbitrary and irrational.

3. **The Toll on Victims' Families**
   The new law has further complicated Maryland's death penalty system, making it more burdensome for murder victims' families.

4. **The Death Penalty's High Cost Brings Little Return**
   The new law's complications add costs to the state.

5. **Ongoing Racial and Jurisdictional Disparities**
   The new law has ignored these major problems

6. **Ambiguous Language in the 2009 Law Spawns Confusion**
   It has made the application of the death penalty in Maryland more arbitrary and irrational.

7. **Conclusion**
   The death penalty has not been fixed but it has become more costly, arbitrary, and cumbersome. Marylanders would be better served by repealing it and reinvesting the savings in reducing crime and healing victims. The Maryland General Assembly should act to repeal the death penalty in 2012.

1 Ongoing Risk of Executing an Innocent Person

Kirk Bloodsworth was convicted in Maryland in 1985 for the brutal killing and sexual assault of a nine year old girl. He was convicted primarily on the basis of five witnesses, each of whom testified that they had seen Bloodsworth with the victim. His conviction was overturned because police failed to inform the defense that there was another suspect. But he was convicted at a second trial and sentenced to two consecutive life terms. Finally, in 1992, the prosecution agreed to DNA testing. He became the first person to be sentenced to death and later exonerated as a result of post-conviction DNA testing in 1993.

In 2003, Congress passed the Kirk Bloodsworth Post-conviction DNA Testing Program to provide funding for DNA testing under the Innocence Protection Act.[1] That same year, the Baltimore County State's Attorney entered the DNA that exonerated Bloodsworth into a Maryland database and identified the actual perpetrator, Kimberly Shaw Ruffner. Ruffner pleaded guilty and was sentenced to life without parole.

RELATED 2008 MARYLAND COMMISSION FINDINGS

1) Despite the advance of forensic sciences, particularly DNA testing, the risk of execution of an innocent person is a real possibility.

2) DNA testing has improved fairness and accuracy in capital cases. DNA is regarded as a highly reliable source of information and serves as a powerful tool for proving guilt and innocence. Nevertheless, while DNA testing has become a widely accepted method for determining guilt or innocence, it does not eliminate the risk of sentencing innocent persons to death since, in many cases, DNA evidence is not available and, even when it is available, is subject to contamination or error at the scene of the offense or in the laboratory.

Bloodsworth's case shaped the Maryland legislature's decision to implement the 2009 reform to the death penalty. The General Assembly had the noble intention of eliminating the risk that an innocent person could be executed. Unfortunately, there is no such thing as a foolproof death penalty, as study after study has confirmed.

DNA and Biological evidence

Biological evidence is only as good as the technicians and labs conducting the testing. State after state—including Maryland—has found problems in its crime labs ranging from incompetence to inconsistency, from tainted evidence to outright fraud. Even the most sound biological evidence must be tested and analyzed by human beings—human beings who make mistakes, who overreach, and even some who lie.

Maryland is not immune from such human errors. As noted by the Maryland Commission on Capital Punishment in its 2008 report:

> "Maryland's labs have also recently come under fire for misconduct. This year, a former Baltimore County Police chemist was said to have provided explanations about blood typing that fell "within the definition of material perjury." In 2007, a forensic expert who

had testified in hundreds of Maryland cases—including capital cases—was found to be a fraud who forged his credentials. In 2004, a DNA lab based in Montgomery County, Maryland fired an analyst for "professional misconduct" after discovering that she apparently substituted data for control samples. Finally, the Director of the Baltimore City Crime Laboratory was fired this year after a database update revealed that employees' DNA may have tainted evidence."

Innocent people have been convicted of serious crimes ranging from rape to assault to murder because improper or inaccurate biological evidence was used to demonstrated a link that was, in fact, false.

JOSIAH SUTTON
TEXAS, CONVICTED OF RAPE IN 1998, EXONERATED IN 2004

Josiah Sutton was convicted of rape in 1998. Just five days after the attack, Sutton was picked up (along with his friend) by local police when the victim spotted them in her neighborhood. Both teenagers gave blood and saliva samples to be compared by the Houston Police Department Crime Laboratory with evidence collected from the victim and from the crime scene. Testing ruled out Sutton's friend, but didn't exclude Sutton. The Crime Laboratory asserted that the semen sample taken from the crime scene contained Sutton's profile. The DNA evidence formed the core of the prosecution's case against him. At the trial, a crime lab employee claimed that DNA found on the victim was an exact match.

Sutton consistently asserted his innocence. He sought independent DNA testing at the time of his trial and requested it (unsuccessfully) while incarcerated. In 2002, state auditors found numerous and glaring problems with the work of the Houston Police Crime Laboratory. By chance, Sutton's mother was listening to her radio when two local reporters covering the story about the lab spoke of their findings. At her request, they followed up on Sutton's case. One of the experts they had been working with, University of California criminology professor William Thompson, found that the Crime Laboratory reports in Sutton's case were riddled with errors and that the findings were completely wrong. Retesting of the original DNA strips resulted in conclusive exculpatory evidence. Sutton was exonerated in 2004. The actual perpetrator was identified.[2]

TIMOTHY DURHAM
OKLAHOMA, CONVICTED OF RAPE AND ROBBERY IN 1993, EXONERATED IN 1997

Timothy Durham was sentenced to 3,200 years in prison for the violent rape and sodomy of an eleven-year-old girl by the pool of her home in Tulsa, Oklahoma. The victim was only able to vaguely describe her attacker, but hair samples and semen were found at the crime scene. Police pursued Timothy Durham, a local resident with a previous record. Durham maintained his innocence throughout the investigation and trial. Eleven witnesses placed Durham at a skeet ball competition in a completely different state at the time the crime occurred.

The prosecution relied on three pieces of evidence, including a DNA test of the semen that reportedly indicated a match to Durham. The jury disregarded the strong alibi evidence in favor of the prosecution's DNA, hair, and eyewitness evidence. He was convicted and sentenced to over 3,000 years in prison.

Subsequent DNA testing post-conviction revealed multiple errors in the initial DNA test, yielding a false positive as a result of misinterpretation by the lab. The semen stain that was originally tested included genetic material from both the rapist and the victim. The combination of the male and female DNA produced an apparent genotype match to Durham—but the match was based on a mixed profile rather than a single source. When the DNA was correctly tested, it showed that the semen could not have come from Durham and also pointed to the real attacker. Durham was exonerated in 1997.[3]

GILBERT ALEJANDRO

TEXAS, CONVICTED OF AGGRAVATED SEXUAL ASSAULT IN 1990, EXONERATED IN 1994

Gilbert Alejandro was sentenced to 12 years in prison for aggravated sexual assault in 1990. The victim, a woman in her fifties, was pushed into her apartment and raped while her head was covered with a pillow. She gave police an estimate of her attacker's size and a rough description of his clothing. A few months later, when she picked out Alejandro's photo from a book of mug shots, the police picked him up. She failed to pick him out in several photo lineups, but she did pick him out in both a sketch lineup and a live lineup.

The prosecution did not need to rely on her shaky eyewitness identification, however. They relied instead on the testimony of Fred Zain, the chief of forensics in the county. He testified that the banding patterns in the DNA evidence were "identical to the banding patterns of Mr. Alejandro." Zain further told that the jury that the DNA evidence conclusively matched Alejandro and "could have only originated from him."

In 1993, investigators in West Virginia discovered abundant evidence of malfeasance, incompetence and lying in Zain's earlier work there. Zain was fired from his job in Texas and Alejandro's case reopened. DNA experts from the county revealed that the original test Zain had testified about was inconclusive, and that another test done at the time of the trial excluded Alejandro. He was exonerated in 1994 and awarded a $250,000 settlement by the county.[4]

Videotaped interrogation and confession

False confessions are far more common than people believe. In fact, innocent people confessed or pleaded guilty to something they did not do in approximately 25 percent of the cases where DNA later exonerated them. False confessions can occur because the suspect is tired, coerced, stressed, mentally impaired, intoxicated, ignorant of the law, afraid, misunderstands the situation, or is simply trying to be helpful to the police. According to the Innocence Project, people with mental disabilities have falsely confessed because they are tempted to accommodate and agree with authority figures, while mentally capable adults also give false confessions due to a variety of factors like the length of interrogation, exhaustion or a belief that they can be released after confessing and prove their innocence later.[5]

False confessions are far more common than people believe.

While videotaping of interrogations can reduce the rate of wrongful conviction, it cannot eliminate them completely. It is not uncommon for police to interview a suspect multiple times, conducting an

initial interview and then recording a second interrogation later on. In one study of 40 cases where innocent people falsely confessed and were later exonerated, *more than half involved recordings.*[6]

The 2009 law is not clear as to whether *every* interrogation is videotaped, but only names "*a* videotaped, voluntary interrogation and confession" (emphasis added) as death-eligible evidence. Videotaping an interrogation can hide the fact that the suspect was coerced during a prior interrogation. Even when the full interrogation is recorded, police coercion is not always enough to convince a jury that a confession is unreliable. A tape might prevent a wrongful conviction in a case where there has been outright police brutality and torture caught on tape. But most suggestive police practices are far more subtle. Juries are very likely to believe suspects who confess, *even when those confessions are contradicted by other evidence or when it is clear from the recordings that police are feeding facts or issuing promises or threats to encourage the confession.* It is the mere fact that a defendant confessed—not the way they were made to do so or the believability of the confession—that sways jurors.

There are dozens of examples of wrongful confessions based on false confessions—from coerced confessions that appear voluntary to suspects who go to police with details and dreams in order to be helpful. Below are just a few.

ROBERT SPRINGSTEEN AND MICHAEL SCOTT

TEXAS, CONVICTED OF MURDER IN 1999 AND EXONERATED IN 2007

In 1991, four teenage girls were found bound, gagged, raped, and shot in the head in an Austin yogurt shop that had been set on fire. Police initially suspected Robert Burns Springsteen Jr. and Michael Scott, as well as two of their friends, when one of the friends was caught carrying a .22-caliber firearm in the mall. After the ballistics on the gun failed to match the murder weapon, all four suspects were released.

After nine years and no promising leads, new investigators on the case again questioned Scott and Springsteen. Scott was interrogated for over 18 hours. Both interrogations were videotaped, including a portion of the tape where a detective holds a gun to Scott's head. Scott confessed and implicated Springsteen. Springsteen, in turn, confessed and implicated Scott. Despite the video showing the gun to Scott's head, the trial court determined that the confessions were voluntary. There was no physical evidence linking Springsteen or Scott to the crime. DNA evidence did not positively match them, though it did not exclude them either. However, the confessions—even showing a gun to Scott's head—were enough. Scott was sentenced to life in prison and Springsteen was sentenced to death.

Prosecutors ordered new DNA testing in 2007 and found that it excluded both Scott and Springsteen. They dropped the charges in 2009. To date, more than 50 people have confessed to the yogurt shop murders. Many of those confessions contained facts that allegedly "only" the perpetrators could have known.[7]

CLAUDE McCOLLUM

MICHIGAN, CONVICTED OF RAPE AND MURDER IN 2006, EXONERATED IN 2007

Barbara Kronenberg, a 60-year-old-college professor, was found raped and beaten in her classroom at Lansing Community College in 2005. She later died of her injuries. Two days later,

police brought Claude McCollum in for questioning. McCollum was a student and drifter who frequently slept in campus buildings. A videotape from a surveillance camera at the time of the crime showed him in a building near the crime scene.

McCollum was convicted largely on the basis of a videotape that appears to be a confession to murder made to police. McCollum testified that he was only trying to help the police by talking about how the crime *might* have been committed. The jury didn't buy it. The videotape placing McCollum near the crime scene bolstered the confession and McCollum was convicted and sentenced to life without the possibility of parole.

The following year, police arrested Matthew Macon, who confessed to five murders including the one that sent McCollum to prison for life. Macon's confessions were corroborated with physical evidence, and the prosecutor re-opened the case against McCollum. They discovered that the proper analysis of the videotape showed McCollum *near* the crime scene—but in a different building at the time of the crime. The prosecutor at the time of the trial saw the report placing McCollum in a different building and claims he placed it on the defense table during the trial. The defense attorney says he never received it.

Had the authorities realized their mistake in 2005, perhaps the five other women that Macon murdered after Kronenberg would still be alive today.[8]

DAVID VASQUEZ

VIRGINIA, CONVICTED OF HOMICIDE AND BURGLARY IN 1985, EXONERATED IN 1989

David Vasquez was arrested for the murder of a woman who was killed in her Arlington County, Virginia home. She was sexually assaulted and then hung. Vasquez confessed to police on multiple occasions, and became one of several inmates that were exonerated after being convicted on the basis of "dream statements" that were used as confessions. The court excluded the first two confessions, but allowed the third one, which appeared voluntary. Fearing the death penalty and on the advice of his attorney, Vasquez pled guilty just before trial and was sentenced to 35 years.[9]

Although the confessions were only partially recorded, they contained disturbing sections where he repeatedly answered questions incorrectly, often giving multiple incorrect guesses regarding the details of the crime, until the police would simply tell him the details to have him repeat them back:

Detective 1: Did she tell you to tie her hands behind her back?

Vasquez: Ah, if she did, I did.

Detective 2: Whatcha use?

Vasquez: The ropes?

Det. 2: No, not the ropes. Whatcha use?

Vasquez: Only my belt.

Det. 2: No, not your belt.... Remember being out in the sunroom, the room that sits out to the back of the house?...and what did you cut down? To use?

Vasquez: That, uh, clothesline?

Det. 2: No, it wasn't a clothesline, it was something like a clothesline. What was it? By the window? Think about the Venetian blinds, David. Remember cutting the Venetian blind cords?

Vasquez: Ah, it's the same as rope?

Det. 2: Yeah.

Det. 1: Okay, now tell us how it went, David—tell us how you did it.

Vasquez: She told me to grab the knife, and, and, stab her, that's all.

Det. 2: (voice raised) David, no, David.

Vasquez: If it did happen, and I did it, and my fingerprints were on it…

Det. 2: (slamming his hand on the table and yelling) You hung her!

Vasquez: What?

Det. 2: You hung her!

Vasquez: Okay, so I hung her.[10]

If such an unreliable "confession" could become the basis for Vasquez' conviction, it is unlikely that a longer or fuller recording would have changed the outcome.

Video recording

The development of digital recording, home editing, and high-quality cameras that fit in the palm of one's hand further complicates the matter. The ability to create a video recording that links a defendant to a murder is just a few clicks away for the technologically savvy. It is far too early in the digital era to know whether doctored photos and videos will soon become the basis for wrongful convictions. But we do know that the possibility of that happening advances steadily. And as the case of Claude McCollum, above, shows, even older, traditional video recordings can be misused or misinterpreted. Consider, also, the case of Rayshard Futrell.

RAYSHARD FUTRELL

MICHIGAN, CONVICTED OF MURDER IN 2009, EXONERATED FOR THE MURDER IN 2010

On June 12, 2009, Julian Hinojosa and his girlfriend were confronted outside her home by five members of a rival gang. Hinojosa was shot and killed. Three video cameras captured footage of areas near the scene of the crime: two cameras from a market's surveillance system, located a few blocks from the shooting, and a third from a neighbor's home security system.

Hinojosa's girlfriend's roommate witnessed the crime and told police that the shooter was a black man, wearing a white shirt, dark shorts, a dark hat, and a bandana that covered much of his face. The description was confirmed by videotapes from two of the cameras. Only those two videos were provided to the defense.

The third video showed Rayshard Futrell standing on a street corner just before the shooting dressed differently than the shooter identified by the other two videos and the eyewitness. Nonetheless, a store clerk identified Futrell as the shooter during the investigation. He was further identified out of a photographic lineup.

The market surveillance tapes were the only evidence used against Futrell at trial. Although the man in the two was not Futrell, the third tape would have been necessary in order for anyone to know that. Yet the third tape was withheld from the defense and from the trial. To make matters worse, Futrell lied about his alibi. He was convicted and sentenced to life.

The public defender's office discovered the third tape on appeal. Prosecutors dropped the charges in exchange for Futrell's plea to perjury for lying about his alibi. He was released in 2010 and sentenced to probation for the perjury.[11]

Reform Cannot Eliminate Human Failings

Maryland has made a good faith attempt to reduce the risk of wrongful convictions in death penalty cases by restricting the death penalty to cases where certain types of evidence are available. However, none of the "protections" that Maryland has tried to build into its death penalty law is any better than the individuals who are supposed to do the protecting: police, prosecutors, forensic investigators, and others. As long as the handling, analysis, and presentation of evidence is handled by human beings—even human beings with the best of intentions—they will be subject to error, mishandling, or worse.

A 2005 study of wrongful convictions further illustrates why the risk of executing an innocent person cannot be easily reformed away. The study looked at 340 wrongful convictions across the country from 1989 through 2003. Among the 205 murders examined, perjury was the most common factor (in 56 percent of cases) contributing to the wrongful conviction. Such perjury was committed by jailhouse informants, co-defendants, state forensics experts, police, or even the actual murderer.[12] What reform can eliminate such human failings?

There is no such thing as a foolproof death penalty.

There is no such thing as a foolproof death penalty.

States from Illinois to Massachusetts have asked their foremost experts to devise a system that will never sentence an innocent person to death. The Illinois Commission on Capital Punishment recommended 85 reforms and said even if all 85 were implemented, there would still be a risk of executing an innocent person. In Massachusetts, then-Governor Mitt Romney's Council on Capital Punishment tried to create a "gold standard" death penalty, but it was rejected by both prosecutors and the legislature. Illinois and Massachusetts abandoned their fool's errand to create a foolproof death penalty. Maryland's 2009 reform does not even include many of the recommendations put forth in those two states during their failed attempts.

Ten years after first embarking on its reforms, Illinois came to the conclusion that the only way to prevent the execution of an innocent person was to prevent any executions at all. Illinois repealed its death penalty on March 9, 2011.

2 "Struck by Lighting" in Maryland
The arbitrary nature of the 2009 law

The death penalty is supposed to be reserved for "the worst of the worst." But the new law changed the fundamental nature of determining death eligibility in Maryland by emphasizing the type of evidence that must be available over the depravity of the crime. This means that a first-degree murder involving DNA, for example, might be eligible for the death penalty, but a brutal murder-spree that kills five or six people might be ineligible because the case does not include one of the three required pieces of evidence. In other words, the new law could make the system even more arbitrary than it already is by actually excluding the "worst of the worst" in some instances from eligibility of the death penalty.

Maryland Attorney General Douglas Gansler captured this dilemma in the following hypothetical:

> A hundred people observe and take photographs of a convicted serial killer pumping bullets into another man while shouting, "I am killing this man on purpose to steal his money and I have deliberated for weeks before doing so." There likely would be no DNA, videotape of the shooting or videotaped confession. Thus, the case would be ineligible for the death penalty.[13]

Attorney General Gansler's hypothetical helps illustrate the point that Maryland's evidentiary requirements lack a connection to future dangerousness or concrete facts of the crime. Even mass murderers such as Timothy McVeigh and Osama bin Laden could be ineligible for the death penalty under Maryland's statutory scheme.[14]

Researchers James Acker and Rose Bellandi provide another illustration of this point in their forthcoming article on balancing innocence protections with other requirements of the death penalty. They describe a case where four men commit a gruesome double murder and robbery. Two of them confessed and the other two did not. All four men were executed.

But if the same case had taken place under Maryland's 2009 law and the confessions taped, they explain, only the two that confessed would be death eligible. This would be true even if all four were equally culpable. (In fact, it would be true even if the other two were *more* culpable.) Acker and Bellandi write that "the resulting inequities could hardly be more glaring… [I]t seems impossible to justify the different outcomes on grounds bearing on the purposes of the punishment.[15]

Further, the very act of confessing to a crime could be viewed as reason for leniency and mercy, particularly if remorse is shown or responsibility is taken by the defendant. Under Maryland's new law, if that confession is videotaped, a defendant who confesses can now face for the ultimate punishment.

Compounding prior arbitrariness in Maryland's death penalty

To make matters worse, the arbitrary nature of the 2009 law compounds the *already* random nature of Maryland's death penalty. The U.S. Supreme Court struck down state death penalty laws

across the nation in 1972 because being sentenced to death was as random as being "struck by lightning." Four years later, the Court allowed states to use the death penalty again on the basis that they applied guidelines and processes that would make the death penalty *less* arbitrary.

But 33 years later, there is little evidence that Maryland has achieved any consistency or rationality in determining which aggravated murder cases get life sentences and which evoke death sentences. Indeed, as discussed below, the location of a murder and the race of the victim have been two of the strongest indicators of whether a death sentence or a life sentence will be handed down.

Proponents of maintaining the death penalty often point to Maryland's rare use of it as a selling point. But this rarity is part of what makes it all the more random. There have been more than 15,000 murders in our state since 1978. Less than 2 percent went to a death penalty trial, and only 77 (a fraction of 1 percent) resulted in a death sentence.[16]

Maryland now has five people on death row and has executed five more. (The remaining cases were overturned and resentenced for a variety of errors over time.) Are those 10 cases truly the "worst of the worst" in our state? The crimes committed by these men were horrific, brutal crimes, to be sure. But were they "worse" than thousands of other murders that ultimately ended in an outcome other than the death penalty?

Maryland executed a man who killed an elderly grandmother, but let live in prison a man who killed five elderly men and women and raped three of them. Maryland executed a man who killed three teens, but let live in prison a man who killed three young children under the age of 10. Maryland sentenced a man to death who broke into a home and killed the couple who lived there, but let live a man who broke into a home and killed all seven people who lived there—included three young children—by setting the house on fire. One murder for hire gets a death sentence, another gets a life sentence.[17]

And the list goes on. It would be impossible to compare the list of people sentenced to death in Maryland and the people sentenced to life and determine that there is any rationality in the process.

The arbitrary outcomes we can expect from the 2009 law not only contradict American values of fairness and equality, but they are potentially unconstitutional.

Constitutional issues

The arbitrary outcomes we can expect from the 2009 law not only contradict American values of fairness and equality, but they are potentially unconstitutional.

The revised statute has already been challenged on the grounds that it will lead to the death penalty being administered arbitrarily in violation of the Eighth Amendment's prohibition against cruel and unusual punishment and the Supreme Court's 1972 holding in *Furman v. Georgia*[18]. These issues have been raised in the first two cases to be tried under the 2009 amendment, *Maryland v. Lee Edward Stephens* and *Maryland v. Walter Bishop*.

Is the statute unconstitutional because the evidentiary restrictions, while well-intentioned, are essentially arbitrary and vague, and, thus, violate the Due Process Clause of the State or United States Constitution or might constitute "Cruel and Unusual Punishment"? These constitutional questions will probably require years of costly litigation to resolve.

More arbitrary, more unfair

While the laudatory goal of the 2009 Amendment is to reduce the risk of convicting and executing an innocent person, the Amendment's impact is likely to increase the arbitrariness of the imposition of the death penalty because persons who commit the most heinous crimes—the "worst of the worst"—are not necessarily the same people who will eligible for the death penalty.

The definitional issues and ambiguities of the statute, discussed in Part VI, further exacerbate these potential inequities in application of the death penalty in Maryland.

And this new arbitrariness exacerbates a pattern of randomness that already plagued Maryland's death penalty law over the last 30 years—further undermining the death penalty's traditional justifications of retribution, deterrence, and incapacitation.[19]

3 The Toll on Victims' Families

Maryland's track record over the last 33 years is clear: a death sentence always sentences the families of murder victims to decades of legal process and uncertainty. And because a death sentence is more likely to be reversed than carried out, the end result following such delay is almost always an outcome other than an execution. Meanwhile, the existence of the death penalty concentrates attention on a handful of cases, while hundreds of families struggle in silence, without the services they need to cope with their trauma. The 2009 changes to Maryland's death penalty statute exacerbate the pressures on victims' families by introducing more legal ambiguity, more arbitrariness, and an even longer process into the system.

RELATED 2008 MARYLAND COMMISSION FINDING:

While both life without the possibility of parole and death penalty cases are extremely hard on families of victims, the Commission finds that the effects of capital cases are more detrimental to families than are life without the possibility of parole cases.

COMMISSION RECOMMENDATION:

Increase the services and resources already provided to families of victims as recommended by the Victim's Subcommittee.

A lifetime of trauma for families

The death penalty is irreversible. A life is on the line, and so the U.S. Supreme Court has said "death is different."[20] This means that courts exercise special scrutiny in death penalty cases, leading to complex death penalty jurisprudence at all levels of the process and resulting revisions of state and federal court rules governing adjudication of these cases. Appeals do happen in life cases as well, but the perpetrator begins serving the sentence immediately after it is imposed, so the appeals do not result in a delay of the sentence. Furthermore, appeals in life cases are less likely to result in a reversal or change to the original sentence. Offenders serving life terms are often never seen or heard from again.

Appeals in capital cases are just the opposite. They are given far more weight and attention and are much more prolonged. Because the sentence cannot be carried out until after all the appeals are complete, every appeal means a delay.

This all means years and years of limbo for the family members, who are left to wait through years of court proceedings wondering if the sentence will ever be carried out.

It is not surprising that three of the five men currently on death row were first sentenced to death nearly 30 years ago.

Glenn Ivey, then-State's Attorney in Prince George's County, told the Commission:

> "The reality is…whether I seek [the death penalty] or not, if I do seek it, it's probably never going to happen. And long after I'm not State's Attorney, my successor, successor's successor, will probably still be fighting over these issues, in one way or another, and this

> family will keep going through the new appeal and the new rehearing and the new this and the new that, and moratorium, or whatever."[21]

Hearing from many victims—some pro-death penalty, most against it—the Commission concluded that "regardless of whether or not a survivor supports an execution, years of court dates, reversals, appeals and exposure to the killer is harmful to the family members of murder victims."

Proponents of keeping the death penalty argue that it should be up to the individual families to decide whether they want to endure the long process. Yet it is impossible for a freshly traumatized family to imagine how they will feel following years, likely decades, filled with court proceedings. And the very act of consulting with the family is also harmful to grieving victims. Kathy Garcia, an expert in traumatic grief who has counseled survivors of homicide for 25 years after losing her own family member to murder, explained:

> "It adds an additional burden on the traumatized family at a time when they are still processing the shock of the murder and the stress of beginning the journey through the criminal justice process. Regardless of how someone feels about the death penalty, it is a weighty and stressful decision. Families may be ambivalent about whether they want the death penalty, but when they are told it is an option, they can feel like they are betraying their loved one to choose less than the highest punishment. Other families who strongly want the death penalty are in no state where they can make a rational decision about the length of the process. I know that many prosecutors do their best to explain to families that it may take years of uncertainty, but before the process has begun there is no way they can really absorb what that means. A family in a state of shock simply can't make a determination of what they will feel like 10 or 15 years later when they are still trapped in the system.
>
> "Second, when family members have differing views on capital punishment, the introduction of the possibility of a capital charge can split family members at the very time they need each other most. I know families who still do not speak to each other because of the wedge driven between them by fighting over that choice. The potential of a lifetime of conflict is an unfortunate outgrowth of a system claiming to do its job."[22]

Even families determined to see an execution suffer. Phyllis Bricker's parents were murdered by one of the men currently on death row. She testified before the Commission in favor of the death penalty, but described how painful the process has been for her as she has endured the ups and downs of having waited almost 30 years for the execution.

Steven Oken was executed in 2004 for raping and murdering Dawn Garvin. Oken, already sentenced to life without parole in Maine, was extradited to Maryland where Gavin's family pushed for the death penalty. Seventeen years after the murder, and just days before the execution that Gavin's family had long sought, the Washington Post featured their story and reported how each family member "acknowledges it has come at its own awful cost. Damaged health, damaged hearts. Nightmares and a marriage destroyed." Fred Romano Sr., Garvin's father, shared, "I almost think, if he had stayed in Maine, and stayed in prison for life in Maine, it might have been a lot better on my family."[23]

Maryland Circuit Court Judge Joseph Manck, whose 80-year-old mother Beatrice Lippman Manck was murdered, summed up the burden as he issued a life without parole sentence for the 2008 murder of Correctional Officer Jeffrey Wroten. "It is, without question, the most cruel and unusual punishment for surviving victims to go through," Judge Manck said of the death penalty process. "It's an outrageous situation to be in," he concluded. "It's an outrageous way to punish victims even more than what they've already suffered." Speaking directly to Officer Wooten's family about the life without parole sentence, the judge counseled:

> "Tomorrow when you wake up, it'll be the first time you won't have to come to court. Tomorrow, those memories of Mr. Wroten you can embrace and enjoy. I'm not telling you this as a judge for 19 years, but candidly as someone who sat where you sat. I wish and hope that you find peace with all of this." [24]

Additional burdens under the 2009 law

The 2009 changes to Maryland's death penalty statute exacerbate the pressures on victims' families and go in the opposite direction from the Commission's recommendations.

First, implementation of the statutory changes has added a second sentencing phase to death penalty trials. Death penalty trials were already more complicated and cumbersome because they had two phases. Now, Maryland has become the only state in the country where death penalty trials have three phases.

The law has also introduced ambiguities that require additional pre-trial litigation and delay capital trials. Litigation to answer procedural and constitutional issues spawned by the new law is expected to take years. For the families embroiled in these prosecutions and appeals, this guarantees extra years of wait. In a 2006 case where two defendants were capitally charged, one went to trial in 2012 and the other has yet to be tried.[25] Compare this to other recent, high-profile murders cases where the family members of the victims have weighed in for a sentence of life without parole to avoid the "lifetime of anguish and appeals"[26] that the death penalty would bring.

The law has also introduced ambiguities that require additional pre-trial litigation and delay capital trials.

Supporting all murder victims' families

Meanwhile, many murder victims' families in Maryland do not get the support that they need. The Commission on Capital Punishment created a Victims' Subcommittee, made up of three members who had lost a loved one to murder. Informed by the work of this Subcommittee, the Commission concluded that services for murder victims' families are not uniformly offered in Maryland and that available programs are under-funded and under-staffed. While many non-profits provide services to domestic violence and sexual assault victims, few serve the unique and long-term needs of survivor families of homicide victims, who are often unable to access services.

Vivian Penda, mother of a murdered son, urged a different approach in a recent essay in the Baltimore Sun:

> "Instead of providing desperately needed support to all surviving families of murder victims, Maryland has opted to maintain a costly death penalty that throws millions of dollars at just a few cases…I find this use of state resources offensive.
>
> "…Instead of pursuing a handful of executions that may not take place for decades, let's take care of the thousands of families across Maryland who have been hurt by violent crime. Let's take care of all of us."[27]

Justice for victims, and especially survivors of homicide victims, must include full implementation, compliance, and enforcement of victim services and rights. The Commission's Victims' Subcommittee recommended periodic review of every county's needs and services, and compliance with victims' rights laws.

Alongside recommending repeal, the Commission recommended using the savings from repeal of the death penalty to improve and increase services for surviving murder victims' families.

4 The Death Penalty's High Cost Brings Little Return

In 2007, the Abell Foundation in Baltimore commissioned the Urban Institute to conduct a cost analysis of Maryland's death penalty. The Urban Institute's report, "The Cost of the Death Penalty in Maryland,"[28] was completed and released in March of 2008. The study applied dollar values to all of the resources utilized in capital-eligible cases to determine how much more it cost the state to bring capital cases compared to non-death penalty cases. The study used the broadest sampling of aggravated, first-degree homicide cases of any such review in the nation and is viewed by experts as the most comprehensive state cost analysis of the death penalty to date.

RELATED 2008 MARYLAND COMMISSION FINDINGS

1) **The costs associated with cases in which a death sentence is sought are substantially higher than the costs associated with cases in which a sentence of life without the possibility of parole is sought.**

2) **There is no persuasive evidence that the death penalty deters homicides in Maryland.**

Countering popular misconceptions, the study found that execution cost *almost three times more* than a non-death sentence—including the cost of long-term incarceration in life sentences. Most of the costs are upfront, leading up to and including the trial. Death cases also bring more scrutiny post-trial and guarantee extra appeals of the sentence itself.

Revisions to the law in 2009 have lengthened the required process. As detailed above, the process must now include a second phase to the sentencing trial and litigation of procedural and constitutional issues, which will increase the time and costs.

It is important to note that the state has no control over many death penalty-related expenses. The decision to seek the death penalty is made by locally elected state's attorneys. Yet taxpayers across the state, even those in jurisdictions that rarely seek the death penalty, bear the burden of paying for the defense attorneys representing largely indigent, capitally charged defendants, lawyers in the Office of the Attorney General who litigate appeals in state and federal courts, the expensive segregated prison areas that house death row prisoners, and the development of procedures and training of prison staff (and related litigation) necessary to carry out executions—to name just a few state expenses.[29]

Some opponents of repeal, including those signing the Commission's minority report, have suggested that costs enumerated for death penalty cases are inflated. At issue are the opportunity costs[30] of using state resources, as calculated in the Urban Institute study. However, such objections do not touch on the broader question. With the state facing challenging budget issues, isn't there a more effective way to allocate criminal justice system resources than by seeking death sentences? For example, such resources could be used to bring several cases to trial, rather than focus on a single prolonged capital case that stretches out for many years and drains resources.

The high cost of the death penalty is particularly hard to justify given that there is no evidence that the death penalty serves to deter murders.

The facts make clear that Maryland's death penalty system is, in effect, a system that largely hands out sentences of life in prison or life in prison without parole—rather than death. Since 1978, when the death penalty was reinstated in Maryland, 353 death notices have been issued, 215 death notice cases went to trial, and 77 death sentences have been imposed on 58 prisoners. Sixty-two of those 77 sentences have been reversed—an error rate of approximately 80 percent. In all of those cases, the extra costs associated with a capital case accrued.

The bottom line is that after 33 years with the death penalty, Maryland has spent at least $186 million to end up with five executions, five pending death sentences, and a reversal rate of 80 percent. Meeting the requirements of Maryland's revised law will serve to increase the cost of pursuing all capital cases.

A lack of deterrent effect

The high cost of the death penalty is particularly hard to justify given that there is no evidence that the death penalty serves to deter murders.

States without the death penalty have, on average, lower murder rates than states with it.[31] Regionally, the South has consistently had the highest murder rate despite its 1047 executions since 1978. In contrast, the Northeast, West and Midwest have had four, 75 and 150 executions, respectively in that time, yet their murder rates are, on average, almost 25 percent lower than the rate in the South.[32]

In Maryland, despite the de facto moratorium on executions since the Maryland Court of Appeals nullified the state's execution protocols in 2006, the statewide murder rate has declined and in 2010 was at its lowest level since 1986.[33]

Not surprisingly, a 2009 survey of police chiefs around the country found that the death penalty ranked last among tools "most important for reducing violent crime."[34]

5 Ongoing Racial and Jurisdictional Disparties

Extensive research over the last decade shows persistent racial bias in death sentencing in Maryland, largely based on the race of the victim.

The 2003 study, *An Empirical Analysis of Maryland's Death Sentencing System with Respect to the Influence of Race and Legal Jurisdiction*, was commissioned from the University of Maryland (UMD) at College Park by former Governor Parris Glendening. This UMD study examined over 800 variables that might influence the administration of the death penalty.[35] It found that the race of the victim impacts the proportion of cases filtered through the system. In particular, cases with Caucasian victims are more likely to have a death notice filed, be prosecuted, have a death penalty sought, and receive a sentence of death. Further, the combination of a Caucasian victim and an African-American offender increases the probability that the case will be treated more harshly. Cases in which an African-American offender kills a Caucasian victim are almost two-and-a-half times more likely to have death imposed than are cases where a Caucasian offender kills a Caucasian victim. The race effect persisted despite the large number of variables considered.

This race effect is particularly striking given that at least 75 percent of all homicide victims in Maryland annually are African-American.36 Despite the fact that 43 percent of death-eligible cases involve African-American victims, all of the cases that have resulted in execution or where a death sentence is still pending involved the killing of white Marylanders.[37]

The author of the UMD study also explained to the Commission that racial disparities existing statewide also exist within individual counties and therefore can not simply be attributed to different State's Attorney's seeking the death penalty more or less often.[38]

The Commission noted the corrosive effect that enduring racial bias has on public confidence in the criminal justice system. As expert witness Bryan Stevenson testified:

> "The death penalty, in many ways, reflects our criminal justice system's ultimate authority. We claim that we can execute people, and that is exercising great power. It is the ultimate power. I'm going to argue that that ultimate authority comes with an ultimate responsibility, and that if [we] don't exercise that responsibility fairly, reliably, in a non-racially discriminatory manner, the implications for this broader story about race and the criminal justice system get larger. The question of the integrity of the criminal justice system is at its most demanding when we talk about things like race and the death penalty."[39]

RELATED 2008 MARYLAND COMMISSION FINDINGS

1) Racial disparities exist in Maryland's capital sentencing system. While there is no evidence of purposeful discrimination, the statistics examined from death penalty cases from 1978 to 1999 demonstrate racial disparities when the factors of the race of the defendant and the race of the victim are combined.

2) Jurisdictional disparities exist in Maryland's capital sentencing system.

Even starker are the jurisdictional disparities in how the death penalty is sought. Where a murder occurs in Maryland is the single most important determinant of whether a death sentence will be sought and imposed. Death sentences are 23 times more likely in Baltimore County than in Baltimore City for similarly aggravated murders, and 14 times more likely in Baltimore County than in Montgomery County.

The Commission's Minority Report, written by Baltimore County State's Attorney Scott Shellenberger, dismissed these jurisdictional disparities as "local government in action and a reflection of the will of local communities." But local governments do not set criminal penalties in Maryland; that is the responsibility of the General Assembly, which should have a strong interest in assuring that Maryland's death penalty law is applied consistently.

In analyzing its findings about the racial and jurisdictional disparities in how capital cases are handled, the Commission concluded that they are too enduring to be eliminated through reforms to the capital statute and that repeal of the death penalty is the best option.

The 2009 law is silent regarding these disparities.

6 Ambiguous Language in the 2009 Law Spawns Confusion[40]

Professor David Aaronson of the American University Washington College of Law conducted a review of the death penalty statute with the 2009 changes and found considerable ambiguities in the law that require clarification and guidance from the Maryland Court of Appeals, likely requiring years of litigation. As the law stands, he found, there is an insufficient basis to provide jury instructions that offer meaningful guidance on the interpretation of several provisions of the law.[41]

Definitional Issues and Ambiguous Language

Those both for and against the death penalty may agree that the 2009 Amendment presents definitional issues and ambiguous terms that no doubt will have to be clarified by the Maryland Court of Appeals.

To implement the 2009 statutory changes, the Maryland Court of Appeals amended Md. Rule 4-343, which now bifurcates the sentencing phase in what was already a bifurcated procedure in the death sentencing process. As a result, jurors are now required to make decisions in a complicated trifurcated (three phase) process. The first and third steps in the process—the adjudication of guilt phase and the finding and weighing of mitigating and aggravating circumstances to determine the sentence—remain largely unchanged from the prior process. In between those two phases, however, a third phase has been added, in which the jury considers whether one or more of the new evidentiary requirements and other restrictions have been met for the defendant to be eligible for the death penalty. In order to successfully make this determination, several definitional issues must be cleared up.

BIOLOGICAL EVIDENCE

Biological evidence is defined in Md. Code Ann., Crim. Proc. §8-201(a). The provision states that biological evidence includes, but is not limited to, "any blood, hair, saliva, semen, epithelial cells, buccal cells, or other bodily substances from which genetic marker groupings may be obtained." §8-201(a). The definition seems to contemplate only the type of evidence from which "genetic marker groupings," for example, DNA, *may* be obtained. But if DNA evidence "*may* be obtained (emphasis added)" from biological evidence, such as a hair, but is in fact *not* obtained, is the biological evidence still independently admissible in evidence? It is unclear whether the *possibility* of obtaining DNA is sufficient, or whether DNA must, in fact, be recoverable from the evidence in question. Fingerprints and human hair, for example, possess characteristics that are useful for accurate identification of a suspect where a fingerprint or hair at the crime scene is compared with that of the suspect. However, while DNA *may* be obtained from human hair, it is not always recoverable from every individual hair, and therefore, it is unclear under these circumstances, whether the hair would qualify as biological evidence.

These practical problems may raise a question as to whether a different interpretation of §8-201(a) is appropriate. A different reading of §8-201(a) might find that the part of the definition stating "or other bodily substances from which genetic marker groupings may be obtained," is simply one example in a non-exclusive list, rather than a requisite characteristic of biological evidence.

"LINK" OR "CONCLUSIVELY LINK"

The statute states that biological or DNA evidence must "link" the defendant to the act of the murder.[42] On the other hand, the statute provides that a video recording must "conclusively link" the defendant to the murder.[43] The common meaning of "links" is "connects."[44] Accordingly, a plain reading of the statute is that the evidence at issue must establish a connection between the defendant and the murder that creates the inference that the defendant committed the crime.

Although the plain meaning of "link" is generally understood, there is some ambiguity with its use in the statute. The DNA or biological evidence offered by the state to support the death penalty is not a prerequisite of a valid conviction. Thus, even where the state's DNA evidence is so tenuous or insignificant that it was not relied on to obtain a conviction, the state may, nonetheless, offer it in support of the death penalty so long as it establishes the requisite "link." For example, if the victim and the defendant were acquaintances, it is likely that the victim's DNA might be found in the defendant's car. This "link" would suggest that the defendant and the victim were in close proximity at one point, but would not have been a sufficiently reliable basis for a conviction. Could this weak link, however, satisfy the requirements under the new evidentiary threshold to reach a death sentence?

The requirement that the link be conclusive if the state relies on a video recording suggests that the General Assembly intended there to be a difference between the degree of linkage required by the two different types of evidence. It is unclear what standard should apply, however, so the difference is uncertain. For example, "conclusively" might be interpreted to require a link beyond a reasonable doubt, by clear and convincing evidence, preponderance, or a new standard altogether. One plausible explanation for the heightened requirement for a videotape is the uncertainty of identifying an individual on a video recording as opposed to his/her DNA. Since the amendments to the death penalty statute were motivated in part by concerns over the unreliability of eyewitness identification, the General Assembly may have intended the "conclusive link" to allow the state to rely only on video recordings where the defendant can be clearly identified. Under this interpretation the state might be prevented from relying on video recordings where the defendant was wearing a mask or a hat, or was otherwise difficult to identify, or where the video was grainy and difficult to make out.

Is a video showing an accused walking into a store one minute before 911 was called by a person hearing shots a sufficient association to "conclusively link" the defendant to "the murder"? What about two minutes? Three minutes? Five Minutes?

"MURDER" OR THE "ACT OF MURDER"

The 2009 law requires that DNA or biological evidence must link the defendant to the "act of murder," but that a video recording conclusively link the defendant to "the murder." It is unclear

what the General Assembly's intention was in distinguishing between the murder and the "act of murder." It is possible that the General Assembly anticipated a scenario similar to the one discussed above, where the victim and the defendant were acquaintances and, therefore, DNA evidence linking the two is readily available. The requirement that DNA or biological evidence must link the defendant to the "act of murder" may be to distinguish evidence that shows the participation of the defendant in the crime itself rather than merely tending to identify the defendant with the perpetrators of the crime. Further clarification is clearly needed.[45]

A VIDEOTAPED, VOLUNTARY INTERROGATION AND CONFESSION OF THE DEFENDANT TO THE MURDER

Likewise, the requirement for a videotaped confession is riddled with ambiguity and also fails to be a reliable safeguard against misapplication of the death penalty. This provision requires that the defendant must confess "to the murder." Again, the 2009 law fails to clarify key terms that would help guide a jury's decision-making. For instance, the law fails to define "confession" versus a "statement" in which the defendant merely implicates himself/herself in the murder. For example, is a confession to the act of murder required or is it sufficient if the defendant states that he/she was present and was a participant when the killing occurred? Suppose the defendant gave several statements that were not videotaped which contradicted a videotaped statement? Suppose, the video tape is stopped several times during a fifteen minute interview so that the police may talk to the defendant off camera?

The requirement for a videotaped confession is riddled with ambiguity and also fails to be a reliable safeguard against misapplication of the death penalty.

Furthermore, the videotaping requirement is not a failsafe against wrongful conviction. The stories provided in the first section of this report go to the heart of the matter. Partial recordings and on-camera coaching by the police have resulted in numerous false confessions leading to wrongful convictions. Videotape will not capture off-camera coercion by the police or prevent tampering. In one case profiled in Section I, the police held a gun to the suspect's head *on camera*, yet the jury found the confession reliable and accurate enough to convict.

Prolonged litigation required

Both the arbitrary application of the death penalty described in Section II, "Struck by Lighting," and the definitional issues under the evidentiary requirements described in this section raise constitutional issues. The litigation of these constitutional issues both in the Maryland and Federal courts is likely to be prolonged and expensive. A fundamental question is whether the 2009 Amendment is constitutionally vague and arbitrary. These issues already have been raised in the first two cases litigated under the 2009 Amendment: *State of Maryland v. Lee Edward Stephens* and *State of Maryland v. Walter Bishop.*

The statute has also been challenged as unconstitutionally vague under the Fourteenth and Eighth Amendments of the U.S. Constitution. Defense counsel have argued that the statute fails to provide jurors sufficient guidance on how to interpret issues surrounding the new evidentiary

criteria, in violation of the Eight Amendment and *Furman v. Georgia*, 408 U.S. 238 (1972). Additional challenges include: that it fails to provide sufficient notice to defendants in violation of *Williams v. State*, 329 Md. 1, 8 (1992); and that it fails to provide adequate guidance for enforcement of the statute by police, judicial officers, triers of fact and others whose obligation it is to enforce, apply and administer the penal laws, running counter to *Galloway v. State*, 365 Md. 599, 616, (2001). These challenges, and perhaps others, will likely be addressed by the higher courts in Maryland and, then, in the Federal courts.

These challenges, or others in the future, bring a risk that the 2009 Amendment will be overturned on appeal on constitutional grounds. If that were to happen, the law might need to be amended again by the legislature, or at the very least it would require resentencing of multiple death penalty cases, adding more time, costs, and uncertainty for victims' families.

7 Conclusion

In 2009, the Maryland State Bar Association took a formal position in support of repealing the death penalty in our state. Despite the advocacy efforts from diverse groups throughout our state, including the Bar Association, the 2009 bill to repeal the death penalty was never debated on its merits and no vote was ever taken on whether Maryland should keep or abandon the death penalty. Instead, the repeal bill was immediately amended in Maryland's Senate to the reform critiqued extensively in this report.

The legislature's quick "fix" in 2009 does nothing to address the many problems that continue to plague the administration of the death penalty in Maryland. The amended law cannot even achieve its intent of eliminating the risk of executing an innocent person. The law has also spawned a host of other problems. It has made the application of the death penalty in Maryland more arbitrary and irrational. It has further complicated Maryland's death penalty system, making it more burdensome for murder victims' families and more expensive to the state. It has introduced ambiguities into the law that will take years of litigation to sort out. And many of the compelling inequities and limitations identified by the 2008 Maryland Commission on Capital Punishment remain unaddressed.

The legislature's quick "fix" in 2009 does nothing to address the many problems that continue to plague the administration of the death penalty in Maryland.

It is time to give up on the death penalty in Maryland, as four other states have done in the last four years. At minimum, it is time for the General Assembly to take up the issue and to finally vote on it. We welcome plans to include an appropriation to aid murder victims' families in the 2012 death penalty repeal bill.

We urge that death penalty repeal legislation be debated and that up-or-down votes be taken on it in the General Assembly in 2012.

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15 *Id.*

16 *Testimony of Michael Millemann* to the Maryland Commission on Capital Punishment. September 5, 2008. http://www.goccp.maryland.gov/capital-punishment/public-hearing-sep-5.php

17 Cases cited: Wesley Eugene Baker, John Frederick Thanos, John Booth-El, and Vernon Lee Evans, all of whom were executed or remain on death row, and Raymont Hopewell, Policarpio Espinoza Perez, Darrell Brooks, Walter Bishop all of whom received sentences of life without parole or a term of years.

18 *Furman v Georgia*, 408 U.S. 238 (1972)

19 Brandon L. Garrett, and Peter J. Neufeld. "Invalid Forensic Science Testimony and Wrongful Convictions." *Virginia Law Review* 95(1): 1-97. See also *Innocence Project* at http://www.innocenceproject.org/Content/Gilbert_Alejandro.php

20 *Ford v. Wainwright*, 477 U.S. 399, 411, 106 S.Ct. 2595, 2603, 91 L.Ed.2d 399 (1986); see also, Woodson v. North Carolina, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976).

21 *Testimony of Glenn Ivey* to the Maryland Commission on Capital Punishment. September 5, 2008. http://www.goccp.maryland.gov/capital-punishment/public-hearing-sep-5.php

22 *Testimony of Kathy Garcia* to the Maryland Commission on Capital Punishment. http://www.goccp.maryland.gov/capital-punishment/public-hearing-sep-5.php

23 "17-Year Wait for Justice Leaves Family Anguished and Broken, Md. Plans to Execute Triple Murderer This Week," Susan Levine, *Washington Post*, Monday, June 14, 2004. http://www.washingtonpost.com/wp-dyn/articles/A39074-2004Jun13.html

24 Tyeesha Dixon and Jennifer McMenamin, "Guard's killer evades death—Man who shot officer in W. Md. sentenced to life without parole." *Baltimore Sun*, January 29, 2008 at http://articles.baltimoresun.com/2008-01-29/news/0801290109_1_wroten.

25 See also "New death penalty law, appeals delay trials in killing of correctional officer," July 25, 20111, Andrea F. Siegel, *The Baltimore Sun*, http://articles.baltimoresun.com/2011-07-25/news/bs-md-mcguinn-five-years-20110724_1_lee-edward-stephens-death-penalty-law-lamarr-c-harris.

26 Wicomico County State's Attorney Matthew Maciarello, in announcing a life without parole deal in the murder of Sarah Foxwell:"The Foxwell family has told me that they do not want a lifetime of anguish and appeals," he said. "Due to the extreme stress, havoc and grief the death of Sarah has caused them, and their need to begin healing from this horrible, despicable crime, and because they wished to protect Sarah's sister, a 7-year-old material witness in the case, they have unanimously requested that we withdraw our notice to seek the death penalty in consideration for the plea agreement placed on the record today." "Plea Agreement Means Life Without Parole For Leggs," April 1, 2011, Shawn J. Sope, *The Dispatch*, http://www.mdcoastdispatch.com/articles/2011/04/01/Top-Stories/Plea-Agreement-Means-Life-Without-Parole-For-Leggs

27 "For the sake of victims' families, repeal the death penalty," November 17, 2011, *Baltimore Sun*, http://articles.baltimoresun.com/2011-11-17/news/bs-ed-death-penalty-20111117_1_murder-victims-death-penalty-capital-punishment. Vivian Penda is the current Co-Chair of the Board of Maryland Citizens Against State Executions.

28 Roman, John K., Chalfin, Aaron and Knight, Carly R., Reassessing the Cost of the Death Penalty Using Quasi-Experimental Methods: Evidence from Maryland (Fall 2009). *American Law and Economics Review*, Vol. 11, Issue 2, pp. 530-574, 2009. Available at SSRN: http://ssrn.com/abstract=1540384 or http://abell.org/publications/detail.asp?ID=136

29 *Id.* See also, "Executions by County," *Death Penalty Information Center*, http://deathpenaltyinfo.org/executions-county .

30 "Opportunity cost is defined here as "The cost of an alternative that must be forgone in order to pursue a certain action. Put another way, the benefits you could have received by taking an alternative action." Definition from: http://www.investopedia.com/terms/o/opportunitycost.asp#ixzz1gdFilPUW

31 *Death Penalty Information Center*, see http://deathpenaltyinfo.org/deterrence-states-without-death-penalty-have-had-consistently-lower-murder-rates .

32 Murder rates in 2010 were 5.6 per 100,000 people in the South, 4.4 in the Midwest, 4.2 in the West and 4.2 in the Northeast. See http://deathpenaltyinfo.org/murder-rates-nationally-and-state#MRreg

33 "Crime Statistics," *Governor's Office on Crime Control and Prevention*, http://www.goccp.maryland.gov/msac/crime-statistics.php

34 "Smart on Crime: Reconsidering the Death Penalty in a Time of Economic Crisis," *Death Penalty Information Center*, http://deathpenaltyinfo.org/reports

35 It did not include the pre-prosecutorial aspects of the case, which can include interrogation, arrest, pretrial hearings.

36 Recent editions of "CRIME IN MARYLAND," Uniform Crime Reports published annually by the Maryland State Police. Recent year reports available at http://icac.mdsp.org/

37 *Testimony of David Baldus* to the Maryland Commission on Capital Punishment. July 28, 2008. http://www.goccp.maryland.gov/capital-punishment/public-hearing28.php. There have been a handful of death sentences imposed in capital cases where the victim was black but all have ultimately been overturned and settled with sentences of life without parole. Indeed, the last person sentenced to death in Maryland was Jamaal Abeokuto in 2004, post Pasternoster's study. Abeokuto was a black man who killed a black child. His sentence was reversed by the Court of Appeals in Maryland in 2005 and he was resentenced to life without parole.

38 *Testimony of Ray Patternoster* to the Maryland Commission on Capital Punishment. July 28, 2008 http://www.goccp.maryland.gov/capital-punishment/public-hearing28.php

39 *Testimony of Bryan Stevenson* to the Maryland Commission on Capital Punishment. July 28, 2008 http://www.goccp.maryland.gov/capital-punishment/public-hearing28.php.

40 Used with the permission of David Aaronson, B.J. Tennery Scholar and Professor of Law, and Director, Trial Advocacy Program, Washington College of Law, American University. This section and section II of the report is based, in part, on Professor David Aaronson's recently published *2010 Supplement to Maryland Criminal Jury Instructions and Commentary* (LexisNexis: 3rd ed., 2009), "§5.51(C) First Degree Murder: Death Penalty Sentencing," Volume One, pages 71-74. Research assistance was provided by Sydney Patterson, J.D., 2011, and Ted Serafini, a second year law student.

41 Furthermore, traditional methods of statutory interpretation offer little guidance in interpreting the meaning of key provisions of the statute. Virtually no Maryland legislative history exists. No hearings were held on floor amendment to Senate Bill 279, which was introduced as a bill to repeal the death penalty, either by the Senate Judicial Proceedings Committee or by the Maryland House of Delegates Judiciary Committee. No commission reports or studies provide any assistance. Prof. Aaronson was unable to locate any similar statutory provisions or case law from other jurisdictions.

42 Crim. Law §2-202(a)(3)(i).

43 Crim. Law §2-202(a)(3)(iii).

44 *See e.g., Gray v. State*, 368 Md. 529, 564 (2002) ("If the trial court finds that such sufficient evidence, linking the accused witness to the crime…."); Black's law dictionary (9th ed. 2009).

45 *See* Memorandum Opinion of Judge Paul Hackner, Circuit Court for Anne Arundel County, *State of Maryland v. Lee Edward Stephens*, Case No. K-08-646 (Md. Cir. Ct. Dec. 10, 2009), p. 18.

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