

Criminal Justice Legal Foundation



December 14, 2020

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Tracy L. Snell, Statistician
Bureau of Justice Statistics
810 Seventh Street NW
Washington, DC 20531

Re: Comment on Capital Punishment Report of Inmates Under Sentence of Death

Dear Ms. Snell:

The Criminal Justice Legal Foundation (CJLF) submits this comment in response to the notice published at 85 FR 65427.

CJLF is a nonprofit corporation organized to advocate for the rights of victims of crime and the law-abiding public. Our primary interest in the report in question relates to the utility of the information. We often have a need to analyze data regarding capital punishment and to examine analyses by others. Useful data is essential to this task.

Unfortunately, like so much criminal justice data, this report is long on demographics and short on the specifics of the offense. Demographic data without offense data are nearly useless. The main public policy issue is whether punishment is meted out fairly and proportionately to the offense, not based on racial or other bias. Without knowledge of the offense or offenses, no useful conclusions can be drawn.

Item 6 asks merely whether the death sentence was imposed for murder, rape, kidnapping, or other. This question is obsolete. Everyone on state death row today is there for some variation of murder. The death penalty is unconstitutional for personal crimes in which the victim survives. See *Coker v. Georgia*, 433 U.S. 584 (1977); *Kennedy v. Louisiana*, 554 U.S. 407 (2008). The federal government has the death penalty in theory for some national security crimes, see 18 U.S.C. § 3591(a)(1) (espionage and treason), but in states it is only for murder.

A more relevant and useful data point would be the circumstances found that qualified the case as a capital case. Some finding of a

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“circumstance that makes the defendant death eligible” is required in every capital case. See *McKinney v. Arizona*, 140 S. Ct. 702, 707 (2020). The terminology varies by jurisdiction, but every jurisdiction with the death penalty has a statutory list. See, e.g., 18 U.S.C. § 3592(c) (statutory aggravating factors); Fla. Stat. § 921.141(6) (same); Cal. Penal Code § 190.2(a) (special circumstances); Tex. Penal Code § 19.02(a) (capital murder).

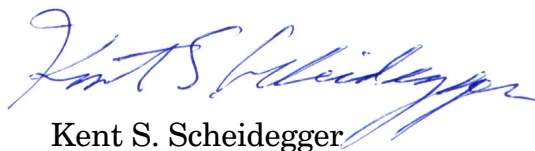
These are the circumstances chosen by the legislative authority to distinguish those cases where the death penalty might be appropriate from those where it cannot even be considered. This would be useful data for comparing cases as at least a first cut as to the higher degree of culpability that should be present for a sentence of death.

Question 7 is useless, and Question 8 is nearly so. To the extent that anyone objects that including pertinent information is a burden, eliminating these immaterial questions could moderate the burden.

Question 10 relates to the other primary reason for sentence choice, prior crimes. Yet it is very basic, asking merely yes or no for prior felonies and whether any of the priors were for homicide. It would be no great burden to list the actual statutes of prior convictions. Prisons keep this information on all their prisoners, and it only needs to be retrieved once per prisoner and resubmitted each year that prisoner is on death row. There are not that many admissions to death row in a state each year.

These changes would increase the utility of this report considerably at minimal additional burden. I hope BJS will give them serious consideration.

Very truly yours,



Kent S. Scheidegger

KSS:iha