Washington State Bar Association

# FINAL REPORT OF THE DEATH PENALTY SUBCOMMITTEE OF THE COMMITTEE ON PUBLIC DEFENSE

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# I. INTRODUCTION

## A. The Subcommittee and Its Scope of Work

The Board of Governors of the Washington State Bar Association ("WSBA") created the Committee on Public Defense to address issues and recommendations presented in the *Report of the WSBA Blue Ribbon Panel on Criminal Defense* (2004).[1] The Board's charter for the Committee on Public Defense included the following assignment:

> Creation of a death penalty subcommittee, composed of death penalty advocates and opponents, to address the effect of financial considerations on whether the death penalty is sought in Washington counties, the practical wisdom of continuing to pursue death penalty prosecutions in light of Washington's experience with sentence reversals, potential benefits to the criminal justice system from cost savings that might be obtained by redirecting funds from death penalty prosecutions to other criminal justice needs, and an hourly rate for attorneys in death penalty cases that reflects, among other factors, the special expertise and unique hardships imposed on counsel in such cases and possible moratorium.

A Subcommittee was carefully formed which included a depth of experience and a range of perspectives. Ken Davidson (Davidson, Czeisler & Kilpatric, PS, Kirkland), a former member of the WSBA Board of Governors, was appointed chair of the Subcommittee. Mr. Davidson's law practice in Washington over the last 32 years has included civil litigation at all levels of the court system, but has not involved a death penalty case. Three Subcommittee members were appointed who each have extensive experience as defense counsel in death penalty cases, as well as other criminal cases – Jeff Ellis (Ellis Holmes & Witchley PLLC, Seattle), Michael Iaria (Cohen & Iaria, Seattle) and Mark Larrañaga (Walsh & Larrañaga, Seattle; former Director, Death Penalty Assistance Center). Three Subcommittee members were appointed who have extensive experience working for and/or with prosecutor's offices on death penalty cases – Mark Larson (King County Prosecuting Attorney's office), Pam Loginsky (Washington Association of Prosecuting Attorneys) and Brian Moran (Office of the Attorney General). Three other Subcommittee members were selected for the different experience and perspective each would bring. Judge David Nichols is a retired superior court judge from Whatcom County who has served as the trial judge in a capital case, as well as in many other criminal cases. Dr. Ruth Walsh McIntyre is a journalist and business consultant who as a layperson has a long history of working with the courts, including chairing the Walsh Commission of the Washington State Supreme Court and serving on the board of the National Center for State Courts. Mary Jane Ferguson is Deputy Director of the Washington State Office of Public Defense which administers state funding of public defense in criminal case appeals and maintains data on appellate costs. Robert Welden, WSBA General Counsel, served as staff liaison.

The Subcommittee conducted its study of the death penalty in Washington over the course of 18 months. It began by reviewing previous reports on the death penalty in Washington published within the last 10 years, including

*Status Report on the Death Penalty in Washington State*, Chief Justice Richard P. Guy (March 2000).
http://www.courts.wa.gov/newsinfo/index.cfm?fa=newsinfo.displayContent&theFile=content/deathPenalty/index

*Washington's Death Penalty System: A Review of the Cost, Length, and Results of Capital Cases in Washington State,* Washington Death Penalty Assistance Center (November 2004). http://www.wdpac.org/images/stories/Costsreports/costreportnov2004.pdf

*Shattering Myths: A Factual Analysis of Washington's Death Penalty Practices,* Pamela Loginsky, Washington Association of Prosecuting Attorneys (2000).

*Where Are We Heading? Current Trends of Washington's Death Penalty,* Mark A. Larrañaga, Washington Death Penalty Assistance Center (April 2004).
http://www.wdpac.org/images/stories/Costsreports/current_trends_of_washington_death_penalty_april_2004.pdf

*Capital Punishment, Proportionality Review, and Claims of Fairness (With Lessons From Washington State)*, Timothy V. Kaufman-Osborn, Washington Law Review, Volume 79 Number 3 (August 2004).

*ACLU Report on Washington's Death Penalty System*

*The Status of the Capital Punishment System in Washington*, Mark A. Larrañaga (September 2005).

The Subcommittee also reviewed other publications on the death penalty including studies and guidelines by the American Bar Association, the National District Attorneys Association and guidelines adopted by the Texas Bar Association for public defense in death penalty cases. Surveys on trial costs and attorney compensation were developed and sent by the Subcommittee to all elected prosecutors, directors of public defender programs, and public defenders and private defense attorneys who have served or been qualified to serve as publicly appointed counsel in capital cases. (The survey questions and responses are attached as Appendices A, B and C). Research was also conducted into costs incurred by state and federal agencies in appellate review of death penalty cases. Members of the prosecution and defense teams in the *State v. Ridgway* case were interviewed to gain understanding about the state's most complex and costly serial murder case. The Subcommittee met with a member of the Supreme Court Capital Counsel Panel to discuss their process for recruiting and maintaining qualified attorneys to represent defendants in death penalty trials pursuant to Superior Court Special Proceeding Rule (SPCR) 2. Finally, Subcommittee members with experience in capital cases discussed and reached consensus on the major cost factors in capital cases.

In this report, the Subcommittee seeks to provide the reader with a comprehensive explanation of the operation of the death penalty in Washington and its costs to the justice system, and makes recommendations on issues of compensation and quality of defense counsel and other issues in capital cases. The Subcommittee concluded that the questions in its charter about the practicality or wisdom of retaining the death penalty in light of its costs and reversal rates are better left to policy markers. Rather than attempting to make those value

judgments, the Subcommittee determined that it better serves the WSBA and the public by providing as objective and complete a report as possible on the application of the death penalty in Washington and its costs in the justice system.

### B. Topics Beyond the Scope of this Report

The subcommittee's study has been limited in scope, and there are topics concerning the death penalty which could be addressed in a comprehensive study, but the Subcommittee has determined are beyond its charter or resources. For example, in its program to study the death penalty in certain states, the ABA has identified a broad range of topics to be studied, including (1) DNA testing and the handling of biological evidence, (2) law enforcement tools and techniques, (3) crime laboratories and medical examiners, (4) jury instructions, (5) clemency, (6) judicial independence, (7) mental retardation and mental illness, (8) treatment of racial and ethnic minorities, and (9) proportionality of application of the death penalty. The Subcommittee does not perceive some of these topics to be a problem in Washington (e.g. jury instructions, judicial independence and mental illness with respect to the application of the death penalty) and others are beyond the expertise of the Subcommittee (e.g. law enforcement techniques and DNA testing).

The Subcommittee notes that the treatment of racial and ethnic minorities is a complex issue, which has been debated and is beyond the resources of the Subcommittee to resolve. In *Shattering Myths,* Loginsky argues that a detailed analysis of the trial judge reports on file with the Washington Supreme Court does not reveal a pattern of imposition of the death penalty based on the race of the defendant or the victim. Moreover, she cites the 1995 Washington Supreme Court decision in *State v. Gentry*,[2] in which the issue of racial disparity was raised and the Court found that a review of the first degree aggravated murder cases in the state did not reveal a racial pattern in the imposition of the death penalty. In *Where Are We Heading? Current Trends of Washington's Death Penalty,* Larrañaga argues that a current review of the trial reports (*i.e.*, as of April, 2004) suggests that there is a racial pattern in the imposition of the death penalty. He points out that 67% of death penalty defendants in Washington are white, while whites comprise 81.8% of the state population, and 18% are black/African descent, while black/African descent comprises 3.2% of the state population. He concludes from the trial reports that black defendants in death penalty cases are given the death penalty more frequently (16.6%) than white defendants (12.9%) and that death sentences are sought and imposed less often when the victim is non-white. Other studies found that the fact of disparity of imposition of the dearth penalty does not establish discrimination in and of itself.[3] However, a complete analysis and study of the role of race in the application of the death penalty in Washington would need to go beyond a review of the trial reports and would require research skills, tools and funding beyond those available to the Subcommittee.

The proportionality of application of the death penalty is a topic often addressed in studies of the death penalty in the states and was recently addressed by the Washington State Supreme Court in *State v. Dayva Cross*.[4] The lead opinion and dissenting opinion in that case frame this issue in Washington quite effectively. The Washington death penalty statute

requires that the Supreme Court review the proportionality of application of the death penalty in every case in which the death penalty is imposed.[5] In the appeal of his death sentence, Mr. Cross challenged the constitutionality of the death penalty and argued that the Court's proportionality review was standardless and capricious. He pointed out that Gary Ridgway, who was responsible for at least 48 murders, had been sentenced to life in prison and that it would be unjust and arbitrary to sentence to death others whose crimes were not of the same magnitude. (Mr. Cross was convicted of the murder of his wife and two children). In a 5-4 decision the Court rejected Cross's challenge. Writing the lead opinion, Justice Chambers stated:

> Since Cross's trial, the Green River Killer, Gary Ridgway, was caught, prosecuted, and sentenced to life in prison. We cannot begin to calculate the harm his abhorrent murders caused. The fact he will live out his life in prison instead of facing the death penalty has caused many in our community to seriously question whether the death penalty can, in fairness, be proportional when applied to any other defendant.
>
> We do not minimize the importance of this moral question. But it is a question best left to the people and to their elected representatives in the legislature. Under the United States Constitution (the only constitution plead here), Washington's death penalty is constitutional and nothing about Gary Ridgway changes that.
>
> It may be that there will always be aberrations like Ridgway. We do not believe that these horrific aberrations make a statute unconstitutional. We look at the entirety of first degree aggravated murder prosecutions, not just at whether any particular case is within an order of magnitude of the worst we have known. RCW 10.95.120.

The dissenting opinion argues that there is no rational framework for proportionality reviews and that the application of the death penalty in Washington has been inconsistent. The dissent points to several mass murders who have escaped the death penalty – Ridgway (48 murders), Yates (15 murders), Mak (13 murders), Ng (13 murders) Rice (4 murders) – and other cases where the death sentence was imposed for a single murder. The dissent, written by Justice C. Johnson, concludes:

> Comparing Ridgway, Mak, Ng, and Rice with the imposition of the death penalty in Dayva Cross's case, and including all other cases required by that statute as similar cases, the penalty of death is not imposed generally in similar cases.
>
> These cases exemplify the arbitrariness with which the penalty of death is exacted. They are symptoms of a system where statutory comparability defies rational explanation. The death penalty is like lightening, randomly striking some defendants and not others. Where the death penalty is not imposed on Gary Ridgway, Ben Ng, and Kwan Fai Mak, who represent the worst mass murders in Washington's history, on what basis do we determine

on whom it is imposed? No rational explanation exists to explain why some individuals escape the penalty of death and others do not.

Having ruled on this particular constitutional challenge, the Court leaves to the voters and the legislative branch the question of whether the death penalty can be fairly and proportionately applied in Washington.

## II. HOW THE DEATH PENALTY HAS OPERATED IN WASHINGTON

### A. Historical Overview of Washington's Death Penalty

On May 6, 1904, Washington State executed its first resident, James Champoux.[6] Over the next hundred years, Washington proceeded to execute seventy-seven more individuals.[7] The most recent execution took place on August 28, 2001 when James Elledge was put to death.[8]

Washington's capital punishment system has had a variety of changes over the last century. In 1904, death was the mandatory sentence upon a conviction of first-degree murder. [9]In 1909, the legislature gave trial courts the discretion to punish first-degree murder with life imprisonment or death.[10] Capital punishment was abolished in 1913.[11] It was reinstated again in 1919 and remained unchanged and regularly used for the next fifty years.[12] During that time, fifty-eight individuals were executed.

In 1975, Washington's death penalty was again abolished.[13] That same year, Initiative Measure No. 316 was passed, establishing a new death penalty statue.[14] This statute imposed a mandatory death penalty for all "aggravated murder in the first degree" convictions. A person, therefore, would receive a sentence of death for conviction of first degree murder coupled with a statutorily defined aggravating factor. The statute was modified again in 1977 with the adoption of RCW 10.94,[15] which allowed for a death sentence after a conviction of premeditated first-degree murder and a special sentencing proceeding. Under this statute, the sentencing jury was asked to determine whether guilt was established by "clear certainty;" whether aggravating mitigating factors existed; and whether the defendant would commit additional violent acts in the future.[16] Because a defendant who entered a plea would not be subject to the death penalty, creating an inequitable sentencing scheme, the Washington Supreme Court concluded RCW 10.94 was unconstitutional. [17]

### B. Overview of Washington's Current Death Penalty Statute

Washington's current death penalty statute was enacted in 1981.[18] Under this statute, only ***aggravated first-degree murder*** convictions carry the possibility of a death sentence.[19] A person may be charged with aggravated first-degree murder if the killing is premeditated and coupled with a statutorily defined aggravating factor.[20] A person convicted of aggravated first-degree murder may be sentenced to life in prison without the possibility of parole (LWOP) or death.[21]

If an elected prosecutor intends to seek a sentence of death, he or she must properly serve and file a Notice of a Special Sentencing Proceeding (death notice).[22] If the prosecutor

files a death notice and the person is convicted of aggravated murder, a special sentencing proceeding (penalty phase) must take place.[23] As a general rule, the same jury that returned a guilty verdict decides whether the sentence should be LWOP or death.[24] During the special sentencing proceeding, the jury is allowed to hear evidence about the crime and the defendant. Specifically, the jury considers statutory and non-statutory mitigating factors to determine whether the circumstances merit a sentence other than death.[25]

If a death sentence is imposed, the Washington Supreme Court is statutorily required to conduct a review.[26] In addition to other general legal issues, the Washington Supreme Court must review: (1) whether the death sentence was based on sufficient evidence; (2) whether the death sentence was excessive; (3) whether the death sentence was brought on by passion or prejudice; and (4) whether the defendant is mentally retarded.[27] If an aggravated murder conviction and death sentence is affirmed, the defendant may file a personal restraint petition (PRP). Under a PRP, a defendant can seek review of issues that may not have been covered in the trial court proceedings or appeals, such as claims of ineffective assistance of counsel.[28]

### C. Application of Washington's Death Penalty Since 1981

Under Washington's death penalty statute, upon a conviction of aggravated first degree murder, a "trial report" is completed and filed with the Washington State Supreme Court.[29] The pre-printed trial report form requests information about the defendant, the trial, the special sentencing proceeding, the victim, the representation of the defendant, the chronology of the case, and general considerations such as defendant's and victim's race, jury's racial makeup, and the respective county's racial population.[30]

Since 1981, there have been 7,467 homicide cases filed in Washington. Of those, there have been 270 convictions of aggravated murder. A death sentence was not an option in each of these cases, since a sentence of death is not permitted when the defendant is a juvenile or deemed mentally retarded.[31] Of the 270 currently filed trial reports, 254 were "death eligible," meaning that a sentence of death was a sentence option.

Of the death-eligible convictions, there have been 79 cases in which the elected prosecutor had filed a death notice.[32] Of the 79 "death sought" cases, a sentence of death was imposed by a jury in 30 cases.[33]

We have classified the 30 "death sentence" cases into two categories: pending or completed review.[34] Pending review means the case is currently on appeal at either the Washington Supreme Court or in federal court. Completed review means the appellate review of the initial death sentence has been completed or terminated.

#### 1. Pending Appeals:

Seven death sentences are currently pending appellate review.[35] As of November 2004, the average appellate review length for these pending cases has reached 7.2 years.

- **Dayva Cross:** A King County jury sentenced Mr. Cross to death on June 22, 2001. On March 30, 2006, by a vote of 5 to 4, the Washington Supreme Court affirmed

his conviction and sentence. On November 6, 2006, the United States Supreme Court denied his petition for review. Mr. Cross is expected to file a personal restraint petition in the Washington State Supreme Court.

- **Clark Elmore:** On May 3, 1996, Mr. Elmore was sentenced to death in Whatcom County. The sentence is still being reviewed under a Personal Restraint Petition.

- **Jonathan Gentry:** A Kitsap County jury sentenced Mr. Gentry to death on July 22, 1991. The sentence is still under review by a federal court.

- **Allen Gregory:** Mr. Gregory's death sentence was imposed on May 25, 2001, and is presently under review by the Washington Supreme Court.

- **Darold Stenson:** Mr. Stenson's death sentence was imposed on August 17, 1994 and is under review by the federal court (habeas corpus proceeding).

- **Dwayne Woods:** Mr. Woods' death sentence is on review by the federal court. He was sentenced to death on June 25, 1997.

- **Robert Yates:** A Pierce County jury sentenced Mr. Yates to death on October 9, 2002. The sentence is currently on direct review by the Washington Supreme Court.

**2. Completed Review Cases**

Twenty-three death sentences have completed their appellate review. The appellate review has resulted in either an execution or reversal of the death sentence. Below is a discussion of each case.

**a. Executions:**

Over the last quarter of a century, Washington State has executed four individuals. The first, Charles Campbell, was executed on May 27, 1994. The last execution, James Elledge, occurred on August 28, 2001. Of the four individuals executed, three waived their non-statutory automatic appellate review and accepted their execution. The only person to be executed after exhausting all of his appeals was Charles Campbell. His appeal took over 11 years to complete. The four execution cases were:

- **Wesley Dodd:** Mr. Dodd was convicted and sentenced to death in Clark County on July 26, 1990. After 29 months, Mr. Dodd waived his right to appellate review and was executed on January 5, 1993.[36]

- **Charles Campbell:** Mr. Campbell was convicted and sentenced to death in Snohomish County on December 17, 1982. After 11 years of appellate review, Mr. Campbell was executed on January 5, 1994.[37]

- **Jeremy Sagastegui:** On February 12, 1996, Mr. Sagastegui was convicted and sentenced to death by a jury in Benton County. After 32 months, Mr. Sagastegui

was allowed to waive all additional appellate review.[38] He was executed on October 13, 1998.

- **James Elledge:** On October 21, 1998, Mr. Elledge was convicted and sentenced to death in Snohomish County. After the Washington Supreme Court conducted its limited appellate review, which took 34 months, he was allowed to waive all additional appellate review.[39] Mr. Elledge was executed on August 28, 2001.

**b. Reversal Cases:**

The majority of the death sentences imposed have resulted in a reversal. Nineteen cases have resulted in the conviction and/or the death sentence being reversed. Of these 19 reversals, nearly all have resulted in a sentence of life without the possibility of parole – the only other sentence option for an aggravated murder conviction.[40]

Errors leading to reversals have been the product of constitutional error (2 cases); judicial error (9); prosecutorial misconduct (2); ineffective defense counsel (5); and jury misconduct (1). The death sentence cases which have been reversed are:

- **Dwayne Bartholomew:** Mr. Bartholomew was arrested on August 5, 1981. On November 24, 1982 he was sentenced to death. After 11 months, the Washington Supreme Court reversed his sentence based on **constitutional error.** The basis for reversal was that Washington's death penalty statute did not "limit in any significant way the evidence that the prosecution may present at the sentencing phase of capital proceedings."[41]

- **Kwan Fai "Willie" Mak:** Mr. Mak was charged with aggravated murder and sentenced to death on October 6, 1983. In 1992, after 9 years on appeal, the Ninth Circuit Court of Appeals overturned the death sentence because of **ineffective assistance of counsel**, **trial court's error in admitting specific mitigation evidence, and erroneous jury instruction.**[42] Nearly 20 years after the initial trial ended, Mr. Mak was resentenced in May 2003 to life without the possibility of parole (LWOP).

- **Michael Furman**: Mr. Furman, at age 17, was charged, convicted, and sentenced to death on March 6, 1990. The Washington Supreme Court – after 42 months on appellate review – overturned the death sentence concluding that, **statutorily**, Washington State does not permit the execution of a minor.[43] Mr. Furman was subsequently sentenced to LWOP.

- **Benjamin Harris**: After five months of trial, Mr. Harris was convicted and sentenced to death. Mr. Harris' case was on appeal for 110 months before the Ninth Circuit Court of Appeals reversed the conviction (and thus the death sentence) because trial counsel provided **ineffective assistance of counsel**.[44] Mr. Harris was subsequently released from prison.

- **Sammie Luvene**: On August 12, 1993 Mr. Luvene was convicted and sentenced to death. After 26 months on appeal, the Washington Supreme Court reversed the death sentence because of **prosecutorial error** in filing the death notice.[45] A decade after his arrest, in May 2002, Mr. Luvene was sentenced to LWOP.

- **David Rice:** Mr. Rice was charged, convicted, and sentenced to death in July 1986. After eleven years on appeal, the Ninth Circuit Court of Appeals reversed Mr. Rice's conviction and death sentence because of **trial court error** in that he was not present during a crucial stage of the trial**.**[46] Subsequently, Mr. Rice entered a plea of guilty and was sentenced to LWOP.

- **Patrick Jeffries**: On November 18, 1983, Mr. Jeffries was convicted and sentenced to death for aggravated first-degree murder. After thirteen years on appeal, the Ninth Circuit Court of Appeals reversed his death sentence because of **misconduct by the jury**.[47] Mr. Jeffries was ultimately sentenced to LWOP on May 15, 1998 – nearly fifteen years after his conviction.

- **Mitchell Rupe:** On June 7, 1982, Mr. Rupe was convicted and sentenced to death. After 12 years of appellate review, the Ninth Circuit Court of Appeals reversed his sentence because the **trial court erroneously** excluded relevant mitigation evidence at the penalty phase.[48] Nearly twenty years after his arrest, on March 10, 2000, Mr. Rupe was sentenced to LWOP.

- **Brian Lord**: Mr. Lord was convicted and sentenced to death on August 18, 1987. In 1999, nearly 12 years after the verdict, the Ninth Circuit Court of Appeals overturned Mr. Lord's conviction and death sentence because of **ineffective assistance of counsel**.[49] On April 29, 2003 – about sixteen years after conviction – Mr. Lord was sentenced to LWOP. His case is on appeal to the Washington Supreme Court.

- **Charles Finch:** Mr. Finch was convicted and sentenced to death on June 21, 1995. After 47 months on appeal, the Washington Supreme Court overturned his death sentence due to **trial court error** for keeping Mr. Finch shackled before the jury.[50] Mr. Finch was subsequently sentenced to LWOP, but had attempted suicide while sentence was pending, and died a month after sentencing in December 2000.

- **Henry Marshall**: After nearly four years at the trial level, Mr. Marshall was convicted and sentenced to death on July 19, 2001. On appeal, the Washington Supreme Court reversed the conviction because of **trial court error** in the competency proceeding.[51] Mr. Marshall was sentenced to LWOP in 2002 - eight years after he was arrested.

- **Michael Roberts:** Mr. Roberts was convicted and sentenced to death on June 13, 1997 – three years after he was arrested. On appeal – which lasted a little over three years – the Washington Supreme Court reversed the death sentence because of **error in the jury instruction**.[52] On September 10, 2002 Mr. Roberts was sentenced to LWOP.

- **Richard Clark**: Mr. Clark was convicted and sentenced to death for aggravated murder in 1997. In 2001, the Washington Supreme Court reversed the death sentence because the **trial court erroneously** admitted prejudicial statements during the penalty phase.[53] Clark was sentenced to LWOP on March 31, 2006, when the prosecutor withdrew the death notice after Clark made a public confession and waived his right to all future review of his conviction.

- **James Brett:** In 1992, Mr. Brett was convicted and sentenced to death. Eight years later, in 2001, the Washington Supreme Court overturned the conviction and death sentence because of **ineffective assistance of counsel**.[54] On March 12, 2003, nearly a decade after his initial trial, Mr. Brett was sentenced to LWOP.

- **Gary Benn**: Mr. Benn was sentenced to death on June 6, 1990. On February 26, 2002, nearly 12 years later, the Ninth Circuit Court of Appeals reversed his conviction and sentence because of **prosecutorial misconduct** in that the state withheld exculpatory evidence from the defense.[55] The state did not re-file a death notice, and Mr. Benn was sentenced to LWOP.

- **Blake Pirtle**: In July 1993, Mr. Pirtle was convicted and sentenced to death. After more than seven years on appeal, the Ninth Circuit Court of Appeals overturned his conviction and death sentence because of **ineffective assistance of counsel**.[56] A decade after initially being convicted and sentenced, Mr. Pirtle was re-sentenced to LWOP in July 2003.

- **Covell Thomas**: Mr. Thomas was convicted and sentenced to death in February 2001. Three years later, the Washington Supreme Court reversed the aggravated murder conviction and death sentence because of **erroneous jury instructions.**[57] The state opted not to seek death and a jury was empanelled to determine whether aggravating factors were present. The jury so found and Mr. Thomas was sentenced to LWOP. The jury decision is on appeal.

- **Cecil Davis:** Mr. Davis was convicted and sentenced to death on February 23, 1998. After 94 months on appeal, the Washington Supreme Court overturned his death sentence due to **trial court error** for keeping Mr. Davis shackled before the jury.[58]

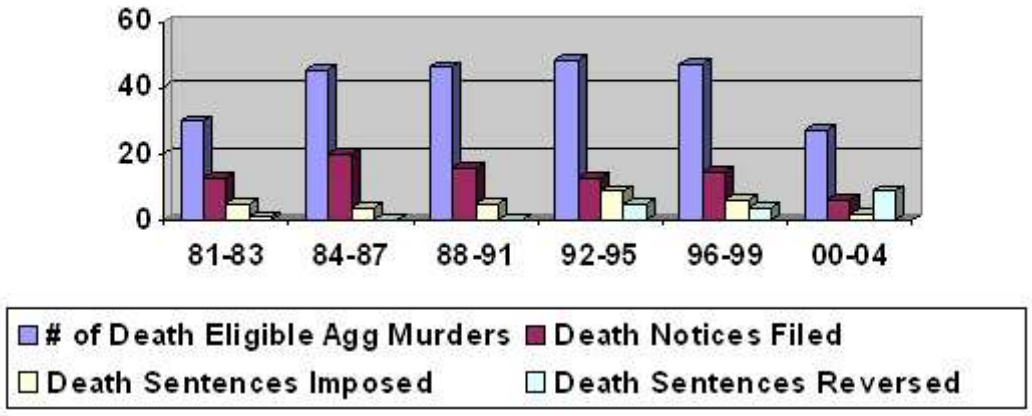
- **Cal Brown:** Mr. Brown was convicted and sentenced to death on January 28, 1994. The death sentence was reversed by the Ninth Circuit Court of Appeals in 2005. The basis for the reversal was the trial court's **erroneous exclusion of a juror**.[59] The state has filed a petition for certiorari with the United States Supreme Court.

### c. Trends in Washington

Over the last 10 years there have been fewer death notices filed by prosecutors and fewer death penalties imposed by juries than over the previous 10-year period. There have also been more reversals of death sentences in recent years. Over the last four years, there have

been nine death sentences reversed, compared to ten reversals over the previous ten years. The following chart reflects the history of trends of death sentences sought, imposed and reversed:

Chart 6: Trends of Death Sentences Sought, Imposed and Reversed




### d. Application of the Death Penalty by the Counties

The trial reports filed with the Washington State Supreme Court since 1981 contain data on the number of aggravated murder cases, number of cases in which the death sentence was sought and the number in death sentences imposed in each county. The following table provides a county by county tabulation of that data:

| County | Total # of Death-Eligible Aggravated Murder Cases | Death Notice Filed | Percent in Which Death Notice was Filed | Death Sentence Imposed | Percent in Which Death Sentence Imposed | Percent in Which Death Sentence Imposed Where Death Notice Filed |
|---|---|---|---|---|---|---|
| Adams | 0 | 0 | 0 | 0 | 0 | 0 |
| Asotin | 1 | 1 | 100 | 0 | 0 | 0 |
| Benton | 7 | 1 | 14.3 | 1 | 14.3 | 100 |
| Chelan | 4 | 0 | 0 | 0 | 0 | 0 |
| Clallam | 5 | 3 | 60 | 2 | 40 | 66.6 |
| Clark | 19 | 4 | 21 | 3 | 15.8 | 75 |
| Columbia | 0 | 0 | 0 | 0 | 0 | 0 |
| Cowlitz | 5 | 1 | 20 | 0 | 0 | 0 |
| Douglas | 2 | 1 | 50 | 0 | 0 | 0 |
| Ferry | 0 | 0 | 0 | 0 | 0 | 0 |
| Franklin | 2 | 1 | 50 | 0 | 0 | 0 |
| Garfield | 0 | 0 | 0 | 0 | 0 | 0 |
| Grant | 1 | 0 | 0 | 0 | 0 | 0 |
| Gray's Harbor | 3 | 2 | 66.6 | 0 | 0 | 0 |
| Island | 1 | 1 | 100 | 0 | 0 | 0 |
| Jefferson | 0 | 0 | 0 | 0 | 0 | 0 |

| County | Total # of Death-Eligible Aggravated Murder Cases | Death Notice Filed | Percent in Which Death Notice was Filed | Death Sentence Imposed | Percent in Which Death Sentence Imposed | Percent in Which Death Sentence Imposed Where Death Notice Filed |
|---|---|---|---|---|---|---|
| King | 69 | 17 | 24.6 | 5 | 7.2 | 29.4 |
| Kitsap | 18 | 8 | 44.4 | 2 | 11 | 25 |
| Kittitas | 0 | 0 | 0 | 0 | 0 | 0 |
| Klickitat | 2 | 0 | 0 | 0 | 0 | 0 |
| Lewis | 0 | 0 | 0 | 0 | 0 | 0 |
| Lincoln | 0 | 0 | 0 | 0 | 0 | 0 |
| Mason | 2 | 1 | 50 | 0 | 0 | 0 |
| Okanogon | 6 | 0 | 0 | 0 | 0 | 0 |
| Pacific | 0 | 0 | 0 | 0 | 0 | 0 |
| Pend Oreille | 1 | 0 | 0 | 0 | 0 | 0 |
| Pierce | 46 | 22 | 47.8 | 9 | 19.5 | 40.9 |
| San Juan | 0 | 0 | 0 | 0 | 0 | 0 |
| Skagit | 4 | 0 | 0 | 0 | 0 | 0 |
| Skamania | 1 | 0 | 0 | 0 | 0 | 0 |
| Snohomish | 25 | 6 | 24 | 4 | 16 | 66.6 |
| Spokane | 13 | 6 | 46 | 2 | 15.4 | 33.3 |
| Stevens | 0 | 0 | 0 | 0 | 0 | 0 |
| Thurston | 5 | 3 | 60 | 1 | 20 | 33.3 |
| Wahkiakum | 0 | 0 | 0 | 0 | 0 | 0 |
| Walla Walla | 0 | 0 | 0 | 0 | 0 | 0 |
| Whatcom | 6 | 1 | 16.7 | 1 | 16.7 | 100 |
| Whitman | 0 | 0 | 0 | 0 | 00 | 0 |
| Yakima | 6 | 0 | 0 | 0 | 0 | 0 |
| **Total** | **254** | **79** | **31.1** | **30** | **11.8** | **38** |

This data shows that most of the death penalty cases occur in a small number of counties. There are 14 counties in which there has not been an aggravated murder case during the last 25 years. There are 8 counties where there have been aggravated murders cases, but the prosecutor has not sought the death penalty. Thus, death penalty cases have been brought in 17 of the 39 counties during the last 25 years and the death sentence has been imposed in 10 of those counties.

According to the 2000 U.S. Census, the state's four largest counties – King (1.7 million), Pierce (700,000), Snohomish (606,000) and Spokane (417,000) – accounted for 58% of the state's population (5.9 million). Since 1981 they have had 60% of the aggravated murders, 64.5% of the cases in which the death penalty was sought and 66.6% of the cases in which the death penalty was imposed. In King and Snohomish counties, the prosecutor has sought the death penalty in approximately one quarter of the aggravated murder cases reported, while prosecutors in Pierce and Spokane counties have sought the death penalty in approximately half the aggravated murder cases. Of the state's 30 death sentences imposed

since 1981, 9 have been from Pierce county, 5 from King county, 4 from Snohomish county and 2 from Spokane county.

### D. Comparing Washington with Other States [60]

It may be helpful to compare the operation of the death penalty in Washington with its application nationally. There are a group of states which have applied the death penalty with far greater frequency than Washington. At the end of 2004, there were 3,314 prisoners in the United States under sentence of death. Half of those prisoners were held by four states. California held the largest number on death row with 637 prisoners, followed by Texas with 446, Florida with 364 and Pennsylvania with 222. The larger number of death row inmates in these states is not simply a function of larger populations, but rather an application of the death penalty, which is different from Washington's, as the following table demonstrates:

| | Inmates Under Death Sentence 12/31/04 | 2004 State Population (millions) | Death Row Inmate per Million Population |
|---|---|---|---|
| California | 637 | 35.9 | 17.7 |
| Texas | 447 | 22.5 | 19.8 |
| Florida | 364 | 17.4 | 20.9 |
| Pennsylvania | 222 | 12.4 | 17.9 |
| Washington | 10 | 6.2 | 1.1 |

From 1977, the year after the Supreme Court upheld revised state death penalty laws, through 2004, there were 944 persons executed under death sentences in the United States. Two thirds of those executions were carried out by five states. Texas alone conducted 36% of the executions with 336, followed by Virginia with 54 executions, Oklahoma with 75 executions, Missouri with 61 executions and Florida with 59 executions. Washington conducted 4 executions over the same time period. Again, the difference in number of executions is due to a different application of the death penalty, and not simply a difference in population, as the following table demonstrates:

| | Number of Executions | Population (Millions) | Executions Per Million Population |
|---|---|---|---|
| Texas | 336 | 22.5 | 14.9 |
| Virginia | 94 | 7.5 | 12.5 |
| Oklahoma | 75 | 3.5 | 21.4 |
| Missouri | 61 | 5.8 | 10.5 |
| Florida | 59 | 17.4 | 3.4 |
| Washington | 4 | 6.2 | .6 |

On the other hand, there are many jurisdictions where there have been no death sentence executions in recent times. At the end of 2004, the District of Columbia and the following 13 states did not have a death penalty: Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, New York,[61] North Dakota, Rhode Island, Vermont, West Virginia and Wisconsin. Five states had a death penalty statute, but had not executed anyone between 1977 through 2004, namely New Jersey, Connecticut, Kansas, New Hampshire and South Dakota. In 2004, New York's death penalty was declared unconstitutional, but New York also had not executed anyone between 1977 and the overturning of its death penalty statute.

There have also been death penalty moratoriums in a few states. In 2000, Governor George Ryan of Illinois declared a moratorium on executions and commuted all death sentences in that state, following the exoneration 13 persons sentenced to death and his conclusion that the system in Illinois was flawed and needed study and reform. In May 2002, Governor Parris Glending of Maryland declared a moratorium on executions to study whether the death penalty was being administered in a racially biased manner. At that time, 70% of the death row inmates were of black/African descent and all but one had been convicted of killing a white person. The Illinois and Maryland moratoriums were subsequently lifted by new governors. In January 2006, the New Jersey legislature passed a one-year moratorium on executions to study the death penalty in its state.

Washington can be placed in the group of jurisdictions which have conducted one to four executions in the period from 1977 through 2004. The other jurisdictions in that group are Pennsylvania, Kentucky, Tennessee, Maryland, Colorado, Oregon, Montana, New Mexico, Wyoming, Nebraska, Idaho and the federal government.

From 1977 through 2004, 6,807 persons entered prison under a death sentence nationwide. Approximately 43% of those death sentences have been reversed or commuted. Among those receiving a death sentence between 1977 and 2004, 49% were white, 41% were black/African descent, 9% were Hispanic and 2% were of other races.[62] Of the 944 who were executed during this period, 58% were white, 34% were black/African descent, 7% were Hispanic and 1% were of other races. As noted earlier, a complete analysis and study of the role of race in the application of the death penalty in Washington is beyond the scope of this Subcommittee's work.

## III. THE COSTS OF DEATH PENALTY CASES

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. It is the sense of both prosecutors and defense attorneys on the Subcommittee that the rarefied nature of a death penalty case results in more motions being brought and more advocacy being presented, which further adds to the

time and costs of a capital case. However, much of the work of the lawyers and the courts in a death penalty case is intertwined with the work of trying the issue of whether the defendant is guilty of murder. If the death penalty were not sought, the issue of guilt would still be the subject of a trial and appeals of the trial court's decision, unless a plea were entered. The challenge then is to assess the additional costs to the criminal justice system which are created when the death penalty is sought.

The additional costs of pursuit of the death penalty can be identified by the special procedures and practices in death penalty cases at the trial court level, in state court appellate review of a death sentence, and then in federal court review of the state court's death sentence. This study has sought to gather data and make assessments on the costs at these stages of litigation of death penalty cases. The data and assessments, as well as an explanation of the procedures and practices driving the costs of death penalty cases, are discussed first at the trial stage and then at the appellate stage in the next two subsections.

## A. Death Penalty Costs at the Trial Level

At the trial court level, the following procedural and substantive requirements make a capital case more complex and costly than a murder case where the death penalty is not sought.

### 1. Appointment of Counsel

Rule 2 of the Superior Court Special Proceedings Rules – Criminal (SPRC 2) requires that at least two attorneys must be appointed to represent the defendant. At least one of the attorneys must be selected from the statewide list of attorneys who have been found qualified by a panel appointed by the Supreme Court to handle defense of a capital case at the trial level. The requirements of SPRC 2 are applicable as soon as a person is charged with aggravated murder and continue unless and until the prosecutor decides not to file a death notice. There are no state law or court rule requirements for appointment of more than one lawyer or the qualifications of the lawyer appointed in murder cases where the death penalty is not sought, but some counties have such requirements imposed by local ordinance or administratively.[63]

### 2. Mitigation Investigations

Capital cases require investigations by both the prosecutor and defense counsel into mitigation evidence which may be presented at the penalty phase of the trial.[64] Mitigation evidence is anything about the defendant or the crime a jury may consider in determining whether the sentence should be death or life without the possibility of parole. Investigations for mitigation evidence involve complete research of the defendant's past, including review of school and criminal records and interviews with people who have known the defendant. The investigation can be particularly difficult and costly when the defendant comes from another state or country. Defense counsel will also seek and are customarily granted funds to hire a specialist in mitigation investigations and psychologists and medical experts to assess the defendant's mental condition.

Under Washington's capital punishment statute, the state has 30 days from the date of arraignment to decide whether to file a death notice.[65] This time period is typically extended

for "good cause," which has generally been based on a defendant's request for more time to assemble a mitigation packet.[66] During this pre-decision period, the defense directs much of its time and resources to collecting mitigation evidence to present in a mitigation packet. The prosecutor reviews this mitigation packet in determining whether to file a death notice.[67] Since the State's decision whether to file a death notice significantly affects the entire case, SPRC 2 requires that qualified counsel shall be appointed during this period. Therefore, the cost and length of aggravated murder cases are increased during the period in which a sentence of death is still a possibility. The time for development of the mitigation packet, its review by the prosecutor and the prosecutor's decision on whether to file a death notice may take from 3 to 14 months.

Mitigation investigations are a major cause of expense and delay which are not present in murder cases in which it is known at the outset that the death penalty will not be involved.

### 3. Pretrial Motions/Challenges

Pretrial motions or legal challenges are typically more complex and plentiful in death penalty cases.[68] Death penalty cases will include all the legal challenges common to homicide cases and, in addition, will incorporate numerous constitutional challenges not applicable in non-capital homicide cases.[69] In order to preserve the defendant's right to have the case reviewed by the federal courts, should such a review become necessary, defense counsel must raise all legal challenges in the trial court. Thus, defense counsel must have a working knowledge of federal habeas corpus law and do a thorough analysis of all potential challenges the defendant may have under federal law. Prosecutors must file replies to these constitutional challenges and the court must consider and rule on them. Thus, there is significantly more time spent by the attorneys and the court in capital cases on pretrial motions than in non-capital cases.

### 4. Jury Selection and Jury Costs

Jury selection for a capital case also takes longer and requires a more detailed process. Since jurors may be asked to sentence someone to death, jury selection must delve into a prospective juror's opinions and beliefs on capital punishment.[70] This process – commonly called "death qualifying" – often results in a significant number of potential jurors being excused "for cause." In addition, the prosecutor and the defense each have 12 preemptory challenges (the right to dismiss a juror without cause), which is twice as many as in the typical non-capital case. Because capital cases are lengthy and may involve sequestration of the jury, many potential jurors request to be excused because of hardship. Since a very large number of potential jurors likely will be excused, it is not uncommon for the court to summon over 1,000 potential jurors. In one capital case, 1,700 jurors were summoned. In a non-capital case, fewer than 100 potential jurors are typically summoned. The task of selecting a jury from such a large jury pool creates major challenges for the lawyers and the court.

The process for jury selection is very cumbersome and time consuming in capital cases. It is often necessary for the court to arrange for extra facilities and staff to process the large number of jurors summoned. Jurors in capital cases are each given a lengthy questionnaire (30 pages) to complete. In non-capital cases the juror questionnaire is short. The

attorneys must review these questionnaires when considering each juror. In a non-capital case, the attorneys typically address their questions in voir dire to the entire panel of potential jurors. In capital cases, each juror who has not been excused for hardship is questioned separately by the attorneys. Thus, it is not unusual for jury selection to take as long as 30 days in a capital case. In a non-capital case jury selection will typically take one or two days. All of this results in additional cost to the justice system, as jurors are paid a per diem plus mileage for each day in attendance at court.[71]

### 5. Penalty Phase Trial

If a jury finds the defendant guilty of aggravated murder, then a second trial is conducted before the same jury on the issue of whether the defendant should be sentenced to death or LWOP. During this special sentencing hearing (the "penalty phase"), the prosecutor and defense counsel each make opening statements, present witnesses and exhibits, cross examine the opposing side's witnesses and make closing arguments. The penalty phase trial can run for days or weeks, depending on the amount of evidence and length of argument each side wishes to present. In a non-capital murder case, the sentence is imposed by the judge after a brief hearing.

### 6. Remands

If the state supreme court or a federal court reviewing a death penalty case finds reversible error, the case may be returned to the trial court for a new trial on the entire case or on the penalty phase. In such event, many of the steps described above will be followed again.

### 7. Case Management

The management of the case schedule and oversight exerted by the trial court impacts the costs of the case and the fairness of the process. Because of their complexity, death penalty cases are not handled under the local trial court's regular scheduling procedures and the case scheduling is determined by the judge assigned to the case. Through the use of scheduling orders and regular status hearings, the trial judge can move the case to trial in a fair and timely manner. The trial judge can also set expectations for and monitor the conduct and work product of the trial attorneys. Good case management by the trial judge can avoid unnecessary delays and costs and may prevent instances of ineffective assistance of counsel and prosecutorial misconduct. Conversely, poor case management and oversight by the trial judge can result in unnecessary delays, costs and prejudice to a party in preparing the case for trial. The importance of the trial judge's oversight role in a death penalty case was underscored by the Illinois Commission on Capital Punishment when it devoted one chapter and eight recommendations in its landmark report to training, resources and support for trial judges assigned death penalty cases.[72] Unfortunately, Washington has also lacked training and special resources and support for trial judges handling death penalty cases. The likelihood is that the trial judge in Washington will have never before handled a death penalty case. The trial judge will also have other cases and responsibilities during the pre-trial stages of a death penalty case. Thus, the level of case management and oversight varies from case to case and may, in some cases, result in unnecessary costs, delay or prejudice.

### 8. Analysis of Costs

The foregoing features of a capital case make the case more expensive to try than a non-capital murder case. To quantify the additional expense, the Subcommittee sought the opinions of elected prosecutors and directors of public defender programs in Washington. The Subcommittee sent surveys to both groups which included the following question:

> What is your best estimate of the cost difference to your office between trying a case to verdict as a capital case and trying to verdict as a non-capital case, including cost for attorney and staff compensation, experts, consultants and overhead?

Several prosecutors declined to answer the question because they had not had a death penalty case, or did not otherwise have an opinion. One prosecutor responded that the cost was "at least quadruple the cost of a non-capital murder trial." Nine prosecutors provided an opinion of the additional cost to their office of trying a capital case, ranging from $25,000 to $1,000,000. The average of their opinions on additional cost was $217,000.[73] Eight directors of public defender programs gave their opinion on additional cost to their office to defend a capital case at the trial level. Their responses ranged from $100,000 to $1,000,000. The average of their responses was $246,000.[74]

There are no time records of prosecutors or defense counsel available to allow a more exact accounting of the cost difference. However, looking at the extra cost of each element of a capital case which increases its cost over trying the case as a non-capital case, the Subcommittee concluded that the prosecutors' average estimate of $217,000 and the public defenders average estimate of $246,000 were realistic estimates of the cost difference for death penalty cases at the trial level. It was noted that the extra cost required of the defense to prepare a mitigation packet, including expert fees, would be in the range of $30,000. Except for preparation of the mitigation packet, the attorneys on both sides of the case generally spend comparable amounts of time in discovery, briefing, trial preparation and court appearances. Thus, the average responses of the prosecutors and public defender directors cited above are consistent and provide a fair estimate of the extra cost of trying a death penalty case.

In sum, the average additional cost to try a murder case as a capital, rather than non-capital case, is in the range of $467,000 for the prosecution and defense together. In addition, a capital case involves substantial additional cost to the superior court and to the county jail. Finally, a capital case requires a far greater contribution by the citizens called to serve as jurors than a non-capital 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 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. As noted in Section C below, this analysis does not suggest that a county sees a direct increase in its budget by this amount,

because a particular case is tried as a capital case. However, this cost analysis may inform discussion on the implications of eliminating the death penalty, expanding the death penalty or shifting costs of death penalty litigation from the counties to the state.

## B. Death Penalty Costs at the Appellate Level

The appeal procedure in death penalty cases typically involves several different stages, unless the appeal is successful at some stage:

- mandatory sentence review and appeal of judgment to Washington Supreme Court[75]
- personal restraint petition to Washington Supreme Court
- habeas corpus petition to United States District Court
- appeal of habeas corpus petition to Ninth Circuit Court of Appeals
- petition for writ of certiorari to United States Supreme Court
- petition to state Clemency and Appeals Board[76]

### 1. Mandatory Appeal to Washington Supreme Court

RCW 10.95.130 provides for automatic review and appeal of all death penalty sentences to the Washington Supreme Court. On appeal, the Washington Supreme Court is required to review four issues:

- whether sufficient evidence existed to justify the jury's determination of insufficient mitigating circumstances;
- whether the sentence was a product of passion or prejudice;
- whether the sentence is excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant;
- whether the defendant was mentally retarded.

The defendant may raise any other appealable issues. As with trials, appellate review of a case where the death penalty is imposed is significantly different from a case where death is not imposed:

- two attorneys must be appointed, at least one of whom must be from the death-penalty qualified list[77]
- every hearing must be transcribed[78]
- a proportionality analysis must be made[79]
- possible mental health evaluation;
- all exhibits are transmitted to the Supreme Court, and must be retained until the defendant's death[80]
- special court personnel
- increased briefing[81]
- allowable time of argument 3 times longer than in non-death penalty cases[82]
- clerk's conference to discuss procedural issues[83]

The Washington Office of Public Defense (OPD) establishes a presumptive fee in each case based on a rate of $100 per hour, and then notifies lawyers on the SPRC 2 list of death penalty qualified lawyers to determine who is interested in being appointed to the case. On identifying a lawyer, the Supreme Court makes the appointment. OPD enters into a contract with the lawyer, who selects co-counsel. OPD also pays costs of experts appointed by the court, and the lawyer may apply for additional fees if unanticipated circumstances arise. Fees are paid upon completion of certain events, and therefore the presumptive fee is always paid in full. In most cases, there are also unanticipated circumstances resulting in additional fees. (By comparison, in non-death penalty cases, OPD pays $2,315 per case, and lawyers can petition for extraordinary compensation).

A major factor in the costs in death penalty appellate cases is the length of the record. All cases have significant legal issues, but the length of the transcripts can vary widely. The Subcommittee was advised that as a general rule, at all stages of post-conviction review defense lawyers must more carefully scrutinize the record for appealable issues; prosecutors generally only need to consider in depth the issues raised by the defense.

Between 1996 and 2005, there were 58 non-death penalty aggravated first-degree murder cases that were appealed to the appellate or Supreme Court for which cost data is available. In that same period, there were direct appeals of 7 death penalty aggravated first-degree murder cases.

The costs on appeal vary widely from case to case.[84] The range of fees and costs in **non-death penalty aggravated first-degree murder appeals** was as follows:

| | Low | High |
|---|---|---|
| **Attorney fees** | $200 | $41,985 |
| **Costs** | $52 | $33,938 |

The range of fees and costs in **death penalty aggravated first-degree murder appeals** was as follows:[85]

| | Low | High |
|---|---|---|
| **Attorney fees** | $47,276 | $135,454 |
| **Costs** | $5,813 | $27,536 |

Considering the averages and medians, the difference in death penalty and non-death penalty cases is as follows:

| | Average atty fees | Median atty fees | Average costs | Median costs | Average total fees and costs | Median total fees and costs |
|---|---|---|---|---|---|---|
| **Death penalty** | $97,647 | $101,219 | $20,151 | $23,220 | $117,799 | $128,755 |
| **Non-death penalty** | $8,799 | $4,845 | $8,171 | $5,395 | $16,971 | $10,244 |

See the Appendix A for case-by-case details of defense fees and costs.

It should be noted that prosecutors also incur additional costs in appellate proceedings, including reviewing lengthier transcripts, increased briefing, and defending against allegations of prosecutorial misconduct.

### 2. Personal Restraint Petitions

After an adverse decision by the Supreme Court, the defendant may, within one year of the date of the decision, file a Personal Restraint Petition (PRP) in the Supreme Court to raise issues not considered in the trial or appellate proceeding.[86] The petition, however, will generally be filed earlier in order to obtain a stay of execution.[87]

As with appellate review of a case where the death penalty is imposed, PRPs in death penalty cases are also significantly different from cases where death is not imposed:

- statutory right to counsel[88]
- two attorneys must be appointed, at least one of whom must be from the death-penalty qualified list[89]
- increased briefing
- reference hearing in about one-half of cases
- experts and investigators[90]
- every hearing must be transcribed
- increased motions practice
- a PRP is a civil proceeding, and civil discovery rules apply[91]

A PRP differs from a direct appeal in that in the PRP proceeding, the defendant may present competent evidence from outside the trial and appeal record on issues such as ineffective assistance of counsel or newly discovered evidence. Thus, the PRP counsel must examine the entire trial record and attempt to evaluate whether trial counsel provided adequate representation, as well as consider the appealable issues presented in the direct appeal. The PRP counsel must review all transcripts, which may be voluminous; read the appellate opinion; review the trial file; interview various parties including witnesses, the entire defense team, jurors if they are willing, and even prosecutors and police detectives if they are willing. The PRP lawyer must also conduct any investigations that he or she concludes should have been more thoroughly conducted by trial counsel.

The PRP counsel must apply to the court for fees to hire investigators, experts and other specialists, and for leave to conduct discovery.[92] Usually a public disclosure application will be filed to review the prosecution office files and police reports.

Typically, a PRP with appendices will be 800 to 1,000 pages.

PRP counsel is paid a contractual flat-fee based on an estimate established by the Office of Public Defense. If necessary, a negotiated fee increase may be agreed to if circumstances change from the time of the estimate.

Since 1996, there have been five death penalty aggravated first-degree murder PRPs. The range of fees and costs in those cases is as follows:[93]

| | Low | High | Average | Median |
|---|---|---|---|---|
| **Attorney fees** | $72,293 | $211,491 | $137,424 | $156,865 |
| **Costs** | $3,347 | $27,685 | $15,443 | $6,530 |

It should be noted that prosecutors also incur additional costs in PRP proceedings, including increased motions practice, witness interviews, hiring of experts and specialists, and defense against allegations of prosecutorial misconduct.

### 3. Habeas Corpus Proceedings

A defendant may file a Petition for Habeas Corpus in the United States. District Court for the district where the trial was held. Federal habeas corpus is a procedure under which a court may review the legality of an individual's incarceration. The petition must be filed within one year of the following, with certain tolling provisions:

- the date of final completion of direct state review procedures; or
- the date of removal of a government impediment preventing the prisoner from filing for habeas relief; or
- the date of United States Supreme Court recognition of the underlying federal right and of the right's retroactive application; or
- the date of uncovering previously undiscoverable evidence upon which the habeas claim is predicated.

Typically, the petition is filed sooner in order to obtain a stay of execution.[94]

The PRP lawyers typically move to be appointed to continue on the case, and a federal public defender is also usually appointed. Counsel are paid at public expense borne by the federal government. The Washington Attorney General represents the state.

A habeas corpus proceeding is commenced with the filing of a civil complaint by the defendant, and an answer by the state. These proceedings are procedurally complex. All state law issues have to have been fully exhausted in state court, and the federal claims also have to have been presented in state court. They are subject to summary judgment motions, and the court must approve discovery, may order depositions, and may order an evidentiary hearing.

The current rate of compensation for attorneys in federal capital cases (either trial or appeal of a federal death sentence or a habeas proceeding involving a state death sentence) is $165 per hour ($159 per hour is the federal rate of compensation for federal appeals in non-death penalty cases). The salary for a federal public defender is based on

experience level. Currently, a federal public defender attorney working on a capital case would likely be paid in the $100,000 to $125,000 annual salary range.

There are currently three pending habeas corpus proceedings for which some financial information is available. The fees noted are in addition to the salaries paid to the public defender:[95]

| Case | Private Defense Attorney Fees | Costs |
|---|---|---|
| Brown | $50,469 to date | n/a |
| Gentry | $126,693 to date | $32,600 |
| Stenson | $47,828 to date | $470 |

The Attorney General's Office (AGO), unlike county prosecuting attorneys, "bills" time to specific cases. However, the AGO does not differentiate between federal appeals and habeas corpus actions, which may affect any direct comparison with defense fees in habeas corpus actions.

To analyze the cost to the AGO for work on federal habeas corpus actions and appeals, an average salary figure for Assistant Attorneys General (AAGs) of $80,000 per year was used, which is believed to be a fair representation of salaries paid to AAGs who perform this work. For the biennium 2003 – 2005, 1290 hours were billed by AAGs to federal habeas and death penalty appeals work. Using these figures, and including benefits at 23% of salary, AAGs were paid at the rate of $67.12 per hour in federal habeas and death penalty appeals work. Factoring in a standard AGO figure for "overhead," designed to capture the costs of equipment, training, travel, office space, paralegal/legal assistant salaries and benefits, and cost of administrative personnel, the hourly rate would be $113.54 per hour. Based on these computations, the total cost to the AGO for federal death penalty litigation in the 2003 – 2005 biennium was $146,467.

**4. Other Post-Conviction Proceedings for Which No Specific Financial Information Is Available**

**a. Appeal to the Ninth Circuit Court of Appeals:** Decisions of the district court on petitions for habeas corpus may be appealed to the U. S. Court of Appeals for the Ninth Circuit. The court may order an evidentiary hearing in the lower court.

**b. Petition for Writ of Certiorari to the United States Supreme Court:** Review on a writ of certiorari is discretionary with the Supreme Court and will only be granted for "compelling reasons," such as:

- a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a

departure by a lower court, as to call for an exercise of the Supreme Court's supervisory power;

- a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
- a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by the Supreme Court, or has decided an important federal question in a way that conflicts with relevant decisions of the Court.[96]

Death penalty cases are the only cases in which the U. S. Supreme Court *requires* a response to the petition for certiorari.[97]

A denial of certiorari terminates the federal habeas corpus action, and an execution date is set 30 days after the date of denial. This may result in a "flurry" of subsequent actions in the period leading up to the execution date, including commencement of a civil rights action pursuant to 42 U.S.C. §1983 challenging the method of execution; additional habeas corpus actions; and additional PRP proceedings in the Washington Supreme Court.

**c. Clemency Petition:** The defendant may petition the state Clemency and Pardons Board for review pursuant to RCW 9.94A.885. The Board shall hold a public hearing. The prosecuting attorney is required to make reasonable efforts to give notice of the hearing to victims, survivors of victims, witnesses, and the law enforcement agency or agencies that conducted the investigation of the crime. In extraordinary cases, the Board may recommend clemency to the Governor.

## C. Defining Costs and Potential Cost Savings

The foregoing analysis of costs of the death penalty attempts to measure costs in terms of the additional time and effort of the prosecution and defense teams and the trial courts in capital cases. However, these costs do not necessarily represent identifiable expenditures from a county or state fund. Defense costs in a death penalty case may be traced to additional expenditures, but prosecution and trial court costs are generally a part of the annual budgets for the prosecutor's office and superior court.

In most capital cases, and certainly in larger counties, the salary costs for prosecutors in death penalty cases are absorbed within existing budgets. As with the courts, there may be some "lost opportunity" costs when a capital case is undertaken. For example, other work and/or office priorities that could be completed while a prosecutor works on a death penalty case may be deferred, assigned to another prosecutor or left undone. In smaller counties, a death penalty case may result in supplemental budget increases for the prosecutor's budget to cover the extra costs of that case. It is also important to bear in mind that aggravated murder cases will always be complex and require substantial time of a prosecutor even if the death penalty were eliminated.

Similarly, determining the actual or real costs to the superior court for a death penalty case is not an easy exercise. In many larger counties, for instance, even complex cases can be

absorbed and accommodated within existing workloads such that there are no significant added costs. In smaller counties, actual cost may be more significant since the ability to spread or absorb work is not as great. It should be noted, however, that even in large counties there are always some costs (including delays in the trial docket for other cases) associated with a large complex case being added to caseloads. These costs may be less direct, but can impact busy criminal courts nonetheless. It should also be remembered that a case involving a charge of aggravated murder case, or first-degree murder, but without the death penalty is still a complex case that court systems have to handle. In other words, the failure to file a death penalty notice does not save any court system the entire cost of trying a complex, albeit non-capital, case.

The death penalty has other cost impacts on the criminal justice system which are difficult to quantify. First, the death penalty may result in more aggravated murder cases being resolved with a guilty plea than would occur if there were no death penalty. Of the "death eligible" aggravated murder cases in Washington since 1981, 25% were resolved by a guilty plea. During the same period, there were guilty pleas in 11% of the aggravated murder cases in which the death penalty was not possible under the law (e.g. due to defendant's age or mental retardation). It is not possible to conclude that the 14% difference in the plea rate is due entirely to the threat of the death penalty since the trial reports do not reveal when in the proceedings the plea was entered or what other factors in the case could have led to a plea agreement. However, both prosecutors and defense counsel on the Subcommittee acknowledge that the death penalty creates an incentive for a defendant to plead guilty, if the prosecutor will drop the death penalty, and that as a part of their mitigation package presented to the prosecutor, defendants have in some cases offered to plead guilty if no death notice is filed. When a case is resolved by a guilty plea, an expensive trial and possible appeals are avoided. Assuming arguendo that the death penalty has resulted in 14% of the aggravated murder cases being resolved by pleas, then on average 1.4 trials per year have been avoided in aggravated murder cases. While the exact degree of its impact may be debated, the death penalty is responsible for some savings to the criminal justice system, which must be kept in mind as the cost issues are examined and weighed.

On the other hand, the death penalty may be adding costs to cases in which the prosecutor decides not to seek the death penalty. When a "death eligible" aggravated murder case is filed, two attorneys are appointed under SPRC 2 along with experts to assist them in preparing a mitigation packet for presentation to the prosecutor. The preparation of the mitigation packet involves a major defense cost. The prosecutor spends the time of staff and investigators doing an evaluation of the mitigating factors which may result in no death sentence being imposed by the jury. The process of assembling and reviewing mitigation packets is expensive and, indeed, in some recent cases has run into hundreds of thousands of dollars. The elimination of the death penalty would eliminate this cost to the criminal justice system for the vast majority of the aggravated murder cases in which the prosecutor decides to seek life without parole.

## IV. COMPENSATION OF ATTORNEYS IN DEATH PENALTY CASES

The work of the attorneys handling a death penalty case is among the most complex and demanding in the legal profession. In no other case are the stakes so high. In no other case

are the actions of the trial attorneys so thoroughly scrutinized by appellate courts. If the prosecutor's or defense counsel's conduct does not meet the standards expected by the appellate courts, the case will be reversed. Of the 19 Washington death sentences reversed, five were reversed because of substandard work of defense counsel and two were reversed for prosecution misconduct. Thus, death penalty cases should only be handled by experienced, knowledgeable and capable trial attorneys who are provided the resources and time to do their work properly.

The compensation of prosecutors and defense counsel must be set high enough to attract and retain experienced and capable trial attorneys who can properly handle a death penalty case. In addition, funding must be provided for investigators and experts to allow the trial attorneys to properly prepare and present their case. It would be foolhardy for any county to attempt to save money on the compensation of prosecutors or defense counsel in death penalty cases, or on the support services and experts they reasonably need to conduct the case. The cost of reversal and remand of the case for ineffective assistance of counsel or prosecutorial misconduct will be many times greater than any savings by "low-balling" the compensation of the defense counsel or prosecutor. Counties should review their levels of compensation of prosecutors and defense attorneys to assure that they can retain the services of very capable trial attorneys to handle a death penalty case. If they do not, these experienced trial attorneys may be recruited by the private sector to handle other trial work.

To learn more about how attorneys working on death penalty cases in Washington are being compensated, the Subcommittee conducted confidential surveys of death penalty qualified defense counsel, public defender directors, and elected prosecuting attorneys. Written surveys were sent to every defense attorney listed in trial reports filed with the State Supreme Court and on the list of SPRC 2 qualified attorneys, every elected prosecutor and the director of every public defender organization. The following number of responses was received:

| Survey Group | Mailed | Received |
|---|---|---|
| Defense Counsel | 119 | 41 |
| Public Defender Directors | 19 | 9 |
| Elected Prosecutors | 39 | 29 |

The 41 responses received from defense counsel concerned representation in 96 cases (some responses from 2 or more lawyers concerned the same case).

While the number of responses may not support statistically valid conclusions, the survey responses provide a great amount of information about how both prosecutors and defense counsel in death penalty cases are being compensated, how their case loads are being handled and what their opinions are about fair and reasonable compensation.

### A. Public Defender Attorneys:[98]

Public defenders who have represented defendants in death penalty cases were asked their current annual salary and the annual salary of the highest paid attorney in their office. In

all cases, the responding attorney's salary was the highest in the office. Looking only at the responses of public defenders handling cases since 2000, their salaries were in the following ranges:

| | Western WA | Eastern WA |
|---|---|---|
| Current Salary High | $100,000 | $90,000 |
| Current Salary Low | $55,000 | $58,000 |

### B. Public Defender Directors:[99]

The directors of public defender agencies were asked questions about current compensation of their death penalty-qualified staff attorneys. They were asked the annual salaries paid to 4 levels of both death penalty experienced and non-death penalty experienced staff attorneys. Responses were broken down by county population: less than 100,000 (1 response); 100,000 – 400,000 (3 responses); and greater than 400,000 (5 responses).

| County Pop. | DP Exp. Atty. 1 | DP Exp. Atty. 2 | DP Exp. Atty. 3 | DP Exp. Atty. 4 | Non-DP Exp. Atty. 1 | Non-DP Exp. Atty. 2 | Non-DP Exp. Atty. 3 | Non-DP Exp. Atty. 4 |
|---|---|---|---|---|---|---|---|---|
| <100,000 | n/a | n/a | n/a | n/a | $100,000 | $85,000 | n/a | n/a |
| 100,000 - 400,000 | n/a | n/a | n/a | n/a | $70,000 | n/a | n/a | n/a |
| 100,000 - 400,000 | n/a | n/a | n/a | n/a | $102,336 | $90,636 | $85,440 | 71,424 |
| 100,000 - 400,000 | $103,000 | $96,000 | $84,000 | n/a | $70,000 | $70,000 | n/a | n/a |
| >400,000 | $113,404 | $103,103 | $103,103 | $90,581 | $103,103 | $90,581 | n/a | n/a |
| >400,000 | $87,517 | n/a | n/a | n/a | $87,881 | n/a | n/a | n/a |
| >400,000 | n/a | n/a | $57,648 | n/a | n/a | n/a | $57,648 | n/a |
| >400,000 | $106,090 | $89,820 | $83,820 | $83,820 | $83,820 | $83,820 | n/a | n/a |
| >400,000 | n/a | n/a | n/a | n/a | n/a | n/a | n/a | n/a |

Defender agency directors were also asked about benefits. Of the 9 responses, all reported some benefits:

| Benefit | # Offering |
|---|---|
| Medical | 9 |
| Medical with family coverage | 6 |
| Dental | 8 |
| Disability | 6 |
| Pension | 4 |
| Other | 2 |

### C. Elected Prosecuting Attorneys:[100]

Prosecutors were asked salary information for trial and appellate attorneys in their offices. Most of the responses (19) were from counties with population less than 100,000; 7 were from counties with population 100,000 – 400,000; and 4 were from counties of greater than 400,000. Of the 29 responses, only a few provided salary information. The salary ranges within those population areas are as follows (figure in parentheses is number of responses):

| <100,000 | High | Low |
|---|---|---|
| Trial Atty. 1 (7) | $97,000 | $51,300 |
| Trial Atty. 2 (3) | $84,000 | $70,000 |
| Trial Atty. 3 (0) | n/a | n/a |
| Trial Atty. 4 (0) | n/a | n/a |
| App Atty. 1 (4) | $97,000 | $60,000 |
| App Atty. 2 (2) | $37,000 | $75/hr. |

| 100,000 – 400,000 | High | Low |
|---|---|---|
| Trial Atty. 1 (6) | $128,000 | $85,000 |
| Trial Atty. 2 (4) | $107,979 | $80,000 |
| Trial Atty. 3 (4) | $100,856 | $73,641 |
| Trial Atty. 4 (3) | $107,980 | $79,081 |
| App Atty. 1 (4) | $107,980 | $75,000 |
| App Atty. 2 (2) | $107,890 | n/a |

| > 400,000 | High | Low |
|---|---|---|
| Trial Atty. 1 (4) | $122,000 | $91,270 |
| Trial Atty. 2 (3) | $118,000 | $108,688 |
| Trial Atty. 3 (3) | $110,800 | $100,978 |
| Trial Atty. 4 (3) | $107,978 | $105,000 |
| App Atty. 1 (4) | $122,000 | $100,978 |
| App Atty. 2 (3) | $118,000 | $93,359 |

### D. Private Practice Death Penalty Defense Attorneys:[101]

In their survey responses, attorneys in private practice consistently reported being paid at substantially lower hourly rates in death penalty cases, in which they were appointed as defense counsel, than in their privately paid cases. They appear to expect some discount from customary hourly rates for death penalty cases. While private attorneys reported an average hourly rate in their practice of $189.00, the average hourly rate they recommended for private attorneys appointed in death penalty cases was $171.00. The inadequacy of pay was raised as a reason for having declined appointments in death penalty by several attorneys and a caveat by others on whether they would accept a death penalty case in the future. Most private attorneys (12 out of 17) report there were no negotiations over the rate of pay when they were appointed. Most (16 out of 20) also reported being reimbursed for travel expenses in addition to their hourly compensation.

All surveys requested an opinion on a fair and reasonable hourly rate for lead counsel in death penalty cases for private attorneys appointed to represent the defendant. The responses to that question in the survey by survey group was as follows:

**Fair Hourly Rate for Private Attorney as Lead Counsel**

| | Number of Responses | High | Low | Average |
|---|---|---|---|---|
| Public Defender Directors | 8 | $250 | $80 – 100 | $169 |
| Elected Prosecutors | 15 | $300 | $60 | $143 |
| Private Attorneys | 24 | $300 – 500 | $100 | $185 |

(Note: When responses gave a range, the mid-point was used in computing the average of all responses. One response of $125,000 per year was translated to an hourly rate of $183.60 for purposes of computing the average among the prosecutors.)

All surveys also requested an opinion on a fair and reasonable hourly rate for co-counsel in death penalty cases for private attorneys appointed to assist the lead attorney. The response to that question by survey group was as follows:

**Fair Hourly Rate for Co-Counsel in Private Practice**

| | Number of Responses | High | Low | Average |
|---|---|---|---|---|
| Public Defender Directors | 8 | $250 | $70 | $131 |
| Elected Prosecutors | 15 | $200 | $45 | $113 |
| Private Attorneys | 25 | $225 | $75 | $135 |

In reaching its recommendation on hourly rates, the Subcommittee noted that the federal government's average hourly rate paid to private attorneys appointed in death penalty cases is $163.00. The Subcommittee also considered the overhead costs for private attorneys and the fact that work on a capital case requires a private attorney to turn away other work and usually work exclusively on the capital case for an extended period. At the end of a capital case, a private attorney will need to re-build a caseload and may experience a drop in monthly revenue while awaiting new clients.

### E. Recommending An Hourly Rate

In responding to its charter to recommend an hourly rate for private attorneys appointed in capital cases, the Subcommittee recognized the problems in establishing a statewide hourly rate applicable in all cases. Some overhead costs will vary among attorneys because of the location of the attorney's practice and their level of office support. Attorney fees among attorneys may also vary based on their level of knowledge and experience. Thus, the hourly rate in each case should be determined after considering multiple factors about the attorney and the case.

By majority vote, the Subcommittee recommends the federal rate of $163.00 per hour (in 2006 dollars) as a reasonable hourly rate of compensation for a private lawyer appointed as lead counsel in a death penalty case. The actual rate established in a case may be more or less than this rate depending on the circumstances of the case and the attorney being appointed. However, under no circumstances should the hourly rate for lead counsel be less than $125.00. This recommendation is based on the opinions set forth in the responses to the surveys of prosecutors, directors of public programs and private defense attorneys and upon a determination that this hourly rate would produce a reasonable net income to an experienced defense attorney with typical office overhead. Compensation in this range will not create a "windfall" to the private attorney, but should allow him or her to earn a reasonable living. The hourly rate for private attorneys appointed in death penalty cases should be high enough so that the attorney can devote the necessary time and attention to the case and not feel compelled to cut corners or take on other work to cover overhead and family expenses. During certain phases of the case and particularly during trial, the attorney must work exclusively on the death penalty case and should feel comfortable about turning away all other work. Thus, the hourly rate should also compensate for the unusual demands the case will place upon the attorney's practice. Finally, the Subcommittee was cognizant of the rates of compensation for experienced trial attorneys in private practice which are generally higher than $163 per hour for private clients.

Three members of the Subcommittee, Mr. Larson, Mr. Moran and Ms. Loginsky, voted against the Subcommittee's recommendation and felt that the recommendation of $163.00 per hour as a reasonable rate is too high. They calculate that the average compensation of private counsel in capital cases over the last five years was $91.00 per hour based on responses to the Subcommittee's survey. That average would be above the national average of compensation in the Spangenberg Group's 2002 report on compensation in capital cases.[102] They point out that there are currently 54 attorneys on the list of attorneys qualified to be appointed as lead counsel pursuant to SPRC 2, which is more than an adequate number to service the limited number of capital cases filed in Washington each year. Therefore, they question the need for such a large increase in hourly compensation for lead counsel. In any event, they oppose setting a statewide "fair" rate of compensation, because there are too many regional and local variables and/or market forces that bear on the fair rate of compensation to make setting a recommended statewide rate useful.

## F. Caseloads

Defense attorneys were asked whether they worked on other cases while working on a capital case and if so, how many:

- **Private Attorneys:** All responded yes, with responses varying from "carry a full civil and criminal case load" to a limited number as small as one.

- **Public Defenders:** Nearly all responded affirmatively, with some reporting that when they were assigned a capital case, no other new cases were assigned to them. Two respondents answered no.

Both public defender directors and elected prosecutors were asked whether an attorney assigned to a capital case at the trial level is also responsible for other cases while working on the capital case. Then following responses were received:

**Public Defender Directors:**

| |
|---|
| Yes (2) |
| No (3) |
| Usually not (1) |
| Lead attorney no, 2nd attorney yes(1) |

**Elected Prosecuting Attorneys:**

| |
|---|
| Yes (21) |
| Yes until trial (2) |
| Probably (1) |

## V. CONCLUSIONS, RECOMMENDATIONS AND IMPLEMENTATION

### A. Conclusions:

#### 1. Wisdom of Continuing Death Penalty in Light of Sentence Reversals.

Over the last 25 years, there have been 79 death penalty cases brought in Washington, about three cases per year. The jury imposed the death sentence in 30 of those cases. There have been reversals on appeal in 19 of those death sentences. Appeals are still pending in seven cases. Four cases have resulted in executions, including three "volunteers" who waived their appeal rights and allowed themselves to be executed.

The question posed in the Subcommittee's charter about the practical wisdom of continuing the death penalty in light of Washington's experience with sentence reversals involves value judgments best left to the readers of this study. Voters and their elected representatives may decide to discontinue the death penalty for this or other reasons. The Subcommittee concluded that its best service to the bar and the general public is to provide as much information as possible about the application of the death penalty in Washington so that informed debate and decisions can be made on the subject of the death penalty.

#### 2. Potential Cost Savings from Elimination of the Death Penalty.

Assessing the potential benefits to the criminal justice system from cost savings by elimination of the death penalty is a difficult task because the costs are not easily quantified nor are the cost savings which would follow from elimination of the death penalty. It costs significantly more to try a capital case to final verdict than to try the same case as an aggravated murder case where the penalty sought is life without possibility of parole.

- At the trial level, death penalty cases are estimated to generate roughly $470,000 in additional costs to the prosecution and defense over the cost of trying the same case as an aggravated murder without the death penalty and costs of $47,000 to $70,000 for court personnel.
- On direct appeal, the cost of appellate defense averages $100,000 more in death penalty cases, than in non-death penalty murder cases.
- Personal restraint petitions filed in death penalty cases on average cost an additional $137,000 in public defense costs.

On direct appeals and personal restraint petitions, the prosecutor spends significant attorney time responding to the issues raised by the defendant to the Washington Supreme Court. If a death penalty defendant does not succeed before the Washington State Supreme Court, additional defense costs will be incurred in a habeas corpus petition to the federal court and appeals to the Ninth Circuit Court of Appeal and the U.S. Supreme Court. The Washington State Attorney General must provide attorneys to defend the death penalty sentence before the federal courts.

The death penalty creates additional costs in aggravated murder cases where the prosecutor does not file a death notice, because in most cases SPRC 2 counsel are appointed and mitigation packets are prepared before the prosecutor makes the decision on whether to seek the death penalty. If there were no death penalty, the significant expense of mitigation packets in all death-penalty-eligible cases would be eliminated. On the other hand, the elimination of the death penalty may reduce the number of aggravated murder cases resolved by a guilty plea and, thereby, lead to one or two more aggravated murder trials per year.

The potential benefit to the criminal justice system from cost savings following the elimination of the death penalty would not be a dollar-for-dollar increase in funds for other uses. County and state funds spent on defense costs in capital cases would be reduced and available for other uses. However, in most instances prosecutor budgets would not be reduced by the elimination of the death penalty. Rather, prosecutor offices would redirect staff time from capital cases to other cases and work to carry out their mission. The elimination of the death penalty would not reduce the number of trial judges in the state. However, judges would be able to attend to other cases which would have been delayed on the trial docket by a capital case. As with the first question in the Subcommittee's charter, weighing these potential benefits involves a value judgment for the reader to decide.

### 3. Financial Considerations in Deciding to Pursue the Death Penalty.

The question posed in the Subcommittee's charter on the effect of financial considerations on the decision to seek the death penalty cannot be answered with empirical data. The elected prosecutor of the county has the sole responsibility and discretion to determine whether the death penalty should be sought in each case of aggravated murder in the county. The statutory guidelines for the filing of a death penalty notice contain several factors, but do not include consideration of the costs of litigation. The prosecutor is not required to make a record or give an explanation of his or her decision on filing or not filing a death notice in a particular case. The decision is a professional judgment, which often

involves multiple factors, including sensitive information about the defendant, the victim or the witnesses. The Subcommittee believes that it would be inappropriate and likely unproductive to inquire into the decisions of past and current prosecutors about the decision not to seek the death penalty in particular cases. The Subcommittee does not believe financial considerations play a role in the death penalty decisions in larger counties. Several smaller counties face difficult financial circumstances and prosecutors in those counties may be concerned by the significant impacts the costs of a death penalty case would have on the county's financial condition. Under the Extraordinary Criminal Justice Costs Act of 1999,[103] the Legislature established a program under which counties may apply for reimbursement of costs in aggravated first-degree degree murder cases, but it has not been fully funded and its funding has steadily declined. In 1999, eight counties submitted claims totaling approximately $2,940,000, and the state paid a total of $975,000 on seven claims. In 2005, four counties submitted claims totaling $2,023,100, but the state only made a partial payment of $54,000 on one claim. Thus, a prosecutor may reasonably expect that his or her county will bear most of the costs of a death-penalty case.

The high cost of death penalty cases and the lack of state assistance could cause a prosecutor in a county with financial constraints to elect not to pursue the death penalty. Such financial pressures could result in the uneven application of the death penalty across the state. If the state were to assume the prosecution and defense costs of all aggravated murder cases, then financial considerations would not enter into the prosecutor's decision on whether to seek the death penalty.

4. **Improving the Current System.**

The Subcommittee finds that the quality of representation and fairness in capital litigation can be improved by (1) providing better training, resources and support for trial judges, (2) adopting the standards for public defense in capital case listed below, and (3) improving the process for maintaining statewide lists of attorneys qualified to handle death penalty defense both as lead counsel and co-counsel.

## B. Recommendations:

The Subcommittee makes the following recommendations concerning the death penalty in Washington.

1. The State should provide full funding for all costs of prosecution and defense of aggravated murder cases. State funding should include programs and policies to assure high quality representation. The State should investigate the best model for delivery of effective and efficient representation, including the possibility of a statewide public defender agency for aggravated murder cases.

2. The defense team in a death penalty case should include, at a minimum, the two attorneys appointed pursuant to SPRC 2, a mitigation specialist and an investigator. Psychiatrists, psychologists and other experts and support personnel should be added as needed.

3. The funding agreement or budget for a public defender agency should provide for caseload adjustment when a lawyer is appointed to a death penalty case, so that the attorney may be able to devote the time and attention necessary to provide competent defense in the death penalty case. The caseload adjustment may involve hiring additional lawyers by the agency or a reduction in cases assigned to the agency.

4. Flat fees, caps on compensation and lump-sum contracts for trial attorneys are improper in death penalty cases.

5. Private practice attorneys appointed in death penalty cases should be fully compensated for actual time and service performed at a reasonable hourly rate with no distinction between rates for services performed in court and out of court. Periodic billing and payment should be available.

6. The Subcommittee's study has been limited in scope, and there are additional topics concerning the death penalty which could be addressed in a comprehensive study; therefore, the Subcommittee recommends that a separate task force created by the Legislature should be dedicated to a multi-disciplinary examination of the death penalty.[104]

7. The Administrative Office of the Courts should provide capital case training and resources for judges, the capital trial desk book should be kept current, and a judicial mentorship program in capital cases should be established.

8. The Subcommittee recommends that the Washington Supreme Court authorize the Capital Counsel Committee to create and maintain two lists of attorneys qualified to represent a capital defendant in the trial court. The first list should include those individuals who have demonstrated their qualifications, as defined in SPRC 2, to serve as "first chair" in a capital case. The second list should include those individuals who have not yet satisfied the requirements to serve as "first chair," but who are qualified to serve as "second chair" and who are interested in gaining the experience necessary to be placed on the "first chair" list. Trial courts may, but need not, appoint an attorney from the "second chair" list.

   In addition, the Subcommittee recommends that the Washington Supreme Court direct that the Capital Counsel Committee, when conducting its initial and its yearly review of applicants, solicit information from judges before whom the applicant has practiced, opposing counsel, co-counsel, peers and supervisors. The sub-committee recommends that the Washington Supreme Court direct that the Capital Counsel Committee pay particular attention to any declarations, allegations, or judicial findings of ineffective assistance of counsel.

9. The Death Penalty Subcommittee recognizes that no single statewide rate can account for the various factors that should be taken into consideration to determine

compensation for lead counsel in a death penalty case at trial level. The hourly rate established for lead counsel in a particular case should be based on the circumstances of the case and the attorney being appointed, including the following factors: the anticipated time and labor required in the case, the complexity of the case, the skill and experience required to provide adequate legal representation, the attorney's overhead expenses and the exclusion of other work by the attorney during the case. The subcommittee finds that the federal rate of $163.00 (in 2006 dollars) is a reasonable rate of compensation for private lawyers appointed as lead defense counsel in death penalty cases. The subcommittee recommends that under no circumstance should the hourly rate for lead counsel appointed in a death penalty case be less than $125.00 per hour (in 2006 dollars).

Recommendations 1 through 7 above were adopted by unanimous vote of the Subcommittee. Recommendations 8 and 9 were adopted by majority vote.

### C. Implementation:

The Washington State Bar Association should propose legislation to implement recommendations 1 and 6 listed above and an amendment to SPCR 2 to implement recommendation 8. Recommendations 2 through 5 and 9 should be included in the State Bar's standards for public defense. Bar leadership should encourage the Administrative Office of the Courts to implement recommendation 7 and support funding for it.

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**ENDNOTES:**

[1] http://www.wsba.org/lawyers/groups/blueribbonreport.pdf.
[2] 125 Wn.2d 570; 888 P.2d 1105 (1995)
[3] Klein, Stephen P., Berk, Richard A., and Hickman, Laura J., *Race and the Decision to Seek the Death Penalty in Federal Cases*, RAND Corporation (2006) http://www.rand.org/pubs/technical_reports/2006/RAND_TR389.pdf; *cf*.., Conference, *The Death Penalty in the Twenty-First Century: Race and the Death Penalty*, 45 American U. L. Rev. 239, *318* (1995) http://www.wcl.american.edu/journal/lawrev/45/death.cfm (arguing that data from a prior Rand study which purported to demonstrate lack of racial prejudice in implementation of the death penalty actually proved that the race of the victim was a significant factor in whether a defendant received the death penalty).
[4] 2006 slip 71267-1 (March 30, 2006).
[5] RCW 10.95.100, .130.
[6] Washington State Department of Corrections. www.wa.gov/doc/deathpnlty.htm
[7] *Id*.
[8] A breakdown of Washington's executions under different death penalty statutes is:

* 1904 – 1909: 9 executions
* 1909 – 1913: 6 executions
* 1913 – 1919: death penalty abolished
* 1919 – 1975: 58 executions
* 1975 – 1975: death penalty abolished
* 1975 – 1977: 0 executions

* 1977 – 1981: 0 executions
* 1981 – present: 4 executions

[9] Act of Apr. 28, 1854 Sec. 12, 1854 Wash. Laws 75, 78.
[10] Act of Mar. 22, 1909, ch. 249, Sec. 140, 1909 Wash. Laws 890.
[11] Act. of Mar. 22, 1913, ch. 167 Sec. 1, 1913 Wash. Laws 581.
[12] Act of Mar. 14, 1919, ch. 112, Sec. 1, 1919 Wash. Laws 273.
[13] Washing Criminal Code Act of 1975, ch. 260, Sec. 9A.92.010(125), 1975 Wash. Laws 1st Ex. Sess. 817, 862.
[14] 1975 – 1976 Wash. Laws 2d Ex. Sess. 17 (codified at RCWA Sec. 9A.32.045 - .047 (1977)(repealed 1981).
[15] Act of June 10, 1977, ch. 206, 1977 Wash. Laws 1st Ex. Sess. 774 (codified at RCWA ch. 10.94 (1980) (repealed 1981).
[16] *Id*.
[17] *State v. Frampton*, 95 Wn.2d 469, 627 P.2d 922 (1981) and *State v. Martin*, 94 Wn.2d 1, 614 P.2d 164 (1980) (The Washington Supreme Court concluded the statute unconstitutional because it "chill[ed] a defendant's constitutional rights to plead not guilty and demand a jury trial and violated due process. [citation omitted]. They do not meet the standards of the state or federal constitutions." 95 Wn.2d at 477).
[18] Act of May 14, 1081, ch. 138, 1981 Wash. Laws 535 (codified at RCW ch. 10.95 (1981)).
[19] RCW 10.95.020.
[20] RCW 10.95.020.
[21] RCW 10.95.030.
[22] RCW 10.95.040.
[23] RCW 10.95.050.
[24] *Id*.
[25] RCW 10.95.060(4) and RCW 10.95.070. The specific question posed to the jury is: "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?"
[26] RCW 10.95.100.
[27] RCW 10.95.130.
[28] See Justice Guys' *Status Report on the Death Penalty in Washington State*, pages 4 –5 for a more thorough explanation of the appellate review process.
[29] RCW 10.95.120.
[30] Blank trial report questionnaires may be found at http://www.courts.wa.gov/appellate_trial_courts/supreme/clerks/tjreport.doc.
[31] *See*, RCW 10.95.030 and *State v. Furman*, 122 Wn.2d 440, 858 P.2d 1092 (1993).
[32] Note that in some instances a death notice was initially filed, but may have been dismissed or withdrawn prior to trial (*e.g.*, *State v. Ridgway*).
[33] There are actually 31 death sentences but one (Furman #073) was a juvenile at the time of his offense and the sentence was reversed. The thirty death sentences are: Bartholomew (#003), Clark (#175), Finch (#154), Jeffries (#015), Luvene (#135), Mak (#013), Rupe (#031), Roberts (#176), Benn (#075), Pirtle (#132), Brett (#125), Harris (#029), Lord (#049), Marshall (#181), Rice (#043), Brown (#140), Cross (#220), Elmore (#165), Stenson (#144), Yates (#251), Davis (#180), Gentry (#119), Gregory (#216), Thomas (#194), Woods (#177), Dodd (#076), Campbell (#009), Sagastegui (#160), Elledge (#183), and Hazen (#039).
[34] One individual, Hazen, committed suicide while his appeal was pending and thus no appellate review took place.
[35] A status report of all pending death penalty appeals can be found on the Washington State Attorney General's web page at: http://www.atg.wa.gov/pubs/capital_litigation/

[36] 120 Wn.2d 1 (1992).
[37] 103 Wn.2d 1 (1994).
[38] 135 Wn.2d 67 (1998).
[39] 144 Wn.2d 62 (2001).
[40] There are two death sentences that have been reversed and remanded, but the decision whether to re-seek a death sentence is still pending. Davis (Pierce), and Clark (Snohomish).
[41] *State v. Bartholomew,* 98 Wn.2d 173, 176, 654 P.2d 1170 (1982).
[42] *Mak v. Blodgett*, 970 F.2d 614 (1992).
[43] *State v. Furman*, 122 Wn.2d 440 (1994).
[44] *Harris v. Woods*, 64 F.3d 1432 (1995).
[45] *State v. Luvene*, 127 Wn.2d 690 (1995).
[46] *Rice v. Wood*, 44 F.3d 1396 (1995).
[47] *Jeffries v. Wood*, 75 F.3d 491 (1996).
[48] *Rupe v. Wood*, 93 F.3d 1434 (1996).
[49] *Lord v. Wood*, 184 F.3d 1083 (1999).
[50] *State v. Finch*, 137 Wn.2d 792 (1999).
[51] *State v. Marshall*, 144 Wn.2d 266 (2001).
[52] *State v. Roberts*, 142 Wn.2d 471 (2001).
[53] *State v. Clark*, 143 Wn.2d 731 (2001).
[54] *In Re Brett*, 142 Wn.2d 868 (2001).
[55] *Benn v. Lambert*, 283 F.3d 1040 (2002).
[56] *Pirtle v. Morgan*, 313 F.3d 1160 (2002).
[57] *State v. Thomas*, 150 Wn.2d 821 (2004).
[58] *Personal Restraint of Cecil Davis*, Docket Number 70834-7 (Nov. 4, 2004).
[59] *Brown v. Lambert*, 431 F.3d 661 (C.A.9 (Wash.),2005)
[60] The statistical information in this section is taken from Bonczar, Thomas P. and Snell, Tracy L., "*Capital Punishment, 2004,*" *Bureau of Justice Statistics Bulletin,* U. S. Department of Justice, November 2005. http://www.ojp.usdoj.gov/bjs/pub/pdf/cp04.pdf
[61] New York had no death penalty until September 1, 1995.
[62] Bonczar and Snell*, supra*.
[63] See generally RCW 10.101.030.
[64] RCW 10.95.060, .070
[65] RCW 10.95.040
[66] *Id*. It is not uncommon to have the period between the date of arraignment to the date in which the state elects whether to file a death notice or not range from 9 to 18 months.
[67] In deciding whether to file a death notice, the state is statutorily required to review the case to determine whether or not the death penalty should be imposed when there is reason to believe that there are not sufficient mitigating circumstances to merit leniency. RCW 10.95.040
[68] Since homicide cases are often factually complex, challenges include the exclusion or inclusion of certain types of evidence (e.g., photographs, expert testimony, hearsay evidence, prior criminal convictions, etc.).
[69] Given the fluid nature of capital jurisprudence, counsel must raise and preserve legal challenges even if the courts have denied similar claims. *See, Atkins v. Virginia*, 536 U.S. 304 (2002) and *Roper v. Simmons*, 125 S. Ct. 1183 (2005) (U.S. Supreme Court overruled decades of decisions upholding the execution of mentally retarded individuals and juveniles).
[70] *Witherspoon v. Illinois,* 391 U.S. 510 (1968) and *Wainwright v. Witt*, 469 U.S. 412 (1985).
[71] RCW 2.36.150 .
[72] *Report of the Governor's Commission on Capital Punishment,* State of Illinois, 2002 http://www.idoc.state.il.us/ccp/ccp/reports/index.html

[73] *See* Appendix C.
[74] *See* Appendix B.
[75] RCW 10.95.100, 130
[76] RCW 9.94A.880
[77] SPRC 2
[78] SPRC 3; RCW 10.95.110
[79] SPRC 6
[80] SPRC 7
[81] RAP 16.22(c)
[82] RAP 16.23
[83] RAP 16.21
[84] Appellate cost data is from the Office of Public Defense.
[85] Three of these 7 cases are on-going, and thus the final fee and cost figures may vary.
[86] RCW 10.73.090
[87] RAP 16.24
[88] RCW 10.73.150
[89] RAP 16.25
[90] RAP 16.27
[91] RAP 16.26
[92] See, RAP 16.26 and 16.27
[93] Two of these 5 cases are on-going, and thus the final fee and cost figures may vary.
[94] *See, e.g.,* U.S. District Court of Washington, Western District, Local Civil Rule 104(h).
[95] These fees and costs may include both the costs of the initial habeas corpus action and appeal to the Court of Appeals.
[96] Rules of the United States Supreme Court 10.
[97] Rules of the United States Supreme Court 15(1).
[98] *See* Appendix A.
[99] *See* Appendix B.
[100] *See* Appendix C.
[101] *See* Appendix A.
[102] The Spangenberg Group, *Rates of Compensation for Court-Appointed Counsel in Capital Cases at Trial, 2002*; http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/compensationratescapital2002-table.pdf
[103] RCW 43.330.190
[104] In the 2000 legislative session, both the House and Senate considered a review of the administration of Washington's death penalty. HB 2824 and SB 6137 would have created a task force to study the administration of the death penalty in Washington State. The bills would have allocated to Office of the Administrator for the Courts (now the Administrative Office of the Courts) $150,000 over the biennium to staff the task force. The policy legislation did not pass. The state budget adopted by the legislature that year did, however, include a proviso appropriating up to $30,000 for OAC to conduct such a study. OAC declined to accept the appropriated funding, noting that the Supreme Court is statutorily obligated to review all individual death penalty cases and that having OAC conduct a death penalty study could create a conflict of interest with the court's existing statutory obligation.

In July of 2000, the Washington State Bar Association Board of Governors unanimously adopted the "Resolution to Study Death Penalty Process" that recommended then Governor Locke require a comprehensive report of the imposition of Washington's death penalty. Noting the $30,000

appropriation in the recently-passed state budget, Governor Locke deferred the study to the OAC or, in the alternative, suggested the WSBA conduct such a study.