

**Washington Death  
Penalty Assistance  
Center**

WDPAC  
810 Third Ave., Suite 800  
Seattle, WA 98104

Phone 206.447.3900  
mal@wdpac.org  
[www.wdpac.org](http://www.wdpac.org)

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# Washington's Death Penalty System

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## A Review of the Costs, Length, and Results of Capital Cases in Washington State

Mark A. Larranaga, Director

Donna Mustard, WDPAC Legal Intern

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## Summary of Findings

- Death penalty cases are more complex, more detailed, and procedurally more involved than non-capital cases.
- On average, a death penalty trial costs more than double the amount spent on a non-death penalty trial. Under one review, an average death penalty trial from 2000 to 2003 costs \$432,000, compared to \$153,000 for a non-death penalty trial.<sup>1</sup>
- Death penalty trials and appellate review<sup>2</sup> take longer than those for non-death penalty cases.<sup>3</sup> An average non-death penalty trial lasted 15 months, whereas a death penalty trial lasted 20 months. Appellate review for non-death penalty cases lasted an average of two years; death penalty review lasted **seven**.
- Since 1981, the year Washington’s current death penalty was enacted, there have been thirty-one death sentences imposed.
  - Twenty-one death sentences have completed their appellate review.
    - Seventeen death sentences (81% of completed reviews) have been reversed and **none**, after remand, have resulted in a sentence of death.
    - The reversals demonstrate the presence of systemic error leading to the death sentences being reversed rather than a single identifiable factor.
    - Four resulted in executions; three executed defendants effectively waived their federal appellate review. Only one case resulted in an execution after all review was exhausted, which took eleven years.
  - Nine sentences are still pending review.

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<sup>1</sup> Because the data are difficult to obtain, the costs data does not reflect the amount associated with capital appeals. Although outdated, see “Report to the Supreme Court and the Legislature on Defense Fees and Costs in Washington State Appellate Death Penalty Cases” by the Office of Public Defense Advisory Committee, September 30, 1998.

<sup>2</sup> Appellate review includes review by State or Federal Courts. For a more detailed explanation of appellate review see Justice Guy’s Status Report on the Death Penalty in Washington, Chief Justice Richard P. Guy, March 2000, pages 4–5.

<sup>3</sup> For purpose of this report, the term “non-death cases” is limited to those cases that are death eligible (i.e., aggravated first-degree murder), but a death notice was not filed. RCW 10.95.020.

- Since 2000, death notices and sentences have decreased while the number of reversals for previous death sentences has increased.

After 23 years under the current death penalty statute, we have spent millions of dollars, numerous years, and a significant amount of resources on a system that has netted one involuntary execution, 3 volunteers executed, and nine men who are still working their way through the appellate system with the likelihood that they, if they do not become volunteers, will end up serving a life sentence – like most of the persons upon whom the death penalty was originally imposed.

## Introduction

Over the course of the last twenty-three years, Washington's experience with capital punishment has demonstrated to be expensive, time consuming, and leads to unpredictable results. Millions of dollars have been poured into capital punishment, yet upon appellate review, nearly all death sentences have been reversed and have ultimately resulted in a sentence other than death.

Many studies have reviewed the economic impact caused by capital punishment.<sup>4</sup> In March 2000, Washington Supreme Court Justice Richard Guy examined the costs, length, and results of capital cases in Washington State and concluded:

There is no doubt that these cases are unlike all others, given the number of years their adjudication and review takes, the amount of money they cost, and their uncertain results. Partially as a result of a general lack of knowledge of the procedures governing capital cases and partially due to unrealistic expectations that the courts should be able to resolve them expeditiously, many people have articulated a loss of confidence in the justice system when discussing death penalty cases within the court trial and appellate process.

Consideration of how aggravated murder cases should be handled, and how resources should be allocated within the criminal justice system, is in the province of the legislature. It is my hope that the documentation of how capital punishment operates in Washington will be of use to the legislature and the public in assessing the benefits and burdens of death penalty cases.<sup>5</sup>

Recently, the Washington State Bar Association, citing Justice Guy's report, similarly concluded:

The expenditure of large sums of public moneys to obtain a death sentence rarely results in an execution. The extreme scrutiny and high standards to

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<sup>4</sup> A Kansas study on the costs of capital punishment concluded that capital cases are 70% more expensive than comparable non-death penalty cases. [http://www.kslegislature.org/postaudit/audits\\_perform/04pa03a.pdf](http://www.kslegislature.org/postaudit/audits_perform/04pa03a.pdf). National Bureau of Economic Research, "The Budgetary Repercussions of Capital Convictions," (2001) by Katherine Baicker concluded that capital cases burden county budgets with large unexpected costs. *See also:* Indiana Study on the death penalty (Indiana Criminal Law Study Commission, January 10, 2002); North Carolina study, "The Costs of Processing Murder Cases in North Carolina" (Duke University, May 1993) [www.pps.aas.duke.edu/people/faculty/cook/comnc.pdf](http://www.pps.aas.duke.edu/people/faculty/cook/comnc.pdf). Florida report on millions spent on capital cases (Palm Beach Post, January 4, 2000) and California Spends Millions More on Capital Cases (New York Times, January 14, 2003).

<sup>5</sup> *Status Report on the Death Penalty in Washington*, Chief Justice Richard P. Guy, March 2000. <http://www.courts.wa.gov/newsinfo/deathpen/>

which Washington and federal courts properly subject death penalty convictions and sentences translate into a life sentence in the vast majority of death penalty cases in which a guilty verdict is returned. The need of increased funding of defense services elsewhere in Washington's criminal justice system counsels against efforts to seek the death penalty, which require the expenditure of huge sums for death penalty cases that will not, upon conviction, result in executions.<sup>6</sup>

This report reviews capital cases from 1999 to 2003 to determine whether Justice Guy's conclusions are still pertinent. This report is structured as follows: Section II is an overview of Washington's death penalty statute, Revised Code of Washington (RCW) 10.95. Section III explains some procedural and substantive differences between capital and non-capital cases, demonstrating why capital cases require significantly greater resources. Section IV is a discussion of the Extraordinary Criminal Justice Costs Act (ECJCA), a project set up to reimburse some of the costs for aggravated murder cases. In Section V, we review aggravated murder cases petitioned for reimbursement under the ECJCA to compare the costs and time spent on capital cases. In Section VI, we review all death sentences that have been imposed under Washington's current death penalty statute, which provides a historical backdrop to predict likely results of future death penalty cases.

## Overview of Washington's Death Penalty Statute

Washington's current death penalty statute was enacted in 1981.<sup>7</sup> Only aggravated first-degree murder convictions carry the possibility of a death sentence.<sup>8</sup> A person may be charged with aggravated first-degree murder if the killing is premeditated and coupled with a statutorily defined aggravating factor.<sup>9</sup> A person convicted of aggravated first-degree murder may be sentenced to life in prison without the possibility of parole (LWOP) or death.<sup>10</sup>

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.<sup>11</sup> If the prosecutor files a death notice and the person is convicted of aggravated murder, a special sentencing proceeding (penalty phase) must take place.<sup>12</sup> As a general rule, the same jury that returned a guilty verdict decides whether the sentence should be

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<sup>6</sup> *Report of the Washington State Bar Association Blue Ribbon Panel on Criminal Defense*, May 15, 2004, page 29. <http://www.wsba.org/blueribbonreport.pdf>

<sup>7</sup> Act of May 14, 1081, ch. 138, 1981 Wash. Laws 535 (codified at Wash. Rev. Code ch. 10.95 (1981)).

<sup>8</sup> RCW 10.95.020.

<sup>9</sup> Revised Code of Washington (RCW) 10.95.020.

<sup>10</sup> RCW 10.95.030.

<sup>11</sup> RCW 10.95.040.

<sup>12</sup> RCW 10.95.050.

LWOP or death.<sup>13</sup> 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.<sup>14</sup>

If a death sentence is imposed, the Washington Supreme Court is statutorily required to conduct a review.<sup>15</sup> 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.<sup>16</sup> 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 their trial court proceedings or appeals, such as claims of ineffective assistance of counsel.<sup>17</sup>

## Why Death Penalty Cases Are Different

Capital cases are profoundly different than all other types of criminal cases. Besides the irrevocable punishment, capital cases are factually more detailed, legally more complex, and procedurally more involved. All these factors lead to a prolonged and costly process.

The differences between capital and non-capital cases are many. Commenting on these differences, the American Bar Association has noted:

[D]eath penalty litigation is extraordinarily complex, both for the courts and for the attorneys involved. Not only do the cases incorporate the evidentiary and procedural issues that are associated with virtually every noncapital case, but they also involve a host of issues that are unique to capital cases. These include: special voir dire of jurors; presentation of evidence going to guilt or innocence and punishment; special penalty procedures, including additional factual findings by the jury . . .

It is well established that representation of an individual in a capital case is an extraordinary responsibility placed on any lawyer . . .

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<sup>13</sup> Id.

<sup>14</sup> 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?”

<sup>15</sup> RCW 10.95.100.

<sup>16</sup> RCW 10.95.130.

<sup>17</sup> See Justice Guys’ Report, pages 4–5 for a more thorough explanation of the appellate review process.

Counsel must not only be able to deal with the most serious crime - homicide - in the most difficult circumstances, but must also be thoroughly knowledgeable about a complex body of constitutional law and unusual procedures that do not apply in other criminal cases.<sup>18</sup>

Washington law also demands procedural and substantive complexities not required in non-capital cases. For instance, in addition to the general rules applicable in non-capital cases (e.g., Criminal Rules, Evidence Rules, Criminal Code), Washington has adopted specific court rules to govern capital cases.<sup>19</sup> Because of the complexities in capital cases, Superior Court Special Proceeding Rule 2 (SPRC) mandates that a certain number of attorneys are appointed on a capital case, and at least one attorney be deemed qualified to handle such a case.<sup>20</sup>

Capital cases also require more time and effort for trial preparation. Generally, homicide cases take longer since many do not involve a witness and thus rely heavily on scientific evidence (e.g., DNA, fingerprints, ballistics) and expert testimony.<sup>21</sup> The State, therefore, commits vast resources toward its effort to prove the defendant's guilt. In turn, the defense is legally required to properly and thoroughly review the prosecution's case and develop its own theory – often necessitating the need to obtain its own experts.<sup>22</sup>

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<sup>18</sup> See American Bar Association, *Toward A More Just And Effective System Of Review In State Death Penalty Cases*, at 43, 49, 50 (October 1989) See also *Irving v. State*, 441 So. 2d 846, 856 (Miss. 1983) cert. denied (death penalty litigation is "highly specialized... [and] few attorneys have even a surface familiarity with seemingly innumerable refinements put on *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976) and its progeny") (citation omitted); *Bailey v. State of South Carolina*, 424 S.E. 2d 503, 506 (S.C. 1992) ("the attorney [in a capital case] must be conversant with constantly new interpretations of constitutional law by not only the United States Supreme Court, but by courts of all jurisdictions, both Federal and State"); *White v. Board of County Commissioners*, 537 So. 2d 1376, (Fla. 1989) (death penalty cases involve "extraordinary circumstances and unusual representation") (quoting *Makemson v. Martin County*, 491 So. 2d 1109, 1110 (Fla. 1986)); *Arnold v. Kemp*, 813 S.W. 2d 770 (Ark. 1991); *People v. Bigelow*, 37 Ca. 3d 731, 691 P. 2d 994, 209 Cal. Rptr. 328 (1984) appeal after remand (death penalty cases "raise complex additional legal and factual issues beyond those raised in an ordinary felony trial"); Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U.L. Rev. 299, 317 (1983); Gredd, *Washington v. Strickland: Defining Effective Assistance of Counsel at Capital Sentencing*, 83 Colum. L. Rev. 1544 (1983).

<sup>19</sup> See generally, Superior Court Special Proceeding Rules – Criminal (SPRC)

[http://www.courts.wa.gov/court\\_rules/?fa=court\\_rules.display&group=sup&set=SPRC&ruleid=sup\\_sprc2](http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=sup&set=SPRC&ruleid=sup_sprc2)

<sup>20</sup> See generally, Superior Court Special Proceeding Rules – Criminal (SPRC). See also *The American Bar Association Guidelines For Appointment and Performance of Defense Counsel in Death Penalty Cases* (Rev. Ed. Feb. 2003) Guidelines 5.1: Qualifications of Defense Counsel, page 35 – 37 sets out similar skill and experience requirements for handling capital cases.

<sup>21</sup> Evidence Rule 702: If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

<sup>22</sup> As examples, see *Strickland v. Washington*, 466 U.S. 668, (1984) and *In re Pers. Restraint of Brett*, 142 Wn.2d 868 (2001).

Additionally, capital defense attorneys are ethically and legally required to conduct a thorough investigation into mitigation evidence that may be presented at the penalty phase.<sup>23</sup> Mitigation evidence is anything about the defendant or the crime that a jury may consider in determining whether the sentence should be death or LWOP.<sup>24</sup> Because investigation is required into the guilt and penalty aspect of a capital case, there are significantly more witnesses to interview, substantially more documents to collect and review, and the necessity to consult with more specialized experts – all factors leading to more time and effort for trial preparation.

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.<sup>25</sup> This process – commonly called “death qualifying” – often results in a significant number of jurors being excused “for cause,” increasing the need to have more jurors summoned and questioned, thus prolonging the jury selection process.

Appellate review for a capital case is also distinctly different than review of a case where death is not imposed. As stated, under Washington law, the Supreme Court is mandated to conduct a specific review into the appropriateness of a death sentence.<sup>26</sup> This mandatory review is in addition to other issues that may be raised.<sup>27</sup>

## Extraordinary Criminal Justice Costs Act (ECJCA)

Because of substantive and procedural complexities, aggravated first-degree murder, and in particular, death penalty cases, take significantly more time, resources and costs. In an attempt to alleviate some of these burdens, the Washington State Legislature passed the Extraordinary Criminal Justice Costs Act (ECJCA) in 1999.

### A. *History of the Extraordinary Criminal Justice Costs Act*

The ECJCA was passed by the Washington State legislature in 1999 after an Omak death-penalty case nearly broke the Okanogan County budget.<sup>28</sup> The bill’s primary sponsor was Representative Cathy McMorris of the 7<sup>th</sup> Legislative

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<sup>23</sup> *Wiggins v. Smith*, 123 S. Ct. 2527 (2003)(counsel deemed ineffective for failing to investigate mitigation evidence that could be presented at the penalty phase); *Williams v. Taylor*, 529 U.S. 362; 120 S. Ct. 1495; 146 L. Ed. 2d 389 (2000); *Jackson v. Calderon*, 211 F.3d 1148 (9<sup>th</sup> Cir.2000); *In re Brett*, 142 Wn.2d 868, 16 P.3d 601 (2001).

<sup>24</sup> See RCW 10.95.070 for a list of statutory mitigating factors. A jury may also consider non-statutory mitigating factors. *Lockett v. Ohio*, 438 U.S. 536 (1978).

<sup>25</sup> *Witherspoon v. Illinois*, 391 U.S. 510, (1968) and *Wainwright v. Witt*, 469 U.S. 412 (1985).

<sup>26</sup> RCW 10.95.130.

<sup>27</sup> *Id.*

<sup>28</sup> The Seattle Times - County may get millions for Ridgway legal expenses, 8/19/2003.

District – a district that includes part of Okanogan County.<sup>29</sup> Since the administrative costs on aggravated first-degree murder cases, and in particular death penalty cases, are high and often impact the county’s budget, many bill supporters were from rural counties. When the bill was in committee, County Commissioners for Grant, Douglas, and Okanogan Counties testified in favor of the bill, noting, “[R]ural counties, including Okanogan, Douglas and Grant, have experienced significant budget impacts as a result of these types of cases. Rural counties consider this bill a high priority...[O]ne big case can break a budget.”<sup>30</sup>

The ECJCA, codified as RCW 43.330.190, was enacted to provide counties with financial relief from the extraordinary costs of investigating, prosecuting and defending aggravated murder cases.<sup>31</sup>

### **B. Mechanics of the ECJCA Program**

The Washington State Office of Public Defense (OPD), in consultation with the Washington Association of Prosecuting Attorneys and the Washington Association of Sheriffs and Police Chiefs, administers the ECJCA program. The OPD accepts applications and supporting documentation from counties, audits the information for veracity, and adjusts the total amount so that it reflects only allowed items. It then prioritizes the petitions and submits a list of petitions recommended for funding to the legislature. Per the statute, the OPD must weigh four factors when prioritizing the petitions:

1. The disproportionate impact relative to the county budget;
2. The efficient use of resources;
3. The extraordinary nature of the costs; and
4. The county’s ability to accommodate and anticipate the costs in its normal budget process.<sup>32</sup>

While prioritizing the claims, the OPD may not necessarily provide the total amount that counties claim. OPD analyzes the amounts and adjusts each claim by amounts that are either undocumented, claimed for cases that are not active with the year, capital expenses, or fixed costs.<sup>33</sup>

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<sup>29</sup> The 7<sup>th</sup> District covers Lincoln, Pend Oreille, Spokane, Stevens, and parts of Ferry and Okanogan counties. Other sponsors were also from primarily rural counties.

<sup>30</sup> Final Bill Report HB 1599 – page 3.

<sup>31</sup> Final Bill Report HB 1599 – page 1 (C 303 L 99)

<sup>32</sup> RCW 43.330.1190.

<sup>33</sup> “2002 Extraordinary Criminal Justice Costs Prioritized List Commentary” (page 1) available from the Washington State Office of Public Defense <http://www.opd.wa.gov/ExtraordCrimJustice.htm>

### **C. Results of ECJCA Program**

From 2000 to 2003, Washington counties have sought nearly 35 million dollars in reimbursement under the ECJCA. The amount of money has increased each year.<sup>34</sup> Although the ECJCA was enacted, in part, to provide smaller counties financial assistance for costs associated with aggravated murder cases, Washington's two larger counties – King and Pierce – have requested most of the reimbursement money.<sup>35</sup> For example, in 2001 the adjusted claim amount totaled \$5.4 million, with nearly \$3 million going to King and Pierce counties.<sup>36</sup>

## **A Review of Aggravated Murder Cases Petitioned Under the ECJCA From 2000 TO 2003**

### **A. Limitations of Using ECJCA Petitions to Calculate and Compare Cost**

Ordinarily, information about the specific costs associated with a particular criminal case is not readily available in a summary form. The petitions submitted under the ECJCA make some of these dollar figures publicly available.

The use of ECJCA petitions to analyze costs does have its limitations. One limitation is that the ECJCA only provides information about cases when a county files a petition. Another limitation arises when a county files a petition for a case (or cases) one year, but does not file in subsequent years even though the case (or cases) extends beyond the initial fiscal year. For example, a case may take three years to complete, but the county files only a petition for one of the three years. The failure to file for the remaining two years makes it difficult to compare counties' expenditures over time, establish the costs of an individual case if there is a break in the submissions, or to calculate and compare the costs of aggravated murder cases in the state.

### **B. Methodology**

In order to compare the costs of death penalty cases to non-death penalty cases, we obtained copies of EECJA petitions submitted for 2000, 2001, 2002, and 2003. Although the amounts reimbursed by the OPD differ slightly from those submitted, we used the costs the counties self-reported. In some instances, the totals we used in our analysis differ slightly from those the counties submitted due to addition errors in the petitions or differences in rounding. The following rules were used in our analysis:

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<sup>34</sup> The amount requested per year: 2000 = \$3.2 million; 2001 = \$7.8 million; 2002 = \$10 million; and 2003 = \$12 million.

<sup>35</sup> Although Pierce and King may have petitioned for the most money, the Legislature may not have, in fact, reimbursed the amount requested.

<sup>36</sup> See 2001 State Reimbursement of Extraordinary Criminal Justice Costs Report and Prioritized List at <http://www.opd.wa.gov/ExtraordCrimJustice.htm>.

- We considered petitions filed in 2000, 2001, 2002, and 2003.
- We used the amount based on what was petitioned for, not what was reimbursed.
- We used only those cases where the petitioned reimbursement request exceeded \$200 per year.
- If a death notice was filed and later withdrawn, we included that case in the “death penalty” category.<sup>37</sup>
- Unless noted, we did not include the petitions for *State v. Ridgway* (King County) and *State v. Yates* (Spokane County) in the costs analysis.<sup>38</sup>

### C. *An Analysis of Aggravated Murder Cases Under the ECJCA 2000 – 2003.*

We reviewed three scenarios associated with Washington’s capital punishment since 2000:

- All Cases: We reviewed all cases that were petitioned under the ECJCA from 2000 – 2003. This comparison includes those cases that are still pending and therefore incurring additional expenses.
- Completed Cases: We reviewed only those cases that were charged and completed their trial<sup>39</sup> from 1999 – 2003. “Completed cases” allow for a review into the costs and length of the trial.
- Trial Report Cases: This analysis was of the aggravated first-degree murder charges that resulted in a conviction and thus a trial report was filed with the Washington Supreme Court per RCW 10.95.120. This

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<sup>37</sup> Death notices were filed and then withdrawn in two cases covered by this study, Vasquez and Ridgway. Vasquez does not have a substantial impact on our findings regardless of the category in which it is placed. However, due to the fact that Ridgway is an unusual circumstance even among extraordinarily costly cases we prepared comparisons with and without that data.

<sup>38</sup> Both cases involve the prosecution of “serial killers.” In one, Robert Yates, the defendant was charged in numerous Washington counties with aggravated murder. Spokane County did not seek the death penalty, and after negotiation, Mr. Yates entered pleas of guilty to Murder in the First Degree. Pierce County, however, did not join in on this agreement and subsequently charged Mr. Yates with Aggravated Murder and sought the imposition of the death penalty. Mr. Yates was found guilty and sentenced to death. According to ECJCA 2001, Spokane County requested 1.7 million dollars for the Yates case, but since it received a federal Byrne grant, the amount was reduced to \$442,832.

The other case involved the prosecution of Gary Ridgway. Mr. Ridgway was charged with the murder of 48 women, over 20 years. The King County prosecutor initially filed a death notice, but after negotiation, the death notice was withdrawn. Given the extensive investigation and preparation for this case, the amount petitioned under the ECJCA was astronomical.

Because the amount of money requested for both of these cases was substantially higher than other cases our tables and charts note whether the data is included.

<sup>39</sup> “Trial” includes those cases that were determined by a jury, or judge, or involved pleas of guilty.

category of cases allows for a more extensive review into the costs, length, and results after appellate review.

**1. All Cases Petitioned Under the ECJCA from 2000 – 2003.**

According to the ECJCA, there were 94 aggravated murder cases petitioned for reimbursement from 2000 to 2003.<sup>40</sup> These petitions included cases that are still pending, that have resulted in convictions, and that have been remanded for a retrial.<sup>41</sup>

Most of the cases petitioned were not death penalty cases. Of the 94 cases, a death notice was not sought in 74 (79%) and was in 20 (21%).

The total amount of money petitioned for reimbursement under the ECJCA from 2000 to 2003 was 34 million dollars. However, excluding the extraordinary amount requested for Ridgway and Yates, the total amount requested still reached 19 million dollars. Of this \$19 million, \$11 million was requested for non-death penalty cases and 8 million for death penalty cases.

On average, death penalty cases cost nearly three times the amount spent on non-death penalty cases. From 2000 to 2003, an average non-death penalty case costs \$153,082 compared to \$432,614 spent on death penalty cases. (Table 1.)

**Table 1. All Petitions Filed Under the ECJCA From 2000 - 2003**

Total Number of Cases	Total Number of NDN Cases	Total Number of DN Cases	Total Amount of Money Requested	Total Amount of Money Requested for NDN	Total Amount of Money Requested for DN	Ave. of Money Spent on NDN	Ave. of Money Spent on DN
94	74	20	\$34,329,502	\$12,874,003	\$20,790,065	\$173,973	\$1,039,503
92 <sup>42</sup>	73	19	\$19,394,692	\$11,175,020	\$8,219,672	\$153,082	\$432,614

These petitions demonstrate that nearly 50% of the total money requested for reimbursement was from death penalty cases - which make up only 21% of the total number of petitioned cases. **Moreover, if the sentence of death was not an option, nearly 5.3 million dollars could have been allocated for other uses.**<sup>43</sup>

<sup>40</sup> There are 94 cases if Ridgway and Yates are included.

<sup>41</sup> For example, *State v. Champion* (pending), *State v. Lakey* (pending), *State v. Yates* (conviction), and *State v. Clark* (remand) are included in these petitions.

<sup>42</sup> This chart excludes Ridgway (death notice case) and Yates (Spokane, a non-death notice case). It does, however, include Yates (Pierce) where death was sought.

<sup>43</sup> This amount was derived as follows:

\$8.2 million (total number for all death cases)  
 - \$2.9 million (19 death penalty cases times the average costs for a non-death case (\$153,082))  
 \$ 5.3 million

## 2. Completed Cases.

This analysis is derived from the petitioned cases where the aggravated murder charge was filed and the trial was completed from 1999 to 2003. There were twenty-five (25) cases that meet these criteria.<sup>44</sup> Including Ridgway, a death notice was not filed in seventeen cases (68%) and was filed in 8 (32%). Substantially more money was spent on death penalty cases than non-death penalty cases.

### A. Costs:

The total costs requested for these completed cases reached 20 million dollars. However, if Ridgway is excluded from the analysis, the total amount sought was \$7.3 million. Of this, \$2.8 million was requested for non-death penalty cases and \$4.5 for cases in which a death notice was filed. Therefore, the average cost for a non-death penalty “trial” was \$167,504 while the average costs for the seven death penalty cases (excluding Ridgway) reached \$645,541.

**If the sentence of death was not an option for the eight death penalty cases, 3 million dollars could have been allocated to other uses.**

### B. Time Spent:

In addition to more money being spent on death penalty cases, significantly more time was spent on cases when death was sought than on those cases when it was not. Of the completed cases that occurred from 1997 to 2003, an average non-death penalty aggravated murder case took 13 months while death penalty cases took 25 months.

### C. Results

When a death sentence is not requested, the only sentence available for a conviction of aggravated first-degree murder is LWOP. Thus, in the seventeen cases where death was not sought, LWOP is the only sentence possible. By contrast, when death is sought, a jury may impose a sentence of LWOP or, if unanimous, death.

All of the seventeen non-death penalty cases resulted in the only sentence possible: LWOP. In half of the eight death cases, a jury returned a verdict of

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<sup>44</sup> Although Gary Ridgway and Robert Yates make up two of these cases, they are excluded from the costs analysis. They are, however, included in the analysis of the length of time for the case to be resolved.

LWOP rather than the state-requested death sentence. In one death imposed case, Covell Thomas, the death sentence has already been reversed.<sup>45</sup> (See Table 2)

**Table 2: List of “Completed” Aggravated Murder Cases  
Petitioned under the ECJCA from 1999 to 2003.**

County	Defendant's Name	Death Penalty Sought?	Type of disposition/ Sentence	Duration of Trial	Costs
Chelan	Garrett	No	Plea/LWOP	14 Months	\$237,045
Clallam	Roberts	No	Jury/LWOP	27 Months	\$64,023
Cowlitz	Fernandez	No	Jury/LWOP	9 Months	\$51,734
<b>Franklin</b>	<b>Vasquez</b>	<b>Yes<sup>46</sup></b>	<b>Plea/LWOP</b>	<b>22 Months</b>	<b>\$1,013,939</b>
<b>King</b>	<b>Cross</b>	<b>Yes</b>	<b>Plea/Death</b>	<b>27 Months</b>	<b>\$1,126,160</b>
<b>King</b>	<b>Cruz</b>	<b>Yes</b>	<b>Jury/LWOP</b>	<b>26 Months</b>	<b>\$678,329</b>
King	Jones	No	Jury/LWOP	5 Months	\$162,193
<b>King</b>	<b>Ridgway</b>	<b>Yes<sup>47</sup></b>	<b>Plea/LWOP</b>	<b>24 Months</b>	<b>\$12,471,443</b>
King	Webbe	No	Jury/LWOP	33 Months	\$705,803
King	Wentz	No	Plea/LWOP	19 Months	\$198,398
Kitsap	Hacheny	No	Jury/LWOP	17 Months	\$340,741
<b>Kitsap</b>	<b>Walradt</b>	<b>Yes</b>	<b>Jury/LWOP</b>	<b>24 Months</b>	<b>\$726,054</b>
Klickitat	Neal, Jr.	No	Plea/LWOP	8 Months	\$164,389
Klickitat	Neal, Sr.	No	Plea/LWOP	9 Months	N/A <sup>48</sup>
<b>Pierce</b>	<b>Thomas</b>	<b>Yes</b>	<b>Jury/Death<sup>49</sup></b>	<b>24 Months</b>	<b>\$260,984</b>
<b>Pierce</b>	<b>Yates</b>	<b>Yes</b>	<b>Jury/Death</b>	<b>30 Months</b>	<b>\$277,763</b>
Pierce	Price	No	Jury/LWOP	11 Months	\$11,038
Skagit	Garnett	No	Jury/LWOP	10 Months	\$114,535
Snohomish	Fischer	No	Jury/LWOP	16 Months	\$192,286
<b>Snohomish</b>	<b>Opel</b>	<b>Yes</b>	<b>Jury/LWOP</b>	<b>24 Months</b>	<b>\$435,560</b>
Spokane	Goldberg	No	Jury/LWOP <sup>50</sup>	10 Months	\$16,858
Spokane	White	No	Jury/LWOP	12 Months	\$309,833
Stevens	Lembcke	No	Jury/LWOP	9 Months	\$16,858
Yakima	Delgado, Jr.	No	Jury/LWOP	9 Months	\$105,449
Yakima	Delgado, Sr.	No	Jury/LWOP	16 Months	\$156,399

<sup>45</sup> *State v. Thomas*, 150 Wn.2d 821 (2004).

<sup>46</sup> Death notice was initially filed but later withdrawn upon a plea of guilty.

<sup>47</sup> Death notice was initially filed but later withdrawn upon pleas of guilty.

<sup>48</sup> The petition combined the money for Neal Jr. and Sr. as one amount.

<sup>49</sup> Death sentence was reversed in 2004. *Thomas v. State*, 150 Wn.2d 821 (2004).

<sup>50</sup> Court reversed the “aggravating factor” special verdict. *State v. Goldberg*, 149 Wn.2d 888 (2003).

### 3. **Trial Report Cases Petitioned Under the ECJCA from 2000 – 2003.**

This section reviews only those cases petitioned under the ECJCA from 2000 to 2003 that resulted in a conviction of aggravated first-degree murder and thus a “trial report” was filed per RCW 10.95.120.

Specifically limiting the review to “trial report” cases allows for a more extensive analysis. First, we can exclude cases that were petitioned under the ECJCA from 2000 – 2003 that are still pending, that did not result in a conviction, or in which the trial court failed to comply with the statute. Second, reviewing only trial report cases allows us to examine cases that have completed the trial stage. Finally, many of the trial report cases petitioned under the ECJCA during this period have sought appellate review, thus allowing us to review the time spent and results of the reviews.

Of the 92 petitions filed under the ECJCA from 2000 to 2003, 41 resulted in a conviction of aggravated first-degree murder, and a trial report was filed with the Washington Supreme Court.<sup>51</sup> A death sentence *was not* sought in 23 of these cases (56%). A death sentence *was* sought in 18 (43%).

#### A. **Costs:**

The total amount of money spent on the “trial report” cases during 2000 to 2003 reached 10 million dollars.<sup>52</sup> The amount sought for reimbursement for non-death penalty cases was 3.4 million dollars; death penalty cases cost twice as much: 6.7 million dollars.

At 23 non-death penalty cases costing a total of 3.4 million dollars, the average per non-death penalty case is \$147,518. By comparison, at 18 death penalty cases costing a total of 6.7 million dollars, the average per death penalty case is \$371,765. (See Table 2.)

**If death was not an option for the 18 death penalty cases, over 4 million dollars could have been allocated to other uses.**

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<sup>51</sup> This does not include Ridgway. There is no trial report for the Yates conviction out of Spokane County since he was convicted of Murder in the First Degree (and not Aggravated Murder). However, there is a trial report for the Yates conviction and death sentence from Pierce County, which is included.

<sup>52</sup> If Ridgway is included, the total expenditure is 22 million dollars.

**Table 3: All Petitions Filed Under the ECJCA From 2000 – 2003 that Ended in a Conviction of Aggravated Murder (Trial Report Filed)**

Total Number of Cases	Total Number of NDN Cases	Total Number of DN Cases	Total Amount of Money Requested	Total Amount of Money Requested for NDN	Total Amount of Money Requested for DN	Ave. of Money Spent on NDN	Ave. of Money Spent on DN
42	23	19	\$22,556,152	\$3,392,936	\$22,556,152	\$147,518	\$1,008,590
41 <sup>53</sup>	23	18	\$10,084,709	\$3,392,936	\$6,691,773	\$147,518	\$371,765

**B. Case Duration:**

RCW 10.95.120 mandates that upon a conviction of Aggravated First Degree Murder, the trial court must complete and file with the Washington Supreme Court a “trial report.” A review of these same “trial report” cases demonstrates that death penalty trials, in addition to costing significantly more, took significantly longer to complete. Additionally, the appellate review process for death penalty cases was substantially longer.

The “trial report” questionnaire requests information about the chronology of the specific case, such as the date of the incident, date of the arrest, date of the trial, penalty phase (if applicable), and date of sentencing. We used these dates to determine the length of trial and appellate review. To review the length of a trial, we calculated the date of the arrest to the date of the sentence at trial.<sup>54</sup> The appellate review was derived from the date of sentencing (trial) to the date the case was resolved on appeal, or as of September 1, 2004 if the appeal is still pending.

**1. Length of Trials:**

We classified “trial cases” into three categories: *non-death pleas*, *non-death jury*, and *death penalty cases*. We did not separate death cases into pleas and jury because under RCW 10.95.050(1) once a death notice is filed a penalty phase

<sup>53</sup> This chart excludes Ridgway (death notice case).

<sup>54</sup> We did not use the date of the incident as the starting point because in some cases the arrest of the convicted person occurred months or years later. See *State v. Gary Ridgway*.

must occur if the defendant is adjudicated guilty of aggravated first-degree murder regardless of whether by plea or verdict.<sup>55</sup>

From 2000 to 2003, there were 47 trial report cases petitioned under the ECJCA.<sup>56</sup> A sentence of death **was not** sought in 27 (57%). The break down of these cases is as follows:

- Six (6) non-death penalty cases resulted in pleas of guilty.<sup>57</sup>
- Twenty-one (21) non-death penalty cases resulted in a jury verdict.<sup>58</sup>
- Twenty (20) death penalty cases.<sup>59</sup>

The average length for a non-death case that resulted in a plea of guilty was 12 months. A non-death penalty case that proceeded with a jury determination took an average of 15.6 months to complete. By comparison, the average length of a case once a death notice was filed was 20 months – regardless of whether the conviction was based on a plea or jury verdict.

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<sup>55</sup> See RCW 10.95.050(1): If a defendant is adjudicated guilty of aggravated first degree murder, whether by acceptance of a plea of guilty, by verdict of a jury, or by decision of the trial court sitting without a jury, a special sentencing proceeding shall be held if a notice of special sentencing proceeding was filed and served as provided by RCW [10.95.040](#). No sort of plea, admission, or agreement may abrogate the requirement that a special sentencing proceeding be held.

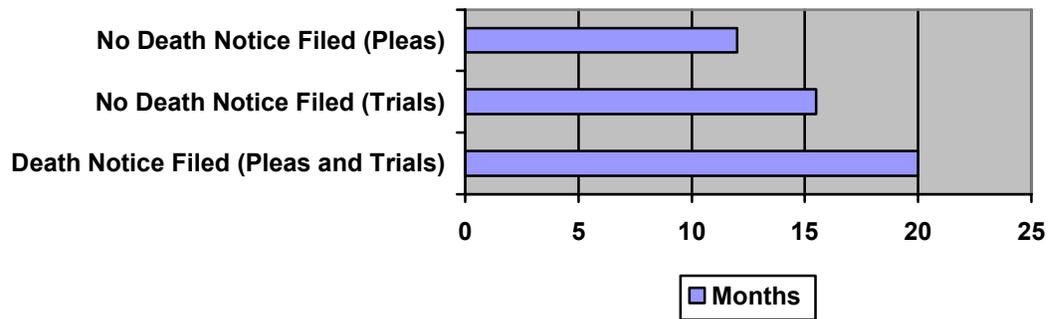
<sup>56</sup> The reason the number of “trial report” cases increased from the 41 under the costs analysis to 47 for the trial length analysis is because some of these trial report cases petitioned less than \$200, and were, therefore, not included in the costs analysis. We, nevertheless, included them in the analysis of how long the trial and appeals took.

<sup>57</sup> Garrett (Chelan, TR#255), Wentz (King, TR#249), Neal, Jr. (Klickitat, TR#218), Neal, Sr. (Klickitat, TR#219), Ruch (Pierce, TR#233), and Kinney (Whatcom, TR#245).

<sup>58</sup> Roberts (Clallam, TR#257), Fernandez (Cowlitz TR#230), Jones (King, TR#187), Webbe (King, TR#249), Foxx (King, TR#138), Anderson (King, TR#205), Mitchell (King, TR#091), Hacheney (Kitsap, TR#253), Phet (Pierce, TR#246), Price (Pierce, TR#248), Garnett (Skagit, TR#192), Fischer (Snohomish, TR#260), Howerton (Snohomish, TR#235), Skay (Snohomish, TR#170), White (Snohomish, TR#237), Eggers (Snohomish, TR#169), Goldberg (Spokane, TR#225), Thang (Spokane, TR#206), Lembcke (Stevens, TR#223), Delgado, J. (Yakima, TR#229) and Delgado, R (Yakima, TR#228).

<sup>59</sup> Vasquez (Franklin, TR#224), Cross (King, TR#220), Cruz (King, TR#256), Mak (King, TR#013), Parker (King, TR#185), Roberts, (King, TR#176), Ridgway (King, TR#263), Lord (Kitsap, TR#047), Waldradt (Kitsap, TR#227), Marshall (Pierce, TR#181), Davis (Pierce, TR#180), Gregory (Pierce, TR#216), Thomas (Pierce, TR#194), Yates (Pierce, TR#251), Clark (Snohomish, TR#175), Elledge (Snohomish, TR#183), Opel (Snohomish, TR#258), Woods (Spokane, TR#177), Pirtle (Spokane, TR#262), and Rupe (Thurston, TR#031).

**CHART 1. AVERAGE OF TIME FOR TRIAL REPORT CASES (TRIALS) FILED UNDER THE EXTRAORDINARY CRIMINAL JUSTICE ACT 2000 - 2003**



## 2. Length of Appellate Review

To determine the length of appellate review, we classified appeals into two categories: *non-death appeals* and *death penalty appeals*. We did not examine appellate review for cases where death was not sought and the defendant entered a plea of guilty to aggravated first-degree murder.<sup>60</sup>

Excluding those cases that resulted in plea of guilty and where death was not imposed, there were thirty-eight (38) appeals. The breakup of the cases is:

- Twenty-one (24) non-death appeals (jury verdict)<sup>61</sup>;
- Fourteen (14) death penalty appeals.

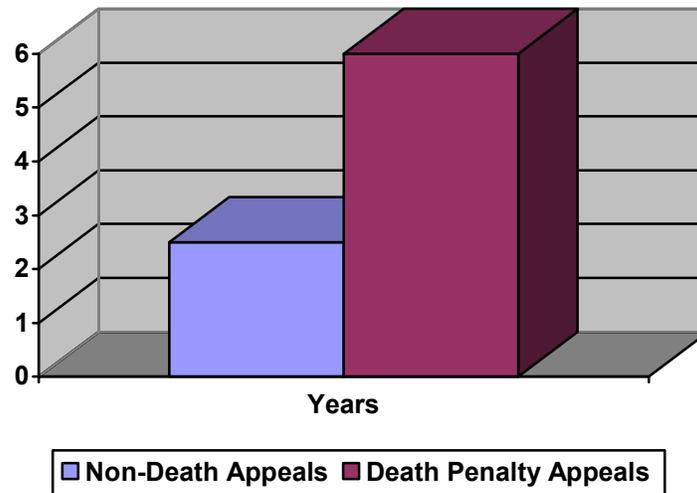
Death penalty appellate review took significantly longer than review for non-death penalty cases. As mentioned previously, a review of death penalty cases require substantially more issues not required in non-death cases (i.e., proportionality). The average length for a non-death penalty appeal lasted 29.5 months, or 2-½

<sup>60</sup> We excluded non-death penalty cases that resulted in convictions by plea since pleas are generally the byproduct of bargained -or agreements and thus appellate review rarely occurs. Moreover, when a person enters a plea of guilty, he or she waives his or her right to appeal the finding of guilt and thus any appellate review is limited to specific issues surrounding the plea (e.g., competency, waivers, voluntarily entered, etc.). There were two cases where the death notice was initially filed, but was subsequently withdrawn upon pleas of guilty: Ridgway (King, TR#265) and Vasquez (Franklin, TR#224). Since these cases did not have a jury trial nor was a death sentence imposed; these cases were classified as “non-death plea” cases and were not included the length of trial analysis.

<sup>61</sup> There are three cases in which death was sought, a jury convicted the defendant of aggravated first-degree murder, but did not impose a sentence of death. Opel (Snohomish, TR258), Parker (King, TR#185), and Waldradt (Kitsap, TR#227). These cases were placed in the “non-death appeals” since any appellate review would be limited to the aggravated murder conviction.

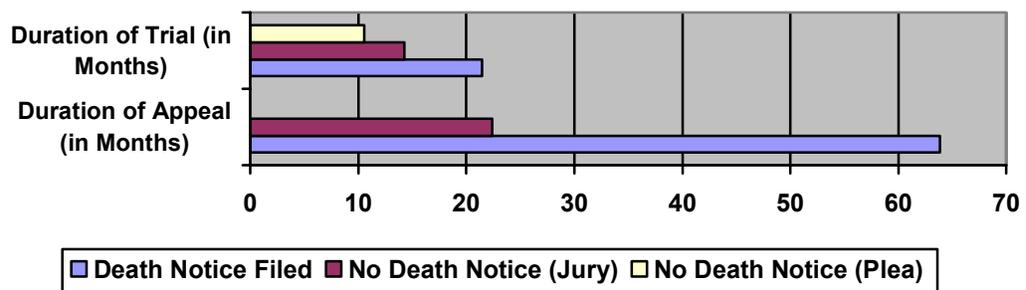
years.<sup>62</sup> Death penalty appeals, however, lasted an average of 73.5 months or six years.<sup>63</sup>

**Chart 2: Average Length of Appeals for Trial Report Cases Filed Under the ECJCA 2000 - 2003**



The length of trials and appeals for trial report cases that sought reimbursement under the ECJCA from 2000 to 2003 were significantly longer when death was sought. An average death penalty trial took nearly a half-year longer than a non-death trial and four years longer on appellate review.

**Chart 3: Average (in Months) of Trials and Appeals for Trial Report Cases Filed Under the ECJCA 2000 - 2002**



<sup>62</sup> The shortest non-death penalty appellate review lasted 9 months (Fernandez, 230) while the longest lasted 79 months (Howerton, 235). Both resulted in the conviction being affirmed. See *State v. Fernandez*, 2003 Wn.App 616 (2003) and *In Re Howerton*, 109 Wn.App 494 (2001).

<sup>63</sup> The shortest death penalty appeal (Clark, 175) lasted 24 months, whereas the longest death penalty appeal (Rupe, 031) lasted 147 months, or 12 years. Both cases resulted in the death sentence being reversed. See *State v. Clark*, 143 Wn.2d 731 (2001) and *State v. Rupe*, 93 F.3d 1434 (1996).

### 3. Appellate Review Results

We also reviewed the appeals that are completed and resulted in either being affirmed or reversed. There are nine cases in which the appeal is still pending review.<sup>64</sup> Twenty-nine (29) appeals have been completed.<sup>65</sup>

A review of the completed appellate cases demonstrates a vast difference in results. **Every completed non-death penalty appeal resulted in the conviction, and thus the sentence, being affirmed.**<sup>66</sup>

Death penalty appeals have produced a vastly different outcome. **Nine death penalty appeals have completed their appellate review. Of these, all but one has resulted in the death sentence being reversed.**<sup>67</sup> The only case not resulting in a reversal was *State v. Elledge*, where the defendant effectively waived his right to a thorough appellate review and requested to be executed.<sup>68</sup>

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<sup>64</sup> Cross (Death Penalty Appeal), Yates (Death Penalty Appeal), Davis (Death Penalty Appeal), Gregory (Death Penalty Appeal), Woods (Death Penalty Appeal), Opel (Non-Death Penalty Appeal), Cruz (Non-Death Penalty Appeal), Phet (Non-Death Penalty Appeal), and Price (Non-Death Penalty Appeal).

<sup>65</sup> Information about the appeal in *State v. Hachenev* (Non-Death Penalty) was not available

<sup>66</sup> See *State v. Fernandez*, 2003 Wn.App 616 (2003), *State v. Jones*, 2002 Wn.App LEXIS 1678 (2002), *State v. Foux*, 129 Wn. 1015 (1996), *State v. Anderson*, 112 Wn. App 828 (2002), *State v. Mitchell*, 117 Wn.2d 521 (1991), *State v. Garnett*, 2002 Wa. App LEXIS 414 (2002), *State v. Howerton*, 109 Wn.App 494 (2001), *State v. Skay*, 1998 Wn.App 63 91998), *State v. White*, 2003 Wn.App LEXIS 1189 (2003), *State v. Eggers*, 136 Wn.2d 1024 (1998), *State v. Goldberg*, 149 Wn.2d 888 (2003)(Conviction affirmed, special verdict reversed), *State v. Thang*, 103 Wn. App 660 (2000), *State v. Lembcke*, 2003 Wn.App LEXIS 56 (2003), *State v. Delgado, J.*, 2003 Wn.App LEXIS 774 (2003), *State v. Delgado, R.*, 2002 Wn.App LEXIS 1154 (2003), *State v. Webbe*, 94 P.3<sup>rd</sup> 994 (2004), and *State v. Fischer*, 2004 Wa. App LEXIS 1708 (2004).

<sup>67</sup> *Mak v. Blodgett*, 979 F.2d 614 (1996), *Lord v. Wood*, 184 F.3d 1083 (1999), *State v. Marshall*, 144 Wn.2d 266 (2001), *State v. Thomas*, 150 Wn.2d 821 (2004), *State v. Clark*, 143 Wn.2d 731 (2001), *Pirtle v. Morgan*, 313 F.3d 1160 (2002), and *Rupe v. Wood*, 93 F.3d 1434 (1996) and *State v. Roberts*, 142 Wn.2d 471 (2001). Three death sentence appeals still pending: *State v. Cross*, *State v. Yates* and *State v. Woods*.

<sup>68</sup> *Elledge* (183). See, 144 Wn.2d 62 (2001).

## Review of All Death Sentences Imposed

In “Why There Is So Much Error in Capital Cases, and What Can Be Done About It,” Columbia Law Professor Liebman, concluded:

Our June 2000 Report shows how often mistakes occur and how serious it is: 68% of all death verdicts imposed and fully reviewed during the 1973 – 1995 study period were reversed by courts due to serious error.

Analyses presented for the first time here reveal that 76% of the reversals at the two appeal stages where data are available for study were because defense lawyers had been egregiously incompetent, police and prosecutors had suppressed exculpatory evidence or committed other professional misconduct, jurors had been misinformed about the law, or judges and jurors had been biased. Half of those reversals tainted the verdict finding the defendant guilty of a capital crime as well as the verdict imposing the death penalty.<sup>69</sup>

Washington State has demonstrated this conclusion to be accurate. Since 1981, thirty-one death sentences have been handed down in Washington State.<sup>70</sup> Death sentences can be classified into two categories: pending or completed appellate review.<sup>71</sup> Nine death sentences are currently pending appellate review. As of May 2004, the average appellate review length for these pending cases is 7.2 years.

### Pending Appeals:

- **Cal Brown:** Mr. Brown was convicted and sentenced to death by a King County jury on January 28, 1994. Currently, after 128 months, the case is pending review in Federal Court (Western District of Washington).
- **Dayva Cross:** A King County jury sentenced Mr. Cross to death on June 22, 2001. The death sentence is currently on appeal in state court (Washington Supreme Court).
- **Cecil Davis:** A Pierce County jury sentenced Mr. Davis to death on February 23, 1998. The appeal is still pending after 79 months.

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<sup>69</sup> *Why There Is So Much Error in Capital Cases, and What Can Be Done About It*, James S. Liebman and Jeffrey Fagan, February 11, 2002. Interestingly, many of these reversals ultimately resulted in a sentence other than death.

<sup>70</sup> The first death sentence occurred in 1981, when a jury sentenced Mr. Dwayne Bartholomew to death. A year later, that sentence was reversed. *State v. Bartholomew*, 98 Wn.2d 173 (1982).

<sup>71</sup> One individual, Hazen, committed suicide while his appeal was pending and thus no appellate review took place.

- **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 under review by a Federal Court.
- **Allen Gregory:** Mr. Gregory's death sentence, which was imposed on May 25, 2001, and is presently under review by the Washington Supreme Court.
- **Darold Stenson:** Mr. Stenson's death sentence, which was imposed on August 17, 1994, is under review by the Federal Court (Personal Restraint Petition).
- **Dwayne Woods:** Mr. Woods' 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.

### Completed Review Cases

Appellate review has been completed for twenty-one (21) death sentences. These have either resulted in executions or reversals.

Over the last quarter of a century, Washington State has executed four individuals. The first, Mr. Charles Campbell, was executed on May 27, 1994. The last execution occurred on August 28, 2001, that of Mr. James Elledge. The average length for the reviews of these cases was approximately 4.8 years. However, of the four individuals executed, three waived their non-statutory automatic appellate review and in essence requesting the State to kill them. Therefore, the length of appellate review was reduced dramatically. The only defendant that exhausted all of his appeals and was sentenced to death was Campbell, and his appeal took over 11 years to complete.

### Executions:

- **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.<sup>72</sup>
- **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.<sup>73</sup>

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<sup>72</sup> 120 Wn.2d 1 (1992).

- **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.<sup>74</sup> He was executed on October 13, 1998.
- **James Elledge:** On October 21, 1998, in Snohomish County, Mr. Elledge was convicted and sentenced to death. After the Washington Supreme Court conducted its limited appellate review, which took 34 months, he was allowed to waive all additional appellate review.<sup>75</sup> Mr. Elledge was executed on August 28, 2001.

The majority of the death sentences imposed, however, have resulted in reversals. Seventeen (17) cases have resulted in either the conviction and/or the death sentence being reversed. The average length for these appeals was 6.9 years. Of these 17 reversals, all but two have resulted in a sentence of life without the possibility of parole – the only other sentence option for an Aggravated Murder conviction.<sup>76</sup>

Interestingly, the reversals have been attributed to all aspects of the criminal justice system: constitutionally prohibited errors (2); judicial error (6); prosecutorial misconduct (2); ineffective defense counsel (4), and jury misconduct (1).

### **Reversal Cases:**

- **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 Washington Supreme Court reversed because the 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.”<sup>77</sup>
- **Kwan Fai “Willie” Mak:** Mr. Mak was charged with aggravated murder and sentenced to death on January 8, 1991 – 8 months after being arrested. In 1996, after 7 years on appeal, the Ninth Circuit Court of Appeals overturned the death sentence. The court reversed the death sentence

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<sup>73</sup> 103 Wn.2d 1 (1994).

<sup>74</sup> 135 Wn.2d 67 (1998).

<sup>75</sup> 144 Wn.2d 62 (2001).

<sup>76</sup> The other two reversals, Thomas and Clark, have been remanded to the trial courts and are pending

<sup>77</sup> *State v. Bartholomew*, 98 Wn.2d 173, 176, 654 P.2d 1170 (1982).

because of **ineffective assistance of counsel**, trial court's error in admitting specific mitigation evidence, and erroneous jury instruction.<sup>78</sup> 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 the age of 17 years, 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.<sup>79</sup> 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**.<sup>80</sup> Mr. Harris was subsequently released from prison and is considered to be a wrongfully convicted individual.<sup>81</sup>
- **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.<sup>82</sup> 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 **he was not present** during a crucial stage of the trial.<sup>83</sup> 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

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<sup>78</sup> *Mak v. Blodgett*, 979 F.2d 614 (1996).

<sup>79</sup> *State v. Furman*, 122 Wn.2d 440 (1994).

<sup>80</sup> *Harris v. Woods*, 64 F.3d 1432 (1995).

<sup>81</sup> See Death Penalty Information Center:

<http://www.deathpenaltyinfo.org/article.php?scid=6&did=110>

<sup>82</sup> *State v. Luvene*, 127 Wn.2d 690 (1995).

<sup>83</sup> *Rice v. Wood*, 44 F.3d 1396 (1995).

because of **misconduct by the jury**.<sup>84</sup> 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.<sup>85</sup> 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 20 years after the verdict, the Ninth Circuit Court of Appeals overturned Mr. Lord’s conviction and death sentence because trial counsel rendered **ineffective assistance**.<sup>86</sup> On April 29, 2003 – about sixteen years afterward – Mr. Lord was sentenced to LWOP.
- **Charles Finch:** Mr. Finch was convicted and sentenced to death on June 21, 1995. Mr. Finch appealed. After 47 months on appeal, the Washington Supreme Court overturned his death sentence due to **error of the trial court** for keeping Mr. Finch shackled before the jury.<sup>87</sup> Mr. Finch was subsequently sentenced to LWOP, but committed suicide a month later 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.<sup>88</sup> 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**.<sup>89</sup> On September 10, 2002 Mr. Roberts was sentenced to LWOP.
- **Richard Clark:** Mr. Clark was charged, 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

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<sup>84</sup> *Jeffries v. Wood*, 75 F.3d 491 (1996).

<sup>85</sup> *Rupe v. Wood*, 93 F.3d 1434 (1996).

<sup>86</sup> *Lord v. Wood*, 184 F.3d 1083 (1999).

<sup>87</sup> *State v. Finch*, 137 Wn.2d 792 (1999).

<sup>88</sup> *State v. Marshall*, 144 Wn.2d 266 (2001).

<sup>89</sup> *State v. Roberts*, 142 Wn.2d 471 (2001).

prejudicial statements during the penalty phase.<sup>90</sup> Nearly seven years later, Mr. Clark's case is still pending.

- **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 concluding that trial counsel provided **ineffective assistance**.<sup>91</sup> 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 concluding that the **State withheld exculpatory evidence** from the defense.<sup>92</sup> 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 **trial counsel's failure to provide effective assistance**.<sup>93</sup> 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.<sup>94</sup> The State's decision whether to re-file aggravated murder and a death notice are still pending.

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<sup>90</sup> *State v. Clark*, 143 Wn.2d 731 (2001).

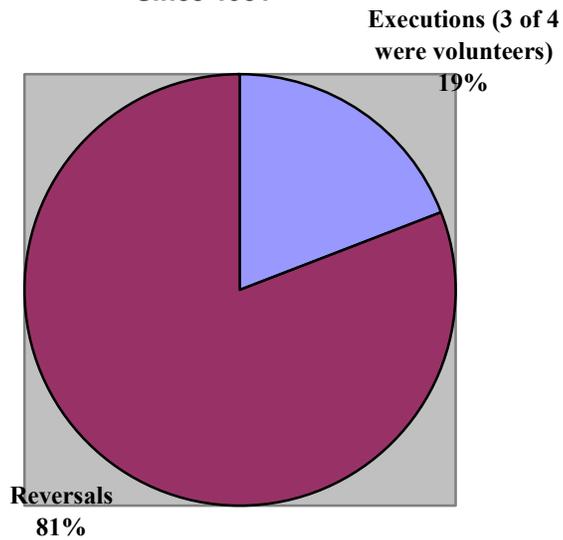
<sup>91</sup> *In Re Brett*, 142 Wn.2d 868 (2001).

<sup>92</sup> *Benn v. Lambert*, 283 F.3d 1040 (2002).

<sup>93</sup> *Pirtle v. Morgan*, 313 F.3d 1160 (2002).

<sup>94</sup> *State v. Thomas*, 150 Wn.2d 821 (2004).

**Chart 5: Completed Appellate Review of Death Sentences Imposed Since 1981**

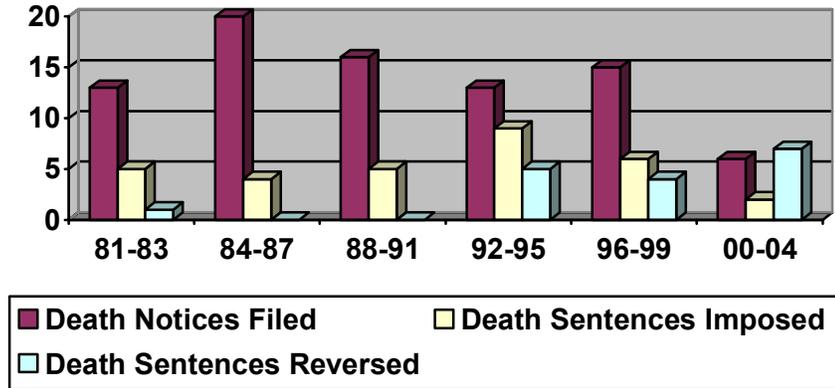


## Conclusion

Over the years, capital punishment has led to stricter procedural rules, detailed legal principles, specialized jury selection, and specific demands, which all lead to the likelihood that most death sentences will ultimately be reversed upon appellate review.

Since 2000, this phenomenon has been apparent in Washington State. As demonstrated, seventeen death sentences have been reversed in Washington State since the current death penalty statute was enacted in 1981. Seven of these reversals have been decided since 2000. Moreover, 10 of these 17 reversal cases were “re-sentenced” to LWOP over the same four-year period (this could increase by two, since Clark and Thomas are still pending). The reason for the reversals has not been attributed to one identifiable factor; the reversals point to a systemic problem with capital punishment.

**Chart 6: Trends of Death Senences Sought, Imposed and Reversed**



Over the last four years, filing of death notices and death sentences imposed has decreased, while the costs and length of death penalty trials and the and number of death sentence reversals have significantly increased.

