Approved: May 22, 2009
Date

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Thomas C. (Tim) Owens at 9:30 a.m. on February 26, 2009, in Room 545-N of the Capitol.

All members were present.

Committee staff present:
Jason Thompson, Office of the Revisor of Statutes
Doug Taylor, Office of the Revisor of Statutes
Jill Wolters, Office of the Revisor of Statutes
Athena Andaya, Kansas Legislative Research Department
Jerry Donaldson, Kansas Legislative Research Department
Karen Clowers, Committee Assistant

Conferees appearing before the committee:
Senator Carolyn McGinn
Senator David Haley
Richard Dieter, Executive Director, Death Penalty Information Center, Washington, DC
Sean O'Brien, Attorney, Kansas City, MO
Rebecca Woodman, Attorney, Lawrence, KS
Sue Norton, Murder Victims' Families for Reconciliation, Arkansas City, KS
Dr. Michael Birzer, Kansas Coalition Against the Death Penalty
Michael Schuttloffel, Executive Director, Kansas Catholic Conference
Duane Friesen, Mennonite Churches of Central Kansas
Pat Scalia, Board of Indigent Defense
Forrest Swall, Former House of Representatives Member
Ron Evans, Chief, Death Penalty Defense Unit

Others attending:
See attached list.

The Chairman opened the hearing on **SB 208 - Abolishing the death penalty**.

Senator Carolyn McGinn appeared as sponsor of the bill. The Senator indicated the death penalty has become an expensive and inefficient way to protect society against offenders and deliver justice to victims and their families. In addition to saving state funds, life without parole will ensure murderers will be punished for their crimes while protecting the citizens of Kansas. (Attachment 1)

Senator David Haley testified in support stating the death penalty costs millions of dollars and referred to the *Performance Audit Report Costs Incurred for Death Penalty Cases: A K-Goal Audit of the Department of Corrections, A Report to the Legislative Post Audit Committee,* by the Legislative Division of Post Audit, State of Kansas, December 2003. Senator Haley indicated the report states that each death penalty case costs approximately $500,000 more than a non-death penalty case. The Senator urged the enactment of **SB 208.** (Attachment 2)

Richard Dieter spoke in favor indicating there has been a national trend away from the death penalty in the United States. Since 1999 there has been a 60% drop in death sentences and a 50% decline in executions. When given a choice, more people prefer a life without parole rather than a death sentence. Part of this attitude is a result of the innocence issue, cases where innocent people have been wrongly convicted. This in turn has contributed to the increasing time requirements of a capital cases, the appeals process and the associated increased cost. (Attachment 3)

Sean O'Brien appeared as a proponent explaining factors that contribute to the cost of representation in a capital trial which include:

- the constitutional obligation to provide competent legal representation,
- guidelines and standards pertaining to the investigation and presentation of mitigation evidence,
- and issues involving expert assistance, recruiting and training counsel, and other death penalty issues. (Attachment 4)

Sue Norton spoke in support providing personal experience and the effect the long drawn out emotionally draining, she said it is devastating to watch the execution and she does not have closure and is not healed bythe death of the man who murdered her Father and Step-mother in Oklahoma. Repercussions are wide-spread and long lasting when someone is put in prison for life without parole. Ms. Norton urged the removal of the death penalty and recommended enactment of **SB 208.** (Attachment 5)

Rebecca Woodman appeared in support stating the cost of the death penalty in Kansas is too costly to justify its use both financially and psychologically. Death penalty cases require extraordinary and unique expenditures often over several years costing the State millions of dollars. A death verdict at trial is not an end but marks the beginning of a process continuum that is expensive, time-consuming, emotionally draining and highly error-prone. (Attachment 6)

Michael Bizer spoke in favor stating capital punishment poses a host of problems. These include:

- lack of empirical evidence the death penalty is a deterrent,
- disparities in who receives the sentences,
- the cost of the death penalty, and
- the possibility of an innocent person put to death.

Mr. Bizer feels the death penalty is not a meaningful solution to crime and abolition of the death penalty would potentially save an astronomical amount of money which could be put to better use. (Attachment 7)

Michael Schuttloffel appeared as a proponent stating in modern industrialized societies capital punishment is not necessary. We have the technological means to ensure that those who would do us harm are incarcerated for life. The Catholic tradition makes room for the taking of human life in cases of defense against an aggressor, it makes no room for killing for the sake of revenge. By incarcerating a convicted criminal, society provides itself with time to ensure the correct verdict has been reached, permits the criminal time to reflect and possibly arrive at a conversion of heart. (Attachment 8)

Duane Friesen spoke in favor stating the death penalty is not necessary to protect the public and is expensive to administer. A life sentence without parole fits the gravity of the crime, will provide swifter justice, and is more likely to provide the context for victims to focus on their own healing. The criminal justice system is not perfect and innocent persons have been executed, and it has been applied disproportionately to the poor and minorities. (Attachment 9)

The Chairman indicated the hearing would continue tomorrow.

The next meeting is scheduled for February 27, 2009.

The meeting was adjourned at 10:30 a.m.

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 2/26/09

NAME	REPRESENTING
Donna Schneweis	Amnesty International
Michael Birzer	Wichita State Univ
Forrest Swall	Lawrence Unitarian Universalists
Richard Dieter	Death Penalty Information Center
Rebecca Woodman	Capital Defense Atty / Assist Prof. Washburn Law
Sue Morton	Murder Victims for Reconciliation
PAT SCALIA	Board of Indigents' Defense
Ron Evans	Board of Indigents Defense
BEATRICE SWOOPES	KANSAS CATHOLIC CONFERENCE
David Hansen	KS Coalition Against Death Penalty
Tobias Schlingensiepen	FIRST CONGREGATIONAL CHURCH, TOPEKA
Judith Ummenhofer	Protestantische Kirche Baden, Germany
Cynthia Neufeld Smith	Southern Hills Mennonite Church, Topeka
Roxanne Siemens	Southern Hills Mennonite Church, Topeka
[redacted] Catholic	Washburn Univ. School of Law, Students in Legis. Workshop
Roger P. Reitz M.D.	Kansas State Senator
Larry Dixon	Southern Hills Mennonite Ch., Topeka
Richard Simaviego	Kansas Legislature

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 2/25/09

NAME	REPRESENTING
Duane K. Friesen	Mennonite Churches in Central KS
James C. Juhnke	Mennonite Churches
Miriam Dofsinger	Mennonite Churches in Central KS
Roger Barringer	
Sheila Head	KSAG
Dan Gibb	KSAG
Ben Sciortino	Myself
Bill Lucero	MVFR of KS
Sisters Therese Bangert	Ks. Catholic Conference
Carolyn Zimmerman	Herself + Amnesty
Gaynor Briggs	Observer - Supporter
Samantha Snyder	KU Amnesty International
Michael Schuttloffel	Kansas Catholic Conference

CAROLYN McGINN
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State of Kansas
Senate Chamber

COMMITTEE ASSIGNMENTS
CHAIR: NATURAL RESOURCES
VICE CHAIR: WAYS & MEANS
MEMBER: UTILITIES
LOCAL GOVERNMENT
CHAIR: JOINT COMMITTEE ON ENERGY AND ENVIRONMENT
JOINT COMMITTEE ON KANSAS SECURITY

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Testimony in Support of Senate Bill 208
Presented to the Senate Judiciary Committee
February 26, 2009

Thank you, Chairman Owens and members of the committee, for giving me the opportunity to testify before you today. Senate Bill 208, to abolish the death penalty, addresses a very important and emotional subject in our society: how to punish offenders of some of the most heinous crimes in our state. I come before you today to establish that the use of capital punishment is not only an expensive way to protect society against such persons, but a costly and inefficient way to deliver justice to the victims and their families.

In addition to information from other states, a 2003 Kansas legislative post-audit report found that "the estimated median cost of a case in which the death sentence was given was about 70% more than the median cost of a non-death penalty murder case, that figure was $1.2 million compared to $740,000." Today you will hear compelling evidence from many different sources for why we should stop using the death penalty. I would ask that you pay special attention to several conferees that bring important experience and facts to this discussion:

Richard Dieter, Executive Director of the Death Penalty Information Center, will speak on the national trends of the death penalty and how these relate to the dilemmas of innocence and cost.

Sean O'Brien is a capital litigator with decades of experience in death penalty cases in Missouri, Kansas and other states. He will speak to the complexity of the death penalty process and how that has an impact on cost.

Rebecca Woodman, an appellate defender, will testify on many of the legal and constitutional inconsistencies that the death penalty presents in our state.

Sue Norton, who knows the grief of losing a loved one to homicide, will speak on her personal and family's experience with the death penalty process.

Michael Birzer, a leading criminologist and former law enforcement officer, will address capital punishment, crime prevention, and deterrence. Others will testify on other components of the death penalty to consider.

Senate Judiciary
2-26-09
Attachment 1

Please keep in mind, looking at the death penalty as a way to save state funds is not unique to Kansas. Lawmakers in as many as six other states, including Colorado and Nebraska, are considering legislation that would abolish the death penalty. With the drastic cuts we are looking at in 2010 and beyond, we need to look at ways to save in areas that might prevent future crimes, such as education and community corrections. Families and communities who have been violated and victimized by heinous crimes deserve to know the murderer will be punished. The safety of our citizens is our first priority, and we can secure this with life without parole.

Please consider passing SB 208 favorably out of committee. Thank you for giving me time to testify before you today.

Senator Carolyn McGinn

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SENATE CHAMBER

DAVID B. HALEY
SENATOR
DISTRICT 4
WYANDOTTE COUNTY

SENATE BILL 208 **February 26, 2009**

ABOLISHING THE DEATH PENALTY

TO : Hon. Tim Owens, Chair ; Hon. Derek Schmidt, Vice-Chair & Members

KANSAS SENATE JUDICIARY COMMITTEE

Mr.Chairman & Members of the Committee. Thank you for holding a hearing on SB 208.
Senate Bill 208 basically abolishes the Kansas death penalty. Despite the many moral and teleological justifications that a truly "civilized society" has for doing away with a statute that once reinstated, our State, has never actually used,

SB 208 points to one glaring, irrefutable Truth :our Death Penalty costs millions of dollars.
This point was driven home in a Performance Post Audit report which I requested and which was delivered to our State in December of 2003. The report I requested, after years of trying to get this important topic heard, conclusively shows that each death penalty case costs approximately $500,000. ***more*** than a non death penalty case.

(Attached to my Testimony is a copy of this Report, in the powder blue paper binder.)
Again, this was as of 2003. It is to be inferred that such costs have ***not*** decreased.

Allow me too, Mr. Chair, to also share an article from the front page of the Topeka Capitol-Journal (dated 02/22/05) for your perusal. (Apology. Only have 3 original copies left to share.)

The great Kansas statesman and noted "Voice of Kansas" Bill Kurtis in his insightful expose "The Death Penalty On Trial"on Page 198 had this to say "..."

So, please. Let us evolve and resolve as decent, cash strapped human beings to, for once, stop beating our collective legislative chests and shrieking "Vengeance is mine..."

I could go on but since there are many other conferees, I will defer to them and be pleased to stand for questions at the appropriate time.

I urge your favorable consideration of SB 208.
I believe, our fellow Senators deserve the opportunity to weigh in on this fiscal debate.

Thank you again, Mr. Chairman; Members.

haley@senate.state.ks.us

Senate Judiciary
2-26-09
Attachment 2

Testimony before the Senate Judiciary Committee Regarding SB 208

Kansas State Legislature

Topeka, Kansas

February 26, 2009

by Richard C. Dieter
Executive Director
Death Penalty Information Center

INTRODUCTON

Good morning, Chairman Owens, Members of the Judiciary Committee. I would like to thank you for the invitation to testify before you regarding SB 208 on the abolition of the death penalty.

My name is Richard Dieter. Since 1992, I have been the Executive Director of the Death Penalty Information Center[1] in Washington, DC. The Center is a non-profit organization that conducts research and publishes reports on issues related to capital punishment in the United States. I am an attorney and an adjunct professor at the Catholic University Law School in Washington.

The Center's role is not to advocate for particular pieces of legislation but to focus on research and trends in the death penalty, identifying problems and pointing to possible remedies. In my presentation today, I hope to give the Committee a national perspective on the status of capital punishment in this country, focusing particularly on the cost-and-benefit analysis that many states are considering, and identify the relationship between costs and other key death penalty concerns. I would be more than happy to answer any questions that members of the Committee may have at any time.

THE STATUS OF THE DEATH PENALTY

There has been a clear national trend away from the broad use of the death penalty in the United States in recent years. Since 1999, there has been a 60% drop in

[1] . Death Penalty Information Center, 1101 Vermont Ave. NW, Suite 701, Washington, DC 20005; ph: 202-289-2275; Web site: www.deathpenaltyinfo.org; email: dpic@deathpenaltyinfo.org.

death sentences, a 50% decline in executions, and a decrease in the size of death row.[2] Public support has dropped from a high of 80% support in 1994 to 64% in the most recent Gallup Poll.[3] Moreover, when the public is given a choice between a sentence of life-without-parole for murder and the death penalty, more people would prefer the life sentence.[4] The sentence of life without parole is now available in virtually every state in the country, including Kansas.[5]

Since Kansas reinstated the death penalty in 1994, it has averaged less than one death sentence per year[6] and has carried out no executions in the past 40 years. Although those numbers are less than the national average among death penalty states, Kansas is not alone in its infrequent use of the death penalty. Every region of the country and every state that averaged one or more death **sentences** per year have seen a decline in the annual number of death sentences between the 1990s and the current decade.[7] Almost all of the states with the death penalty (27 out of 36) have averaged less than one **execution** per year over the past 30 years.

The executions that have been carried out have become increasingly restricted to just one area of the country–the south. Last year there were 37 executions—95% were in the south, and most of those were in just one state—Texas. Most states with the death penalty had no executions in 2008 and no executions in 2007.

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[2] . See, e.g., Bureau of Justice Statistics Annual Report on Capital Punishment, at <http://www.ojp.usdoj.gov/bjs/pub/html/cp/2007/cp07st.htm> (2008) (including data on 2007 and preliminary data on 2008).

[3] . See Gallup Poll, Oct. 3-5, 2008, <http://www.gallup.com>.

[4] . See Gallup Poll, < http://www.gallup.com/poll/23548/Support-Death-Penalty-Years-After-Supreme-Court-Ruling.aspx>.

[5] . Only New Mexico and Alaska do not use a sentence of life without parole.

[6] . Bureau of Justice Statistics, *Capital Punishment*, annual reports.

The growing skepticism about the death penalty and its declining use has led some states to take concrete actions away from this punishment. New Jersey voted to abolish the death penalty in 2007, and New York has also abandoned capital punishment, despite having reinstated it in 1995, one year after Kansas. Illinois has had a moratorium on executions since 2000 that remains in effect. Other states such as California, North Carolina, Maryland and Tennessee have recently instituted careful studies of their death penalty process. This year, eight states have had abolition bills introduced into their legislatures.[8] Finally, the U.S. Supreme Court has restricted the use of the death penalty and placed more demands on states to oversee this process carefully through a series of cases.[9]

It is important to realize that the trends in the use of the death penalty were in the opposite direction in the prior decade. Executions, the size of death row and public support for the death penalty were all on the rise in the early 1990s. New states were adopting the death penalty and the federal death penalty was greatly expanded. But the expansion of the death penalty turned into a sharp decline when the public became aware that so many mistakes were being made in capital cases. Advances in DNA testing and the images of death row inmates walking out of prison greeted by their

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[7] . See Death Penalty Information Center, "Sentencing," at http://www.deathpenaltyinfo.org/death-penalty-sentences-have-dropped-considerably-current-decade.

[8] . Maryland, New Hampshire, Colorado, Montana, New Mexico, Nebraska, Washington, and Kansas.

[9] . See, e.g., *Atkins v. Virginia* (2002) (excluding the mentally retarded), *Roper v. Simmons* (2005) (excluding juvenile offenders), *Kennedy v. Louisiana* (2008) (excluding crimes against a person where no death resulted), and *Wiggins v. Smith* (2003) (requiring more thorough mitigation investigations).

attorneys and the journalism students who helped free them have had a profound impact on the use of the death penalty.[10]

THE INNOCENCE ISSUE

The decline in the use of the death penalty has correlated directly with the rise in importance of the innocence issue. The American people now know that the problem of innocence is a lot more serious than was previously thought. Since 1973, 130 people who were sentenced to death in 26 states have been freed after their convictions were reversed. On average, it took about 9.5 years between the defendant's sentencing and his or her exoneration.

In the vast majority of these cases, the defendants were acquitted of all charges at a retrial or the prosecution decided to drop all charges.[11] In the few remaining cases, a governor granted a complete pardon based on innocence. For every 9 people who have been executed since 1973, there has been one person slated for execution who was innocent and fortunately freed from death row. That represents a substantial risk when human lives are at stake.

Nor is this problem of innocence restricted to the earlier years of the death penalty. Most of the 130 people who have been freed were exonerated since 1995, and 46 were freed since the beginning of 2000. Four people were exonerated in 2008.

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[10] . See Frank Baumgartner et al., *The Decline of the Death Penalty and the Discovery of Innocence* (2008) (Cambridge Press).

[11] . See R. Dieter, *Innocence and the Crisis in the American Death Penalty,* Death Penalty Information Center (2004), listing the first 116 cases and discussing the problem generally. See also DPIC's Web site

The reversals in these 130 cases do not prove that the system works. Many of the cases indicate just the opposite. The 17 cases where people were freed as the result of post-conviction DNA testing are a stark reminder of the fallibility of our justice system. DNA testing evolved as a tool of science. If this technology had emerged ten years later, many of those 17 people may have been executed. It is important to note that the typical DNA case resulted not only from a unanimous jury conviction and a unanimous vote for a death sentence, but was also affirmed at numerous levels of appeal.

Many of the other exonerations similarly occurred because of fortuitous circumstances outside of the normal justice system. In some instances, journalism students were able to uncover glaring flaws in the original evidence, and were even able to locate the actual murderer. The media played an important role in many of the cases, and in others, volunteer lawyers from major law firms revisited the evidence and trial records. They donated thousands of free hours resulting in the freeing of death row inmates. But that kind of attention, and the millions of dollars for appeals that accompany it, is only applied to a few cases. Many people have been executed where there was considerable evidence that they may have been innocent, but there was neither the time nor the resources to thoroughly examine their cases.[12]

CAPITAL CASES ARE TIME CONSUMING

In addition to contributing to the declining use of the death penalty, the innocence issue has also affected the pace of capital cases and increased their costs.

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http://www.deathpenaltyinfo.org under "Innocence" for a complete list of all cases and the criteria for inclusion on the list.

Much of the delay is a healthy caution resulting from the near executions of innocent people. It is also the result of years of a much broader use of capital punishment, which created large death rows and a backlog of cases in the appellate courts.

For executions carried out in 2007 (the last year for which complete data is available), the average time between sentencing and execution was 12.7 years, the longest time for any year since the death penalty was reinstated in 1976.[13] The times in 2005 and 2006 were also longer than any previous years since the death penalty was reinstated. Even in Texas, the time between sentencing and execution is ten years. No state, including those with the fewest protections, has found a way to make the death penalty process work quickly. In some states, inmates are on death row for 20 or even 30 years awaiting execution. About 275 inmates have been on death row for 24 years or more.[14]

This extensive delay results in the imposition of two sentences on the defendant: a life sentence in highly restricted confinement, *and* a death sentence that may never be carried out. Of the capital cases that have been concluded, only about one-quarter of those sentenced to death were executed.[15] Three-quarters of the defendants were permanently removed from death row for other reasons.

Such a system is enormously expensive for the state and a source of frustration for many. Death penalty cases are very costly to prosecute and defend compared to

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[12] . See, e.g., T. Ganey, "Was the Wrong Man Executed, "St. Louis Post-Dispatch, July 11, 2005, regarding the case of Larry Griffin who was executed in 1995 in Missouri.
[13] . See Bureau of Justice Statistics, note 2 above (Table 11).
[14] . See Bureau of Justice Statistics, Capital Punishment, 2005 (2006), appendix Table 3.

similar cases without the death penalty. When a death sentence is handed down, there will be years of expensive appeals and a form of incarceration that is much more expensive than the costs in general population. And at the end of the process, most defendants will end up with a life sentence anyhow—though one achieved through the most expensive process in the criminal justice system—the death penalty.[16] Those left with a death sentence will probably not be the worst offenders, but rather an unfortunate few determined by arbitrary factors. Even for many supporters of capital punishment, this system makes little sense.

It has also created skepticism among the public regarding the value of such a nebulous form of justice. Indeed, some family members have remarked that, given the extensive time, the unpredictability of the outcome, and the painful re-living of the tragedy that inevitably accompanies this process, it would have been better if a life sentence had been imposed in the first place.[17]

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[15] . See Bureau of Justice Statistics, note 2 above (Table 10) (cases "concluded" are those executed (1,099) and those permanently removed from death row (3,228) as of 2007).

[16] . A study at Columbia University Law School demonstrated how few capital cases actually result in an execution: the study found that 68% of death penalty sentences or convictions are overturned on appeal. The serious errors that were discovered required at least the sentencing phase to be done over. When these death penalty cases were re-tried, approximately 82% resulted in a life sentence. Thus, the typical death penalty case has all the expenses of its early stages and appeal; it is then overturned, and a life sentence is imposed, resulting in all the costs of a lifetime of incarceration. James S. Liebman, "A Broken System: Error Rates in Capital Cases," (Columbia Univ. June, 2000) (executive summary).

[17]. James O'Brien's daughter Deidre was murdered in 1982, and the capital trials and appeals for the man convicted of the crime lasted many years. O'Brien stated, "I've lived through the state's process of trying to kill [a murderer], and I can say without hesitation that it is not worth the anguish that it puts survivors through...." Because of the "horrendous toll" the process took on his family and the little closure it gave them, O'Brien, a resident of St. Michael's, Maryland, called for abolition of the death penalty. Regarding closure for the family, he said, "the death penalty forces that closure further away than any other punishment on the books." J. O'Brien, "Death Penalty Punishes Victims' Families, Too," The Daily Record, Nov. 25, 2007.

RELATIONSHIP BETWEEN COSTS AND INNOCENCE

The death penalty on the cheap is really no bargain. There is no abstract dollar figure for the cost of the death penalty--it ultimately depends on the quality of the system a state demands. In Illinois, their system was fraught with error. Over a 20-year period, they freed more innocent people from death row than they executed. As a result, a blue-ribbon commission there recommended 85 changes to make the death penalty more reliable; most of these changes, if implemented, will cost the state even more money.[18]

There is little dispute that the death penalty is expensive. Sentencing someone to life in prison is also very expensive. But death penalty costs are accrued up-front, especially at trial and for the early appeals, while life-in-prison costs are spread out over many decades. A million dollars spent today is a lot more costly to the state than a million dollars that can be paid gradually over 40 years.

Death penalty cases are clearly more expensive at every stage of the judicial process than similar non-death cases. Everything that is needed for an ordinary trial is needed for a death penalty case, only more so:

- more pre-trial time will be needed to prepare: cases typically take a year to come to trial
- more pre-trial motions will be filed and answered
- more experts will be hired
- twice as many attorneys will be appointed for the defense, and a comparable team for the prosecution
- jurors will have to be individually quizzed on their views about the death penalty
- they are more likely to be sequestered
- two trials instead of one will be conducted: one for guilt and one for punishment

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[18] . Report of the Governor's Commission on Capital Punishment (Illinois, released April 15, 2002).

- the trial will be longer: a cost study at Duke University estimated that death penalty trials take 3 to 5 times longer than typical murder trials
- and then will come a series of appeals during which the inmates are held in the high security of death row.

These individual expenses result in a substantial net cost to the taxpayer to maintain a death penalty system as compared to a system with a life sentence as the most severe punishment. It is certainly true that after an execution the death row inmate no longer has to be incarcerated while the life-sentenced prisoner remains under state care. But that partial saving is overwhelmed by the earlier death penalty costs, especially because relatively few cases result in an execution, and, even those that do occur, happen many years after the sentence is pronounced.[19]

Theoretically, Kansas might fashion a more efficient death penalty system. Texas, for example, has executed about one-third of the people it has sentenced to death. Even at that rate, it has been estimated that the **extra** costs of the death penalty in Texas are about $2.3 million per case.[20] And Texas' "efficient" death penalty system has also been accompanied by a record of sleeping lawyers, prosecutorial misconduct, and sharp reprimands from the U. S. Supreme Court.[21]

Most of the cost studies that have been conducted do not look solely at the costs of an isolated case. Rather the best analyses compare a **system** in which the death

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[19] . Some commentators have suggested that the existing cost studies ignore the possible financial savings from the theory that the threat of the death penalty results in more plea bargains. However, many of the studies do mention this plea bargain factor: see, e.g., note 22 below (North Carolina); Indiana Criminal Law Study Commission, January 10, 2002. These studies considered such a factor to be speculative or that such pleas were restricted by state law. Moreover, if this was the avowed purpose of the death penalty, it is doubtful that courts would uphold the constitutionality of such an intentional interference with the right to trial.

[20]. C. Hoppe, "Executions Cost Texas Millions," Dallas Morning News, March 8, 1992, at 1A.

[21] . See, e.g., Miller-El v. Dretke, 125 S. Ct. 2317 (2005) (race bias in jury selection).

penalty is employed to a system dealing with similar crimes in which a life sentence is the most severe punishment allowed. At every step of the analysis, the question is asked: how much more, or less, does the system with the death penalty cost compared to the other system?[22]

Not every cost associated with the death penalty appears as a line item in the state budget. Prosecutors, judges, and public defenders are usually salaried employees who will be paid the same amount to do death penalty cases or other work. But it would be a superficial analysis to not count the extra time that pursuing the death penalty takes in a case compared to the same case prosecuted without the death penalty. If it takes 1,000 hours of state-salaried work to arrive at a death sentence and only 100 hours to have the same person sentenced to life without parole, then the 900 hours difference is a state asset. If the death penalty is eliminated, the county or the state can decide whether to direct those employee-hours to other work that had been left undone, or it could choose to have less employees. But there is a financial dimension to all aspects of a death penalty cases and the better cost studies take these "opportunity costs" into account.

COST STUDIES

The major cost studies on the death penalty all indicate that it is much more expensive than a system where the most severe sentence is life in prison. In recent

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[22] . See, e.g., P. Cook, "The Costs of Processing Murder Cases in North Carolina," Duke University (May 1993). This is probably the most comprehensive cost study conducted in this country. It found that the death penalty costs North Carolina $2.16 million per execution over the costs of a non-death penalty system imposing a maximum sentence of imprisonment for life. These findings are sensitive to the number of executions the state carries out. However, the authors noted that even if the death penalty were 100% efficient, i.e., if **every** death sentence resulted in an execution, the **extra** costs to the taxpayers would still be $216,000 per execution.

years, cost studies have been used not just to determine the bottom line in dollars and cents for this system, but as a way of evaluating whether the death penalty is justified in comparison to other pressing state needs. In this context, it is the amount of money spent *per execution that* is significant. For example:

- On June 30, 2008, the California Commission on the Fair Administration of Justice released a 107-page report on the state's capital punishment system, calling it "dysfunctional" and a "broken system." The report stated that the state was spending $137 million per year on this failed system and that $95 million per year more was needed just to lessen the backlog of cases. That would amount to spending $232 million per year while the number of executions has averaged less than one per year. Thus, the cost *per execution* would be over $200 million. The Commission estimated that a comparable system that sentenced the same inmates to a maximum punishment of life without parole would cost only $11.5 million per year.[23] Meanwhile, the state has also indicated that it needs about $400 million more for a new death row.

- In New York and New Jersey, the high costs of capital punishment were one factor in those states recently abandoning the death penalty. New York spent over $170 million over 9 years and had no executions.[24] New Jersey spent $250 million over a 25-year period and also had no executions.[25]

- In Maryland, which is seriously considering abolishing the death penalty this year, a sophisticated cost study by the Urban Institute indicated that costs to taxpayers for having the death penalty between 1978 and 1999 will be $186 million.[26] During that time, Maryland has had 5 executions. Hence, the cost per execution is over $37 million each.

And the cost per execution is growing. In 1988, the *Miami Herald* estimated that the costs of the death penalty in Florida were $3.2 million per execution, based on the rate of executions at that time.[27] Florida's death penalty system bogged down for a number of reasons, including a controversy over the electric chair. As a result, a more

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[23] . See Calif. Com. on the Fair Administration of Justice, http://www.ccfaj.org/rr-dp-official.html, June 30, 2008.

[24] . See, e.g., D. Wise, "Capital Punishment Proves to Be Expensive," New York Law Journal, April 30, 2002, at p.1; see also "Costly Price of Capital Punishment—Case Shows Effort Expended Before the State takes a Life," Albany Times-Union, Sept. 22, 2003 (over $160 million spent in 7 years).

[25] . See Newsday, Nov. 21, 2005.

[26] . See J. McMenamin, "Death penalty costs Md. more than life term," The Baltimore Sun, March 6, 2008.

recent estimate of the costs in Florida by the *Palm Beach Post* found a much higher cost per execution: Florida spends $51 million a year above and beyond what it would cost to punish all first-degree murderers with life in prison without parole. Based on the 44 executions Florida had carried out from 1976 to 2000, that amounts to a cost of $24 million for each execution.[28]

The increasing costs of the death penalty are having a direct and negative impact on the administration of justice:

- In New Mexico, the state Supreme Court held that more resources had to be made available for indigent defendants facing capital punishment. The legislature declined and adjourned for the year. A trial judge then ruled that the state could not pursue the death penalty in a prosecution and the attorney general's office concurred, thus halting the capital prosecution.[29]

- In Georgia, the death penalty prosecution in one death penalty case (Brian Nichols) cost the state over $2 million and resulted in a jury verdict for life. There was no question of Nichols' guilt, but seeking the death penalty has proven enormously expensive. The case has resulted in a crisis in indigent funding across the state. The head of the death penalty unit of the public defender's office resigned because he said his office could no longer fairly represent its clients and many cases have ground to a halt.[30]

- In New Jersey, police chief James Abbott served on the commission that reviewed that state's death penalty law. He concluded that the money spent on the death penalty was wasteful and that there were better ways to reduce crime. He wrote: "I no longer believe that you can fix the death penalty. Six months of study opened my eyes to its shocking reality. I learned that the death penalty throws millions of dollars down the drain -- money that I could be putting directly to work fighting crime every day -- while dragging victims' families through a long and torturous process that only exacerbates their pain. . . As a police chief, I find this use of state resources offensive. . . . Give a law enforcement professional like me that $250 million, and I'll show you how to reduce crime. The death penalty isn't anywhere on my list."[31]

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[27]. D. Von Drehle, "Bottom Line: Life in Prison One-sixth as Expensive," The Miami Herald, July 10, 1988, at 12A.
[28]. S. V. Date, "The High Price of Killing Killers," Palm Beach Post, Jan. 4, 2000, at 1A.
[29] . Scott Sandlin, "Death Penalty Out in Guard Killing," Albuquerque Journal, April 4, 2008.
[30] . Shannon McCaffrey, "Georgia Senate slashes money for public defenders," Macon Telegraph, February 20, 2008; see also New York Times, September 7, 2007.
[31] . James Abbott, "Less money, more pain and injustice," Fort Worth Star-Telegram, January 20, 2008.

- In Florida, a budget crisis has led to a cut in funds for state prosecutors' offices. As a result, some prosecutors will be cutting back on use of the death penalty because it is so costly. Florida State Attorney Harry Shorstein recently said that cuts to his budget might mean abandoning expensive death penalty cases. "There will be cases that can't be tried. Will it mean we can't get to the trials? Will it take longer? Will it, will it clog the criminal justice system? Yes. . . . We are strained to the breaking point. . . . Instead of seeking the death penalty, maybe we'll seek something else," he said.[32]

Economic downturns in the past have meant that states have had to make drastic cuts in law enforcement and other services such as reducing the number of police officers, closing libraries, laying off prison guards and nurses, and neglecting to repair essential vehicles.[33] The death penalty is not responsible for these budget crises, but it does force legislators to choose among programs that can make a difference in people's lives.

An article in the *Wall Street Journal* noted that in states where counties are chiefly responsible for prosecuting capital cases, the expenses can put an extraordinary burden on local budgets comparable to that caused by a natural disaster.[34] Katherine Baicker of Dartmouth concluded that capital cases have a "large negative shock" on county budgets, often requiring an increase in taxes. She estimated the extra expenses on counties to be $1.6 billion over a 15-year period.[35]

The net effect of this burden on counties is a widely disparate and arbitrary use of the death penalty. "Rich" counties that can afford the high costs of the death penalty

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[32] . Jacksonville Daily Record, September 13, 2007.
[33] . See, e.g., New York Times, June 7, 2003 (cuts in prison guards and police forces; Lakeland (Florida) Ledger, December 14, 2003 (cuts in libraries); Associated Press, April 2, 1999 (not replacing nurses or fixing vehicles).
[34]. R. Gold, "Counties Struggle with High Cost of Prosecuting Death-Penalty Cases," Wall St. Journal, Jan. 9, 2002.

may seek this punishment often, while poorer counties may never seek it, settling for life sentences instead. In some areas, this geographical disparity can have racial effects, as well, depending on the geographical location of racial minorities within the state. Some counties have approached the brink of bankruptcy because of one death penalty case that has to be done over a second or third time.[36]

Many of the costs of the death penalty are inescapable and have likely increased as the demands for a more reliable and fairer system have been heard.[37] The appeals process now takes longer, the defense attorneys, prosecutors and judges all are paid more, re-trials are long and more expensive. The majority of the costs occur at the trial level, and cannot easily be streamlined or reduced.

CONCLUSION

The death penalty in the United States has become unwieldy. In most states, executions are rare, the delay between sentencing and executions has lengthened, and the costs of the death penalty system have grown considerably. Yet for all this additional effort, death penalty cases are still prone to error and the risk of executing an innocent person remains. The public and the families of victims have a right to be frustrated with this system. But there is no simple way to reduce delays and costs while ensuring that innocent lives are protected and that the system works fairly. This

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[35]. K. Baicker, "The Budgetary Repercussions of Capital Convictions," National Bureau of Economic Research, Working Paper 8382, July 2001.

[36] . See generally, R. Dieter, "Millions Misspent: What Politicians Don't Say About the High Costs of the Death Penalty," (revised edit., 1994) (available from the Death Penalty Information Center).

[37] . The U.S. Supreme Court placed higher demands on state-provided representation when it overturned a death sentence because the attorneys had not employed a mitigation specialist to thoroughly explore their client's background. *Wiggins v. Smith*, 123 S. Ct. 2527 (2003).

dilemma is one of the principal reasons that the use of the death penalty has declined so dramatically in recent years.

I would be happy to provide this committee with more extensive information on the points I have raised. I would also be pleased to answer any questions you may have.

3-16

TESTIMONY OF SEAN D. O'BRIEN[1]

I am testifying in support of the legislation to abolish the death penalty. I have specialized in capital punishment issues since 1985 as the Public Defender for Jackson County, Missouri, and as director of a not-for-profit legal services firm specializing capital punishment issues. From 2005 through 2008, I headed a nationwide effort to identify and articulate standards of performance for the mitigation function of capital defense teams. The fruits of that effort are reported in the summer, 2008, issue of the Hofstra Law Review, a copy of which is available to the Committee.

I believe that my experience in this field can be of assistance to the Committee on the area of costs inherent in any system of capital punishment. I can help explain factors that contribute to the cost of representation, which include:

1) The constitutional obligation to provide competent legal representation (*Williams v. Taylor, Wiggins v. Smith and Rompilla v. Beard);*

2) The American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, and standards pertaining to the investigation and presentation of mitigation evidence; and

3) Particular issues involving expert assistance, recruiting and training counsel, and other death penalty procedures.

These issues were recently investigated and reported upon by a committee of federal judges examining the costs of defense representation in death penalty cases in federal court, and my testimony will highlight many of those findings for this Committee. Most of the observations of that committee have universal application to systems for delivery of defense services in any death penalty jurisdiction. Therefore, I have attached a copy of that report.

Respectfully submitted,

Sean D. O'Brien

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[1] Mr. O'Brien is an Associate Profession of Law at UMKC School of Law, where he teaches Criminal Law, Criminal Procedure, and Problems and Issues in the Death Penalty. He is a Capital Case Resource Counsel for the Administrative Office of the United States Courts specializing in providing training and assistance to courts and appointed counsel on capital punishment cases. In 2005, Benedictine College in Atchison, Kansas, awarded him and Honorary Doctor of Humane Letters degree for his work on the death penalty issue.

Senate Judiciary
2-26-09
Attachment 4

Committee on Defender Services, Judicial Conference of the United States, Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation (1998),

http://www.uscourts.gov/dpenalty/4REPORT.htm

INTRODUCTION

This report responds to judicial and congressional concerns about the cost of providing representation in federal death penalty cases. Congress revived the death penalty for federal crimes in 1988, authorizing capital punishment for "drug kingpin" murders.(1) In 1994, Congress expanded to fifty the number of federal crimes punishable by death.(2) The portion of the Defender Services appropriation allocated to federal death penalty cases has increased over the past decade, especially since fiscal year (FY) 1995. Federal death penalty cases consumed almost six percent of the Defender Services obligations for payments to panel attorneys for fiscal year 1997, although they comprised approximately 0.3 percent of the caseload.(3)

In order to understand better the reasons for the high cost of representation in federal death penalty cases in comparison to non-capital cases, Judge Emmett Ripley Cox, the Chair of the Judicial Conference Committee on Defender Services, in May 1997 appointed a Subcommittee on Federal Death Penalty Cases to study the judiciary's current approach to the appointment and compensation of counsel in these cases, its success in recruiting qualified attorneys, and the quality and cost of services provided. Judge Cox named three members of the Committee on Defender Services to the Subcommittee: Judge James R. Spencer, of the Eastern District of Virginia, Chair of the Subcommittee; Judge Robin J. Cauthron, of the Western District of Oklahoma; and Judge Nancy G. Edmunds, of the Eastern District of Michigan. Norman Lefstein, Dean of the Indiana University School of Law at Indianapolis, was selected to serve as the Subcommittee's chief consultant.

The Subcommittee gathered both qualitative and quantitative information about federal death penalty cases. Dean Lefstein and his staff (4) conducted extensive interviews with lawyers and judges representing a wide range of perspectives, and covering more than half of the judicial districts in which a federal death penalty prosecution has been authorized. The Subcommittee's staff also reviewed articles and reports concerning representation in death penalty cases, including the recent Report on Costs and Recommendations for the Control of Costs of the Defender Services Program prepared by Coopers & Lybrand Consulting.

Additionally, staff compiled a database containing cost information regarding federal death penalty cases from 1990, the year the first post-Furman federal death penalty case was authorized, to the end of fiscal year 1997. The Subcommittee's staff analyzed these data by correlating cost information with descriptive information (case demographics), and by comparing costs in federal death penalty cases with costs in non-capital homicide cases. The Subcommittee also obtained information concerning the time spent by

attorneys in federal defender organizations (FDOs) on representation in federal death penalty cases and the costs incurred by local United States Attorney's Offices in prosecuting them. Because of the small number of federal death penalty cases that have been reviewed on direct appeal or in post-conviction proceedings, the quantitative analyses in this report focus on representation at the trial stage, and therefore do not reflect the overall cost of representation in a case in which a death sentence is imposed.(5)

The Subcommittee's findings are set out in Part I of this Report. The Subcommittee has proposed eleven recommendations to enhance the judicial administration of federal death penalty cases. These recommendations, supported by commentary, are set out in Part II. The recommendations alone are reproduced in Appendix A. The Subcommittee's methodology and the sources consulted are described in Appendix B. Additional statistical and other supporting data are contained in Appendix C.

I. ANALYSIS AND FINDINGS

In general, the high cost of providing representation in federal death penalty cases is a result of the heavy demands these cases place on the time and skill of counsel and the growing number of federal criminal cases in which the defendant faces a potential sentence of death. The cost of representation in each federal death penalty case depends upon several elements: the number of hours each attorney must work to discharge his or her ethical obligation to the client; the hourly rate at which the attorney is compensated; and the nature, type, and cost of investigative and expert services reasonably required. To understand why federal death penalty cases cost so much, and how these costs may be controlled consistent with constitutional and statutory mandates, requires first and foremost an understanding of the characteristics of federal death penalty cases and the special responsibilities of defense counsel appointed to such cases.

A. Number and Overall Cost of Federal Death Penalty Cases.

The total cost of providing representation in federal death penalty cases depends upon the number of such cases, as well as the cost of representation in each case. As described more fully below, special standards affecting the cost of representation apply to all federal criminal cases in which an offense charged is punishable by death, whether or not the prosecution ultimately decides to seek the death penalty.(6) Although many factors effect the cost of representation, two particularly significant ones are the prosecution's decisions whether to seek the death penalty and whether to accept a plea agreement to a sentence less than death.(7)

1. The Decision to Prosecute in Federal Court. The total number of federal death penalty cases depends, in the first instance, on the decision to prosecute an offense in federal rather than in state court.(8) The number of federal prosecutions including an offense punishable by death has increased dramatically, particularly since the enactment of the Federal Death Penalty Act as part of the 1994 crime bill. No exact count of federal

death penalty cases filed nationwide by United States Attorney's offices since 1988 is available; a reasonable estimate, however, is 560 cases(9) over the period 1991 to 1997, increasing from 12 cases in 1991, to 118 in 1995, 159 in 1996, and 153 in 1997.(10)

The average total cost per federal death penalty representation in a sample of cases prosecuted from 1990 to 1997 (including cases in which the prosecution ultimately declined to seek the death penalty) was $142,000.(11)

However, the prosecution's decision to seek the death penalty -- as would be expected -- makes a substantial difference in the cost of representation, so that this overall average is not useful in assessing the resources required for a case in which the prosecution does decide to seek the death penalty.

2. The Decision to Authorize the Death Penalty. The cost of representation in a federal death penalty case depends heavily upon whether the prosecution does or does not seek the death penalty. (See Charts C-4, C-5, and C-6, comparing the total costs and elements of total cost of cases in which death penalty authorization was granted with those in which it was denied.) While the decision to charge an offense punishable by death is made by a local U.S. Attorney, no federal prosecutor may actually seek the death penalty unless specifically authorized to do so by the Attorney General of the United States.

The Attorney General has authorized seeking the death penalty in a total of 111 cases between 1988 and December 1997.(12) The average total cost (for counsel and related services) of authorized cases in the Subcommittee's sample was $218,112, as compared to $55,772 for cases in which the death penalty was never authorized; the average total cost of cases in which the prosecution was authorized to seek the death penalty, but later formally withdrew its request before trial was $145,806. The number of cases in which the Attorney General authorized seeking the death penalty rose from two cases in 1990 to 31 cases in 1997. Twenty-two cases in which the prosecution has been authorized to seek the death penalty were pending as of December 1997.

3. The Decision to Go to Trial. The third prosecutorial decision affecting the cost of representation is the decision whether to enter into a guilty plea agreement with the defendant or to try the case. (See Table C-7 and Chart C-8.) Of the 111 defendants against whom the Attorney General has sought the death penalty, the total number of defendants tried on capital charges in federal court was 41 through December 1997. The average total cost for authorized cases ending in capital trials was $269,139,(13) as compared to $192,333 for authorized cases resolved by a guilty plea. To date, nineteen defendants have been sentenced to death; one death sentence was later overturned on appeal and the case remanded for resentencing.

B. Factors Affecting the Scope and Cost of Defense Representation.

1. Death Penalty Cases Involve Two Trials. Federal law provides for a two part (bifurcated) trial in a capital case. (14) In the first part, the guilt phase, the jury is asked to determine whether the prosecution has proven, beyond a reasonable doubt, that the

defendant has committed a crime punishable by death. If a conviction is returned on a capital count, then in the second part, the penalty phase, the jury must first determine whether the prosecution has proven additional facts (aggravating circumstances) in order to satisfy threshold requirements for imposing the death penalty. If so, the jury considers evidence offered by the prosecution to justify the death penalty, including aggravating circumstances in addition to those required for the threshold finding, and evidence the defense offers as a reason not to sentence the defendant to death (mitigating circumstances). Lawyers in a death penalty case must prepare for both trials, and must develop an overall strategy that takes the penalty phase into account even in the guilt phase. This means that the way the defense proceeds differs from a non-capital case in important ways beginning with jury selection. For example, facts that make no difference in the determination of guilt or innocence may become very important to the jury's assessment of the defendant's culpability in the penalty phase. Lawyers interviewed by the Subcommittee, for instance, described cases in which both the prosecution and the defense invested substantial resources in obtaining expert opinions concerning the precise manner of the victim's death, even though this would not affect the guilt phase verdict, because of the importance of this information to the determination of the appropriate penalty.

2. Complexity of the Guilt Phase. Federal death penalty cases generally are highly complex criminal prosecutions, even without taking the penalty phase into account. As a representative of the Department of Justice remarked at a meeting with Subcommittee staff to discuss compilation of cost data, federal death penalty cases have more in common with complex drug conspiracy cases than with non-capital federal homicide cases,(15) many of which are comparatively simple cases brought in federal court only because they occurred on federal land. (See Table C-7.) Most cases in which the prosecution has sought a death sentence have invoked the "drug kingpin" provision of the 1988 Anti-Drug Abuse Act, 21 U.S.C. § 848(e). This statute authorizes the death penalty for intentional killings in furtherance of a "continuing criminal enterprise" (CCE), or serious drug offense, and for intentional killings of law enforcement officers to avoid prosecution for a drug offense. CCE cases, together with prosecutions of drug organizations under the RICO death penalty provision added in 1994, comprised approximately 62 percent of the authorized federal death penalty cases through December 1997.(16) CCE and RICO cases typically involve investigations stretching over years, and encompassing numerous acts of violence. They often include several homicide charges, many witnesses, and evidence in the guilt phase derived from wiretaps, video surveillance, informants, and experts. The magnitude of some of these cases is illustrated by a judge's estimate that the prosecution listed 500 potential witnesses in one case, and another judge's estimate that the prosecution disclosed 30,000 pages of documents in discovery.

Another reason drug conspiracy cases are so complex is that they often involve many defendants joined in a single indictment. Multi-defendant cases generally tend to cost more to defend, per defendant, than single defendant cases.(17) This effect may be magnified in a case in which some defendants face the death penalty and other defendants

face only non-capital charges, as the difference in the potential penalty may produce significant differences in strategy both before and during trial.

In most cases, judges have severed defendants facing capital charges from those facing only non-capital charges,(18) with the expectation that this will, among other things, reduce the overall cost of representation. Severance practices with regard to defendants facing capital charges have varied. Some judges have followed the more common state practice and tried each defendant separately. Others have severed only the penalty phase trials, so that the same jury determined the penalty for each defendant, but in separate hearings. Others have conducted joint penalty phase trials. Drug conspiracy cases (including both CCE and RICO prosecutions) are the most expensive federal death penalty cases to defend. The total cost of representation in drug conspiracy cases in which the prosecution authorized seeking the death penalty averaged $244,185,(19) or nearly 12 percent more than the average total cost of all authorized cases. (See Table C-7 and Chart C-8.)

3. Scope of the Penalty Phase. Evidence in the penalty phase of a federal death penalty trial typically includes a wide range of information about the defendant, the victim, and the nature of the offense that is not admissible in the guilt phase. Defense counsel in a federal death penalty case must investigate and prepare to respond to information offered by the prosecution to justify a death sentence. Federal law allows prosecutors to offer reliable information in the penalty phase, even if it does not satisfy the normal rules of evidence.(20) Although the prosecution must prove certain aggravating circumstances spelled out by statute, it is not limited to proving these factors. Defense counsel must therefore investigate and prepare to meet potential "non-statutory aggravating circumstances," such as an allegation that the defendant will be dangerous in the future. The penalty phase of a federal death penalty case therefore may include yet another "trial" in which the jury is required to determine whether the defendant is responsible for crimes in addition to those charged in the indictment. In one federal death penalty case, for example, the government attempted to prove the defendant committed another murder in the penalty phase, even though charges against him for that crime had been dismissed in a state court proceeding. Mini-trials of other criminal charges can be costly in terms of time and resources to prosecute and defend.

In addition to defending against the prosecution's case for a death sentence, counsel must also plan and present a case for a lesser sentence. In order to effectuate the defendant's constitutional right to present any information in mitigation of sentence, counsel must conduct a broad investigation of the defendant's life history. "Although it makes no express demands on counsel, the [right to offer mitigating evidence] does nothing to fulfill its purpose unless it is understood to presuppose the defense lawyer will unearth, develop, present and insist on consideration of those 'compassionate or mitigating factors stemming from the diverse frailties of humankind.'"(21) Indeed, one of the most frequent grounds for setting aside state death penalty verdicts is counsel's failure to investigate and present available mitigating information.(22) The broad range of information that may be relevant to the penalty phase requires defense counsel to cast a wide net in the investigation of any capital case.(23)

4. Special Obligations of Counsel in a Death Penalty Case. The nature of a criminal prosecution in which the defendant's life is at stake transforms counsel's role from start to finish. The quality of defense counsel's work must always remain in accord with the gravity of the proceeding. The special obligations of counsel appointed to a federal death penalty case are reflected in a comparison of hours billed in capital as compared to non-capital homicide cases.(24) The average number of hours billed in non-capital homicide cases from FY 1992 to FY 1997 was 117, as compared to 962 in a sample of federal death penalty cases (including cases never authorized). The average number of hours billed in authorized cases was 1,464. While representation in a federal death penalty case differs from representation in a non-capital federal criminal case in many ways, there are several particularly notable differences.

Average Number of Attorney Hours Billed in Capital and Non-Capital Homicide Cases
Case TypeIn Court HoursOut of Court HoursAvg. Total Attorney Hours Per Representation
Non-CapitalHomicides18100117
CapitalAuth. Denied38391429
Auth. Granted2311,2331,464
Capital Trial4091,4801,889
Plea611,2011,262
Drug Cases2771,3431,619

a. Consultation with the client. An important element of death penalty representation is the establishment of a professional relationship with the client.(25) Although it is important in every case, lawyers emphasized that consultation with the client is vastly more time consuming and demanding in a death penalty case for several reasons. First, the nature of the penalty phase inquiry requires a relationship which encourages the client to disclose his or her most closely guarded life history with the lawyer. Experiences of mental illness, substance abuse, emotional and physical abuse, social and academic failure, and other "family secrets" must be revealed, researched and analyzed for the insight they may provide into the underlying causes of the client's alleged conduct. The establishment of trust and confidence is also vitally important if the lawyer is to convince the defendant to consider an offer to plead guilty, especially because what is offered is likely to be life imprisonment without the possibility of parole. Accepting such a "deal" requires tremendous faith in counsel. Another reason the attorney-client relationship is particularly time-consuming stems from the enormous stress that the risk of a death sentence imposes on both the client and the lawyer; special care must be taken in order to avoid a rupture of the professional relationship that would force counsel to withdraw, delaying the trial.

b. Motions Litigation. The relative novelty of the federal death penalty laws, particularly those enacted in the 1994 crime bill, means that many legal issues concerning the interpretation and constitutionality of those statutes have not been authoritatively

resolved. To date, the circuit courts of appeals have decided only a handful of federal death penalty cases. Lawyers and judges agree that these issues are time-consuming to litigate. Several judges commented that they, or their law clerks, devoted months of preparation to a federal death penalty case. Defense lawyers have an ethical obligation to raise challenges to the manner in which both the guilt and penalty phases of the trial are conducted, because if an issue is not raised at trial, the defendant generally cannot benefit, even if a ruling by a higher court subsequently favors the defense position.(26) Consequently, newer statutes tend to produce more constitutional and interpretive issues than statutes that have already been the subject of extensive appellate and Supreme Court consideration. Many issues may arise in a single case. In one multi-defendant case, for example, a judge estimated that 2,800 legal pleadings had been filed by the parties.

c. Jury Selection. The lawyer in a death penalty case also has additional responsibilities in jury selection. Because the same jury will generally decide the penalty phase as a well as the guilt phase, the court must determine whether jurors should be disqualified because their views about the imposition of the death penalty, for or against, would make them unable to follow the law governing penalty phase deliberations. Typically the "death qualification" inquiry is conducted on an individual basis. The usual voir dire in a federal criminal case is conducted by the judge, with limited participation by counsel. In death penalty cases, however, the lawyers generally participate in drafting questionnaires for prospective jurors, and take part in questioning the venire. Jury selection takes much longer in federal death penalty cases than in non-capital federal criminal cases both because the total number of jurors questioned is larger to allow for those who may be excused due to the death qualification inquiry, pretrial publicity or other factors related to the nature of the case, and because of the more extensive questioning of each individual prospective juror. For example, one judge who ordinarily selects a jury for a criminal case in an afternoon reported that it took three weeks to complete jury selection in a federal death penalty case. As part of its recent study of the Defender Services program, Coopers & Lybrand reviewed records of federal death penalty cases (including cases that were not authorized and cases resolved by guilty plea) from FY 1995 to FY 1997, and found a similar distribution of attorney hours for each year.(27) In-court hearings, including trials, comprised 14%. The largest components were legal research (20%) and reviewing documents (16%). Legal research and writing is of great importance in federal capital cases because the federal death penalty statutes have not been definitively construed.(28) Judges as well as lawyers reported they had to devote extraordinary amounts of time to the analysis of legal issues in federal death penalty cases. Conferences with the client comprised 9% of attorney hours, reflecting the time required to establish and sustain a professional relationship in a federal death penalty case.(29) Another element, not directly captured in the available payment data, is the additional in- and out-of- court attorney time associated with jury selection in a death penalty case.

5. Effect of Prosecution Resources. Coopers & Lybrand found that "[t]he prosecution's resources are a key driver of capital representation costs."(30) Interviews with lawyers and judges confirmed this. Judges generally reported that prosecution resources in death penalty cases seemed unlimited. Typically, at least two and often three lawyers appeared for the prosecution in federal death penalty cases, who were assisted in court by one or

more "case agents" assigned by a law enforcement agency. Investigative work and the preparation of prosecution exhibits for trial, including charts, video and audiotapes, is generally performed by law enforcement personnel. Law enforcement agencies also performed scientific examinations and provided expert witnesses at no direct cost to the prosecution. In some cases, which arose from joint state and federal investigations, state law enforcement agencies contributed resources to the prosecution effort. At the request of the Subcommittee, the Department of Justice gathered cost information concerning 21 of 24 completed federal death penalty prosecutions in which the Attorney General had decided to seek the death penalty after January 1995.(31) Some of these prosecutions involved more than one defendant. The set of cases included some cases that were resolved by guilty pleas and some cases that went to trial. The Department of Justice reported an average total cost per prosecution of $365,296, but this figure does not include the cost of investigation or the cost of scientific testing and expert evaluations performed by law enforcement personnel.(32) The average cost of payments to private retained experts (such as psychiatrists or other experts not employed by a government agency) was $30,269 per prosecution.

6. Effect of the Authorization Process. Another obligation unique to federal capital cases is advocacy on behalf of the client in the Justice Department death penalty authorization process. In January 1995 the Department promulgated a formal "protocol" describing the manner in which the Attorney General would review federal death penalty cases to determine whether to file a notice of an intention to seek the death penalty.(33) Initially, the local United States Attorney reviews the case and makes a non-binding recommendation to the Justice Department about whether the death penalty should be sought. Generally, the Attorney General has followed recommendations against seeking the death penalty, but has overriden such recommendations in at least two cases. All cases are reviewed by a committee of senior Department of Justice officials, who submit their views to the Attorney General, who then makes the final decision. The Death Penalty Review Committee offers defense counsel the opportunity to present information in writing and in a face-to-face meeting in Washington, D.C.(34) The Department of Justice authorization process has two important implications for the cost of defense representation in federal capital cases. First, because any case involving an offense punishable by death remains a potential death penalty case until a final decision is made by the Attorney General, a longer authorization process increases the length of time that the defendant remains statutorily entitled to at least two lawyers who are compensated at a higher hourly rate. (See Section C.5, infra.) A number of judges reported "riding herd" on the authorization process by requiring reports from the prosecution or setting deadlines to expedite a final decision. All other things being equal, including the number of capital prosecutions ultimately approved, a shorter authorization review process would mean lower defense costs.

The second cost implication of the authorization process is that it creates another forum in which defense counsel must advocate on behalf of the client facing a possible death sentence.(35) One of defense counsel's most important functions is to present information first to the local United States Attorney and then to the Justice Department that would justify a lesser sentence. Effective advocacy requires counsel to explore all of the issues

that are likely to enter into the Attorney General's decision whether to authorize a federal death penalty prosecution, including the nature and strength of the federal interest, the evidence of guilt, and the aggravating and mitigating factors. Although the written and oral presentations made to the Death Penalty Review Committee are not as detailed or comprehensive as a penalty phase presentation to a jury, counsel must conduct a wide-ranging preliminary investigation of facts relevant to sentencing before the Justice Department makes the decision whether to file a notice seeking the death penalty, if it is to have an effect on the authorization process.

It was impossible to quantify the effect of defense participation on the death penalty review process in terms of outcome and cost. Department of Justice officials said they view the participation by defense counsel as valuable, and that they encourage oral and written presentations. Defense lawyers offered divergent opinions about the value of participating in the central Department of Justice review, but the majority made representations and would do so in future cases.

Because development of mitigating information early in the case may convince the prosecution that the death penalty should not be authorized, delaying preparation for the penalty phase is likely to increase the number of cases authorized, and therefore increase total costs. In a small number of instances, judges were reluctant to approve expenditures related to the penalty phase until an authorization decision was made. However, if the result of such a decision is that cases are authorized which should not be, this approach may cost more money than it saves, for cases that are never authorized cost much less than cases that are authorized, even if a guilty plea to a sentence less than death eventually is negotiated. This is illustrated by a comparison of the average total cost of cases in which the prosecution declines to seek the death penalty in the first instance ($55,772), as compared to the average total cost of cases in which the prosecution grants authorization, and then withdraws it ($145,806), and the average total cost of cases ending in guilty pleas ($192,333). (See also Recommendation 5, "The Death Penalty Authorization Process," in Part II of this report.)

7. Importance of Experts and their Cost. Another factor affecting the cost and complexity of capital cases is the importance of expert testimony in both the guilt and penalty phases. Payments to experts are a substantial component of defense costs in federal death penalty cases. Coopers & Lybrand found that about 19% of payments for representation in federal capital cases for FY 1997 went to services other than counsel: primarily experts and investigators.(36) This figure may understate the total spending on these services, because some of these costs are included as reimbursable expenses on attorney vouchers, rather than in separate vouchers submitted by the expert or investigator. As with attorney compensation, there were significant differences between cases in which the Attorney General authorized seeking the death penalty, and those in which the death penalty was not authorized. (See Chart C-10.) The average amount spent on non-attorney compensation in cases in which authorization was denied was $10,094, as compared with $51,889 in cases in which authorization to seek the death penalty was granted.

Average Amount of Non-Attorney Compensation in Capital and Non-Capital Homicide Cases

Case Type	Avg. Amount of Non-Attorney Comp.	Avg. Total Cost of Representation (Attorney and Non-Attorney)
Non-Capital Homicides	$ 1,515	$ 9,159
Capital Auth. Denied	$10,094	$ 55,773
Auth. Granted	$51,889	$218,113
Capital Trial	$53,143	$269,139
Plea	$51,028	$192,333
Drug Cases	$52,218	$244,186

In general, both the prosecution and the defense rely more extensively on experts in death penalty cases than in other federal criminal cases. Although prosecution forensic science experts typically are salaried employees of law enforcement agencies, the defense generally must hire experts who charge an hourly rate for their services. In the guilt phase, the prosecution is likely to call experts to testify about scientific analyses, such as DNA profiling, ballistics comparisons, or hair, fiber, or metallurgical evidence that may connect the defendant to a crime. Other types of experts common in large drug conspiracy cases include experts in the interpretation or authentication of audiotapes, and experts in the structure of drug organizations. To assure the reliability of this evidence and the manner in which it is presented to the jury, defense lawyers must consult with experts in these fields as well. The defense depends on experts to develop information relevant to sentencing, even before the prosecution makes a final decision about whether to seek the death penalty. "Because the first job of the defense is to convince the Department of Justice not to certify the case as a capital case, mitigation expenses, including the use of increasingly specialized experts, are increasing and are occurring early in the process."(37) Both the prosecution and the defense also typically hire experts to evaluate the defendant's mental condition in order to develop evidence related to culpability and future dangerousness relevant to the penalty phase. (See Charts C-11 and C-12, comparing expert and investigative costs in federal death penalty cases and non-capital federal homicide cases.) Two important categories of expert services frequently used in federal death penalty cases but not in non-capital federal criminal cases are litigation specialists and jury consultants. Mitigation specialists typically have graduate degrees, such as a Ph.D. or masters degree in social work, and have extensive training and experience in the defense of capital cases. They are generally hired to coordinate an investigation of the defendant's life history, identify issues requiring evaluation by psychologists, psychiatrists or other medical professionals, and assist attorneys in locating experts and providing documentary materials for them to review. Although most often they assist counsel in assembling and interpreting the information needed in the penalty phase of a capital case, in some cases mitigation specialists are also called to testify about their findings. Without exception, the lawyers interviewed by the Subcommittee stressed the importance of a mitigation specialist to high quality investigation and preparation of the penalty phase. Judges generally agreed with the

importance of a thorough penalty phase investigation, even when they were unconvinced about the persuasiveness of particular mitigating evidence offered on behalf of an individual defendant. The work performed by mitigation specialists is work which otherwise would have to be done by a lawyer, rather than an investigator or a paralegal. Because the hourly rates approved for mitigation specialists are substantially lower than those authorized for attorneys,(38) the appointment of a mitigation specialist or penalty phase investigator generally produces a substantial reduction in the overall costs of representation.

Jury consultants provide a range of services in federal death penalty cases. They assist in drafting questionnaires for prospective jurors to aid in the jury selection process. The use of questionnaires has become standard in federal capital cases as a way to streamline and expedite the process of jury selection. In addition, in some cases jury consultants are retained to organize and interpret the results of jury questionnaires, advise attorneys about follow-up questions to be asked during the in court voir dire, and to advise the attorneys about whether or not to strike a particular juror. Jury consultants are routinely retained in high stakes civil litigation, and have been engaged by the prosecution in federal death penalty cases. Most of the attorneys interviewed by the Subcommittee were emphatic about the value of jury consultants, and regarded the availability of a jury expert as a top priority. However, some lawyers were willing to forego a jury consultant in order to assure judicial approval of other needed services. Judges generally indicated greater willingness to approve jury consultants when the prosecution retained a jury consultant than when the prosecution did not. (See also Recommendation 7, "Experts," in Part II of this report.)

C. Factors Affecting the Availability, Cost and Quality of Counsel.

1. Importance of "Learned" Counsel. Since the first Judiciary Act in 1789, federal law has required the appointment of "learned" counsel in a capital case. Currently, 18 U.S.C. § 3005 explicitly requires the appointment of two lawyers, at least one of whom is learned in the law related to capital punishment. An American Bar Association study several years ago summarized the special demands on counsel in a capital case:

> 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. Bifurcated capital cases involve two trials with two different sets of issues. Investigation must often be conducted in several states, and, in some cases, in foreign countries. And penalty phase preparation requires extensive and generally unparalleled investigation into personal and family history.(39)

In interviews, judges and lawyers attested to the importance of the statutory "learned counsel" requirement. A number of judges, particularly those with experience reviewing state death penalty trials in federal habeas corpus proceedings underscored the

importance of "doing it right the first time," i.e., minimizing time-consuming post-conviction proceedings by assuring high quality representation in federal death penalty cases at the trial level.(40) Similarly, a former Florida Attorney General testified before an American Bar Association Task Force studying representation in state death penalty cases that, "[b]eyond peradventure, better representation at trial and on appeal will benefit all concerned."(41)

Federal death penalty cases require knowledge of the extensive and complex body of law governing capital punishment and the intricacies of federal criminal practice and procedure. Neither one alone is sufficient to assure high quality representation. Lawyers and judges recounted cases in which seasoned federal criminal lawyers who lacked death penalty experience missed important issues. For example, one judge described a situation in which experienced and highly esteemed felony trial lawyers who had no capital experience simply did not know how to pursue the mitigation investigation required by the case. After many months had been invested, the court appointed an experienced capital litigator from outside the jurisdiction as "learned counsel." A series of mental health tests arranged by this attorney resulted in a decision by the Justice Department to withdraw the request for the death penalty on the eve of trial. The judge credited the "learned counsel" with obtaining that result, which the judge believed could have been achieved much earlier. On the other hand, differences between state and federal practice place a lawyer who may have prior capital experience but no prior federal criminal trial experience at a disadvantage. The federal sentencing guidelines, speedy trial act, rules of evidence and procedure, and the specifics of the federal death penalty law play an important role in representation. Also, because federal death penalty cases frequently involve complex drug conspiracies, familiarity with this specialized area of practice is often desirable. When lawyers with experience in both the federal trial and death penalty arenas cannot be found, some courts have attempted to combine strengths by appointing a team which includes an experienced federal criminal practitioner and an experienced state court capital litigator.

Judges praised the quality of the representation provided by the lawyers they appointed as higher than the ordinary standard of practice in federal criminal cases. Judges familiar with state death penalty trials found that the quality of representation in federal death penalty cases was superior to the norm in state death penalty cases as well. In a few cases, judges expressed disappointment with the quality of representation, but in these instances they generally had replaced the lawyers whose performance they considered deficient.

After having handled their first federal death penalty case, a number of learned counsel have accepted subsequent appointments to such cases. This is a significant trend and one which the judiciary should seek to perpetuate. Judges and lawyers agreed that counsel with federal death penalty experience were more efficient than lawyers without such experience. The availability of these highly skillful and knowledgeable lawyers has been an important resource, particularly in districts that lack attorneys with death penalty trial experience. (See Section C.4.b, infra.) In contrast, in federal capital habeas corpus cases, very few lawyers have been willing to accept repeat appointments, so that the learning

curve remains steep (and therefore time-consuming and costly) in almost every new case. The continued willingness of these learned counsel to accept appointments in federal death penalty cases is an important element of any strategy for managing the costs of representation while maintaining quality.(42) (See also Recommendation 1, "Qualifications for Appointment," in Part II of this report.)

2. Federal Death Penalty Resource Counsel Project. The federal defender program has no systemic counterpart to the Criminal Division of the Department of Justice, which centrally supports the work of federal prosecutors nationwide. While a U.S. Attorney's Office bringing a federal death penalty prosecution can obtain training, advice, legal research and brief-writing assistance, sample pleadings and supplemental staffing from the Justice Department,(43) the private panel attorneys defending federal death penalty cases are, for the most part, sole practitioners or partners in small law firms comprised of fewer than half a dozen attorneys. Furthermore, although federal defender organizations are centrally funded, the representation they provide is entirely de-centralized. In order to improve the quality of representation and the cost effectiveness of defense services, in FY 1992 the judiciary established the Federal Death Penalty Resource Counsel Project (RCP). The RCP currently consists of three experienced capital litigators who support the work of appointed counsel and provide advice to the Administrative Office of the U.S. Courts on a part-time basis.(44) The Resource Counsel Project has become essential to the delivery of high quality, cost-effective representation in federal death penalty cases. Dividing the work regionally, Resource Counsel are available to provide assistance to defense counsel in every federal death penalty case. Judges, defense counsel, Administrative Office staff and Department of Justice death penalty policy makers praised their efforts and effectiveness. Resource Counsel's legal advice and pleadings have prevented lawyers from having to "reinvent the wheel" in every case. They have provided substantial assistance to courts and counsel in developing and implementing case budgeting procedures. They have assisted the Administrative Office and federal public defenders in discharging their statutory responsibilities to recommend qualified counsel for appointment. They have provided training opportunities for counsel. In addition, by monitoring prosecution decisions and following developments in this important area, they have provided critical statistical information and policy advice to the Administrative Office. (See also Recommendations 6, 8 and 9 ("Federal Death Penalty Resource Counsel," "Training," and "Case Budgeting") in Part II of this report.)

3. Consultation Prior to Appointment of Counsel. Since 1995, federal law has required the court, before appointing counsel in a federal death penalty case, to consult with the federal public defender for the district, or, if there is no federal public defender (or the defender has a conflict), with the Administrative Office of the United States Courts. This statutory requirement has generally, although not universally, been honored. In a very few cases, judges have appointed counsel without formally consulting either the federal public defender or the Administrative Office. For the most part, judges have taken a case-by-case approach to seeking advice about the appointment of counsel, although in one district the court directed the federal public defender to provide a list of lawyers qualified to handle federal death penalty cases instead of consulting as each case arose. In districts not served by a federal public defender, judges have consulted with the Administrative

Office, which generally refers the court to one of the three Federal Death Penalty Resource Counsel, who provide training and support to lawyers handling federal death penalty cases nationwide.(45) The consultation process assists judges in identifying qualified lawyers to appoint to federal death penalty cases. (See also Recommendation 2, "Consultation with Federal Defender Organizations or the Administrative Office," in Part II of this report.)

4. Availability and Recruitment of Qualified Lawyers. A defendant charged with an offense punishable by death is entitled to two lawyers by statute. (18 U.S.C. § 3005). A judge assigned a federal death penalty case may appoint private lawyers compensated on an hourly basis ("panel" attorneys) or, in a district served by a federal defender organization,(46) the court may appoint a lawyer employed by the FDO together with a panel attorney.(47) For the reasons discussed below, panel attorneys have been appointed in the vast majority of federal death penalty cases.

a. Federal Defender Organizations. Federal defender organizations are not currently able to provide representation in a large proportion of federal death penalty cases.(48) A few federal defender offices employ lawyers with prior death penalty experience gained in state court, but most do not. Indeed, lawyers in federal defender offices may also lack significant experience trying homicide cases, because few such cases are brought in the federal courts. Even federal defenders with extensive federal criminal experience feel themselves unqualified to provide representation without the participation of a "learned" counsel with capital case experience. Trial experience in non-capital cases is no substitute for the training required to prepare for the penalty phase of a capital case and to develop an overall trial strategy that integrates both phases. In almost all instances in which a judge has appointed a federal defender organization as counsel, the FDO has been joined by a panel attorney with death penalty experience. Another obstacle to relying on federal defender organizations to provide representation in a larger proportion of federal death penalty cases is the effect of an appointment on the defender office as a whole. Death penalty cases consume resources: the time of experienced lawyers and supervisors, investigators, and support staff; and budgetary allocations for experts. Defenders reported to the Subcommittee that the time commitment involved in handling a death penalty case was disruptive, especially in districts in which it was difficult for the federal defender organization to compensate for the appointment in the death penalty case by reducing the number of non-capital cases assigned to the office. Lawyers assigned to federal death penalty cases generally transferred their existing cases to other attorneys and reduced or eliminated their intake of new cases. Especially in smaller offices, where the added caseload had to be divided among fewer lawyers, death penalty cases interfered with the office's ability to fulfill its obligations to other clients.

b. Panel Attorneys. To date, courts generally have been able to locate and recruit a sufficient number of qualified lawyers to meet the need for representation. In some areas of the country, particularly those with state death penalty statutes, a substantial number of lawyers have developed experience defending capital cases. Not all of these lawyers, however, are fully qualified to provide representation in federal death penalty cases, because of unfamiliarity with important aspects of federal criminal practice. In other

areas, especially those in which there is not a state death penalty statute, courts have been unable to recruit qualified lawyers from within the district, and have appointed lawyers with death penalty experience from other states. The Subcommittee found that judges who appointed counsel from outside their districts in order to meet qualification standards experienced a very high degree of satisfaction with the representation provided in their cases.(49) Typically, these judges had appointed one of the small (but growing) number of litigators who have provided representation in two or more federal death penalty cases. Both the appointing judges and the local counsel reported a range of resulting benefits, including the on-the job training of the local co-counsel.(50) (See also Recommendation 4, "Appointment of the Federal Defender Organization," in Part II of this report.)

5. Adequacy of Compensation to Attract Qualified Counsel. Current federal law authorizes an attorney in a federal death penalty case to be paid up to $125 per hour.(51) At present, this maximum hourly rate appears adequate. Several years ago, the Judicial Conference reported that, "[w]hile many courts find the quality of panel attorneys [in non-capital cases] to be very high, serious funding difficulties and inadequate compensation hamper many courts in their ability to recruit and retain experienced attorneys as members of the CJA panel."(52) If the "real" (inflation-adjusted) hourly rate were to decline substantially, as it has for non-capital federal criminal representation, fulfillment of the judiciary's statutory and constitutional obligations to appoint qualified counsel might be jeopardized.(53) Panel attorneys who are qualified for appointment to a federal death penalty case are generally among the most experienced and respected criminal practitioners. Consequently, many of them command high fees for retained criminal work and, in some instances, for civil litigation. Without exception, lawyers appointed in federal death penalty cases reported earning hourly rates from private clients that are much higher than (and often double) the maximum rate that may be paid for their representation in a federal capital case. Although the hourly rates of compensation in federal capital cases are higher than those paid in non-capital federal criminal cases,(54) they are quite low in comparison to hourly rates for lawyers generally, and to the imputed hourly cost of office overhead.(55)

Most of the lawyers interviewed said they would not be willing to accept appointment to federal death penalty cases at the hourly rates which are authorized for non-capital representation. One of the reasons it is sometimes difficult to recruit qualified counsel for a federal death penalty case is that lawyers in federal death penalty cases have to decline work they would otherwise accept while the capital case is pending. A single death penalty case can preclude a lawyer from accepting any other clients for a significant period.(56) Especially in the months preceding trial, defending a death penalty case often consumes all of an attorney's time. A lawyer's unavailability can significantly damage the network of referrals and name recognition vital to sustaining a small practice. One judge in a district with a very active criminal defense bar found that several lawyers declined appointment to a capital case because of the anticipated length of the trial and the effect the case would have on their retained practice. A number of lawyers recounted the detrimental effect of a single capital case on their practices. "You do lose business. People know you're busy and don't call," said one attorney who was interviewed. Another lawyer described the effect of a lengthy death penalty case involving a drug conspiracy

on his practice as "devastating." Some lawyers also feel they lose potentially lucrative white-collar business once they become categorized as death-penalty lawyers. Lawyers also believe they lose future clients because of lack of exposure. One lawyer who had been devoting all of his professional time to a large, multi-defendant case recounted running into a journalist who said he had thought the lawyer must have left town because he had not seen him at the state courthouse for so long.

Another factor discouraging lawyers with active practices from accepting appointment to a federal death penalty case is a reluctance to become economically dependent on the timely payment of vouchers. Although generally lawyers did not complain about the timeliness of payments, in more than one case a long delay in the approval of vouchers forced lawyers to borrow money to pay office expenses. (See Recommendation 1(e), "Hourly Rate of Compensation for Counsel," in Part II of this report.)

6. Number of Counsel. Since the First Judiciary Act in 1789, federal law has provided for the appointment of a minimum of two lawyers per defendant in a capital case. Judges have generally appointed two lawyers in federal death penalty cases, although there have been rare instances in which the court has not done so until after the prosecution has filed notice of its intention to seek the death penalty, effectively delaying defense preparation. In a few cases, a judge has formally appointed more than two lawyers. This usually has occurred because the judge was dissatisfied with one or more of the lawyers originally appointed, but felt the overall ability of the defense team to meet statutory time limits and to provide an effective defense would be better accomplished by adding a new lawyer with needed skills rather than by replacing the lawyer originally appointed.

The defense team in federal capital cases may include paralegals, investigators and less experienced lawyers, generally billing at an hourly rate substantially below that of lead counsel. The additional lawyers who work on the case generally are not formally appointed, but rather are authorized by the court to work on limited and discrete tasks. When these assistant counsel are used effectively, total costs of attorney compensation are reduced, because the average hourly rate is reduced. For example, one appointed lawyer, who was authorized by the court to receive the statutory maximum of $125 per hour, hired a less experienced lawyer at $45 per hour to listen to thousands of hours of wiretap tapes and identify the important parts, thus achieving substantial savings.(57) (See Recommendation 3, "Appointment of More than Two Lawyers," in Part II of this report.)

D. Efforts to Control the Cost of Representation.

Judges presiding over federal capital cases have been mindful of the need to closely monitor and control costs, and have pursued several strategies to this end. Probably the paramount concern has been to appoint responsible, trustworthy and experienced lawyers who will themselves exercise judgment about the reasonableness of costs. After closely reviewing vouchers, the judges interviewed indicated their satisfaction with the integrity of the lawyers they had appointed. In a very few instances, judges removed the lawyers who had first been appointed to the case, sometimes by a different judicial officer. The

most common reason for removal was lack of death penalty experience evidenced in the lawyers' failure to identify and focus on the more promising lines of investigation, thus wasting resources.

Judges have used a variety of techniques to control costs. Many judges, particularly those presiding over cases filed in the last two years, have established budgets for the cost of defense representation. In one complex multi-defendant case, a judge directed the clerk of court to develop a computer program to assist in the tracking of expenditures. Other judges recounted denying or reducing requests for experts, and asking counsel to determine whether a qualified expert could be found at a lower rate or to persuade the expert to reduce the requested fee. Judges also authorized the hiring of paralegals to reduce the costs of coordinating and distributing materials among defense counsel in multi-defendant cases.

Interviews with lawyers also revealed a reassuring degree of restraint. A number of lawyers recounted decisions not to request funds for certain experts or services, and almost all of them negotiated reduced rates or obtained some services from experts on a pro bono basis, recognizing that by reducing costs whenever possible, it would be easier to obtain judicial approval for other needed services. In multi-defendant cases, lawyers, both on their own and with judicial prompting, coordinated discovery and motions practice, thereby reducing the potential for duplicative work. (See Recommendations 9 and 10 ("Case Budgeting" and "Case Management") in Part II of this report.)

CONCLUSION

The recommendations set forth in Part II of this report should be adopted by the Judicial Conference of the United States and implemented by the judiciary.

II. RECOMMENDATIONS AND COMMENTARY

1. Qualifications for Appointment.

a. Quality of Counsel. Courts should ensure that all attorneys appointed in federal death penalty cases are well qualified, by virtue of their prior defense experience, training and commitment, to serve as counsel in this highly specialized and demanding type of litigation. High quality legal representation is essential to assure fair and final verdicts, as well as cost-effective case management.

b. Qualifications of Counsel. As required by statute, at the outset of every capital case, courts should appoint two counsel, at least one of whom is experienced in and knowledgeable about the defense of death penalty cases. Ordinarily, "learned counsel" should have distinguished prior experience in the trial, appeal, or post-conviction review of federal death penalty cases, or distinguished prior experience in state death penalty trials, appeals, or post-conviction review that, in combination with co-counsel, will assure high quality representation.

c. Special Considerations in the Appointment of Counsel on Appeal. Ordinarily, the attorneys appointed to represent a death-sentenced federal appellant should include at least one attorney who did not represent the appellant at trial. In appointing appellate counsel, courts should, among other relevant factors, consider:

i. the attorney's experience in federal criminal appeals and capital appeals;
ii. the general qualifications identified in paragraph 1(a), above; and
iii. the attorney's willingness, unless relieved, to serve as counsel in any post-conviction proceedings that may follow the appeal.

d. Special Considerations in the Appointment of Counsel in Post-Conviction Proceedings. In appointing post-conviction counsel in a case where the defendant is sentenced to death, courts should consider the attorney's experience in federal post-conviction proceedings and in capital post-conviction proceedings, as well as the general qualifications set forth in paragraph 1(a).

e. Hourly Rate of Compensation for Counsel. The rate of compensation for counsel in a capital case should be maintained at a level sufficient to assure the appointment of attorneys who are appropriately qualified to undertake such representation.

Commentary

As Recommendation 1(a) indicates, the first responsibility of the court in a federal death penalty case is to appoint well-trained, experienced and dedicated defense counsel. Federal law requires the appointment of two counsel to represent a defendant in a federal death penalty case, of whom at least one must be "learned in the law applicable to capital cases." 18 U.S.C. § 3005.

Additional requirements relating to counsel's experience are codified at 21 U.S.C. § 848(q)(5)-(7). Legislatures, courts, bar associations, and other groups that have considered the qualifications necessary for effective representation in death penalty proceedings have consistently demanded a higher degree of training and experience than that required for other representations. Such heightened standards are required to ensure that representation is both cost-effective and commensurate with the complexity and high stakes of the litigation. The standards listed in Recommendations 1(b) - (d) are designed to assist courts in identifying the specific types of prior experience which have been deemed most valuable in the experience of the federal courts thus far. They emphasize the importance of bringing to bear both death penalty expertise and experience in the practice of criminal defense in the federal courts.

Recommendation 1(b) calls for the appointment of specially qualified counsel "at the outset" of a case, because virtually all aspects of the defense of a federal death penalty case, beginning with decisions made at the earliest stages of the litigation, are affected by the complexities of the penalty phase. Early appointment of "learned counsel" is also necessitated by the formal "authorization process" adopted by the Department of Justice

to guide the Attorney General's decision-making regarding whether to seek imposition of a death sentence. (See United States Attorney's Manual § 9-10.000.) Integral to the authorization process is a presentation to Justice Department officials of the factors which would justify not seeking a death sentence against the defendant. A "mitigation investigation" therefore must be undertaken at the commencement of the representation. Since an early decision not to seek death is the least costly way to resolve a potential capital charge, a prompt preliminary mitigation investigation leading to effective advocacy with the Justice Department is critical both to a defendant's interests and to sound fiscal management of public funds.

Trial courts should appoint counsel with "distinguished prior experience" (Recommendation 1(b)) in death penalty trials or appeals, even if meeting this standard requires appointing a lawyer from outside the district in which a matter arises. The preparation of a death penalty case for trial requires knowledge, skills and abilities which are absent in even the most seasoned felony trial lawyers, if they lack capital experience. An attorney knowledgeable about the nature of capital pretrial litigation, the scope of a mitigation investigation and the impact of the sentencing process on the guilt phase is indispensable and generally produces cost efficiencies. The costs of travel and other expenses associated with "importing" counsel from another jurisdiction can be minimized with careful planning by counsel and the court. With appropriate forethought, investigations, client counseling, court appearances and other obligations can be coordinated to maximize the efficient use of counsel's time and ensure cost-effectiveness.

Recommendations 1(c) and (d), with respect to the appointment of appellate and post-conviction counsel, respond to the requirement of 21 U.S.C. § 848(q) that representation in death penalty cases continue through post-conviction proceedings. Because trial counsel ordinarily will be precluded by a conflict of interest from representing the defendant in a post-conviction proceeding under 28 U.S.C. § 2255, continuity of representation and the efficient use of resources generally will best be achieved by appointing, at the appellate stage, at least one new lawyer who may continue to provide representation in any post-conviction proceedings. This should promote continuing representation by a lawyer who is already familiar with the record. In determining which, if any, of a death-sentenced defendant's prior counsel to appoint as post-conviction or appellate counsel, courts should consult with those counsel, the district's federal defender organization and/or the Administrative Office (See Recommendation 2).

Recommendation 1(e) reflects the fact that appropriate rates of compensation are essential to maintaining the quality of representation required in a federal capital case. The time demands of these cases are such that a single federal death penalty representation is likely to become, for a substantial period of time, counsel's exclusive or nearly exclusive professional commitment. It is therefore necessary that the hourly rate of compensation be fair in relation to the costs associated with maintaining a criminal practice. Federal statute currently provides for an hourly rate of up to $125 (21 U.S.C. § 848 (q)(10)(A)), which the Subcommittee finds to be adequate at the present time. However, this figure should be reviewed at least every three years, to ensure that it remains sufficient in light of inflation and other factors. (See 18 U.S.C. § 3006A(d)(1).)

2. Consultation with Federal Defender Organizations or the Administrative Office.

a. Notification of Statutory Obligation to Consult. The Administrative Office of the U.S. Courts (Administrative Office) and federal defender organizations should take appropriate action to ensure that their availability to provide statutorily mandated consultation regarding the appointment of counsel in every federal death penalty case is well known to the courts. (See 18 U.S.C. § 3005.)

b. Consultation by Courts in Selecting Counsel. In each case involving an offense punishable by death, courts should, as required by 18 U.S.C. § 3005, consider the recommendation of the district's Federal Public Defender (FPD) (unless the defender organization has a conflict) about the lawyers to be appointed. In districts not served by a Federal Public Defender Organization, 18 U.S.C. § 3005 requires consultation with the Administrative Office. Although not required to do so by statute, courts served by a Community Defender Organization should seek the advice of that office.

c. Consultation by Federal Defender Organizations and the Administrative Office in Recommending Counsel. In discharging their responsibility to recommend defense counsel, FDOs and the Administrative Office should consult with Federal Death Penalty Resource Counsel in order to identify attorneys who are well qualified, by virtue of their prior defense experience, training and commitment, to serve as lead and second counsel. Commentary. Since 1994, courts have been required to consider the recommendation of their federal public defender organization(58) or the Administrative Office regarding the appointment of counsel in each federal death penalty case. The Administrative Office has notified courts of this relatively recent innovation, and it has been largely followed and yielded results satisfying to judges, defense counsel and prosecutors. In a small number of cases, however, the Subcommittee found that courts had ignored or been unaware of the consultation requirement. For that reason, Recommendation 2(a) suggests that the Administrative Office take further steps to ensure that all courts are familiar with their obligations in this area and with the nature of the assistance which will be provided to them upon their request (see Commentary accompanying Recommendation 2(c)).

Recommendation 2(b) reflects the Subcommittee's view that recommendations concerning appointment of counsel are best obtained on an individualized, case-by-case basis. The relative infrequency of federal death penalty appointments, and the typically swift response which any court requesting a recommendation can expect, makes lists or "panels" of attorneys both unnecessary and, in some respects, impractical. Currently, within approximately 24 hours of receipt of a request, the Administrative Office or federal defender provides the court with the names of attorneys who not only are qualified to serve as counsel but who also have been contacted and indicated their willingness to serve in the particular case.(59) These individualized recommendations help to ensure that counsel are well-suited to the demands of a particular case and compatible with one another and the defendant. Case-specific consultation is also

required by existing Judicial Conference policy (see paragraph 6.01B of the Guidelines for the Criminal Justice Act (CJA Guidelines), Volume VII, Guide to Judiciary Policies and Procedures, explaining the 18 U.S.C. § 3005 consultation requirement and suggesting that in developing a recommendation, consideration be given to "the facts and circumstances of the case.")

Recommendation 2(b) also suggests that in districts served by a Community Defender Organization (rather than a Federal Public Defender Organization) courts extend the statutory requirement and seek the recommendation of the head of that organization about appointment of counsel in federal death penalty cases. The omission of specific reference to Community Defender Organizations in the statute is not explained in any legislative history, and consultation with a Community Defender Organization is likely to be as valuable as consultation with a Federal Public Defender Organization.

To assist federal defender organizations and the Administrative Office in discharging their responsibility to recommend counsel, the judiciary has contracted with three Federal Death Penalty Resource Counsel, experienced capital litigators whose work is described in Section C.2 of Part I of this report. Recommendation 2(c) recognizes the value of the assistance provided by Resource Counsel and urges federal defenders and the Administrative Office to continue to work closely with them. Resource Counsel are knowledgeable about and maintain effective communication with defense counsel nationwide. Their ability promptly to match attorneys with cases is of great value to the judiciary.

3. Appointment of More Than Two Lawyers.

Number of Counsel. Courts should not appoint more than two lawyers to provide representation to a defendant in a federal death penalty case unless exceptional circumstances and good cause are shown. Appointed counsel may, however, with prior court authorization, use the services of attorneys who work in association with them, provided that the employment of such additional counsel (at a reduced hourly rate) diminishes the total cost of representation or is required to meet time limits.

Commentary

The norm in federal death penalty cases is the appointment of two counsel per defendant. More than two attorneys should be appointed only in exceptional circumstances. Courts contemplating the appointment of a third counsel might consider contacting the Administrative Office for information and advice about whether circumstances warrant such appointment. Notwithstanding this suggested limit on the number of attorneys charged with responsibility for the defense in its entirety, courts are encouraged to permit appointed counsel to employ additional attorneys to perform more limited services where to do so would be cost-effective or otherwise enhance the effective use of resources. For example, in many federal death penalty cases the prosecution provides to defense counsel an extensive amount of discovery material which must be reviewed for relevance and organized for use by the defense. Providing legal assistance to appointed counsel at a

lower hourly rate may prove economical or it may be a necessity in light of court deadlines. This is consistent with existing Judicial Conference policy with respect to all Criminal Justice Act representations (see CJA Guideline 2.11A), and is emphasized here because of its cost containment potential in capital litigation.

4. Appointment of the Federal Defender Organization (FDO).

a. FDO as Lead Counsel. Courts should consider appointing the district's FDO as lead counsel in a federal death penalty case only if the following conditions are present:

i. the FDO has one or more lawyers with experience in the trial and/or appeal of capital cases who are qualified to serve as "learned counsel"; and

ii. the FDO has sufficient resources so that workload can be adjusted without unduly disrupting the operation of the office, and the lawyer(s) assigned to the death penalty case can devote adequate time to its defense, recognizing that the case may require all of their available time; and

iii. the FDO has or is likely to obtain sufficient funds to provide for the expert, investigative and other services reasonably believed to be necessary for the defense of the death penalty case.

b. FDO as Second Counsel. Courts should consider appointing the district's FDO as second counsel in a federal death penalty case only if the following conditions are present:

i. the FDO has sufficient resources so that workload can be adjusted without unduly disrupting the operation of the office, and the lawyer(s) assigned to the death penalty case can devote adequate time to its defense, recognizing that the case may require all of their available time; and

ii. the FDO has or is likely to obtain sufficient funds to provide for the expert, investigative and other services reasonably believed to be necessary for the defense of the death penalty case.

Commentary

Federal defender organizations have provided representation in only a small number of the federal death penalty cases filed to date. In many cases, representation by defender organizations has been precluded because of conflicts of interest which arise because the organization has represented either another defendant or a witness in the case. Even where the defender organization is not disqualified by a conflict, however, there are good reasons to proceed with caution in making appointments in this area. A decision to

appoint a defender organization either as lead or as second counsel in a capital case should be made only after consideration of the factors identified in this Recommendation and consultation between the court and the federal defender.

Recommendation 4(a) is intended to inform courts, which are accustomed to relying on federal defenders to undertake the most difficult representations, that few federal defender attorneys currently possess appropriate qualifications and experience to act as lead counsel in a federal death penalty case. Because violent felony offenses, particularly homicides, rarely are prosecuted in the federal courts, there is little opportunity for federal court practitioners to learn even the fundamentals relevant to the guilt phase defense of a federal death penalty case. Unless they gained such experience in state court before joining the defender organization, most federal defender attorneys have little to no experience defending a homicide case; of those who did bring with them such state court background, few have capital experience.

Notwithstanding these considerations, however, there is much to be gained from the involvement of a defender organization in the defense of a federal capital case. Recommendation 4(b) suggests pairing a defender organization as co-counsel with an experienced capital litigator, an approach which has successfully been employed in some cases. In these cases, the defender organization has benefitted from the expertise of the "learned counsel" and gained valuable capital litigation experience as well. At the same time, the "learned counsel" has benefitted from the institutional resources and local court expertise of the defender staff. Whether as lead or second counsel(60), a federal defender organization should not be required to undertake more than one federal death penalty representation at a time unless the head of the organization believes such an arrangement is appropriate. Recommendations 4(a) and (b) acknowledge that capital cases inevitably and seriously disrupt the normal functioning of an office. To undertake too much death penalty litigation would seriously threaten the effective performance of a defender organization's overriding responsibility to provide representation to a substantial number of financially eligible criminal defendants in its district each year.

5. The Death Penalty Authorization Process.

a. Streamlining the Authorization Process. The Department of Justice should consider adopting a "fast track" review of cases involving death-eligible defendants where there is a high probability that the death penalty will not be sought.

b. Court Monitoring of the Authorization Process. Courts should exercise their supervisory powers to ensure that the death penalty authorization process proceeds expeditiously.

Commentary

A decision not to seek the death penalty against a defendant has large and immediate cost-saving consequences. The sooner that decision is made, the larger the savings. Since the death penalty ultimately is sought against only a small number of the defendants

charged with death-punishable offenses, the process for identifying those defendants should be as expeditious as possible in order to preserve funding and minimize the unnecessary expenditure of resources.

Recommendation 5(a) calls upon the Department of Justice to increase the speed with which it makes decisions not to authorize seeking the death penalty. Recommendation 5(b) urges judges to oversee the authorization process by monitoring the progress of the decisionmaking and imposing reasonable deadlines on the prosecution in this regard. Courts should also ensure that the prosecution's timetables allow for meaningful advocacy by counsel for the defendant.

6. Federal Death Penalty Resource Counsel.

a. Information from Resource Counsel. In all federal death penalty cases, defense counsel should obtain the services of Federal Death Penalty Resource Counsel in order to obtain the benefit of model pleadings and other information that will save time, conserve resources and enhance representation. The judiciary should allocate resources sufficient to permit the full value of these services to be provided in every case.

b. Technology and Information Sharing. The Administrative Office should explore the use of computer-based technology to facilitate the efficient and cost-effective sharing of information between Resource Counsel and defense counsel in federal death penalty cases.

Commentary

Recommendation 6(a) urges the judiciary and counsel to maximize the benefits of the Federal Death Penalty Resource Counsel Project (described in Section C.2 of Part I of this report), which has become essential to the delivery of high quality, cost-effective representation in federal death penalty cases, and to ensure the Project's continued effectiveness.

Recommendation 6(b) recognizes that recent innovations in computer technology are making it increasingly easy and inexpensive for individuals who are geographically dispersed to share information. The Administrative Office should explore the feasibility and cost-effectiveness of using computer and other technology to enhance the delivery of support to appointed counsel in federal death penalty cases.

7. Experts.

a. Salaried Positions for Penalty Phase Investigators. The federal defender program should consider establishing salaried positions within FDOs for persons trained to gather and analyze information relevant to the penalty phase of a capital case. FDOs should explore the possibility that, in addition to providing services in death penalty cases to which their FDO is appointed, it might be feasible for these investigators to render assistance to panel attorneys and to other FDOs.

b. Negotiating Reduced Rates. Counsel should seek to contain costs by negotiating reduced hourly rates and/or total fees with experts and other service providers.

c. Directory of Experts. A directory of experts willing to provide the assistance most frequently needed in federal death penalty cases, and their hourly rates of billing, should be developed and made available to counsel.

Commentary

Penalty phase investigators, or "mitigation specialists," as they have come to be called, are individuals trained and experienced in the development and presentation of evidence for the penalty phase of a capital case. Their work is part of the existing "standard of care" in a federal death penalty case. (See Section B.7 of Part I of this Report.) Because the hourly rates charged by mitigation specialists are lower than those authorized for appointed counsel, employment of a mitigation specialist is likely to be a cost-effective approach to developing the penalty phase defense.

Mitigation specialists are, however, in short supply. In most of the federal death penalty cases the Subcommittee examined, penalty phase investigators were not available locally. Courts thus were required to pay for the costs of travel and related expenses in addition to paying the mitigation specialist's hourly rates. Recommendation 7(a) suggests ameliorating this problem by employing and training persons for this work in federal defender organizations. Because of the cost containment potential, the feasibility of having these salaried employees work not only on cases to which their federal defender organization is appointed, but on others within their region, should be explored as well.

Recommendation 7(b) encourages counsel to negotiate a reduced hourly rate for expert services whenever possible. Private experts must be employed in death penalty cases, but the cost of their services can and should be contained. When asked to provide services for the defense of an indigent criminal defendant, many experts are willing to accept fees lower than their customary hourly rates for private clients. In addition, courts and counsel should agree in advance to a total amount which may be expended for a particular expert. If it appears that costs will exceed the agreed-upon amount, counsel should return to the court for prior authorization to secure them. If travel costs are to be incurred, government rates should be obtained.

8. Training.

Federal Death Penalty Training Programs. The Administrative Office should continue to offer and expand training programs designed specifically for defense counsel in federal death penalty cases.

Commentary

All of the defense counsel interviewed by the Subcommittee stressed the importance of participating in specialized death penalty training programs. Although the individuals appointed as "learned counsel" comprised a highly experienced group of lawyers, they nevertheless continued to attend training programs to update and refine their skills and knowledge, and emphasized that they availed themselves of such opportunities whenever possible. There are, however, very few training programs anywhere in the country specializing in the defense of death penalty cases, and there is only one -- an annual one-day program organized by the Federal Death Penalty Resource Counsel Project and funded by the Administrative Office -- focusing entirely on federal death penalty representation. Almost all of the defense counsel the Subcommittee interviewed had attended this program and identified it as a significant resource. With the case law relatively undeveloped and so many issues being litigated for the first time, the opportunity for counsel to benefit from the research of others and to share information and ideas was considered especially important and cost-effective. The Administrative Office and Federal Death Penalty Resource Counsel should ensure that training opportunities continue to meet the needs of appointed counsel in this area.

9. Case Budgeting.

a. Consultation with Prosecution. Upon learning that a defendant is charged with an offense punishable by death, courts should promptly consult with the prosecution to determine the likelihood that the death penalty will be sought in the case and to find out when that decision will be made.

b. Prior to Death Penalty Authorization. Ordinarily, the court should require defense counsel to submit a litigation budget encompassing all services (counsel, expert, investigative and other) likely to be required through the time that the Department of Justice(DOJ) determines whether or not to authorize the death penalty.

c. After Death Penalty Authorization. As soon as practicable after the death penalty has been authorized by DOJ, defense counsel should be required to submit a further budget for services likely to be needed through the trial of the guilt and penalty phases of the case. In its discretion, the court may determine that defense counsel should prepare budgets for shorter intervals of time.

d. Advice from Administrative Office and Resource Counsel. In preparing and reviewing case budgets, defense counsel and the courts should seek advice from the Administrative Office and Federal Death Penalty Resource Counsel, as may be appropriate.

e. Confidentiality of Case Budgets. Case budgets should be submitted ex parte and should be filed and maintained under seal.

f. Modification of Approved Budget. An approved budget should guide counsel's

use of time and resources by indicating the services for which compensation is authorized. Case budgets should be re-evaluated when justified by changed or unexpected circumstances, and should be modified by the court where good cause is shown.

g. Payment of Interim Vouchers. Courts should require counsel to submit vouchers on a monthly basis, and should promptly review, certify and process those vouchers for payment.

h. Budgets In Excess of $250,000. If the total amount proposed by defense counsel to be budgeted for a case exceeds $250,000, the court should, prior to approval, submit such budget for review and recommendation to the Administrative Office.

i. Death Penalty Not Authorized. As soon as practicable after DOJ declines to authorize the death penalty, the court should review the number of appointed counsel and the hourly rate of compensation needed for the duration of the proceeding pursuant to CJA Guideline 6.02.B(2).

j. Judicial Conference Guidelines. The Judicial Conference should promulgate guidelines on case budgeting for use by the courts and counsel.

k. Judicial Training for Death Penalty Cases. The Federal Judicial Center should work in cooperation with the Administrative Office to provide training for judges in the management of federal death penalty cases and, in particular, in the review of case budgets.

Commentary

The Judicial Conference has endorsed the use of case budgets to manage the cost of capital habeas corpus cases. (CJA Guideline 6.02.F.) Case budgets for federal death penalty cases are designed to serve purposes similar to those accomplished by case budgets for capital habeas corpus cases. A complete case budget will require the lawyer to incorporate cost considerations into litigation planning and will encourage the use of less expensive means to achieve the desired end. For example, a budget might request appointment of an expert to perform a task that could be accomplished by a lawyer, justifying the request by showing that the expert's work will produce a corresponding reduction in the attorney hours required. Submission and review of a budget will also assist the court in monitoring the overall cost of representation in the case, and determining the reasonableness of costs. Case budgets are increasingly being requested by courts or submitted by lawyers in federal death penalty cases. Most judges and lawyers interviewed by the Subcommittee were receptive to the idea of case budgeting, provided that persons with expertise in the defense of federal death penalty cases were available to assist in the development or the review of a case budget.

Recommendation 9(d) encourages courts and counsel to seek such assistance from the Administrative Office and Federal Death Penalty Resource Counsel. Because of the unpredictability of pretrial litigation, it is impractical to require counsel to budget for an

entire case from start to finish. At a minimum, the budgeting process should be in two stages, as suggested in Recommendations 9(b) and (c). The first stage begins when the lawyer is sufficiently familiar with the case to be able to present a budget reasonably related to the anticipated factual and legal issues in the case and continues until the Department of Justice makes its decision as to whether it will seek the death penalty. If a death penalty notice is filed, a further budget should be prepared. The court may require a single budget from authorization to trial, or a series of budgets covering shorter increments of time. If the prosecution will not seek the death penalty, Recommendation 9(i) calls for the court to review the case in accordance with CJA Guideline 6.02.B(2), to determine whether the number or compensation of counsel should be reduced. Because case budgeting is time consuming, and because federal death penalty cases in which the prosecution decides not to seek the death penalty cost much less than cases in which the death penalty is authorized, it may not be cost-effective for counsel to prepare a case budget if authorization is improbable. For this reason, Recommendation 9(a) encourages courts to inquire of the prosecution whether authorization is unlikely. Furthermore, inquiring into the date by which the authorization decision will be made will provide information about how long a period the initial budget should cover, which will assist courts in reviewing budgets. If a significant mitigation investigation is to be undertaken, the Subcommittee recommends that a budget be developed for this work.

Recommendation 9(e) calls for case budgets to be submitted ex parte and maintained permanently under seal. A case budget requires defense counsel to spell out the overall litigation plan for the case. Consequently, it is an extremely sensitive document and contains privileged information. This approach is consistent with Judicial Conference policy regarding capital habeas case budgets. (CJA Guideline 6.02F.) Review of case budgets greater than $250,000 by the Administrative Office should assist courts in determining whether the cost of representation is reasonable in light of experience in other similar cases and in identifying areas in which expenses might be reduced.

10. Case Management.

a. Non-Lawyer Staff. Where it will be cost-effective, courts should consider authorizing payment for services to assist counsel in organizing and analyzing documents and other case materials.

b. Multi-defendant Cases.

i. Early Decision Regarding Severance. Courts should consider making an early decision on severance of non-capital from capital co-defendants.

ii. Regularly Scheduled Status Hearings. Status hearings should be held frequently, and a schedule for such hearings should be agreed upon in advance by all parties and the court.

iii. "Coordinating Counsel." In a multi-defendant case (in particular a multi-defendant case in which more than one individual is eligible for the death penalty), and with the

consent of co-counsel, courts should consider designating counsel for one defendant as "coordinating counsel."

iv. Shared Resources. Counsel for co-defendants should be encouraged to share resources to the extent that doing so does not impinge on confidentiality protections or pose an unnecessary risk of creating a conflict of interest.

v. Voucher Review. In large multi-defendant cases, after approving a case budget, the court should consider assigning a magistrate judge to review individual vouchers. The court should meet with defense counsel at regular intervals to review spending in light of the case budget and to identify and discuss future needs.

Commentary

Recommendation 10(a) recognizes that the large volume of discovery materials and pleadings associated with a federal death penalty case may make it cost-effective for courts to authorize (and appointed counsel to employ) the services of law clerks, paralegals, secretaries or others to perform organizational work which would otherwise have to be performed by counsel at a higher hourly rate. (See also Commentary Accompanying Recommendation 3, endorsing the practice of authorizing counsel to obtain the services of additional attorneys under appropriate circumstances.) Judicial Conference policy provides that, in general, appointed counsel may not be reimbursed for expenses deemed part of their office overhead (CJA Guideline 2.28); however, unusual expenses of this nature may be compensated (CJA Guideline 3.16). The Guidelines suggest that in determining whether an expense is unusual or extraordinary, "consideration should be given to whether the circumstances from which the need arose would normally result in an additional charge to a fee paying client over and above that charged for overhead expenses" (CJA Guideline 3.16).

Recommendations 10(b)(i) - (iv) address some of the particular management burdens associated with multi-defendant federal death penalty cases. Special efforts are required to ensure the orderly administration of justice in these matters, which tend to become costly and cumbersome for courts and counsel. Recommendation 10(b)(i) suggests that courts make early decisions concerning severance of non-capital from capital co-defendants. In general, capital cases remain pending longer than non-capital cases and involve far greater amounts of pre-trial litigation. Separating the cases of non-capital co-defendants, where appropriate, may lead to swifter and less costly dispositions in those cases. The earlier such a decision is implemented, the greater will be the cost savings.

Recommendation 10(b)(ii) suggests that courts schedule frequent status hearings so that discovery and other matters may proceed efficiently and so that problems may be noted early and swiftly resolved. If the schedule for such status hearings (on a monthly or other basis) is agreed upon in advance, then all parties can plan accordingly and valuable time will not be wasted while counsel and judges try to find a mutually convenient time for their next meeting.

Recommendation 10(b)(iii) suggests that, if all counsel agree, courts consider designating the attorneys for one defendant as "coordinating counsel." Coordinating counsel might be responsible for arranging the efficient filing and service of motions and responses among the co-defendants, scheduling co-counsel meetings and court dates, facilitating discovery, or any other tasks deemed appropriate by counsel and the court. In multi-defendant cases where the federal defender organization represents a defendant eligible for the death penalty, courts should (taking into account the views of the federal defender) consider designating the FDO as coordinating counsel because of its institutional capabilities. In the event that a panel attorney is designated as coordinating counsel, the additional time and resources demanded by this role should be compensated.

11. Availability of Cost Data

The Administrative Office should improve its ability to collect and analyze information about case budgets and the cost of capital cases.

Commentary

Only because there have been a comparatively small number of federal death penalty cases was it possible to assemble -- by painstaking manual collection -- the cost data relied upon by the Subcommittee. This process was necessitated by the limitations of the only available information source, the CJA payment system. The Administrative Office is in the process of replacing that system. Given the heightened significance of capital case costs to the federal defender program, the Administrative Office should give priority to ensuring that its new system will provide capital case data which is accurate, reliable and accessible. In addition, the Administrative Office should continuously track capital case costs so that the impact of appellate and post-conviction litigation can be analyzed, trends in case costs can be readily identified, and appropriate cost-containment mechanisms can be developed.

Footnotes

1. 21 U.S.C. § 848, codifying Pub. L. 100-690, 102 Stat. 4382 (1988). The Supreme Court's decision in Furman v. Georgia, 408 U.S. 238 (1972), had invalidated the previously existing federal death penalty statutes.
2. Pub. L. 103-322, 108 Stat. 1959 (1994).
3. Coopers & Lybrand Consulting, Report on Costs and Recommendations for the Control of Costs of the Defender Services Program (C&L) at Appendix Table 0.1 (Jan. 28, 1998).
4. Dean Lefstein was assisted by Lisa Greenman, Attorney Advisor in the Defender Services Division of the Administrative Office of the U.S. Courts, and David Reiser, a consultant to the Division. In addition, Kathleen O'Connor, Budget Analyst, and Sylvia Fleming, Systems Support Analyst, assisted in the quantitative analysis.
5. Cost averages reported here do not include estimates of the cost of representation in cases in which a federal defender organization (FDO) served as sole or co-counsel. The available data were inadequate to make reliable estimates of the cost of work performed by FDO attorneys and staff, and using panel attorney payments alone in cases in which FDOs served as co-counsel would have understated the actual cost of representation.

Because panel attorneys, rather than FDOs, have provided representation in the vast majority of cases, the actual payments approved for panel attorneys are a better source of information on the cost of representation than estimates of FDO costs. The cost averages in this report also do not include expenditures attributable to the case that arose from the bombing of the federal building in Oklahoma City. Payment information related to the defense of that extraordinary case remains under seal pursuant to court order. However, the data available to the Subcommittee affords an adequate basis for assessing the cost of the typical range of federal death penalty cases.

6. See 18 U.S.C. § 3005 (requiring appointment of two lawyers, including at least one "learned" counsel); 21 U.S.C. § 848(q) (setting higher maximum hourly rate for capital cases, establishing special qualifications for appointment, and setting special threshold for review of services other than counsel). These standards are discussed more fully in Sections B.7 (expert services), C.1 (learned counsel), C.5 (compensation of counsel), and C.6 (number of counsel).

7. Other factors considered by the Subcommittee included regional variations and variations over time. Although there have been too few federal death penalty cases to draw any statistically meaningful conclusions about whether the cost of representation varies regionally, the data which do exist suggest that there are not substantial differences such as those which have been noted in federal capital habeas corpus cases. Also, while annual costs of representation have varied -- probably as a result of the number of new cases for which few vouchers have yet been approved in a given fiscal year -- the average total cost per representation has remained stable and even declined from year to year. (See Appendix C, Chart C-1.) One possible explanation is that the proportion of highly complex drug conspiracy cases has declined, so that the average federal death penalty case is slightly less complex and expensive.

8. There is a small category of offenses over which the federal government has exclusive criminal jurisdiction. See 18 U.S.C. §§ 7, 13. Such cases cannot be prosecuted in a state court. However, most of the offenses charged in federal death penalty cases could also be prosecuted in a state court. Of the federal death penalty cases filed to date, it is uncertain precisely how many could have been prosecuted as capital cases in state court, because not all state laws provide for the death penalty, and the statutory standards for death penalty prosecutions vary from state to state. Interview data indicate, however, that the vast majority of federal death penalty cases could also have been prosecuted as state capital cases.

9. This estimate is based on cases tracked by the Federal Death Penalty Resource Counsel Project, which is described in Section C.2, infra.

10. Since January 1995, the Justice Department has reviewed all federal death penalty cases in order to monitor and centralize decisionmaking as to those cases in which the death penalty will be sought. Prior to that time, there was centralized review only of cases in which the local U.S. Attorney requested permission to seek the death penalty, and there was no requirement that the Attorney General review cases in which the local United States Attorney did not request such authorization. (The Department of Justice reports that 46 such cases were reviewed by the Attorney General from 1990 to 1994, of which 36 were authorized.) Between January 1995 and December 1997, the Attorney General reviewed 162 federal death penalty cases in which she did not seek the death penalty; however, this statistic cannot be extrapolated to determine the likely number of

unauthorized cases for the period from 1988 to 1995, because fewer federal offenses were punishable by death before the enactment of the 1994 crime bill.

11. The sample consists of 78 authorized federal death penalty cases, 58 cases in which authorization was denied, and 7 cases in which the authorization decision was still pending. The $142,000 figure reflects the average (mean) total cost of vouchers approved for the representation of a single defendant prior to the end of FY 1997. Because federal death penalty cases typically extend over more than one fiscal year, total costs are more helpful in analyzing costs and making recommendations for case budgeting and other controls than annual costs. The distribution of costs for a representation on an annual basis may reflect more about how quickly vouchers are submitted and approved in a particular case than about the reasonable cost of the work required in the case in any given year. Average cost statistics reported are based on the total of payments made through the end of FY 1997, and may not be complete for any given case. The Subcommittee's sample over-represents the proportion of federal death penalty cases in which authorization was granted; therefore the average cost of the cases in the sample is greater than the average total cost of all federal death penalty cases.

12. This number was provided by the Department of Justice in a letter to the Honorable William Terrell Hodges, Chair of the Executive Committee of the Judicial Conference of the United States, dated April 14, 1998. The Department provided the Subcommittee with a list identifying 113 authorized cases through December 12, 1997.

13. The "capital trials" in the Subcommittee's sample include one case in which defendants were acquitted of capital charges, and which therefore did not include a penalty phase, and one case in which the government withdrew its request for the death penalty mid-trial, because these cases were prepared and litigated through the guilt phase as capital cases, even though there was no penalty phase. Two cases resolved by guilty pleas after the commencement of jury selection but before the presentation of evidence have not been classified as capital trials, although in these cases the vast majority of costs associated with the trial of a federal death penalty case had been incurred.

14. See 21 U.S.C. § 848(i) (separate sentencing hearing); 18 U.S.C. § 3593(b) (same). All post-Furman state death penalty laws likewise provide for a bifurcated sentencing proceeding.

15. A report by the General Accounting Office (GAO) prepared shortly after the revival of the federal death penalty examined existing data concerning the additional costs associated with a death penalty prosecution. GAO, Limited Data Available on Costs of Death Sentences (Sept. 1989). Subsequently, the State Justice Institute sponsored a study responding to some of the GAO's methodological critiques of earlier studies. Phillip J. Cook & Donna B. Slawson, The Cost of Processing Murder Cases in North Carolina (1993). Cook and Slawson found that both the prosecution and the defense devoted much more time to a capital murder trial than to a non-capital murder trial, and that the capital trials lasted much longer. Id. at 61.

16. Source: Federal Death Penalty Resource Counsel Project data. In addition, some of the federal death penalty prosecutions not brought under the CCE or RICO provisions also involve drug conspiracies. For example, one prosecution under the civil rights law arose from a federal investigation into a related drug conspiracy. Another case in which the capital charge was based on a kidnapping statute also grew out of a drug conspiracy, as did a robbery case.

17. C&L at IV.81.
18. Source: Federal Death Penalty Resource Counsel Project data.
19. The number of representations in other offense categories was too small to generate meaningful averages; however, the average cost per representation in each category was lower than the average for drug cases.
20. As a result, the scope of the penalty phase in a federal capital case may be even wider than it is in states that adhere to the rules of evidence in the penalty phase.
21. Louis D. Bilionis & Richard A. Rosen, Lawyers, Arbitrariness and the Eighth Amendment, 75 Tex. L. Rev. 1301, 1316-17 (1997) (citing Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (opinion of Stewart, Powell, & Stevens, JJ.).
22. Recent decisions illustrating this point include: Williamson v. Ward, 110 F.3d 1508 (10th Cir. 1997); Hall v. Washington, 106 F.3d 742 (7th Cir. 1997); Emerson v. Gramley, 91 F.3d 898 (7th Cir. 1996), cert. denied, 117 S.Ct. 1260 (1997); Glenn v. Tate, 71 F.3d 1204 (6th Cir. 1995), cert. denied, 117 S.Ct. 273 (1996); Hendricks v. Calderon, 70 F.3d 1032 (9th Cir. 1995), cert. denied, 116 S.Ct. 1335 (1996); Clabourne v. Lewis, 64 F.3d 1373 (9th Cir. 1995); Antwine v. Delo, 54 F.3d 1357 (8th Cir. 1995), cert. denied, 116 S.Ct. 753 (1996); Baxter v. Thomas, 45 F.3d 1501 (11th Cir.), cert. denied, 116 S.Ct. 385 (1995); Jackson v. Herring, 42 F.3d 1350 (11th Cir.), cert. denied, 116 S.Ct. 38 (1995).
23. See ABA Guideline 11.8.3; New York Guideline 10.3.
24. Cook and Slawson found an enormous difference in the amount of time defense counsel devoted to a non-capital murder case as compared to a capital murder case in their study of North Carolina cases. The Costs of Processing Murder Cases in North Carolina at 61. (See note 15, supra.)
25. See ABA Guideline 11.4.2.
26. In other words, lawyers have to raise issues that may previously have been decided against them in their district or circuit. If they fail to do so, they will be barred by procedural default from obtaining relief from a death sentence, even if the Supreme Court later finds their positions meritorious. See Hitchcock v. Dugger, 481 U.S. 393 (1987) (upholding challenge to application of Florida death penalty statute that had been repeatedly rejected by the circuit and district courts).
27. C&L at IV.50. Prior to 1994, attorneys did not categorize their hours on vouchers, so reliable data concerning the attorney workload do not exist prior to FY 1995.
28. It is too early to tell from the data whether attorney time associated with legal research and writing will decline as unresolved issues are decided by the appellate courts.
29. Comparable data are not available for non-capital homicides, or other non-capital cases, because the voucher form used in non-capital cases does not break down attorney hours into these categories.
30. C&L at IV.22.
31. The Department did not identify cases by name; therefore it was impossible to compare the cost of prosecution and defense in specific cases.
32. In addition, the Department's estimate of its personnel costs for each prosecution was based on the share of attorney and non-attorney staff salary and benefits devoted to each prosecution, and therefore did not include "overhead" costs.
33. Department of Justice, United States Attorney's Manual § 9-10.000.

34. In some districts, U.S. Attorney's offices have also implemented a similar process for obtaining defense counsel's input into the decision regarding whether or not to recommend authorization to the Attorney General.
35. Another, less important, cost factor is the direct cost of participating in the authorization process. This includes the attorney time devoted to drafting a written submission to the Death Penalty Review Committee and the costs of travel to and from Washington to meet with the Committee. The CJA payment system does not separately track these costs.
36. C& L at IV.49. For non-capital homicides, the portion of payments for services other than counsel was approximately 16.2% in FY 1997, and 18% over the period FY 1992-97. The distribution of these costs was different from that in capital cases. Investigators were used much more frequently in federal death penalty cases (88/136) than in non-capital homicides (128/639 from FY 1992-1997). In those cases in which investigators were hired, the average cost was $22,438 for death penalty cases, compared to $3,502 for non-capital homicide cases. Psychologists were also hired much more frequently (50/136 versus 62/639). The average spending for each case in which a psychologist was hired was $8,723 for death penalty cases compared to $1,382 for non-capital homicide. Similarly, "other" experts were hired in 94/136 federal death penalty cases versus 78/639 non-capital homicides, with an average cost in each case in which an "other" expert was hired of $21,928 in death penalty cases versus $3,980 for non-capital homicides.
37. C&L at IV.24. See ABA Guideline 11.8.3 (preparation for the sentencing phase should begin immediately upon counsel's entry into the case).
38. The precise amounts and hourly rates paid to mitigation specialists in all cases could not be determined, because the standard death penalty expert expense form does not include a distinct code for mitigation specialist or the equivalent, who are therefore coded "other." It was possible, however, to tie CJA payment system information to other data concerning the use of mitigation specialists for several cases. Hourly rates paid to mitigation specialists in those cases ranged from $35 to $80 per hour.
39. American Bar Association, Toward a More Just and Effective System of Review in State Death Penalty Cases, 40 Am. U. L. Rev. 1, 63 (1990).
40. Id. at 65, 69, 70.
41. Id. at 70.
42. See Judicial Conference of the United States, Committee on Defender Services, Subcommittee on Death Penalty Representation at 5 (1995) (discussing the problem of constant reinvention of the wheel in capital habeas cases).
43. In fact, the Justice Department is in the process of enhancing the support already available to prosecutors in federal death penalty cases. Although in the past the Criminal Division did not have a designated death penalty unit, approximately eight new attorney positions are to be dedicated exclusively to assisting U.S. Attorney's Offices involved in federal death penalty prosecutions.
44. The Federal Death Penalty Resource Counsel Project is modeled on the CJA Panel Attorney Resource Counsel program, in which, in a limited number of federal districts which are not served by a federal defender organization, a private panel attorney provides, on a part-time, hourly fee basis, training and advice to appointed counsel and serves as a liaison with the court and the Administrative Office when necessary. The Federal Death Penalty Resource Counsel Project should not be confused with the former

Post-Conviction Defender Organizations, or Death Penalty Resource Centers, which were fully staffed law offices providing representation and other services in death penalty habeas corpus proceedings arising from state court death sentences, and which no longer receive any federal funding.

45. See Section C.2, supra.

46. There are two types of FDO. A federal public defender (FPD) is a federal agency staffed by federal employees. A community defender organization (CDO) is a non-profit agency funded by a grant from the judiciary. The fifty FPD offices serve 58 of the 94 federal districts. Thirteen CDOs serve an additional 15 districts.

47. In a small number of cases, courts have appointed two attorneys from an FDO as counsel and have not appointed a panel attorney. There has been one capital trial in which representation was provided exclusively by the FDO. In all other cases in which the death penalty was authorized, a panel attorney was appointed together with the FDO.

48. In many federal death penalty cases, conflict of interest rules have precluded the FDO from accepting appointment. These conflicts typically arise because the FDO has previously represented a co-defendant or witness in the case, and are particularly common in multi-defendant prosecutions.

49. Although 21 U.S.C. § 848(q)(5) requires appointment of at least one attorney who has been admitted to practice in the court in which the prosecution is to be tried for not less than five years, the statute provides an exception, for good cause, which permits the court to appoint instead "an attorney whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation. 21 U.S.C. § 848(q)(7).

50. Concerns have been raised, however, about whether lawyers from out-of-district might be less effective than local attorneys in jury trials. Those interviewed disagreed about this point, and it may be more true in some areas than in others. At one extreme, there were those who believed it would be disadvantageous to appoint a lawyer from a larger city within the same district to a case in a more rural area. It may also be, as some interviewees suggested, that familiarity with the local jury pool is especially important in a capital case, and that counsel without local trial experience is more likely to need an expert to assist in jury selection. See Section B.7, supra.

51. 21 U.S.C. § 848(q)(10)(A). There is no statutory maximum for cases filed prior to April 24, 1996, however Judicial Conference guidelines recommend an hourly rate ranging between $75 and $125 per hour. Courts authorized rates higher than $125 per hour only in a handful of federal death penalty cases filed before the enactment of the statutory maximum. Coopers & Lybrand attributed a substantial portion of the increase in the cost per federal death penalty representation to a "real increase in [hourly] rates." (C&L IV.37). This conclusion, however, is not correct, as it was based on a projection from the highest hourly rates paid in a case during a fiscal year, rather than the average rate paid per hour billed over the fiscal year. Using the latter method, the average hourly rate fluctuated from year to year. FY 1991: $115.82; FY 1992: $108.22; FY 1993: $99.44; FY 1994: $79.92; FY 1995: $88.16; FY 1996: $113.84; FY 1997: $108.84. Calculating average hourly rates billed per representation showed a similar pattern of fluctuation, rather than a consistent rise in the hourly rate of attorney compensation.

Therefore, it cannot be said that the rate of attorney compensation accounted for a significant portion of the overall increase in spending on federal death penalty cases.
52. Report of the Judicial Conference of the United States on the Federal Defender Program at 12 (1993).
53. The national average (mean) billing rate for law firm associates, as of January 1, 1997, was $134 per hour. The median billing rate for associates was $125 per hour, which means that half of the country's non-partner lawyers (who typically have less experience than qualified federal death penalty lawyers) bill at a higher rate than the highest rate that may be authorized for a lawyer capable of undertaking the most challenging criminal representation. Altman, Weil, and Pensa, The 1997 Survey of Law Firm Economics at II-3 (1997). For small firms, the mean for associates was $127 per hour, and the median was $125 per hour. For partners in small firms -- the most comparable source for the rate panel attorneys in capital cases would command in the private market, the mean was $169 per hour, and the median was $160 per hour. Id. at II-6. For lawyers with at least five years of experience, the minimum required by statute, the mean billing rate was $150 per hour, with a median of $145. For lawyers with 15 years of experience -- much more typical of the lawyers considered qualified for federal death penalty cases -- the mean was $179 per hour, and the median was $175 per hour. Id. at II-9. The 1996 national average hourly cost of office overhead, assuming 1800 billable hours yearly, was $64.3 per hour. Id. at VII-5. In some areas, billing rates and overhead costs are much higher than the national average, yet the maximum rate for representation in a federal death penalty case is limited to $125 per hour.
54. The maximum rate which may be paid to appointed counsel in non-capital cases is $75 per hour. Although the Judicial Conference has approved this rate for all districts, funding has been provided by Congress only for 12 districts (or portions of districts) at this rate. The remaining districts are limited to $45 for out-of-court work and $65 for in court work.
55. These factors are relevant to the determination of a reasonable rate of compensation for legal representation under the ABA Model Rules of Professional Conduct and caselaw interpreting federal "fee-shifting" statutes. See Model Rules of Professional Conduct 1.5(a)(1), (3) and (7).
56. See Model Rules of Professional Conduct 1.5(a)(2) (inability to accept other employment is a factor in setting reasonable fee).
57. In the sample of federal death penalty cases assembled for this report, there were two cases in which a total of five lawyers were compensated, however in both cases some of the lawyers were replaced by others, so that no more than three lawyers worked on the case at one time. In eight cases, four lawyers were compensated, however in some of these cases lawyers replaced others who had been removed. In 12 cases three lawyers were compensated. In the remaining 95 cases (81% of the total), only two lawyers were compensated.
58. A district court which chooses to provide representation through a federal defender organization may elect one of two organizational models. A Federal Public Defender Organization (FPDO) is a federal agency, headed by a Federal Public Defender who is selected by the Circuit Court of Appeals. The attorneys and other staff of a federal public defender organization are government employees. A Community Defender Organization (CDO) is a not-for-profit corporation governed by a board of directors and led by an

executive director. Both types of organization are funded and administered by the federal judiciary pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A. The term "federal defender organization," or "FDO," as used in this report, includes both organizational models.

59. The distinction between being qualified to serve and willing to do so is significant. Most defense counsel interviewed by the Subcommittee indicated that they would not be willing to accept appointment to more than one federal death penalty case at a time. Furthermore, since accepting a federal death penalty appointment requires a substantial time commitment which may ultimately cause the attorney to become entirely unavailable for any other fee-generating work, appointment to such a case is not lightly undertaken.

60. In a very small number of cases, federal defender organizations have served as both lead and second counsel, without the assistance of a panel attorney; such appointments should not be made unless the federal defender believes it is in the best interests of the client and the organization.

Murder Victims' Families for Reconciliation
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Senate Judiciary Committee
Testimony in Support of S 208
26 February 2009

Mr. Chairman and Members of the Committee:

I come today, to ask you to support Senate Bill 208. My name is Sue Norton and I was born and raised in Arkansas City, Kansas. I also have raised all of my children there and my husband was born and raised in Winfield. I hope that none of you will ever have to walk in my shoes, nor travel the journey that I have traveled, but I do hope that you can learn from what I know.

My Daddy and Step-mother were murdered nineteen years ago. The man that was convicted received the death penalty in Oklahoma and was executed in 2003. The murders and funerals and all that is entailed were heartbreaking enough, but we had two weeks of preliminary hearing and later that year we had 3 weeks of trial. I fell into bed totally and entirely exhausted and heartbroken each night. When it was finally over I went home to try to heal. How does one heal and resume normal activities after your loved ones have been murdered. By the time I realized that I did not want the death penalty, it was too late as the jury had given Robert Knighton the death penalty for ME! That is what they told me. Then I lived with the guilt that he was going to die because of me.

For thirteen years I followed all of the appeals and every single time was especially emotional. I did not want this man on the street, but neither did I want him to be killed by the state. Because I am a part of the state, I took full responsibility for his upcoming execution. For thirteen years I dreaded his execution. I had forgiven this man for my own sanity, however many family members did not feel the same way. Our family became torn in two.

In 2003, my husband and I attended the execution. I was sent to the room with the news media, as I was there to support Robert Knighton as "his friend", in his last hour. My sister went to the other room as she was the "victim's family". It was devastating to watch a man be put to death by the state. Today in 2009 I can truthfully tell you that both my sister and I are broken women. We are not "healed because that man was killed". *We do not have closure!* We continue to have health issues that have made us both unable to work in the normal workforce: health issues that are both mental and physical. Others across the nation who have experienced executions of loved ones- or of the offender in the murder of their loved ones, have similar after-effects as my sister and I.

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The after effects of the execution of Robert Knighton did not end with my family. Many of the personnel of the prison that participated in the execution suffer some sort of health issue as a result of it. Many times the staff had to quit work due to the results leaving the state paying the health bills. The repercussions are widespread and long lasting.

The financial cost of the Death penalty is horrendous, but the emotional cost is even worse. These expenditures would be so much better spent on our children, our seniors and health care, education and other important things. Please consider what I have told you. Please put these folks in prison for life without parole rather than the expense of the death penalty. And remember, I have walked the walk in this issue, and I know and understand all sides of it. I choose the Death penalty to be removed from Kansas.

Thankyou,

Sue Norton
Arkansas City, Kansas
Murder Victims Family for Reconciliation

KANSAS SENATE JUDICIARY COMMITTEE
Hearing on SB 208
February 26, 2009

TESTIMONY OF REBECCA E. WOODMAN IN SUPPORT OF SB 208

I am an attorney from Lawrence, Kansas. Primarily, I represent individuals under death sentence in Kansas on direct appeal in my position as a capital appellate defender. I also teach classes on wrongful convictions and the death penalty as an adjunct professor at Washburn Law School. I am here as an attorney in support of Senate Bill 208, a bill to abolish the death penalty in Kansas.

The price of the death penalty in Kansas is simply too high to justify its use. It is too costly, both in terms of the sheer monetary cost of seeking death – costs which far exceed any rational, reasonable or reliable return on the expenditure, and in terms of the psychological toll on families of victims misled into believing that a death verdict at trial represents "closure," and on families of the condemned who are left to contemplate their own loved one's death at the hands of the state. In reality, each death penalty case requires extraordinary and unique expenditures, over what may well turn into decades of trial, possible re-trial, appeals, state and federal post-conviction litigation, and possibly more re-trial, sapping both dollars and the human spirit every step of the way, with every reasonable likelihood the death sentence will never be carried out.

Since the death penalty was enacted in 1994, 12 individuals have received a death sentence in Kansas, out of approximately 78 charged capital cases. Many millions of dollars have been spent in pursuing those 12 death sentences, and many more millions have been spent

in those cases where a death sentence was sought by the prosecution, but, for one reason or another, resulted in a life sentence. The mere fact that a case is filed as a death case necessitates, as a constitutional matter, an immediate, thorough, painstaking investigation of the circumstances of the crime and the defendant's life history, in preparation for a penalty trial which may or may not occur.[1]

Of those 12 death sentences imposed since 1994, none have proceeded beyond the direct appeal stage. In the 3 cases that have been heard on direct appeal, the death sentences have been reversed and sent back for re-trial. Gary Kleypas' death sentence was vacated on direct appeal in 2001 and sent back for a penalty phase re-trial. The reversal was based on the finding that the Kansas death penalty statute was unconstitutional – a finding later overturned by the Supreme Court of the United States in a 5-4 decision,[2] but the opinion in the Kleypas case suggested that prosecutorial misconduct at Mr. Kleypas' trial warranted reversal of his death sentence as well.[3] Last November, Mr. Kleypas was sentenced to death a second time following the re-trial, and his case is once again on direct appeal. Michael Marsh's capital murder conviction was reversed on direct appeal due to the trial court's exclusion of material evidence of third-party guilt connecting the victim's husband to the crime,[4] and his case has been sent back to the trial court, where Mr.

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[1] *See Woodson v. North Carolina*, 428 U.S. 280 (1976); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Rompilla v. Beard*, 545 U.S. 374 (2005); *ABA Guidelines for the Appointment and Performance of Defense Counsel* (Rev. Ed. 2003); *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 Hofstra L. Rev. 677 (2008).

[2] *Kansas v. Marsh*, 548 U.S. 163 (2006).

[3] *State v. Kleypas*, 272 Kan. 894 (2001).

[4] *State v. Marsh*, 278 Kan. 520 (2004).

Marsh awaits an entirely new trial. Gavin Scott's death sentence was reversed last year based on the trial court's error in penalty phase jury instructions,[5] and Mr. Scott's case was sent back to the trial court for a penalty phase re-trial, which remains pending. A fourth case on direct appeal involving Stanley Elms was settled out of court for a life sentence in exchange for a dismissal of the appeal after Mr. Elms' brief had been filed, which had raised serious issues of prosecutorial misconduct. A fifth case, involving Phillip Cheatham, has been remanded to the trial court for a hearing scheduled in April on a claim of ineffective assistance of counsel for, among other things, failing to investigate and present any mitigation case at all.

These cases give the lie to claims that the process by which the death sentences have been imposed is fair and free of constitutional error. Moreover, the cases confirm what every legal actor in the process knows to be true: A death verdict at trial is not an end; it only marks the beginning point of a process continuum that is expensive, time-consuming, emotionally draining, and highly error-prone. Indeed, the cost involved in the Kansas cases, at this point in time, doesn't even begin to account for the lengthy state and federal post-conviction litigation yet to come. With no end on the horizon, and without assurance of any return on the investment, it is time to end the death penalty in Kansas.

Opponents of this bill have claimed that the application of the death penalty in Kansas is not arbitrary. This assertion is plainly contradicted by prosecutorial decisions accepting a plea in exchange for a life sentence in some cases but not others, without any meaningful basis for distinction. For instance, the Attorney General's office accepted a plea for a life sentence in the White case in Salina, in which three people including a child were killed, but would not accept a

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[5]*State v. Scott*, 286 Kan. 54 (2008).

plea for a life sentence without parole in the most recent case involving Justin Thurber, who was sentenced to death for killing Jodi Sanderholm. Just last week, prosecutors accepted a plea for a life sentence in the Brandon Reed case for killing his pregnant girlfriend. Pleas for life sentences were also entered in the Edwin Hall case for the killing of Kelsey Smith, and the death penalty was taken off the table by prosecutors in the case of Benjamin Appleby, who was convicted of killing Ali Kemp. These cases are equally tragic, yet one received a death sentence and the others did not. The lack of any meaningful basis for distinguishing between cases in which the death penalty is imposed and cases in which it is not is the hallmark of arbitrariness.[6]

Similarly, in two cases involving quadruple homicides that occurred nearly simultaneously in Sedgwick County, Reginald and Jonathan Carr received the death penalty in one case, while in the other case, Earl Bell and Cornelius Oliver did not. Significantly, while both cases involve African-American defendants, the victims in the Carr case were White and the victims in the Bell/Oliver case were African-American. Another form of arbitrariness is highlighted by definitive studies showing that there is a much greater likelihood that the death penalty will be imposed in a case involving White victim than in a case involving an African-American victim.[7]

Opponents have also claimed that the death penalty is a necessary, useful, potentially cost-saving tool for prosecutors, ostensibly to secure plea agreements in capital cases which would not otherwise occur without the threat of the death penalty. This is wrong, factually,

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[6] *Furman v. Georgia*, 408 U.S. 238 (1972).

[7] *See McCleskey v. Kemp*, 481 U.S. 279 (1987) (citing undisputed findings of the Baldus Study).

ethically, and constitutionally. It is wrong factually, since the lack of availability of the death penalty in the Dennis Rader ("BTK") case did not prevent prosecutors from obtaining a guilty plea from Rader. It is ethically and constitutionally wrong because it is simply unconscionable that the death penalty could ever be justified by prosecutors as a sword to coerce guilty pleas. Indeed, a death penalty that resulted merely because an accused chose to exercise his or her constitutional rights to a jury trial is a gross perversion of justice, and would violate the most basic duties of the prosecutor.[8]

Historically, the spirit of Kansas citizens has always leaned in the direction of life. This reverence for life stems from Kansas' foundation as a free state, and the enactment of a state constitution based on principles which protect the "inalienable" rights to life, liberty and the pursuit of happiness.[9] The death penalty was abolished *de facto* in 1872 and then *de jure* in 1907. It was reinstated during Prohibition in 1935, became inoperable after the Supreme Court's decision in *Furman v. Georgia* in 1972, and then, even after the death penalty was re-authorized by the Supreme Court in 1976, it was nevertheless formally abolished in 1978. In 1994, the

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[8]*See Berger v. United States*, 295 U.S. 78 (1935).

Moreover, using the death penalty as a coercive tool in this regard carries the real risk that an innocent person will plead guilty just to avoid the death penalty. This is precisely what has recently come to light in Nebraska, where 6 now-exonerated persons were wrongfully accused of a brutal murder of an elderly woman, threatened with the death penalty, after which four of the accused falsely confessed, and five of the accused pled guilty to avoid the death penalty."5 pardoned after wrongful conviction in Neb. crime," Associated Press (January 26, 2009), available at http://www.google.com/hostednews/ap/article/ALeqM5hxdoa0I5eyjIDrW1lgqOvB0-_WIAD95V802O1 (last visited February 25, 2009)(noting that the sixth person's conviction was reversed earlier).

[9]Kansas Const. Bill of Rights, § 1.

death penalty became law again without the Governor's signature.[10] Thus, Kansas has existed without a death penalty either in law or practice for 85 years of its history.

It is time for our state to exist without the death penalty again. Our budget requires it, the integrity of our justice system will be better served without it, and our state's rich history compels it.

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[10]*See* Harvey R. Hougen, "The Strange Career of the Kansas Hangman: A History of Capital Punishment in the Sunflower State to 1944 (Doc. diss., Kansas State University 1979)(on file with author); Louise Barry, *Legal Hangings in Kansas*, 18 Kan. Historical Quarterly 279 (1950).

Senate Judiciary Committee
Written Testimony in Support of S 208
26 February 2009

Mr. Chairman and Members of the Committee:

My name is Michael Birzer and I am an Associate Professor of Criminal Justice and Director of the School of Community Affairs at Wichita State University. I appear today as a proponent of Senate Bill 208 which calls for the abolition of Capital Punishment in the State of Kansas.

As a criminologist, I am familiar with a fair amount of research that shows that capital punishment posses a host of problems. These problems center on several issues which include the lack of empirical evidence that the death penalty is a deterrent, disparities in who gets sentenced to death, the substantial cost of the death penalty, and the possibility of an innocent person being sentenced and put to death. My brief remarks today will focus on the substantial cost of the death penalty.

As you may be aware, research shows that a death penalty trial is significantly more costly when compared to non-death penalty trail. In fact, the death penalty is much more expensive even when compared to incarcerating an offender for the rest of his or her life without the possibility of parole. Various state governments estimate that a single death penalty case, from the point of arrest to execution, ranges from one to three million dollars per case.

One study found the death penalty to cost over $7 million. In that particular study which was published in the Northern Kentucky Law Review in 1990, cost data were analyzed from two capital punishment cases. The total cost of the first case, which began in 1979, was $1.2 - 3.1 million. After 10 years, it had progressed through only 1 of the 10 levels of appeal. The costs were predicted eventually to cost as much as $7.4 million. After eight years, the second case cost between $980,000 and $1.9 million; at the time of the research it had progressed through 2 of the 10 levels of appeal. The researcher predicted that the cost of the second case may rise to as much as $3.2 million. If the defendants had been sentenced to life without parole at age 21 and lived until age 70, the incarceration costs would total $735,000 and $795,000, respectively.

In general, cases resulting in life imprisonment average from $500,000 to 700,000, this includes incarceration costs. Death penalty cases are expensive because of a more extensive jury selection system, an increase in the number of motions that are filed, longer trials, additional investigators, more expert testimony, more lawyer expenses, and mandatory appeals. Of course, other economic considerations include the cost of keeping the offender on death row until execution, and the management and operation of death row.

Please do not construe my testimony today as advocating for a soft approach on crime or for those convicted of the most heinous crimes. I have been an academic for 10 years now, however, prior to entry into teaching and research I served for 18 years with the Sedgwick County Sheriff's Department in Wichita. During my 18 year law enforcement career I saw firsthand the devastating effects of crime. I saw the victims of crime who had been beaten,

brutalized and murdered, and I saw the worst of society - the most hardened criminals. And there is not a day that goes by that I don't think about four fellow officers that I worked with and who were killed in the line of duty. My law enforcement experience along with my academic training has given me a unique view of crime, criminals, and the criminal justice system.

After 18 years of serving the public as a law enforcement officer, and the past 10 years as an academic studying crime and criminal justice, including capital punishment, I have come to the conclusion that the death penalty is not a meaningful solution to crime. There is simply too much evidence suggesting that it has too many problems, no matter how perfect we perceive our criminal justice system to be. The fact of the matter is the death penalty is simply a retribution tool.

Abolishing the death penalty in Kansas would potentially save an astronomical amount of money. Perhaps the money saved could be used to enhance the security of our state prison system that houses our most heinous criminals while at the same time providing added security for our men and women who serve as correctional officers. Moreover, maybe the money saved could be used to invest in promising criminal justice practices and programs aimed at reducing recidivism or enhancing crime fighting resources which over time could result in immense cost savings.

In light of these brief remarks, I respectfully ask that you pass Senate Bill 208.

Michael Birzer
Associate Professor and Director
School of Community Affairs
Wichita State University

Kansas Catholic Conference

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Joint Statement in Support of Senate Bill 208

Abolishing the Death Penalty in Kansas

by

The Four Catholic Bishops of Kansas

Most Reverend Joseph F. Naumann, Archbishop of Kansas City in Kansas
Most Reverend Ronald M. Gilmore, Bishop of Dodge City
Most Reverend Paul S. Coakley, Bishop of Salina
Most Reverend Michael O. Jackels, Bishop of Wichita

**Testimony presented on the bishops' behalf by Michael Schuttloffel, Executive Director of the Kansas Catholic Conference.

Senate Judiciary
2-26-09
Attachment 8

We, the Catholic bishops of the state of Kansas, wish to register our strong support for Senate Bill 208, which would abolish the death penalty in our state.

There are over 400,000 Catholics living in Kansas, and we speak to you today on their behalf. However it is also our intention to persuade those who are not Catholic of the grounds for abolishment of the death penalty. While Catholic theology, our interpretation of Holy Scripture, and our understanding of God's will underpin our views on capital punishment, we also believe that there are principles at stake that speak to all men and women of good will. One need not be a Catholic to recognize the deleterious effects of the death penalty upon our society.

The Catholic Church takes a nuanced position with regard to capital punishment. It has traditionally been allowed, not as a form of vengeance, but rather as a means of protecting people in cases of absolute necessity: in other words, when it would not be possible otherwise to defend society. However, as Pope John Paul II explained in the 1990's, such circumstances rarely if ever exist in modern industrialized societies. We have the technological means to ensure that those who would do us harm are incarcerated for life. Thus, capital punishment has ceased to be a matter of necessity. While the Catholic tradition makes room for the taking of human life in cases of defense against an aggressor, it makes no room for killing for the sake of revenge.

Of the many factors that recommend the discontinuation of the death penalty, perhaps none is more obvious than the terrible possibility of executing an innocent man. In the last 35 years, over 100 Americans have been released from death row due to evidence of their innocence. The fact that innocent persons were near to being executed in this country is so astounding, so shocking, that we have no choice but to seek alternate forms of justice. As DNA and other forensic technologies improve with each passing year, it is possible than there are people on death row today who will eventually be exonerated. Even if only one innocent person is put to death, the system has failed and failed catastrophically. The only way for society to have the peace of mind that no guiltless person will ever face execution is for there to be no executions. The mere possibility of such a thing, no matter how remote, is still too much.

By incarcerating a convicted criminal rather than killing him, society provides itself with time to ensure the correct verdict has been reached. It also permits the criminal time to reflect upon his evil deeds and, hopefully, to arrive at a conversion of heart. We do not suggest that such a conversion is grounds for release. Instead, we seek to heed Jesus Christ's injunction in the Gospel of Matthew:

> *You have heard that it was said, 'You shall love your neighbor and hate your enemy.' But I say to you, love your enemies, and pray for those who persecute you...For if you love those who love you, what recompense will you have?*

To express love for a person who has committed a heinous crime is a great challenge, however this can best be done by praying for his conversion and by not seeking to deny the Lord time to change his heart. While the wounds that have been inflicted by crimes of violence cannot ever be fully mended in this world, would it not be better to know that the perpetrator has come to regret his actions? Or would we prefer that he cling to the wicked impulse that governed his behavior till the bitter end?

We should not be in such a hurry to mete out revenge that precludes the possibility of conversion or exoneration. Indeed, the book of Romans admonishes us to leave retribution to the Lord:

> *Do not repay anyone evil for evil...Do not take revenge, my friends, but leave room for God's wrath, for it is written: 'It is mine to avenge; I will repay,' says the Lord."*

While we support measures to protect society from dangerous criminals, we trust only in the Lord to, in the end, judge us as we deserve to be judged. And it is the matter of what criminals deserve that is ultimately the crux of the debate over capital punishment.

Many death penalty proponents freely admit that their support derives not from fear of felons escaping prison nor out of any conviction about the death penalty's deterrent value, which very much remains a hotly disputed topic. Instead, they say that they believe in the death penalty because the perpetrators of certain particularly despicable crimes "deserve to die."

In our minds, however, it is not a question of whether someone deserves to die. We do not want to be a country that gives people "what they deserve." If we were such a country, advocates of the "eye for an eye" approach to criminal justice would not support the death penalty as we know it today. Instead of lethal injection, they would demand that convicted criminals be subjected to the same cruel tortures and agonizing deaths that they inflicted upon their victims. Yet no one proposes such a thing. Why not? Does a murderer not "deserve it?" If we wanted to "give them what they deserve," might we not allow the victim's family to themselves kill the murderer of their loved one? Our society, of course, does not permit this. But why? Do they not "deserve it?"

We should not kill our prisoners for the same reason that we do not torture them. Despite whatever it is they have done – and make no mistake, we recognize the horrific crimes that have been committed by those on death row – we should not kill for vengeance's sake....*for our own sakes*. We do not want to be the kind of people who kill human beings out of anger, revenge, hate, bloodlust – the same dark emotions that animated the original crimes we seek to punish. We should not have our ethics shaped by the crimes of those who demonstrated none. We should take no action to reflect theirs, but instead we should make bright the distinction between our ways and their ways. Ours should be a higher standard.

There are other good reasons to move beyond the death penalty that will be examined by these proceedings, including its high costs, the arbitrariness and apparent racial disparity of its application, and the extraordinary capacity of victims' families to show mercy to their victimizers. However, we hope to impress upon members of the Legislature that the moral basis for supporting SB 208 in no way involves some naïve refusal to see clearly that there is evil in the world. Indeed there is. This is the very premise of the Church and its mission on Earth. We firmly believe, however, that the death penalty, by vainly trying repay killing with killing, does great harm to the society that dispenses this false justice, while permitting the guilty to avoid a lifetime of confinement and reflection upon their crimes.

The guilty have blood on their hands. Let our hands be clean.

Statement on Capital Punishment
Testimony on Senate Bill 208, Senate Judiciary Committee
Feb. 26, 2009

1. We are members of Mennonite Churches in the Central Kansas area who belong to the Western District Conference of Mennonite Church U.S.A.

2. We support Senate Bill 208 that abolishes the death penalty, amending K.S.A. 213105.

3. In these difficult economic times, when the Kansas Legislature is forced to trim the budgets of essential services like public education, it is critical that the legislature fund only those programs that are proven to be absolutely necessary to protect and preserve the common good. The death penalty is unnecessary to protect the public, and it is very expensive to administer.[i] Kansas does not need the death penalty either as a form of punishment or to protect public safety.

4. An essential component of a well ordered society is public safety, the prevention of crime and the protection of our communities from those who have no respect for the sacredness of human life. Society must have laws to protect itself against dangerous criminals who endanger the lives of others. Public safety can be achieved in Kansas with a maximum sentence of life without the possibility of parole. Public support for the death penalty declines significantly when the alternative of a life sentence without parole is available to assure the public that their safety is secure.

5. Some argue that the death penalty protects public safety by deterring criminals from committing violent crime. However, there is little, if any, scientific evidence that capital punishment has a deterrent effect. Careful and well designed scientific studies and policy analyses raise serious doubts that executions deter criminals from violent crime.[ii] Because the variables are so complex, public policy based on the claim the death penalty has a deterrent effect is unwarranted.

6. A life sentence without parole is at the same time a very severe punishment that fits the gravity of the crime. Public policy must take injustice seriously and address the anger that people feel about the victims of murder. An execution, necessarily delayed for many years because of the appeals process and to guard against mistakes, continues to focus on the criminal who committed the wrong. A life sentence without parole is a swifter justice. It is more likely to provide the context for victims to focus on their own healing rather than on the criminal who committed the crime.[iii]

7. An execution also creates another set of victims, namely the family members and close associates of the one who committed the crime. The cycle of violence is not broken, but it continues through state sanctioned killing. Killing of another human being forever closes off the possibility of repentance and healing.

8. Innocent persons have been executed, because the criminal justice process is not perfect. To avoid a gross miscarriage of justice, on January 31, 2000, following the exonerations of 13 death row inmates found innocent of the capital crimes for which they were convicted, Governor George H. Ryan announced a moratorium on executions in Illinois until a review of the administration of the death penalty in the state could be conducted. It is also difficult to apply fairly which defendants will face capital punishment. Richard Ney, an experienced capital litigator in Wichita disputes Attorney General Six's claim that there is not "unlimited discretion" operative in Kansas. He cites the case of a defendant in Salina allowed to plead guilty for a life sentence though he had killed three people, one of them a child, while his office rejected a plea to life by Justin Thurber who committed a single homicide. Nye says: "This clearly is the height of arbitrariness."

9. An abolition of the death penalty would enable us to allocate the scarce resources of our state more wisely. A 2003 Legislative Post Audit estimated the median cost for death penalty cases was $1.26

million through execution, compared with $740,000 for non-death penalty cases through the end of incarceration. The audit obtained the data from the agencies involved, including the Attorney General's Office. Numerous studies of the costs in other states consistently show that death penalty cases are very expensive. See in the Appendix a 2002 article from the Wall Street Journal. Conclusion: significant savings could be achieved by abolishing the death penalty and redirecting these resources to programs that prevent crime.

10. In the last several years the steep rise in the prison population in Kansas has been significantly reduced. This has been accomplished by an intensive effort by the Department of Corrections to manage parolees and successfully re-integrate offenders into society. This year the state's budget woes are likely to force the closure of day reporting centers in Wichita and Topeka, inmate programs in drug rehabilitation and education will likely be cut back, and the state may need to cut the number of parole officers. The prevention of crime and the promotion of public safety would be much better served by using scarce state resources for programs that prevent crime rather than wasting scarce resources in a few high publicity death penalty cases which neither deter crime nor protect the public safety.

11. We testify before this committee both as citizens of Kansas and as Christians who believe that government has a responsibility to guard and protect the sacredness of all human life. We believe that all human life is sacred, even the criminal who remains a person before God capable of repentance and transformation. Though historically Christians have not agreed on whether all killing is wrong, we do have common ground in believing that there is a presumption for the preservation of life and against killing.[iv] To cross the line and kill a human being intentionally, which some faith traditions choose not to cross, is a momentous act that can only be justified for compelling reasons.[v] The desire for vengeance or to abide by the maxim, "a life for a life" are not compelling reasons to override the presumption against killing.

12. To summarize, there are NOT compelling reasons FOR capital punishment that could justify state sanctioned killing. Capital punishment does not adequately protect against human fallibility, despite the long appeal process. Mistakes have been made in executing persons who are innocent. Capital punishment has been disproportionately applied to the poor and minorities, violating fundamental principles of justice. The death penalty is not necessary to protect the public safety. The evidence that it is a deterrent is not substantiated by careful scientific studies. Life without parole is a severe punishment that addresses the needs of victims better than the death penalty. The death penalty is expensive. It diverts scarce resources away from programs that can better prevent crime and protect public safety.

For all these reasons, most major Christian denominations, both Protestant and Catholic, have taken official positions against capital punishment.[vi] We join these other groups in urging the Kansas legislature to support Senate Bill 208 by abolishing the death penalty.

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Douglas R. Luginbill, Pastor, Hope Mennonite Church, Wichita
Miriam Nofsinger, Member of Deacon Board, Lorraine Ave. Mennonite Church, Wichita
Retired Nurse; Specialty in Drug Rehabilitation
Harold R. Regier, Faith Mennonite Church, Newton
Retired Director of Offender/Victim Ministries, Newton
Mary Lou Woods, Peace Action Committee, Lorraine Ave. Mennonite Church, Wichita
Marvin Zehr, Peace and Outreach Commission, Shalom Mennonite Church, Newton, & Interim Pastor, Grace Hill Mennonite Church, Rural Newton

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i. Kansas is not alone. Efforts to repeal the death penalty for economic reasons are also underway in New Mexico, Colorado, Nebraska, Montana, New Hampshire, and Maryland.

ii. One of the best statistical studies available was done by Brian Forst, "The Deterrent Effect of Capital Punishment: A Cross-State Analysis of the 1960's", Minnesota Law Review 61, no. 5 (May 1977). Glen H. Stassen, Lewis Smedes Professor of Christian Ethics at Fuller Theological Seminary, Pasadena, CA summarizes this study. "Forst uses the method of multiple regression, which can measure the impact of numerous likely influences on the homicide rate. . . . Forst includes comparisons across the states as well as over time, and comparisons of how much each variable has changed rather than simply *whether* it has increased or decreased. He focuses on the crucial 1960s, when the use of the death penalty was changing in different ways in different states, and when the homicide rate began increasing dramatically starting in 1963. (See the collection of essays on the pros and cons of capital punishment, Capital Punishment: A Reader, edited by Glen Stassen, Pilgrim Press, 1998, p. 2) Forst's conclusion: "I doubt that the presence or absence of a deterrent effect of the death penalty is likely to be demonstrable by statistical means." (p. 55). For a more recent analysis of studies on whether capital punishment has a deterrent effect, see the website, http://www.deathpenaltyinfo.org/FaganTestimony.pdf, "Deterrence and the Death Penalty: A Critical Review of New Evidence", Testimony to the New York State Assembly Standing Committee on Codes, Assembly Standing Committee on Judiciary and Assembly Standing Committee on Correction Hearings on the Future of Capital Punishment in the State of New York, Jeffrey Fagan, Columbia Law School, January 21, 2005.

iii. Bill Lucero of Topeka, who lost his father to homicide, says "the emotional cost of the death penalty is tremendously higher because the victim's family is re-traumatized every time they have to deal with the subject of an execution that so far has yet to occur."

iv. On the complex issues surrounding the Bible and capital punishment, and for those who are interested in these issues, we recommend an article published in Review and Expositor: A Quarterly Baptist Theological Journal, Vol. 93, No. 4, Fall 1996. The conclusion is: "In sum, the Bible affirms two profound principles. One is profound moral seriousness about obeying God's will. Disobedience may not be taken lightly. The other is profound seriousness about the sacredness of human life. Killing people to punish them must be avoided if there is another morally serious way to punish crime. Therefore, in practice, the death penalty becomes increasingly rare. One almost never hears of it in the Prophets and the Writings, and every mention of it in the New Testament concerns an unjust death penalty. Other penalties develop, and the death penalty is avoided. Mercy becomes central. Vengeance is ruled out: "Beloved, never avenge yourselves, but leave it to the wrath of God; for it is written, 'Vengeance is mine, I will repay', says the Lord" (Romans 12:19; Lev. 19:18 Deut. 32:35; Hebrews 10:30). And the Bible again and again emphasizes justice for the poor, the powerless, the oppressed, and the innocent. Furthermore, it rejects whatever blocks the possibility of repentance and redemption." All twelve of the most recent Presidents of the Society of Christian Ethics have signed the statement. The Society of Christian Ethics is the professional society of over 1000 teachers of Christian Ethics in theological schools, colleges, and universities in the United States and Canada.

v. See the website, http://www.usccb.org/sdwp/national/penaltyofdeath.pdf, for a carefully reasoned argument against the death penalty by the U.S. Catholic Bishops.

vi. See the Appendix for a list of the many religious organizations - Protestant, Catholic, Jewish - who oppose the death penalty. There is a growing consensus among widely diverse faith traditions that there are not compelling reasons in the case of the death penalty to override the presumption against killing.

Appendix

Death Penalty in America, Legal Studies 485, Spring 2003
Counties Struggle With High Cost
Of Prosecuting Death-Penalty Cases
The Wall Street Journal, January 9, 2002

By RUSSELL GOLD

When a Utah police chief was shot to death in July after responding to a call about a domestic dispute, tiny Uintah County's decision to seek the death penalty was easy. "It was a law-enforcement officer in the line of duty," says county attorney JoAnn Stringham.

Now comes the hard part: paying for the trial. So far, the county hopes to avoid raising taxes on its 25,959 citizens by spreading the as-yet undetermined costs over three fiscal years.

Other counties haven't been as lucky. Jasper County, Texas, ran up a huge bill seeking a capital-murder conviction of three men accused of killing James Byrd Jr., who was dragged to death in a 1998 case that attracted national attention. (Two were sentenced to death; the third got life in prison.) The cost -- $1.02 million to date, with other expenses expected -- has strained the county's $10 million annual budget, forcing a 6.7% increase in property taxes over two years to pay for the trial. County auditor Jonetta Nash says only a massive flood that wiped out roads and bridges in the late 1970s came close to the fiscal impact of the trial.

As a growing number of local governments are discovering, there is often a new twist on an old saying: Nothing is certain except the death penalty and higher taxes.

Just prosecuting a capital crime can cost an average of $200,000 to $300,000, according to a conservative estimate by the Texas Office of Court Administration. Add indigent-defense lawyers, an almost-automatic appeal and a trial transcript, and death-penalty cases can easily cost many times that amount.

The cost, county officials say, can be an unexpected and severe budgetary shock -- much like a natural disaster, but without any federal relief to ease the strain. To pay up, counties must raise taxes, cut services, or both.

In research published last summer, Dartmouth College economist Katherine Baicker found that counties that bring a death-penalty case had a tax rate 1.6% higher than those that didn't. Her statistical examination of 14 years of budget data from all 3,043 U.S. counties showed those with a death penalty also spent 3.3% less on law enforcement and highways. Ms. Baicker's analysis found that the same pattern of raised taxes and spending cuts hits all death-penalty counties regardless of size.

In Texas, Dallas County is struggling to pay for concurrent cases against six prison escapees accused of killing a suburban policeman last year. Gov. Rick Perry gave the county $250,000 from discretionary funds to help.

The fiscal fallout can linger for years. In Mississippi, Quitman County raised taxes three times in the 1990s and took out a $150,000 loan to pay for the 1990 capital-murder trials of two men that went on for years. Now, the county is having trouble attracting a new tenant to a vacant warehouse because it has higher property taxes than any nearby county. A death-penalty case "is almost like lightning striking," says county administrator Butch Scipper. "It is catastrophic to a small rural county."

The issue has become more pressing as death-penalty case costs have pushed higher, says Jay Kimbrough, criminal-justice director for Gov. Perry. Among the causes: DNA tests and appellate-court decisions that require longer jury selection and more expensive defense attorneys.

Now local officials are pressing state governments for relief. In Texas, Jasper County's experience helped persuade lawmakers last year to expand a program to help counties pay for the "extraordinary costs" of prosecuting capital-murder cases. (The discretionary funds given Dallas County last April were not part of this program.) State Rep. Bob Turner, who sponsored the legislation, says he was worried that smaller counties were "downgrading cases" -- pursuing lesser charges rather than the death penalty -- "to preclude the tremendous drain on the county budget." While Mr. Turner says he knows of no specific examples, he says he often heard about the cost pressures during meetings with officials from the 17 mostly rural counties he represents.

A Trial 's Tally

Jasper County, Texas, spent more than $1.02 million bringing death penalty cases against three men for the 1998 murder of James Byrd Jr. A breakdown of expenses:
- Court-appointed defense attorneys 28.3%
- Telephone, travel and misc 20.6
- Salary for extra prosecutors 17.3
- Jury, courthouse security, court reporter 15.5
- Investigation 15.4
- Psychiatric evaluation 2.9

Costs notwithstanding, county officials say they pursue the death penalty when the crime warrants it. "It is very expensive and it is very burdensome on communities, so that gives people pause," says Arthur Eads, who was the district attorney in Killeen, Texas, for 24 years. But, he says, "I never felt the heat to do it or not to do it because of the money."

Polk County, in east Texas, was the most recent county to receive state help. In June, the U.S. Supreme Court overturned the sentence of Johnny Paul Penry, convicted of fatally stabbing a woman in 1979, and sent the case back to Polk County for a third trial. County officials toted up the likely costs: $250 to $350 per hour for the forensic psychiatrist to review and testify about Mr. Penry's medical records; $700 to copy his 1,500-page prison record; $20,000 to pay for hotels, meals and mileage for prosecutors, investigators and support staff when the trial is moved to a different county, as expected.

Total estimated cost: at least $200,000. In December, Polk received $100,000 from the state to help pay the bill.

Other states have begun to set up what amounts to death-penalty risk pools, allowing counties to pay in annually and receive funds in the event of a death-penalty case. Utah created one of the first such pools in 1997 after "the legislature got tired of bailing out counties," says Mark Nash, director of the Utah Prosecution Council.

Uintah was one of six Utah counties that didn't participate in that state's risk pool. The county, in the northeast corner of the state, had never had a death-penalty case until Roosevelt City police chief Cecil Gurr was shot and killed in July, just a few feet inside the county line.

Now, as the county struggles to pay for prosecuting the case, local officials are convinced the insurance is a good idea. In August, Uintah paid $21,500 to join the state risk pool -- for the next death-penalty case.

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Religious organizations Against the Death Penalty

Kansas

Evangelical Lutheran Church in America, Central States Synod
Mennonite Church USA, Western District
United Church of Christ, Kansas Oklahoma Conference
United Methodist Church-Kansas
Kansas Ecumenical Ministries
Adorers of the Blood of Christ, Wichita Center
Benedictine Sisters
Dominican Sisters of Great Bend
Pax Christi Kansas
Sisters of Charity of Leavenworth
Sisters of St. Joseph of Concordia
Sisters of St. Joseph of Wichita
Ursuline Sisters Leadership Team

National denominations who oppose the death penalty

American Baptist Churches in the U.S.A.
American Friends Service Committee (Quakers)
American Jewish Committee
Bruderhof Communities
Buddhist Peace Fellowship
Central Conference of American Rabbis
Christian Church (Disciples of Christ)
Church of the Brethren
Community of Christ
The Episcopal Church
Evangelical Lutheran Church in America
Friends United Meeting
General Conference Mennonite Church
The Mennonite Church
The Moravian Church in America
National Council of Churches of Christ in the U.S.A.
National Council of Synagogues
Orthodox Church in America
Presbyterian Church (U.S.A.)
The Rabbinical Assembly
Reformed Church in America
Union of American Hebrew Congregations
Unitarian Universalist Association
United Church of Christ (Congregationalists)
United Methodist Church
United States Catholic Conference