AN ANALYSIS OF THE ECONOMIC COSTS OF SEEKING THE DEATH PENALTY IN WASHINGTON STATE†

Report by

Peter A. Collins, Robert C. Boruchowitz,

Matthew J. Hickman, & Mark A. Larrañaga[1]

January 1, 2015

[1] Peter A. Collins, Ph.D., Assistant Professor, Criminal Justice Department, Seattle University, 901 12th Avenue Post Office Box 222000, Seattle, Washington 98122-1090, Phone: 206-296-5474, Email: collinsp@seattleu.edu; Robert C. Boruchowitz, J.D., Professor from Practice and Director, The Defender Initiative, Seattle University School of Law, 901 12th Avenue Post Office Box 222000, Seattle, Washington 98122-1090, Phone: 206-398-4151, Email: boruchor@seattleu.edu; Matthew J. Hickman, Ph.D., Associate Professor, Criminal Justice Department, Seattle University, 901 12th Avenue Post Office Box 222000, Seattle, Washington 98122-1090, Phone: 206-296-2484, Email: hickmanm@seattleu.edu; Mark A. Larrañaga, J.D., Walsh & Larrañaga , 705 Second Ave., Suite 501 , Seattle, Washington 98104, Phone: 206-325-7900 , Email: mark@jamlegal.com. Consultants and Assistance: Carl Schremp, J.D., Seattle University School of Law (2013); David C. Brody, J.D., Ph.D., Professor, Criminal Justice and Criminology, Washington State University; Jennifer Ertl, Graduate Student, Masters in Criminal Justice Program, Criminal Justice Department, Seattle University.

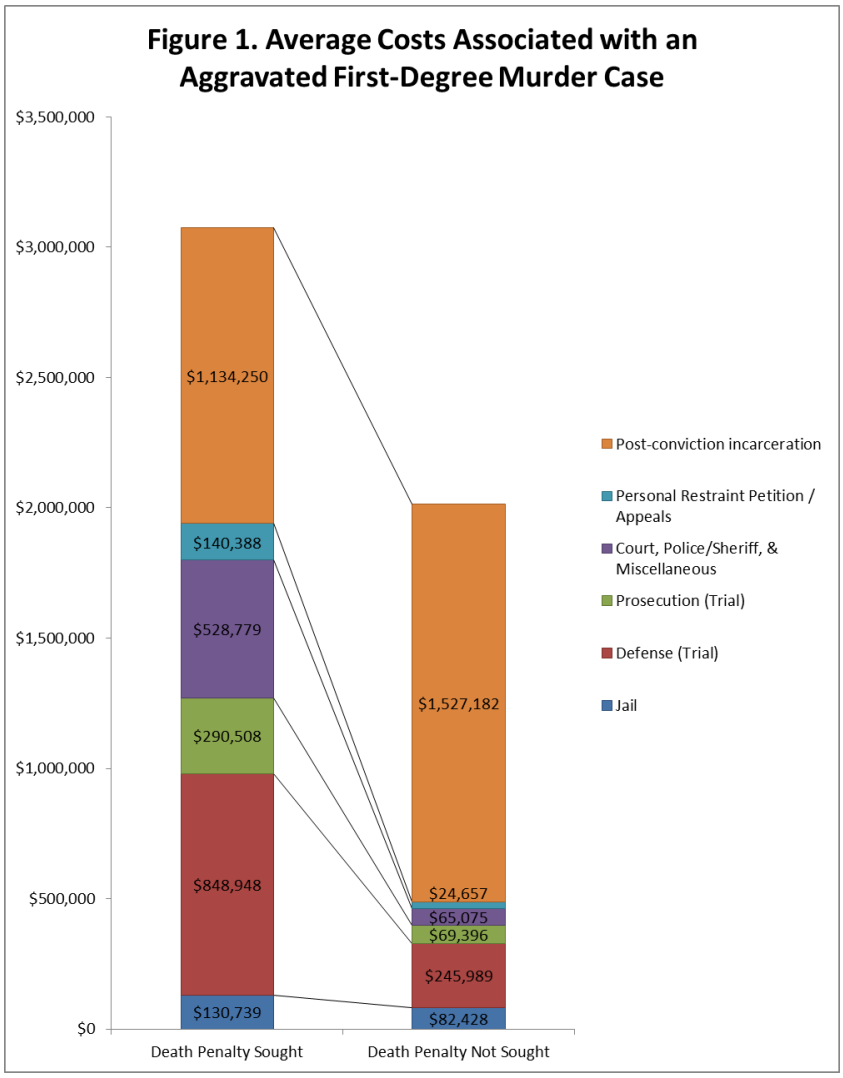
†This study was funded through a grant awarded by the American Civil Liberties Union of Washington Foundation. The findings and opinions reported here are those of the authors and do not necessarily reflect the positions of the ACLU-WF or Seattle University. The ACLU-WF had no role in conducting this research and did not influence the analysis and formulation of conclusions.

ACKNOWLEDGEMENTS

The authors would like to thank the following agencies and staff for their help in gathering data, for their input, and support: The Washington State Department of Corrections, The Washington State Defender Association, King County Department of Adult and Juvenile Detention, Clark and Kitsap County Jails, The King County Department of Public Defense, The Washington State Office of Public Defense, King County Superior Court, The Federal Defender for Western Washington, Prosecutor's Offices in King, Snohomish, and Pierce Counties, the public defense programs and public records officers in Kitsap County, Clark County, Yakima County, Pierce County, Spokane County, and Snohomish County, the Washington Death Penalty Assistance Center, The Washington State Auditor's Office, and Seattle University School of Law Adjunct Professor Michael Russo. We had research assistance from Seattle University Law graduate Carl Schremp and students Steven Lee and Ashwin Kumar, and Criminal Justice graduate student Jennifer Ertl. We would also like to thank Seattle University and the ACLU-WF for their support.

EXECUTIVE SUMMARY

The purpose of this study was to estimate the costs associated with pursuit of the death penalty, as compared to cases where the death penalty was not sought, for aggravated first-degree murder cases in Washington State. The study was limited to economic cost estimation only and does not draw any normative conclusions regarding the death penalty. The study was designed to provide accurate estimates to inform debate and decision-making by policy makers and the public. Prior studies in Washington have been limited in both rigor and comprehensiveness. The current study adds significantly to research on the death penalty in Washington and beyond, as we utilize quasi-experimental methods to estimate cost differences using a wide variety of data sources.



Cases of aggravated first-degree murder were identified from a database of trial reports obtained through open records requests.[2] In addition to the information within the trial reports, major data sources included Extraordinary Criminal Justice Act (ECJA) petitions, and data provided by the Washington Office of Public Defense, the Department of Corrections, and the State Attorney General's office. Additional data sources are detailed within the full report.

This study examined 147 aggravated first-degree murder cases since 1997. A case was identified as Death Penalty Sought (DPS; synonymous with "capital case" used interchangeably throughout

[2] The trial reports are required by statute. RCW 10.95.120 provides in part:

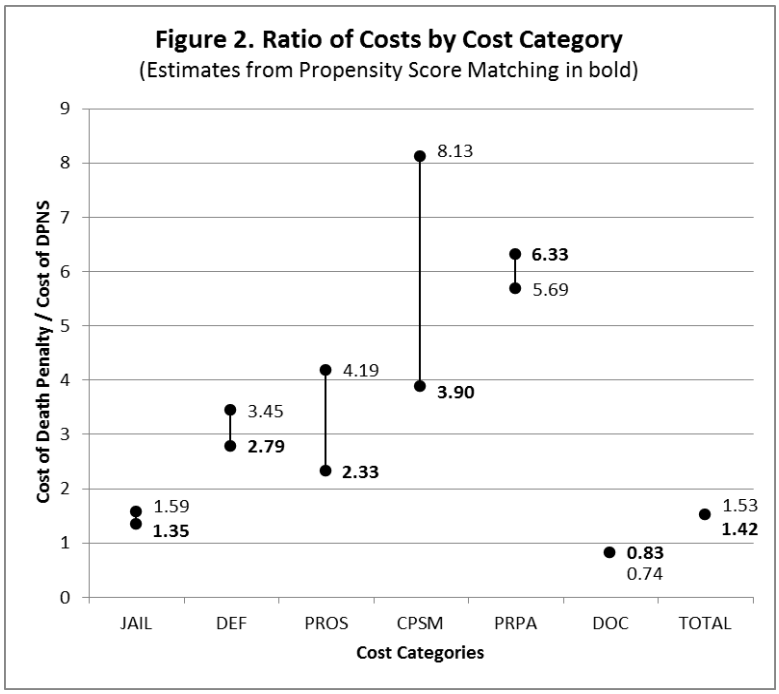
> In all cases in which a person is convicted of aggravated first degree murder, the trial court shall, within thirty days after the entry of the judgment and sentence, submit a report to the clerk of the supreme court of Washington, to the defendant or his or her attorney, and to the prosecuting attorney which provides the information specified under subsections (1) through (8) of this section. The report shall be in the form of a standard questionnaire prepared and supplied by the supreme court of Washington….

*A copy of the form supplied by the Supreme Court is in the Appendix to this Report.

this report) if a death notice was filed by the prosecutor; otherwise it was identified as Death Penalty Not Sought (DPNS). It should be noted that some DPS cases ended without trial (with pleas to life without possibility of parole or otherwise), and in some DPNS cases the decision not to seek death was not made until several months or longer after arraignment.

Two methods were used to estimate costs: an all-inclusive method that used all of the eligible cases, and a more conservative approach that used a smaller sample of comparable cases selected using a technique known as Propensity Score Matching (see the full report at page 33 for a description).

Figure 1 presents the average costs for DPS versus DPNS cases, using all of the eligible cases. The total average cost for DPS cases is $3.07 million, versus $2.01 million for DPNS cases, a difference of $1.06 million (in 2010 dollars). Adjusted to 2014 dollars, the difference is $1.15 million.[3]



The differences in costs might also be understood in terms of ratios. Figure 2 presents the ratio of costs (where the ratio is the average cost for DPS cases, divided by the average cost for DPNS cases) by major cost categories, including the overall total. As previously mentioned, a more conservative estimation technique was also used; the ratios resulting from the more conservative technique are listed in boldface.

Average jail costs (JAIL) related to pursuit of the death penalty are 1.4 to 1.6 times more expensive than DPNS cases. Average trial level defense costs (DEF) related to pursuit of the death penalty are 2.8 to 3.5 times more expensive than DPNS cases. Average trial level prosecution costs (PROS) related to pursuit of the death penalty are 2.3 to 4.2 times more expensive than DPNS cases. Court, Police/Sheriff, and Miscellaneous (CPSM) costs related to pursuit of the death penalty are 3.9 to 8.1 times as much for DPNS cases. Personal restraint petition/appeals (PRPA) costs related to pursuit of the death penalty are 5.7 to 6.3 times more expensive than DPNS cases.

Post-conviction lifetime incarceration costs (DOC) are lower for DPS cases (.7 to .8 times DPNS cases). However, it should be noted that these figures are based on a very conservative cost

[3] For all adjustments, the Organization for Economic Co-operation and Development (OECD) Main Economic Indicators (complete database, base year 2010, Consumer Price Index – Total All Items for the United States) were used to adjust nominal values into real 2010 dollars.

estimation method. The full report discusses alternative estimation methods, as well as case demographics that may account for cost differentials in DOC costs. There have been several empirical studies that have shown that death row inmate management costs more, on average, than the management of non-death row inmates.[4] The reasons for these cost differences can be attributed to inmate-to-staff ratios, generally higher security levels, as well as differences in the physical space, as many high-risk violent offenders are placed in cells of their own, among other cost-generators. The Department of Corrections was not able to provide a daily or annual cost for the maximum-custody unit where death-sentenced prisoners are held at the Washington State Penitentiary. Because we cannot assess where exactly each inmate was located (or will be located in the future) in the system as well as calculate the average daily costs specific to death row, we were forced to estimate costs associated with an average life sentence and at baseline, use the same average daily cost post-2013 for both the DPS and DPNS groups. This resulted in an underestimation of DPS/DPI DOC costs, as viewed in Figure 2. Additionally, the defendants in the death penalty sought and imposed groups were slightly older, on average, than those in the not-sought group, which also artificially decreased the overall incarceration cost estimations associated with the DPS/DPI groups.

The estimated average difference in total costs when the death penalty is sought is $1,058,885

Combining all cost categories, the average total costs to the justice system related to pursuit of the death penalty are about 1.4 to 1.5 times more expensive than DPNS cases. The total average difference in costs when the death penalty is sought is $1,058,885 in 2010 dollars, or $1,152,808 in 2014 dollars.

As outlined below, recent capital cases have become even more expensive. This report documents the costs in the different parts of the criminal justice system and explains the complexity of capital cases that leads to increased costs.

The Washington Supreme Court has emphasized the need for defense counsel to be specially trained and certified, to be "learned in the law of capital punishment,"[5] and in the process of reversing a number of cases has made clear the comprehensive work that defense counsel must do to provide effective representation. The Court requires that when the death penalty is possible "At least two lawyers shall be appointed for the trial and also for the direct appeal."[6] Developments in the case law have led to additional time and resources being required for capital cases. The Court also has stated that "'[b]ecause the death penalty qualitatively differs from all

[4]Criminal Justice Planning Services, 2012: (http://ofm.wa.gov/reports/costeffective_incarceration_adult_offenders.pdf); California Commission on the Fair Administration of Justice, 2008: http://ccfaj.org/documents/reports/dp/official/FINAL%20REPORT%20DEATH%20PENALTY.pdf. According to The Marshall Project, "A 2014 study out of Kansas reported that a death row prisoner costs $49,380 to house per year, whereas a general population prisoner costs $24,690." Maurice Chammah, Six Reasons the Death Penalty is Becoming More Expensive," December 17, 2014, available at: https://www.themarshallproject.org/2014/12/17/six-reasons-the-death-penalty-is-becoming-more-expensive.

[5] The Court has implemented Superior Court Special Proceedings Rules – Criminal that provide in part:
All counsel for trial and appeal must have demonstrated the proficiency and commitment to quality representation which is appropriate to a capital case.

[6] SPRC 2, available at: https://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=sup&set=SPRC&ruleid=supsprc2.

other punishments, there must be reliability in the determination that death is the appropriate punishment.'"[7]

Death sentences were imposed in 33 cases,[8] which are either pending appeal or in which the appellate review has been completed. There are nine cases (9) currently on appeal in either state or federal courts, and 24 cases that have completed their appellate review.[9] There have been five (5) executions. Eighteen (18) cases resulted in either the conviction and/or death sentence being reversed, and one (1) ended when the defendant committed suicide while the matter was on appeal.

This report provides data to assist citizens and policy makers in assessing the impact of the increased costs of pursuing the death penalty.

[7] *State v. Woods*, 143 Wn.2d 561 (2001) (quoting *State v. Lord*, 117 Wn.2d 829, 888 (1991)).
[8] We provide information on these 33 cases in the Chronology of a Capital Case section of this report.
[9] The Office of the Washington State Attorney General, Corrections Division, publishes "The Capital Punishment Case Status Report", a monthly report that sets out the legal status of each case where an individual is currently under sentence of death. This report details motions and orders entered by the courts at different stages of the appeals and post-conviction proceedings, available at: http://atg.wa.gov/page.aspx?id=31729#.VJ2aJ4BA.

TABLE OF CONTENTS

ACKNOWLEDGEMENTS 2

EXECUTIVE SUMMARY 3

Figure 1. Average Costs Associated with an Aggravated Murder Case 3
Figure 2. Ratio of Costs by Cost Category 4

TABLE OF CONTENTS 7

INTRODUCTION 10

PREVIOUS STUDIES 12

Previous Washington Reports 12

Previous Washington Cases 14

Empirical Studies in Other States 16

Maryland 16
California 16
Kansas 17
Idaho 17
North Carolina 18
Federal Courts 18

Defense Attorneys Must be Learned in the Law of Capital Punishment 19

WASHINGTON'S DEATH PENALTY 21

STUDY METHODOLOGY 25

Introduction 25

Sample of Cases 26

Trial Reports Database 26
Table 1. Case Frequency and Average by County 28
Extraordinary Criminal Justice Act (ECJA) Petitions 28
Jail Data 29
Washington State Department of Corrections (DOC) Data 30
Prosecution Data 30
Defense Data 31
Court Data 31

State Level Appeals and Personal Restraint Petitions (PRP).....31
Federal Habeas Corpus Proceedings.....32

Combined Data and Adjustment Strategy 32

Propensity Score Matching.....33

Covariate Selection and Events Per Variable 33
Table 2. Predictor Characteristics of Study Cases Pre and Post PSM.....34
PSM and Post-hoc Diagnostics 34

Measures.....35

Jail Costs – Sub-categories.....35
Defense Costs – Sub-categories.....36
Prosecution Costs – Sub-categories 37
Court, Police/Sheriff, and Miscellaneous (CPSM) Costs – Sub-categories.....37
Post-Conviction Personal Restraint Petition/Appeals (PRPA) Costs – Sub-categories ...38
Department of Corrections (DOC) Costs – Sub-categories 38

Assessment of Data Quality – Multivariate Imputation.....39

Analytic Plan 39

RESULTS 41

How to Read a Box Plot.....41
Figure 3. Jail Costs Associated with Case 42
Figure 4. Defense (Trial) Costs Associated with Case 43
Figure 5. Prosecutor (Trial) Costs Associated with Case 44
Figure 6. Court, Police/Sheriff, and Misc. Costs Associated with Case.....45
Figure 7. Post-Conviction PRP/Appeals Costs Associated with Case 46
Figure 8. Post-Conviction DOC Costs Associated with Case 47
Figure 9. Total Costs Associated with Case 48
Table 3. Average Costs and Differences between DPS and DPNS Pre-PSM 49
Table 4. Average Costs and Differences between DPS and DPNS Post-PSM.....50
Figure 10. Average Costs Assoc. with a First-Degree Aggravated Murder Case 50
Figure 11. Ratio of Costs by Cost Category 51

DOC Sensitivity Analysis 52

Table 5. DOC Sensitivity Analysis.....53

Federal Habeas Corpus Proceedings 53

Table 6. CJA Panel Attny Payments on Cap. Cases in Western WA Fed. Court.....54

Limitations and Recommendations for Future Studies 54

CONCLUSION 57

CHRONOLOGY OF A CAPITAL CASE 58

Capital Trials 58

Trial Level 59

The Defense Team 59
Appointment of Counsel 59
Mitigation Investigation 60
Pre-trial Motions 62
Jury Selection 63
Capital Trials 65

Appellate Level 65

Capital Appeals - State 65
Personal Restraint Petition 66
Federal Habeas Corpus Proceedings 67
Other Post-conviction Proceedings 68

Post-Appellate Proceedings 65

Clemency 68
Execution 69

Status of Cases Resulting in Death Sentences in Washington State 69

Death Sentences – Pending Appeals 70

Death Sentences – Appellate Review Completed 71

Executions 71
Reversals 72

APPENDIX 75

Sample Trial Report 75

Sample Jury Questionnaire 87

INTRODUCTION

The cost and complexity of death penalty prosecutions and the defense of them have increased dramatically since the United States Supreme Court allowed resumption of death penalty trials.[10] As the Washington Supreme Court has explained:

> In death penalty trials, appeals, and habeas corpus or personal restraint petitions, prosecutors and defense counsel often inundate the court with motions raising every conceivable issue that may affect the outcome of the case. For example, prosecutors and defense attorneys filed over 56 motions in *In re Gentry*, a personal restraint petition recently decided by the Washington State Supreme Court.[11]

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

The costs are high. An Ohio newspaper concluded in 2014 that Ohio spends nearly $17 million per year on costs associated with the death penalty.[12] A New Jersey study in 2005 reported that that state had spent $11 million per year on the death penalty.[13] New Jersey abolished the death penalty in 2007.[14]

The Marshall Project recently reported:

> In the six states that have abolished capital punishment over the past decade, Republican and Democratic officials have also emphasized the cost of the death penalty as a major rationale. Even in states that retain the punishment, cost has played a central role in the conversion narratives of conservative lawmakers, public officials, and others who question the death penalty as a waste of taxpayer dollars.[15]

---

[10] See discussion below of requirements for learned counsel.

[11] "Overview of Capital Punishment Laws", available at: https://www.courts.wa.gov/newsinfo/index.cfm?fa=newsinfo.displayContent&theFile=content/deathPenalty/overview

[12] The High Cost Of Executions; Looming overhaul of Ohio law will likely add to the price tag, Dayton Daily News (Ohio), February 23, 2014.

[13] Forsberg, Money For Nothing? The Financial Cost of New Jersey's Death Penalty (November 2005), available at: http://www.njadp.org/forms/cost/MoneyforNothingNovember18.html.

[14] As reported on the New Jersey Legislature web page, "The New Jersey Death Penalty Study Commission was created in 2006 by the New Jersey Legislature (P.L.2005,c.321). The commission's final report, issued on January 2, 2007, recommended that the death penalty be abolished and replaced with life imprisonment without the possibility of parole. The Legislature abolished the death penalty on December 17, 2007 by the enactment of (P.L.2007,c204)." Available at: http://www.njleg.state.nj.us/committees/njdeath_penalty.asp.

[15] "The Slow Death of the Death Penalty", by Maurice Chammah, The Marshall Project, December 17, 2014, available at: https://www.themarshallproject.org/2014/12/17/the-slow-death-of-the-death-penalty.

† Mark Larranaga, "A Review of the Costs, Length, and Results of Capital Cases in Washington State", Washington Death Penalty Assistance Center (2004), available at: http://abolishdeathpenalty.org/wp-content/uploads/2013/08/WAStateDeathPenaltyCosts.pdf.

Washington's Governor Jay Inslee has declared a moratorium on executions. He noted that the majority of death verdicts had been overturned and said "the entire system itself must be called into question." He discussed the high cost of death penalty prosecutions:

> Second, the costs associated with prosecuting a capital case far outweigh the price of locking someone up for life without the possibility of parole. Counties spend hundreds of thousands of dollars – and often many millions – simply to get a case to trial. And after trial, hundreds of thousands of dollars are spent on appellate costs for decades. Studies have shown that a death penalty case from start to finish is more expensive than keeping someone in prison for the rest of their lives – even if they live to be 100 years of age. [16]

While there have been several studies of the costs of death penalty cases both nationally and in Washington, most have not addressed in detail the full spectrum of costs from the beginning of trial proceedings through incarceration and execution. This report provides documentation on the entire scope of economic costs, and details the more than one-million dollar difference when the death penalty is sought.[17] We discuss previous studies of the cost of the death penalty and we review the legal requirements for prosecuting and defending death penalty cases. We explain the methodology used in reaching our conclusions. We provide a section, at the end of this report, outlining the chronology of a capital case to provide a reference for understanding the comprehensive nature of these cases. In addition we provide a list of the status of all cases that have received a death sentence in Washington since 1981.

[16] Governor Inslee's remarks announcing a capital punishment Moratorium, Feb. 11, 2014, available at: http://governor.wa.gov/news/speeches/20140211_death_penalty_moratorium.pdf.

[17] This report analyzes the economic costs of the death penalty. The personal and social impacts on people involved in death penalty cases, including family members of murder victims, lawyers, jurors, jailers, court personnel, families of accused persons, and police officers, have been discussed elsewhere [See, e.g., Mitchell, "The Weight of Capital Punishment on Jurors, Justices, Governors, & Executioners", Verdict, October 25, 2013, discussing the psychological toll of capital punishment, at: http://verdict.justia.com/2013/10/25/weight-capital-punishment-jurors-justices-governors-executioners#sthash.Js7jBAn4.dpuf]. They are not the focus of this study. This report also does not address racial disparity in the application of the death penalty. See, Beckett and Evans, "The Role of Race in Washington State Capital Sentencing, 1981-2014", available at: https://lsj.washington.edu/sites/lsj/files/research/capital_punishment_beckettevans_10-1.6.14.pdf.

PREVIOUS STUDIES

Previous Washington Reports

There have been at least three previous studies in Washington of the cost of the death penalty. All have concluded that the cost of death penalty cases is greater than those in which the prosecutor seeks a sentence of life without parole.

Chief Justice Richard Guy authored a study in 2000 that found that for each of eight death penalty trials from 1997-1999, the average cost was $388,680.[18] That is the equivalent of $537,269.97 in 2014 dollars.[19] Chief Justice Guy discussed a U.S. Supreme Court case and a change in federal habeas corpus law that require the defense to raise all issues in state court in order to be able to raise them later in federal court review. He discussed the impact this has had on state courts and on the defense counsel:

> The McCleskey decision and AEDPA have placed a difficult and complex burden on the state courts to ensure the fairness of capital sentencing proceedings. In death penalty cases, the penalty for the prosecution's failure to adequately provide the defendant's rights can be reversal of the conviction; the penalty for the defendant's failure to timely raise issues can be preclusion of the defendant's ability to raise them in the future.[20]

Chief Justice Guy discussed the reasons for longer trials: "One result of the court's strong desire to avoid error is that death penalty cases at the trial level are far more expensive and lengthy than ordinary aggravated murder cases."[21] He also pointed out that changes in the law resulted in a five-fold increase in the pages of appeal briefs.[22] He noted that in three personal restraint petitions, one recorded 1,167 defense attorney hours and two others more than 3,000 hours.[23] Those petitions occur after the trial and the direct appeal have been completed.

Capital cases also require significant amounts of time for the Court. Chief Justice Guy wrote:

> Judicial costs are also high. Washington State Supreme Court death penalty cases involve enormous records, often numbering ten thousand pages or more. Death penalty appeals are frequently assigned four hours for oral argument, four times the norm for criminal appeals. The justices and their staffs spend numerous hours reading lengthy briefs and other documents filed. Due to the nature of the sentence, every minute detail of every assertion, request, piece of evidence, or conclusion is analyzed with punctilious care.[24]

Another cost is for the Washington Attorney General's office in defending federal habeas corpus challenges. Chief Justice Guy reported: "The Attorney General's Office reports spending

---

[18] Chief Justice Richard P. Guy, "Status Report on the Death Penalty in Washington State," March 2000, available at: http://www.courts.wa.gov/newsinfo/content/deathpenalty/deathpenalty.pdf.
[19] CPI Inflation Calculator available at http://data.bls.gov/cgi-bin/cpicalc.pl?cost1=388680&year1=2000&year2=2014.
[20] Guy, supra note 17 at 5.
[21] Id. at 7.
[22] Id. at 10.
[23] Id. at 10.
[24] Id. at 11.

$154,034 to defend the Sagastegui death sentence, $254,209 on the Lord case, and $78,799 on the Campbell case."[25]

Chief Justice Guy discussed a case in Okanogan County involving the killing of a police officer that began as a death penalty case. As of November 1999 the cost of the case was $481,576. After a competency hearing the death penalty notice was dropped and the case went to trial resulting in a conviction and sentence of life without parole. At the time of the report, the total costs had not been calculated.[26]

A report by the Washington Death Penalty Assistance Center in 2004 found:

> On average, a death penalty trial costs more than double the amount spent on a non-death penalty trial. Under one review, an average death penalty trial from 2000 to 2003 costs $432,000, compared to $153,000 for a non-death penalty trial. [...] Death penalty trials and appellate review take longer than those for non-death penalty cases. An average non-death penalty trial lasted 15 months, whereas a death penalty trial lasted 20 months. Appellate review for non-death penalty cases lasted an average of two years; death penalty review lasted seven. [27]

A Washington State Bar Association committee concluded in 2006: "It costs significantly more to try a capital case to final verdict than to try the same case as an aggravated murder case where the penalty sought is life without possibility of parole."[28] That report also found that death penalty cases generated roughly $470,000 more in defense and prosecution costs than trying the same cases without the death penalty. They concluded that appellate defense for such cases averaged $100,000 more than non-death penalty murder cases, with personal restraint petitions in capital cases averaging an additional cost of $137,000 in public defense costs.[29] The report did not document costs in federal habeas corpus or costs in the Attorney General's office for responding to personal restraint petitions. The State Bar Report also did not address jail and prison costs.

The former Secretary of the Washington Department of Corrections and the former director of Washington's prisons wrote in an op-ed in the Seattle Times, "The costs of pursuing an execution far outweigh the cost of life in prison with no possibility of parole, and the number of capital cases actually resulting in a death sentence is only a small percentage of the total number of these costly prosecutions."[30]

---

[25] Id. at 13.
[26] Id. at 7. The conviction was affirmed on appeal. *State v. Gonzalez*, 112 Wn. App. 1045 (2002), *review denied State v. Gonzalez*, 148 Wn.2d 1022 (2003).
[27] Larranaga, supra note 14.
[28] Final Report of the Death Penalty Subcommittee of the Committee on Public Defense (2006), available at: http://www.wsba.org/~/media/Files/WSBA-wide%20Documents/wsba%20death%20penalty%20report.ashx.
[29] Id.
[30] Eldon Vail and Dick Morgan, "It's wrong for the state to take a life," Seattle Times, Feb. 22, 2014, available at: http://seattletimes.com/html/editorialsopinionpages/2022966008_should-death-penalty-be-abolished.html.

Recent Washington Cases

Costs have continued to rise, with individual cases costing $4 million each even before going to trial. In 2002, King County spent nearly $7.2 million on 18 aggravated homicide cases.[31] Death penalty prosecutions toward the end of the decade exceeded $1 million per case. For example, the Schierman case cost the county $1,934,649.20, of which approximately $1.23 million was for attorney costs.[32] That case resulted in a death verdict in 2010[33] and is still on appeal, generating additional costs.[34]

More recent cases have been even more costly. As of September 2013, King County had spent more than $6.7 million on the case of two co-defendants, more than $800,000 of which was for prosecution costs.[35] In January 2013, the county had prepared to send out 5,000 jury summonses for that case, which did not go to trial then and has been continued many times.[36] Those cases are expected to go to trial in 2015.

In the King County *Monfort* case, the homicide occurred in 2009 and the court began jury selection in November 2014. In his order setting the court schedule, the judge wrote:

> At the October 10, 2014 first meeting with 1170 jurors the court informed the jurors, with the agreement of the parties, "[w]e anticipate we will start the testimony on January 12, 2015. We anticipate the trial will last approximately five to six months once it begins."[37]

That case has cost King County more than $4 million so far, "not including the additional costs incurred by law enforcement agencies, crime labs, and other agencies outside of the prosecutor's office and the Department of Public Defense."[38]

Examples from King County point out the difference in costs for juries. In one capital case, *State v. Schierman*, 608 potential jurors were summoned and 17 were chosen to serve as jurors or alternates. The jurors reported on November 12, 2009, were empaneled on January 12, 2010, and served until May 5, 2010, nearly six months after they started. The cost was $18,112.40. In another murder case, in which the state did not seek the death penalty, *State v. Kalebu*, 639 candidates were summoned, out of which 16 were chosen. They reported May 13, 2011, were

[31] "Tab for murder cases running high", Seattle PI, December 23, 2002, available at: http://www.seattlepi.com/news/article/Tab-for-murder-cases-running-high-1103843.php.
[32] Database provided by King County Department of Public Defense.
[33] "Kirkland quadruple murderer Conner Schierman sentenced to death", Seattle PI, May 5, 2010, available at: http://www.seattlepi.com/local/sound/article/Kirkland-quadruple-murderer-Conner-Schierman-889168.php.
[34] The appellant's 203 page brief was filed in the Washington Supreme Court November 18, 2013, the prosecutor's 262 page brief was filed July 3, 2014, and the appellant's 76 page reply brief was filed September 15, 2014. The case is set for argument March 12, 2015. *State v. Schierman*, NO. 84614-6.
[35] "Court costs in Carnation murder case reach nearly $7 million", KOMO News, September 26, 2013, available at: http://www.komonews.com/news/local/Court-costs-in-Carnation-murder-case-reach-nearly-7M-225449392.html.
[36] "Court costs soar in case of six Carnation murders", MyNorthwest.com, January 4, 2013, available at: http://mynorthwest.com/11/2166729/Court-costs-soar-in-case-of-six-Carnation-murders.
[37] SCHEDULING ORDER FOR VOIR DIRE, *State v. Christopher Monfort*, No. 09-1-07187-6 SEA, October 24, 2014.
[38] "Holding Three Simultaneous Death Penalty Trials in King County Is Unprecedented—and Hugely Expensive", The Stranger, November 12, 2014, available at http://www.thestranger.com/seattle/holding-three-simultaneous-death-penalty-trials-in-king-county-is-unprecedentedandmdashand-hugely-expensive/Content?oid=20991684.

empaneled June 2, 2011, and completed service about a month later, July 1, 2011, less than two months after they started. The cost was $10,696.60, 69.3 per cent less than the capital case.[39] And approximately four and a half years after the *Schierman* case, the *Monfort* trial court dramatically increased the number of jurors summoned and anticipates an even longer trial than in *Schierman*.

In the *McEnroe* case, which has been pending approximately seven years, the King County Superior Court recently summoned 3000 prospective jurors and 700 people responded.[40] They filled out extensive questionnaires in September 2014. Of those people, 400 were invited back for individual questioning and over a three-month period a jury of 16, including four alternates, was selected for a jury trial to begin in January 2015.[41] Before trial, the defense costs have exceeded $4 million.[42] According to the Seattle Times, the combined cost of prosecuting McEnroe and his codefendant, not including costs associated with the criminal investigation or work done by the State Patrol's crime lab, is roughly $1.06 million through November 2014.[43]

Often death penalty cases result in high profile prosecutions and sometimes cases have become more complicated because of claims of prosecution or police misconduct. For example, Yakima requested reimbursement from the State for $378,404.98 in expenses for 2012 for five cases. Explaining the representation structure, the county noted the need in one case for appointment of an additional attorney to address issues arising concerning claims of misconduct:

4. Defense representation in aggravated murder case(s) active in 2012 was provided by:

X the county-employed public defender or county contracted counsel

X private counsel hired specifically to represent the defendant in the aggravated murder case, who was selected by the following method:

The Director of the Yakima County Dept. of Assigned Counsel searched for qualified counsel and recommended them to the court. In addition the court in one case later acted on its own initiative to re-appoint second counsel to address the needs of the case which was commenced for trial, then adjourned pending investigation by special prosecutor appointed by the court of late arising issues of misconduct by law enforcement and/or prosecutor in withholding discover, exculpatory information, and eavesdropping on attorney-client phone calls.

X other (describe):

Retained counsel appeared in two (2) cases (Briden and Posada).

Excerpt of Yakima ECJA request.

Yakima paid lead counsel in capital cases $125 per hour and $35 per hour for paralegal work while death is a possible sanction.[44]

[39] Data provided by King County Superior Court. The prosecutor did not seek the death penalty for Kalebu because of his history of mental illness. "Stun-gun sleeve, therapy dog considered to prevent outbursts in alleged South Park killer's trial", Seattle Times, April 23, 2011, available at: http://seattletimes.com/html/localnews/2014858940_kalebu24m.html.

[40] "Jurors selected for first trial in 2007 Carnation killings", Sara Jean Green, Seattle Times, December 19, 2014, available at: http://seattletimes.com/html/localnews/2025273228_mcenroejuryxml.html.

[41] Id.

[42] Id.

[43] Id.

[44] Order Appointing Attorneys at Public Expense, *State v. Kevin Harper*, No. 11-1-00266-2, March 22, 2011.

Empirical Studies in Other States

Maryland

Studies in other states have concluded that defending a capital case is much more expensive than defending a non-capital aggravated murder case. A 2008 Maryland study found that "An average capital-eligible case resulting in a death sentence will cost approximately $3 million, $1.9 million more than a case where the death penalty was not sought."[45] The Maryland report concluded:

> We find that both the filing of a death notice and the imposition of a death sentence added significantly to the cost of a case. For the average case, a death notice adds $670,000 in costs over the duration of a case. A death sentence adds an additional $1.2 million in processing costs. Thus the average total cost for a single death sentence is about $1.9 million over and above the cost of a similar case with no death penalty sought.
>
> About 70% of the added cost of a death notice case occurs during the trial phase. These additional costs are due to a longer pre-trial period, a longer and more intensive voir dire process, longer trials, more time spent by more attorneys preparing cases, and an expensive penalty phase trial that does not occur at all in non-death penalty cases. In addition, death notice cases are more likely to incur costs during the appellate phase even if there is no death sentence [...] adjudication costs are more than three times greater ($850,000 per case) than in no-death-notice cases.[46]

The Maryland study found that state appeal costs for cases with a death sentence were more than six times the cost of appeals in cases in which the death penalty was not sought.

California is spending an estimated $137 million per year on the death penalty and has not had an execution in three and a half years. Florida is spending approximately $51 million per year on the death penalty, amounting to a cost of $24 million for each execution it carries out. A recent study in Maryland found that the bill for the death penalty over a twenty-year period that produced five executions will be $186 million. Other states like New York and New Jersey spent well over $100 million on a system that produced no executions. Both recently abandoned the practice.[†]

California

In a 2011 law review article, a Ninth Circuit Judge and a law professor found that "Since reinstating the death penalty in 1978, California taxpayers have spent roughly $4 billion to fund a dysfunctional death penalty system that has carried out no more than 13 executions."[47] A California judge, Donald McCartin, reportedly known as "The Hanging Judge of Orange County," said, "It's 10 times more expensive to kill them than to keep them alive."[48]

---

[45] The Cost of the Death Penalty in Maryland, Urban Institute Justice Policy Center (2008) available at: http://www.deathpenaltyinfo.org/CostsDPMaryland.pdf.

[46] Id. at 2.

[47] Executing The Will Of The Voters?: A Roadmap to Mend or End The California Legislature's Multi-Billion-Dollar Death Penalty Debacle.

† Smart on Crime: Reconsidering the Death Penalty in a Time of Economic Crisis, p. 5, Death Penalty Information Center (2009), available at: http://www.deathpenaltyinfo.org/documents/CostsRptFinal.pdf.

[48] Quoted in "Considering The Death Penalty: Your Tax Dollars At Work", Forbes, May 1, 2014, available at:

Kansas

The Kansas Judicial Council published a report by its Death Penalty Advisory Committee that concluded that in 15 cases filed between 2004 and 2011, the average difference in defense costs for cases that went to trial was $296,799 for cases in which the death penalty was sought, with capital cases costing roughly four times non-capital ones. In cases resolved by plea, the average difference was $65,884, more than double the non-capital costs. Trial court costs for trials were more than triple for capital cases, and courts costs for cases resolved by pleas were roughly double.[49]

The Kansas committee surveyed its state Supreme Court justices and reported the following:

> The Court estimated that, over the last three years, the seven justices have spent a total of approximately 2,000 hours working on death penalty cases. That time includes preparation and research, oral argument, case conferencing, opinion writing and reviewing draft opinions. Over that same three years, justices' in-chambers research attorneys have spent approximately 1,600 hours working on death penalty appeals, and the two research attorneys in the Court's death penalty unit who work exclusively on death penalty appeals have spent 12,000 hours (2 attorneys x 3 years x 2000 hours per year).

The Court also estimated that the justices spend approximately 20 times more hours on a death penalty case than a non-death case when the justice is assigned to write the opinion and five times more hours when the justice is not writing.[50]

Idaho

A recent Idaho study reached the general conclusion that capital cases take longer than other cases but noted the difficulty in collecting data in the state.[51] The Idaho Appellate Defender had time records for their staff and reported that in 13 years, 2001-2013, their staff recorded more than 7,700 hours more for capital case appellants than for clients with a life sentence. For cases involving ten defendants sentenced to death, the staff averaged 7918 hours per client. During the same time period, they spent an average of 179 hours per client in 95 cases for defendants with a life sentence.[52]

This dramatically higher allocation of resources for a small number of clients affects trial and appellate defenders. Ohio Supreme Court Justice Paul Pfeifer, who co-authored the death penalty law as a state legislator, now opposes capital punishment, in part because of the cost. He said death penalty cases soak up critical resources to the detriment of other cases. "We see literally thousands of prisoners' handwritten appeals because the public defender can't cover

---

http://www.forbes.com/sites/kellyphillipserb/2014/05/01/considering-the-death-penalty-your-tax-dollars-at-work/.

[49] Report of the Kansas Judicial Council Death Penalty Advisory Committee (2014), available at: http://www.deathpenaltyinfo.org/documents/KSCost2014.pdf.

[50] Id. at 11.

[51] "Financial Costs of the Death Penalty", Office of Performance Evaluations, Idaho Legislature, March 2014, available at: http://www.deathpenaltyinfo.org/documents/IDCost.pdf.

[52] Id. at 31.

them", he said. "I think the greatest cost is for defendants in other crimes who may be improperly in prison. They can't get good legal assistance because so much of the resources of the public defender's office is devoted to defending the death penalty cases."[53]

North Carolina

Two Duke University professors did one of the most comprehensive cost studies conducted in the country. It included the costs of the extra time spent by prosecutors, judges, and other personnel on death penalty cases and concluded that the death penalty costs North Carolina $2.16 million per execution more than imposing a maximum sentence of imprisonment for life.[54] The report stated:

> One conclusion is that the extra costs to the North Carolina public of adjudicating a case capitally through to execution, as compared with a noncapital adjudication that results in conviction for first degree murder and a 20-year prison term, is about $329 thousand, substantially more than the savings in prison costs, which we estimate to be $166 thousand. We note that a complete account must also include the extra costs of cases that were adjudicated capitally but did not result in the execution of the defendant. All told, the extra cost per death penalty imposed is over a quarter million dollars, and per execution exceeds $2 million. [55]

The Duke report is more than 20 years old and pre-dated significant changes in the practice resulting from changes in Supreme Court case law and the applicability of American Bar Association standards. And $250,000 in 1993 is equivalent to $411,818.34 in 2014.[56]

Federal Courts

One study of federal capital trials from 1990 to 1997 found:

> The cost of defending cases in which the Attorney General decides to seek the death penalty for commission of an offense potentially punishable by death (authorized cases) is much higher than the cost of defending cases in which the Attorney General declines to authorize the death penalty for an offense punishable by death.[57]

The report found that the cost was nearly four times as great. The same report found that "defense attorneys spent an average of 1,480 out-of-court hours preparing a defendant's case."[58]

---

[53] Dayton Daily News, supra note 11, at fn 1.
[54] See, e.g., P. Cook, "The Costs of Processing Murder Cases in North Carolina," Duke University (May 1993).
[55] Id. at 1.
[56] CPI Inflation Calc., Bureau of Labor Statistics, available at: http://www.bls.gov/data/inflation_calculator.htm.
[57] Subcommittee on Federal Death Penalty Cases, Committee on Defender Services, Judicial Conference of the United States, Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation 14 (May 1998). Cited in *Maples v. Thomas*, 132 S. Ct. 912, n.1 (2012).
[58] Id.

Defense Attorneys Must be Learned in the Law of Capital Punishment

In Washington State, the Supreme Court by court rule has emphasized the need for defense counsel in aggravated homicide cases to be specially trained and certified, to be "learned in the law of capital punishment,"[59] and in the process of reversing a number of cases has made clear the comprehensive work that defense counsel must do to provide effective representation. (In the final section of this report, we outline in detail counsel's obligations in a capital case.) For example, the Court reversed a death penalty verdict because the trial lawyers did not fully investigate the mental health of their client.

> When defense counsel knows or has reason to know of a capital defendant's medical and mental problems that are relevant to making an informed defense theory, defense counsel has a duty to conduct a reasonable investigation into the defendant's medical and mental health, have such problems fully assessed and, if necessary, retain qualified experts to testify accordingly. *In re Brett*, 142 Wn. 2d 868, 879-80 (2001).[60]

As a retired Ohio appellate judge said about proposed amendments to that state's law, "If you're trying to ensure innocent people aren't executed, you're not likely to find a less expensive way of doing it."[61]

The expectations for what constitutes effective representation in a capital case have increased because of U.S. Supreme Court decisions and because of the American Bar Association guidelines on which they rely. For example, the Court reversed a death verdict because the defense counsel failed to investigate the accused's background and to present mitigating evidence of his troubled life history at the accused's capital-sentencing proceedings, because this failure fell below the standard of reasonableness under prevailing professional norms. The Court wrote:

> Counsel's conduct similarly fell short of the standards for capital defense work articulated by the American Bar Association (ABA) – standards to which we long have referred as

[59] The Court has implemented Superior Court Special Proceedings Rules – Criminal that provide in part:
A list of attorneys who meet the requirements of proficiency and experience, and who have demonstrated that they are learned in the law of capital punishment by virtue of training or experience, and thus are qualified for appointment in death penalty trials and for appeals will be recruited and maintained by a panel created by the Supreme Court. All counsel for trial and appeal must have demonstrated the proficiency and commitment to quality representation which is appropriate to a capital case. Both counsel at trial must have five years' experience in the practice of criminal law be familiar with and experienced in the utilization of expert witnesses and evidence, and not be presently serving as appointed counsel in another active trial level death penalty case. One counsel must be, and both may be, qualified for appointment in capital trials on the list, unless circumstances exist such that it is in the defendant's interest to appoint otherwise qualified counsel learned in the law of capital punishment by virtue of training or experience. The trial court shall make findings of fact if good cause is found for not appointing list counsel.

[60] In 2001, the ACLU of Washington issued a report stating: "In Washington, federal courts have overturned seven of eight cases after defendants lost their appeals before the Washington Supreme Court. These decisions make it clear that capital defendants do not receive effective legal representation, that they are subjected to judicially unsound rulings, and that they can face conduct by prosecuting attorneys and law enforcement officials that does not comply with the law. Defendants have been sentenced to death based on false testimony of police informers, on evidence wrongfully withheld by police or prosecutors, on prejudicial rulings by trial judges, and because of negligent representation by their defense attorneys." Sentenced to Death - A Report on Washington Supreme Court Rulings In Capital Cases (2001), available at: https://aclu-wa.org/library_files/Sentenced%20to%20Death.pdf.

[61] Dayton Daily News, supra note 11.

> "guides to determining what is reasonable." *Wiggins v. Smith*, 539 U.S. 510, 522 (2003) (citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984)).

The ABA published "Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (Revised Edition)" in February 2003.[62] As the commentary to the Guidelines noted, "death penalty cases have become so specialized that defense counsel have duties and functions definably different from those of counsel in ordinary criminal cases."[63]

The Washington Supreme Court has reversed death penalty verdicts because of ineffective assistance of counsel, as in *In re Brett*, supra, and because of prosecutor failure to disclose exculpatory evidence. Sometimes it has taken many years and several levels of court review before the reversal has occurred. For example, in *In re Pers. Restraint of Stenson*, 174 Wn.2d 474 (2012), the Supreme Court reversed a conviction and death penalty sentence because the prosecutor violated the defendant's due process rights in not disclosing exculpatory evidence. Prior to that 2012 decision, the Court had denied Mr. Stenson's appeal and four personal restraint petitions.[64]

In *Stenson*, the Court emphasized that its duty to review constitutional errors is highest in a capital case:

> Our court has stated that "'[b]ecause the death penalty qualitatively differs from all other punishments, there must be reliability in the determination that death is the appropriate punishment.'" *State v. Woods*, 143 Wn.2d 561, 603, 23 P.3d 1046 (2001) (quoting *State v. Lord*, 117 Wn.2d 829, 888, 822 P.2d 177 (1991)). A court's "'duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case.'"…. *[citations omitted]* The stakes are at their highest when, as here, a petitioner sentenced to death claims actual innocence.[65]

---

[62] Available at: http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_representation/2003guidelines.authcheckdam.pdf.

[63] Id. at 923, footnote omitted.

[64] The decision was based on Mr. Stenson's sixth personal restraint petition, filed by his counsel. Mr. Stenson also had filed his own pro se petition (his fifth), which because of the disposition on the sixth petition, the Court dismissed as moot. *In re Pers. Restraint of Stenson*, 174 Wn.2d 474, 494 (2012).

[65] *In re Pers. Restraint of Stenson*, 174 Wn.2d 474, 485 (2012).

WASHINGTON'S DEATH PENALTY

On May 6, 1904, Washington State executed James Champoux.[66] Over the next hundred years, Washington executed seventy-eight more people.[67] The most recent execution took place on September 10, 2010, when Cal Brown was executed by lethal injection.

Washington's capital punishment system has had a variety of changes over the last century. In 1904, death was the mandatory sentence upon a conviction of first-degree murder. In 1909, the legislature gave trial courts the discretion to punish first-degree murder with life imprisonment or death.[68] Capital punishment was abolished in 1913[69] only to be reinstated in 1919.[70]

It remained unchanged and regularly used over the next fifty years. In 1975, Washington's death penalty was again abolished.[71] That same year, Initiative No. 316 was passed, which gave way to a new death penalty statue.[72] This statute imposed a mandatory death penalty for all "Aggravated Murder in the First Degree" convictions. A person, therefore, would receive a sentence of death for First-Degree Murder coupled with a statutorily defined aggravating factor. The statute was modified again in 1977 with the adoption of RCW 10.94, which allowed for a death sentence after a conviction of premeditated first-degree murder and special sentencing proceeding.[73] Under this statute, the sentencing jury was asked to determine whether guilt was established by "clear certainty", whether aggravating factors and sufficient mitigating factors existed, and whether the defendant would commit additional violent acts in the future.[74] Because a defendant who entered a guilty plea would not be subject to the death penalty while someone who exercised his or her right to a trial could be, the statute was held to be unconstitutional since it created an inequitable sentencing scheme.[75]

---

[66] Washington State Department of Corrections, available at: http://www.doc.wa.gov/offenderinfo/capitalpunishment/executedlist.asp.

[67] Id. A breakdown of Washington's executions under different death penalty statutes is:

1904 – 1909:	9 executions
1909 – 1913:	6 executions
1913 – 1919:	death penalty abolished
1919 – 1975:	58 executions
1975 – 1975:	death penalty abolished
1975 – 1977:	0 executions
1977 – 1981:	0 executions
1981 – present:	5 executions

[68] Act of Mar. 22, 1909, ch.249, sec. 140, 1909 Wash. Laws 890.

[69] Act. of Mar.22, 1913, ch. 167 sec. 1, 1913 Wash. Laws 581.

[70] Act of Mar. 14, 1919, ch. 112, sec. 1, 1919 Wash. Laws 273.

[71] Washing Criminal Code Act of 1975, ch. 260, Sec. 9A.92.010(125), 1975 Wash. Laws 1st Ex. Sess. 817, 862.

[72] 1975 – 1976 Wash. Laws 2d Ex. Sess. 17 (codified at Wash. Rev. Code Ann. Sec. 9A.32.045 - .047 (1977) (repealed 1981).

[73] Act of June 10, 1977, ch. 206, 1977 Wash. Laws 1st Ex. Sess. 774 (codified at Wash. Rev. Code Ann. Ch. 10.94 (1980) (repealed 1981).

[74] Id.

[75] *State v. Frampton*, 95 Wn.2d 469 (1981) and *State v. Martin*, 94 Wn.2d 1 (1980) (The Washington Supreme Court concluded the statute unconstitutional because it "chill[ed] a defendant's constitutional rights to plead not guilty and demand a jury trial and violated due process... They do not meet the standards of the state or federal constitutions".).

Washington's current death penalty statute was enacted in 1981.[76] Under the statute, only aggravated first-degree murder convictions carry the possibility of a death sentence.[77] A person may be charged with aggravated first-degree murder if there is probable cause that the killing is premeditated and a statutorily defined aggravating factor exists.[78] As presently enacted, there are fourteen statutory aggravating factors with a few consisting of multiple subsections.[79] After an arraignment on aggravated first-degree murder, the prosecuting agency has 30 days to file a written notice of a special sentencing proceeding.[80] This time period may be, and often is,

[76] Act of May 14, 1081, ch. 138, 1981 Wash. Laws 535 (codified at Wash. Rev. Code ch. 10.95 (1981)).
[77] RCW 10.95.030.
[78] RCW 10.95.020.
[79] RCW 10.95.020 sets out the list of aggravating factors:

(1) The victim was a law enforcement officer, corrections officer, or a fire fighter who was performing his or her official duties at the time of the act resulting in death and the victim was known or reasonably should have been known by the person to be such at the time of the killing;
(2) At the time of the act resulting in the death, the person was serving a term of imprisonment, had escaped, or was on authorized or unauthorized leave in or from a state facility or program for the incarceration or treatment of persons adjudicated guilty of crimes;
(3) At the time of the act resulting in death, the person was in custody in a county or county-city jail as a consequence of having been adjudicated guilty of a felony;
(4) The person committed the murder pursuant to an agreement that he or she would receive money or any other thing of value for committing the murder;
(5) The person solicited another person to commit the murder and had paid or had agreed to pay money or any other thing of value for committing the murder;
(6) The person committed the murder to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group;
(7) The murder was committed during the course of or as a result of a shooting where the discharge of the firearm, as defined in RCW 9.41.010, is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge;
(8) The victim was: (a) A judge; juror or former juror; prospective, current, or former witness in an adjudicative proceeding; prosecuting attorney; deputy prosecuting attorney; defense attorney; a member of the indeterminate sentence review board; or a probation or parole officer; and (b) The murder was related to the exercise of official duties performed or to be performed by the victim;
(9) The person committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime, including, but specifically not limited to, any attempt to avoid prosecution as a persistent offender as defined in RCW 9.94A.030;
(10) There was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the person;
(11) The murder was committed in the course of, in furtherance of, or in immediate flight from one of the following crimes: (a) Robbery in the first or second degree; (b) Rape in the first or second degree; (c) Burglary in the first or second degree or residential burglary; (d) Kidnapping in the first degree; or (e) Arson in the first degree;
(12) The victim was regularly employed or self-employed as a news reporter and the murder was committed to obstruct or hinder the investigative, research, or reporting activities of the victim;
(13) At the time the person committed the murder, there existed a court order, issued in this or any other state, which prohibited the person from either contacting the victim, molesting the victim, or disturbing the peace of the victim, and the person had knowledge of the existence of that order;
(14) At the time the person committed the murder, the person and the victim were "family or household members" as that term is defined in RCW 10.99.020(1), and the person had previously engaged in a pattern or practice of three or more of the following crimes committed upon the victim within a five-year period, regardless of whether a conviction resulted: (a) Harassment as defined in RCW 9A.46.020; or (b) Any criminal assault.

[80] RCW 10.95.040(1).

extended for good cause.[81] In determining whether to file a notice, the prosecutor is to determine whether "there are not sufficient mitigating circumstances to merit leniency."[82] During this period, a defendant may not plead guilty without the consent of the prosecuting attorney.[83]

If a notice of a special sentencing is not filed within the time period, the prosecuting attorney may not request the death penalty.[84] When a special sentencing notice is filed, a fact-finder must first determine whether the prosecutor has proven beyond a reasonable doubt the charge of aggravated first-degree murder; and if so, then the same jury is reconvened for the special sentencing proceeding.[85] If, however, a jury is waived and a judge finds the defendant guilty, or the defendant enters a plea of guilty to aggravated first-degree murder, or upon remand from an appellate court, the trial court shall impanel a jury for the special sentencing hearing.[86]

Both sides are allowed to make an opening statement, admit evidence, and if necessary, present rebuttal evidence.[87] However, the prosecutor's case is limited to evidence presented at the merit (guilt) phase, victim impact evidence, and the defendant's criminal history. *See e.g.*, RCW 10.95.060; *State v. Bartholomew*, 101 Wn.2d 631, 683 P.2d 1079 (1984); *State v. Gentry*, 125 Wn.2d 570, 888 P.2d 1105 (1995). The defendant may present evidence of statutory and non-statutory mitigating factors.[88] After the conclusion of the evidence and argument, the jury is asked to deliberate on the following question: "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?"[89]

There are only two sentencing options at the special sentencing phase: life without the possibility of parole or death. A jury must be unanimous before they can answer the statutory question in

---

[81] Id.
[82] Id.
[83] RCW 10.95.040(2).
[84] RCW 10.95.040(3).
[85] RCW 10.95.050(3).
[86] RCW 10.95.050(4).
[87] RCW 10.95.050(4) and 10.95.060(1).
[88] RCW 10.95.070 Special sentencing proceeding -- Factors which jury may consider in deciding whether leniency merited**.** In deciding the question posed by RCW 10.95.060(4), the jury, or the court if a jury is waived, may consider any relevant factors, including but not limited to the following:

(1) Whether the defendant has or does not have a significant history, either as a juvenile or an adult, of prior criminal activity;
(2) Whether the murder was committed while the defendant was under the influence of extreme mental disturbance;
(3) Whether the victim consented to the act of murder;
(4) Whether the defendant was an accomplice to a murder committed by another person where the defendant's participation in the murder was relatively minor;
(5) Whether the defendant acted under duress or domination of another person;
(6) Whether, at the time of the murder, the capacity of the defendant to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired as a result of mental disease or defect. However, a person found to be mentally retarded under RCW 10.95.030(2) may in no case be sentenced to death;
(7) Whether the age of the defendant at the time of the crime calls for leniency; and
(8) Whether there is a likelihood that the defendant will pose a danger to others in the future.

[89] RCW 10.95.060(4).

the affirmative and give a death sentence.[90] If the jury is not unanimous or unanimously answers the question in the negative, then the sentence is life without the possibility of parole. Death, however, can never be imposed if the person is a juvenile or has intellectual deficits.[91]

Upon a conviction of Aggravated First-Degree Murder and regardless of the imposed sentence, the trial court is mandated to file within 30 days with the Washington Supreme Court a completed pre-printed trial questionnaire.[92] This pre-printed trial report form requests information about the defendant, the trial, the special sentencing proceeding, the victim, the representation of the defendant, whether a death notice was filed, and a chronology of the case. Additionally the reports request specific information pertaining to race of the defendant, the victim, the jury, and the respective county's racial population.[93]

When death is imposed, the Washington Supreme Court is required to conduct an automatic review.[94] The Supreme Court looks at four considerations: (1) whether there was sufficient evidence to justify the death sentence; (2) whether the defendant was mentally retarded; (3) whether it was brought on by passion or prejudice; and (4) whether the sentence was excessive or disproportionate.[95] RCW 10.95.130(2)(b) – which defines the "pool" of cases for the proportionality review – states:

> (b) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. For the purposes of this subsection, "similar cases" means cases reported in the Washington Reports or Washington Appellate Reports since January 1, 1965, in which the judge or jury considered the imposition of capital punishment regardless of whether it was imposed or executed, and cases in which reports have been filed with the supreme court under RCW 10.95.120.

The reports filed pursuant to RCW 10.95.120 are used to make up the "pool" of cases for a proportionality review. This "pool" includes cases in which the death penalty was sought and those in which it was not.[96] We outline the chronology of a capital case after the conclusions section, below.

[90] RCW 10.95.060(4).
[91] RCW 10.95.030(2) (a) – (e): *State v. Furman*, 122 Wn.2d 440 (1993); *Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002); RCW 10.95.030(2)(a).
[92] RCW 10.95.120.
[93] Id.
[94] RCW 10.95.100.
[95] RCW 10.95.130.
[96] *State v. Lord*, 117 Wn.2d 829, 907 (1991).

STUDY METHODOLOGY

Introduction

The primary goal of this study was to estimate the costs associated with pursuit of the death penalty (death penalty sought or DPS; synonymous with "capital case/trial" used throughout this study), as compared to cases where the death penalty was not sought (DPNS), for aggravated first-degree murder cases in Washington State. Prior empirical research supports the notion that the pursuit of the death penalty is more expensive.[97] These studies are somewhat limited in their ability to generalize beyond the particular states in which the research took place, due to the fact that there are many between-state differences in legal systems, geography, population, and crime rates, among many other factors.

Prior studies[98] on this issue within Washington State have also been limited in both rigor and comprehensiveness. The current study adds significantly to research on the death penalty in Washington State and beyond, as we utilize quasi-experimental methods to estimate cost differences using a wide variety of data sources. Roman et al. (2009)[99] highlight several significant limitations of prior research focused on estimating the differences between death penalty cases and, for example, life without parole (LWOP) cases. The authors argue that this type of comparison is inherently flawed because it relies on the identification of cases through "ex post case outcomes rather than ex ante attributes."[100] This first issue can be understood as a problem of selection bias – cases are assigned to study or comparison groups based on the case outcome. In research on the costs of the death penalty, selection bias is one of the most important issues that separate high-quality studies from others. We address the selection bias issue in two important and distinct ways: (1) we focus only on death-eligible cases (aggravated

---

[97] Cook, P. J. (2009). Potential Savings from Abolition of the Death Penalty in North Carolina. *American Law and Economics Review*, 11 (2): 498-529. doi:10.1093/aler/ahp022.
J. K. Roman, A. J. Chalfin, & C. R. Knight. (2009). Reassessing the Cost of the Death Penalty Using Quasi-Experimental Methods: Evidence from Maryland. *American Law and Economics Review*, 11 (2): 498-529. doi:10.1093/aler/ahp023.

[98] See: 1. House Bill 1504 Fiscal Note. 2013, available at: https://fortress.wa.gov/ofm/fnspublic/legsearch.asp?BillNumber=1504&SessionNumber=63.
2. Washington State Bar Association, supra note 27.
3. Larranaga, supra note 14.
4. Washington State Attorney General. Death Penalty Case Information, available at: http://www.atg.wa.gov/DeathPenaltyCases.aspx#.Uv0hZ_ldWSo.
5. Guy, supra note 17.
6. ACLU of Washington, supra note 59.
7. Loginsky, Pamela B. 2000. "Shattering Myths: A Factual Analysis of Washington's Death Penalty Practices", available at: http://www.waprosecutors.org/pdf/wsba-report.pdf.
8. Washington State Institute for Public Policy – studies available at: http://www.wsipp.wa.gov/. 2009 Evidence-Based Public Policy Options to Reduce Crime and Criminal Justice Costs: Implications in Washington State. Olympia: Washington State Institute for Public Policy, Document No. 09-00-1201. 2010a Fight Crime and Save Money: Development of an Investment Tool for States to Study Sentencing and Corrections Public Policy Options —Progress Report. Olympia: Washington State Institute for Public Policy, Document No. 10-04-1201. 2010b *WSIPP's Benefit-Cost Tool for States: Examining Policy Options in Sentencing and Corrections*. Olympia: Washington State Institute for Public Policy, Document No. 10-08-1201. 2013 Benefit-Cost Technical Manual: Methods and User Guide. (Document No. 13-10- 1201b). Olympia, WA: Author.

[99] Id. at 88.

[100] Id. at 88. Roman et al., 2009: 531.

first-degree murder); and, (2) we use propensity score matching (PSM) techniques to balance important covariates in our death penalty sought (DPS) and death penalty not-sought (DPNS) cases (both the sample and PSM process are detailed below). Death penalty sought cases are those in which the prosecution filed a notice to seek the death penalty. There are cases that resulted in guilty pleas to a life without parole sentence after the prosecutor withdrew the notice to seek death, and there are "not-sought" cases in which the prosecutor decision not to file a notice to seek death was made many months after the case began.

The Roman at al. (2009) and Cook (2009) studies also highlight other important limitations that may negatively affect previous death penalty cost studies, including issues surrounding small sample sizes, truncated observation periods, and poor data quality. We give each of these issues careful consideration and we fully describe all limitations that may bear on our overall findings. Below, we describe our sample of cases followed by an explanation of propensity score matching and the PSM model outcomes and diagnostics. We then discuss our cost measures, including the origin of the data along with a discussion of missing data procedures. This is followed by a discussion of the general analytic plan and results.

Sample of Cases

Trial Reports Database

As discussed in the introduction to this report, many of the previous studies on the impacts and costs of the death penalty have used data within States that have higher rates of violent crime than Washington State. Due to the fact that Washington has a significantly lower homicide rate than a majority of the States (ranked 41st out of the 50 states and District of Columbia in 2010),[101] available cases that met our inclusion criteria were somewhat limited. We began with a list of known aggravated first-degree murder cases that resulted in an official trial report, ranging from the earliest in 1981 to the present (2014). Most of the trial reports had already been entered into a database, with a few more added during the course of this study. The total number of cases to date is 339[102] trial reports, which served as our initial sample frame.

We selected aggravated first-degree murder as our primary focus because they are the only cases that are *death penalty eligible* and the trial reports database contains cases that were both DPS and DPNS. We elected to exclude cases that did not meet the criteria listed in RCW 10.95.020 (aggravated first-degree murder) even if they may have reached the arguable threshold for aggravated murder, but were charged/pled for a lower level offense (we could not identify all such cases given the resources available for this study). Additionally, in 1997, the State of Washington adopted new special proceeding rules (SPRC 1997), regarding qualifications for counsel (death-qualified counsel requirement). This change in the legal process, together with other changes at the Federal level that occurred around the turn of the century, have been identified by practitioners and researchers as critical juncture(s) for capital trials in

[101] Washington State Department of Health, http://www.doh.wa.gov/Portals/1/Documents/5500/IV-HOM2014.pdf; see also, FBI UCR: http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/violent-crime/murdermain.

[102] See section Status of Cases Resulting in Death Sentences in Washington State on page 69 below for more information regarding duplicate cases in the trial reports database.

Washington.[103] Moreover, data collection, management, and the accumulation of official records during the 1980s and early 1990s were not at the level that we have become accustomed to in the current "digital" age. Many of the older court records are stashed away in file cabinets, some are lost to time, and some have likely been destroyed. After careful consideration and in light of both substantial systemic change and availability of reliable data, we chose to further exclude cases that had no data points (or very little data) available and cases prior to 1997 (including appeals), resulting in a final 147 cases selected, 108 DPNS and 39 DPS cases.[104] For all adjustments, the Organization for Economic Co-operation and Development, (OECD) Main Economic Indicators (complete database, base year 2010, Consumer Price Index – Total All Items for the United States), were used to adjust nominal values into real 2010 dollars.

The trial reports are public record and can be requested through open records laws procedures. The trial reports (a blank copy is included in the Appendix), completed by the presiding judge or appointee, are prepared on a 13 page questionnaire that documents case numbers, name, and general demographics of the defendant. Some victim-level information including gender and race/ethnicity are usually provided. Additionally, case characteristics such as whether there was a codefendant, the nature of the crime, jury demographics, important dates (e.g. arrest date, trial begin date, sentencing date) as well as aggravating circumstances were most often also included. In the case(s) that had missing dates, or some other piece of missing information (such as offender gender), we turned to official court documents when available and in rare circumstances used some information gleaned from news reports.[105]

There are county-level/geographic differences regarding both the incidence and prevalence of aggravated murder and the pursuit of capital punishment. Although anecdotal, there is some evidence of a relationship between a given county's population/crime rate, budget, and whether or not a case is pursued capitally. Although an empirical analysis of this particular issue is well beyond the scope of this study, it is important to understand where, at the county level, these cases are originating. Table 1 below provides a breakdown of the geographic location, in total, of the cases included in the study. The majority of the cases are concentrated in five counties, beginning with King, followed by Pierce, and then Snohomish, Yakima, and Spokane counties. These counties aside, the counts drop significantly over this 17 year period, and death-eligible aggravated murder cases are comparatively rare.

[103] See section, Capital Trials (A)(1)(a), within this report for a description of the development of the rules surrounding SPRC 1997 and other significant changes in capital case process(es).

[104] There are a few cases (n= 9 DPNS, n= 5 DPS) that originated within the ECJA database that are counted here. They are included in the total, but do not have trial reports as they are currently ongoing.

[105] We did not use any cost figures from any news sources (or any other non-official source) for generating estimates for costs in the main analysis presented below. We only used news sources for simple information, such as location or date of the incident, arrest, trial, or sentence date. Moreover, this only occurred for at most, six cases.

Table 1. Case Frequency and Average by County, 1997-2014 (N= 147).

County	*f* (n)	%	Avg.	County	*f* (n)	%	Avg.
Benton*	3(1)[1]	2.04	0.176	Mason*	2	1.36	0.118
Chelan	1	0.68	0.059	Okanogan*	5	3.40	0.294
Clallam*	2(1)[1]	1.36	0.118	Pierce*	20(10)[1]	13.61	1.176
Clark*	7(2)[2]	4.76	0.412	Skagit	3	2.04	0.176
Cowlitz*	3	2.04	0.176	Snohomish*	16(5)[2]	10.88	0.941
Douglas	1	0.68	0.059	Spokane*	9(3)[1]	6.12	0.529
Franklin	2(1)	1.36	0.118	Stevens	1	0.68	0.059
Grant	1	0.68	0.059	Thurston	1(1)	0.68	0.059
Jefferson	1	0.68	0.059	Whatcom	2	1.36	0.118
King*	47(12)[2]	31.97	2.765	Yakima	12(1)	8.16	0.706
Kitsap*	6(2)[1]	4.08	0.353				
Klickitat	2	1.36	0.118	Total	147	100.00	0.393

Note: *f* = total number of cases. (n) number of DPS cases. % = percent total for all years. Avg. = Average per year from 1997-2013. Averages are unadjusted for county population.*Has at least one case (either DPS/NS) that stretched back prior to 1997, but had cost data reported post 1997. Superscript numbers indicate pre-1997 number of DPS cases referenced parenthetically.

Last, the trial reports data were converted into a new file using IBM SPSS software and were cleaned (checked for accuracy, recoded, etc.) and prepared for further use as a "seed" database. We used a mixed approach here; rather than attempting to survey and create general cost estimates by calculating top-down percent effort and time expended on a "type" of case, we tie costs to each particular case within general stages of the case process and triangulate these costs using several sources of data. It is to these additional sources of data that we now turn.

Extraordinary Criminal Justice Act (ECJA) Petitions

First adopted and put into use in 1999, RCW 43.330.190 Reimbursement of Extraordinary Criminal Justice Costs allows Washington counties to "submit a petition for relief to the office of public defense for reimbursement of extraordinary criminal justice costs. Extraordinary criminal justice costs are defined as those associated with investigation, prosecution, indigent defense, jury empanelment, expert witnesses, interpreters, incarceration, and other adjudication costs of aggravated murder cases." Because of the inherent focus on aggravated murder case costs, we collected and coded all available ECJA petitions from 1999 until present into a case-linked database. These data were then merged to the trial reports database. There was significant overlap with the cases listed in the trial reports and those listed at some point within the ECJA petitions, as 133 (90.5%) records matched with some cost data included during at least one petition year.

The ECJA petitions are compiled by county executives and budget managers, in partnership with agency personnel, who submit a petition outlining the extraordinary costs associated with the

aggravated murder/death penalty cases for which the county is seeking reimbursement. Other non-aggravated murder, but complex cases are also at times referenced in the petition. The petitions are then submitted to the Washington Office of Public Defense, in consultation with the Washington Association of Prosecuting Attorneys and the Washington Association of Sheriffs and Police Chiefs, who process, audit, and prioritize the petitions. As stated in the RCW, "[p]rioritization of the petitions shall be based on, but not limited to, such factors as disproportionate fiscal impact relative to the county budget, efficient use of resources, and whether the costs are extraordinary and could not be reasonably accommodated and anticipated in the normal budget process". The prioritized list is then submitted to the Washington Senate and House of Representatives for consideration and recommendation for funding by the legislature.

Although the ECJA petitions may not include *all* costs associated with *every* aggravated murder case and trial that may have occurred over the last 15 years, the data that they do include, by virtue of the processes employed to render costs included within the petitions, are extremely valuable. The ECJA petitions provide valid costs associated with every significant step in the aggravated and capital case process, including pretrial investigation and policing costs, jail and security, jury selection, defense, prosecution, and court costs, among many other sub-categories. We were not concerned with whether any petition was actually reimbursed, in part or in full, for the stated amounts. Details on cost categories included in this study and adjustments to the cost figures are included in the Measures section below.

Jail Data

Many death penalty cost studies fail to include the costs associated with pre-sentence incarceration. These costs can be significant for aggravated murder cases, as the defendants are often held in segregated, high-security areas within the particular county jail. Not only does the research show a positive relationship with case severity/complexity and time served between arrest and sentencing, but also the cost of running these high-security areas within jails differs significantly compared to placements in lower-risk cells, as the inmate to staff ratio decreases considerably (for example). These cost differentials are warranted, and we do not make any assumptions that the costs associated with managing high-risk offenders would significantly change in the absence of a death penalty option, as there would still be a need to segregate high-risk violent offenders. We include time and expense related to capital and non-capital cases, which is important to consider in any empirical evaluation of the costs associated with various stages of aggravated and capital murder trials.

We gathered jail-related cost data from three main sources. The ECJA petitions often had jail-related expenses listed, and we asked for additional time and cost information from several counties. We received detailed days in custody and cost information from Clark, King, and Kitsap Counties. The county level data was matched using DOC number, case numbers, and names, and checked for accuracy. Additionally, we used date of arrest to date of sentence in the trial reports as a check on the costs and time in custody data provided by Clark, King, and Kitsap Counties as well as the ECJA petitions. A total of 112 (76.2%) of the cases recorded matched data within the ECJA and county level data, and a total of 141 (95.9%) of the cases had either the

number of days from arrest to sentence in the trial reports and/or ECJA county level jail cost data.

Washington State Department of Corrections (DOC) Data

No death penalty cost analysis would be complete without consideration of the costs associated with post-sentence incarceration. Therefore, we provided the DOC a complete list of the cases included here and requested information regarding costs of incarceration. A total of 132 (89.8%) of the cases recorded matched data within the DOC database. The DOC provided data that included movement within and between facilities, and per offender per day costs. We also asked for cost information regarding the actual administration of the death penalty, however, these data are difficult to collect or estimate given the rarity of the punishment (there have only been five executions since Joseph Self was executed June 20th, 1963; Dodd, 1993; Campbell, 1994; Sagastegui, 1998; Elledge, 2001; and, Brown, 2010). Furthermore, the per-facility average daily costs do not cover any of the additional costs commonly associated with a "death row" (e.g. inmate to officer ratio, higher levels of security, single-occupancy cells, etc.).[106] While death-sentenced inmates are held in segregation, DOC states on its web page that the cost to incarcerate a death-sentenced inmate is "the same as it does to incarcerate any other offender in a maximum-custody unit".[107] It adds, "Offenders who are scheduled for execution are housed with other offenders in a maximum-custody unit at the Washington State Penitentiary."[108]

Given that the daily rates for both the known facility-based data (pre-2014) and the estimated rates used for the DOC cost forecasting are the same at baseline for each group, the cost-estimates for the DOC-based cost analyses are *the most* conservative estimates given and should be interpreted with the understanding that the costs for the DPS group are likely suppressed. Thus, we provide more explanation of these issues below, as well as a sensitivity analysis to examine where the cross-over (from savings to costs) occurs when adjusting the DPS costs by ten-percent intervals.

Prosecution Data

Data associated with prosecution costs were collected primarily from the ECJA petitions, as most if not all of the individual or supporting documents within the petitions detailed the costs associated with prosecution of particular cases. A total of 103 (70.1%) of the cases recorded matched data within the ECJA database, or 103 had case-level cost information. Additionally, we met and talked with representatives of prosecutors' offices from several counties to discuss the differences in costs between capital and non-capital aggravated murder cases. As a result of these meetings, we developed a short survey instrument that was given to representatives from King, Snohomish, and Pierce County prosecutor offices. These short surveys contained case references and were given to prosecutors who had direct knowledge of the particular cases. The prosecutors

[106] According to the DOC website, "male defendants under sentence of death are transferred to the Penitentiary, where they remain in a segregation unit pending appeals and until a death warrant is issued setting the date for the execution." Department of Corrections, Capital Punishment in Washington State, available at: http://www.doc.wa.gov/offenderinfo/capitalpunishment/.

[107] Frequently asked questions, available at: http://www.doc.wa.gov/offenderinfo/capitalpunishment/mediaresources.asp.

[108] Id.

were then asked to estimate the percentage of time spent during each significant stage of each particular case. Data from these efforts are still being collected and are not included in the analysis here. An effort will be made to integrate or make available any additional data collected after the issuing of this report. [109]

Defense Data

Data associated with defense costs were collected primarily from the ECJA petitions, as most if not all of the individual or supporting documents within the petitions detailed the costs associated with the defense of particular cases. A total of 115 (78.2%) of the cases recorded matched data within the ECJA database, or had case-level cost information. Additionally, we met and talked with representatives from several counties to discuss the differences in costs between capital and non-capital aggravated murder cases. We received data containing total costs per case for several counties. After carefully examining the documents provided from county defenders offices, we discovered that a vast majority of the documents and data that were provided also appeared in the ECJA database. Also, as outlined in the introduction, recent cases in King county that are still pending, for which there are no trial reports and for which the most recent ECJA petitions have not been filed, have generated significant costs that are not yet reported in the ECJA database.

Court Data

Data associated with court costs were also collected primarily from the ECJA petitions, as many of the petitions included costs associated with courtroom staff, judges, jury selection, and other categories of court-level expenses. A total of 105 (71.4%) of the cases recorded matched data within the ECJA database, or had case-level cost information related to courts. Additionally, the trial reports include significant dates (with the absence of arraignment date) outlining the duration of each significant stage of the case process, such as arrest to trial, trial beginning to the date the jury returned their verdict, duration to sentencing date, and appeals dates. As with the jail data discussed earlier, we used the time-based data to investigate whether there are significant differences in length of time (during each segment of the case) between DPS and DPNS cases. A total of 141 (95.9%) of the cases recorded matched data within the trial reports database, or had case-level duration information related to courts.

State Level Appeals and Personal Restraint Proceedings (PRP)

Data associated with the case-specific costs of state-level appeals were requested from the Washington State Office of Public Defense (OPD). The OPD was given a list of all possible cases and they linked these cases to data regarding costs associated with post-conviction appeals. A total of 107 (72.8 %) of the cases recorded matched data and were returned, or had case-level cost information related to state PRP's and appeals.

[109] Unlike defense attorneys who often are paid by the hour, most prosecutor offices are not keeping time that their attorneys spend on capital cases. Future research could address the benefit of documenting prosecutor attorney time.

Federal Habeas Corpus Proceedings

Data associated with case-specific costs of federal habeas corpus proceedings were requested from the Washington State Attorney General. For death penalty cases, if the defendant is found guilty and sentenced to death, the county is responsible for bearing the costs associated with the direct appeal and personal restraint proceedings. For costs associated with federal habeas corpus petitions and the appeals from them, the State/AGO incurs the costs associated with defending a habeas challenge to conviction. There have only been a handful of cases that have reached this threshold in Washington, so therefore we present the federal appeals costs as a separate analysis. We also requested and received data from the Federal Defender for Western Washington concerning their costs for representing clients in federal habeas corpus proceedings.

Combined Data and Adjustment Strategy

Each separate database was first constructed, cleaned, and recoded as a stand-alone file. Case numbers, DOC case numbers, and later, trial report numbers (TRNs) were used to link datasets together. Because each set of data presented unique challenges, most of the recoding and cost conversions were completed prior to a final merging of all datasets. Some sources provided multiple observations (rows) for each case/offender, while others provided a flattened or unduplicated file, which makes adjusting nominal values impossible if not done prior to a final merge. For example, one offender had 92 separate movements within or between different DOC facilities. It was extremely important to exclude any time between movements, where custody and therefore costs, may have shifted from the DOC to a county jail, as many offenders had business to attend to at their respective county or state court(s) post-conviction.

Additionally, although the DOC could not provide a unit-level cost per inmate per day, they were able to differentiate between the average costs of different facilities. These cost differences and movements were captured in the DOC data. Given the file structure, the adjustments for inflation needed to be done using the full file. Because the "time" issue associated with inflation and costs is so important, adjustments for inflation took place at the individual database level. Furthermore, some file structures allowed for more precise adjustments because they contained multiple dates, while others simply provided a year within which the costs were generated. For all adjustments, the Organization for Economic Co-operation and Development (OECD) Main Economic Indicators (complete database, base year 2010, Consumer Price Index – Total All Items for the United States), were used to adjust nominal values into real 2010 dollars. CPI figures were rounded to the ten thousandths and the annual CPI value for 2014 was provided using Sahr's (2012) estimate.[110]

[110] Robert C. Sahr, (2012). Political Science Department, Oregon State University, Corvallis, OR 97331-6206. "Consumer Price Index (CPI) Conversion Factors 1774 to estimated 2022 to Convert to Dollars of 2010 Estimates for 2011-2022 are based on the average of OMB and CBO estimates as of January and February 2012. Conversion factors for years before 1913 are re-based from data from the *Historical Statistics of the United States Millennial Edition* (Cambridge University Press, 2006). Calculation starting 1913 uses the CPI-U as the base, from the US Bureau of Labor Statistics. Monthly and annual CPI data are available at the BLS web site: http://stats.bls.gov/cpi/home.htm#data (CPI-U = all urban consumers)". http://liberalarts.oregonstate.edu/spp/polisci/research/inflation-conversion-factors-convert-dollars-1774-estimated-2024-dollars-recent-year

Propensity Score Matching

The main purpose for randomization in controlled experimental research designs is to dampen or eliminate the effects of selection bias. In order to more closely approximate causal effects (i.e., the outcomes (costs) attributable to, in this case, a prosecutor's decision to pursue the death penalty), a research design must account for possible confounding factors. Controlling for confounders is achieved by gaining equivalence or closer approximations of the preexisting differences between treatment and control groups (Stuart & Rubin, 2008). Therefore, it is important to separate out any preexisting group-selection effects these differences may have on the outcomes of interest.

Propensity score matching (PSM) is a technique that emulates randomization by balancing the observed covariate distributions within the treatment and comparison groups.[111] Due to the non-random assignment to either the treatment (death penalty sought) or control (death penalty not sought) groups, a one-to-one nearest neighbor propensity score matching technique was utilized to balance the covariate distributions.[112] As noted by Stuart and Rubin (2008:156), there are two main issues that must be taken into consideration when deciding the covariates on which to match cases: 1) one must select a set of variables that are to be compared; and, 2) those variables are selected "without access to any of the outcome data, thereby preventing intentional or unintentional bias when selecting a particular matched sample to achieve a desired result." Thus, outcome variables must not be included in the PSM model.

The predicted probabilities, or propensity scores that were generated via logistic regression for the treatment group, for each observation (i.e. offender) were then matched to the nearest propensity score in the comparison group selection pool. Offender records in either the treatment or the comparison group that were not successfully matched were omitted from the psm-linked analyses. A total of 35 records for DPS cases were matched to comparison group records. As Stuart (2010) notes, the omission of observations may lead some to raise issues with the consequent reduction of statistical power (due to reduction in sample size). This issue, however, is not as critical as one might think, as Stuart (2010:8) notes that "power increases when the groups are more similar because of the reduced extrapolation and higher precision that is obtained when comparing groups that are similar versus groups that are quite different."

Covariate Selection and Events per Variable

Covariates were selected based on three criteria: 1) belief as confounders and correlates of both crime and prosecutorial decision making; 2) initial bivariate tests indicating statistically significant differences (listed in Table 1 below) between the death penalty sought and not sought

[111] Stuart, E. A. (2010). Matching Methods for Causal Inference: A Review and a Look Forward. *Statistical Science*, 25: 1–21; Stuart, E. & D. Rubin. (2008). Best Practices in Quasi-Experimental Designs: Matching Methods for Causal Inference. *In Best Practices in Quantitative Methods*. J. W. Osborne (Ed.). Los Angeles: Sage Publications.
Weitzen, S., K. Lapane, A. Toledano, A. Hume, & V. Mor. 2004. Principles for modeling propensity scores in medical research: a systematic literature review. *Pharmacoepidemiology and Drug Safety*, 13: 841-853.
Thoemmes, F. (2012). Propensity Score Matching in SPSS. Center for Educational Science and Psychology, University of Tubungen.
[112] Id.

groups; and, 3) availability and completeness of the variables. There were eleven variables initially considered for inclusion in the propensity score model.

Table 2. Predictor Characteristics of Study Cases Pre and Post PSM.

	Before PSM (N = 147)			After PSM (N = 70)		
	Not Sought	Sought		Not Sought	Sought	
	M (SE)	M (SE)	t-test sig	M (SE)	M (SE)	t-test sig
Number of:						
Agg. Factors Found	1.69 (0.079)	2.67 (0.233)	0.001*	2.23(0.169)	2.46(0.176)	0.352
No. of Victims	1.75 (0.139)	3.41 (1.223)	0.032*	2.34 (0.335)	2.26 (0.381)	0.870
Age at Arrest	29.4(1.045)	32.6(1.639)	0.113	32.5(2.258)	32.5(1.705)	0.983
	f (%)	*f* (%)	χ2 sig	*f* (%)	*f* (%)	χ2 sig
In Furtherance of:						
Robbery (yes)	31(28.7)	15(38.5)	0.260	12(34.3)	14(40.0)	0.621
Rape (yes)	8(7.4)	8(20.5)	0.024*	4(11.4)	5(14.3)	0.721
Victim Stranger (yes)	32(29.6)	13(33.3)	0.667	9(25.7)	12(34.3)	0.434
Race (non-minority):						
Offender	51(47.2)	12(30.8)	0.075*	13(37.1)	11(31.4)	0.615
Victim	38(35.2)	7(17.9)	0.045*	8(22.9)	7(20.0)	0.771
Prior Felony (yes)	39(36.1)	18(46.2)	0.270	17(48.6)	17(48.6)	1.000
Plea (yes)	20(18.5)	9(23.1)	0.538	11(31.4)	7(20.0)	0.477
Gender (F)	4(3.7)	2(5.1)	0.700	0(0.0)	2(5.7)	0.151

Note: There were no statistically significant differences pre psm for: age at arrest, in furtherance of robbery, victim stranger, prior felony, plea indicator, and gender.

Of these variables, six (prior record, in furtherance of robbery, age at arrest, gender, whether the victim was a stranger, and whether there was a plea in the case) did not indicate significant differences prior to matching, so these variables were not included as primary covariates in the match. As is illustrated in Table 2, below, the remaining five variables were included in the model (EPV = Tx group [death penalty sought] n = 39/5 = 7.8; see Weitzen et al., 2004).

PSM and Post-hoc Diagnostics

Using the MatchIt R interface in IBM SPSS, the match conducted here used a logistic regression model, a nearest neighbor 1-to-1 match, and both treatment (DP sought) and control (DP not

sought) observations outside the common area of support were discarded (caliper = .6). There were no statistically significant differences on the balanced covariates post-match. The overall balance test (χ^2 = 1.147, (df) 5, p = .950; Hansen & Bowers, 2010) was not statistically significant and the relative multivariate imbalance test *L*1 measure was smaller post-match (.400) than pre-match (.530); both measures indicating balance post-match (Thoemmes, 2010). Visual inspections of detailed balance reports, jitter-plot, and standardized difference tests also indicate post-match balance. Additionally, using the resulting propensity scores, a ROC curve (receiver operating characteristic) was employed to examine the performance of the binary classifier system; the area under the curve, 0.567 indicates strong performance (S.E. = 0.069, asymptotic sig.b = 0.333; 95% CI lower = 0.432, upper = 0.702).

Taken as a whole, these tests indicate a successful match. Therefore, we present both the unmatched total average costs across the main categories, as well as costs averages/totals from the matched sample. We include both the unmatched and matched analyses here for several reasons, most notably: 1) we make the argument that we have the entire population of aggravated murder cases within the given timeframe, and therefore, presenting the averages sheds light on the whole spectrum of costs associated with these cases; and, 2) choosing to match using propensity scores allows for the controlling of extreme scores and strengthens the argument that differences between the death sought and not-sought cases included here are linked to the prosecutor's decision to file a death notice, rather than significant confounding factors.

Measures

The creation of cost categories developed in two distinct stages; first, through an analysis of the literature and careful consideration of the key stages in both capital and non-capital cases, we created an outline of key cost categories that follow the general chronology of a case. These *primarily identified* stages included police response/investigation, pre-trial, trial, direct appeal, state post-conviction (PRP), federal habeas, federal appeals, and clemency. Second, within each of these stages costs are incurred by several different agencies, such as defense, prosecution, courts, police, jails, and prisons. As illustrated earlier regarding the sample of cases, given the lack of reliable data that *links costs* incurred by these separate agencies directly *to each specific stage* in the chronology of a case, our analysis focuses mainly on the direct cost-categories (on a case-by-case basis) rather than those same costs spread over the duration of a normal case. In the final analysis below, we present costs incurred in six main categories, jail, defense, prosecutor, court/misc., state appeals (PRP), and DOC costs. We add the seventh category, federal habeas/appeals, as an aside because we have limited data for this category. Although we present only six main categories in this analysis, the main categories, especially regarding the ECJA costs, are made up of many other subcategories. Each measure is detailed below.

Jail Costs – Sub-Categories

King County Department of Adult and Juvenile Detention (DAJD) costs were calculated using booking and release dates. These dates were used to calculate days in custody (minus any days that the particular defendant/offender might have not been in jail). The average daily cost for 2014, $141.88, was used to calculate total costs. The average daily cost is for *all inmates* and it represents costs for officer salaries, building maintenance, direct and overhead costs,

administration costs, as well as some other county level overhead costs. Prior to merging, all cost figures were adjusted using base year 2010 annual CPI figures and all final figures are presented as 2010 dollars. For those cases that had jail cost-observations in both the ECJA and King County data files, the King County figure (or the largest value) was selected to avoid double counting costs.

Clark County Jail costs were also calculated using booking and release dates. These dates were used to calculate days in custody (minus any days that the particular defendant/offender might have not been in jail). Clark County provided daily rates per year (2009, $66.61; 2010, $76.83; 2011, $76.12; 2012, $77.26; 2013, $77.92; 2014, $81.02), which were used to calculate total costs. We assume these are also average daily costs for *all inmates* and it represents costs for officer salaries, building maintenance, direct and overhead costs, administration costs, as well as some other county level overhead costs. Prior to merging, all costs figures were adjusted using base year 2010 annual CPI figures and all final figures are presented as 2010 dollars. For those cases that had jail cost-observations in both the ECJA and Clark County data files, the Clark County figure (or the largest value) was selected to avoid double counting costs.

Kitsap County Jail time in custody figures were calculated using booking and release dates. At this time, we have yet to integrate adjusted costs for these cases because they were replicated in the ECJA jail-costs data. We assume that the costs included for all (six) Kitsap County cases were created using average daily costs for *all inmates* and that they represent costs for officer salaries, building maintenance, direct and overhead costs, administration costs, as well as some other county level overhead costs. Prior to merging, all costs figures were adjusted using base year 2010 annual CPI figures and all final figures are presented as 2010 dollars. For those cases that had jail cost-observations in both the ECJA and Clark County data files, ECJA costs were selected to avoid double counting costs.

ECJA Jail Costs, compared to other ECJA cost categories, were straightforward, as the costs were initially contained in one variable. Again, we assume that the jail costs included for all ECJA cases were created using average daily costs for *all inmates* and that they represent costs for officer salaries, building maintenance, direct and overhead costs, administration costs, as well as some other county level overhead costs. Prior to merging, all ECJA jail costs figures were adjusted using base year 2010 annual CPI figures and all final figures are presented as 2010 dollars. It is important to note that the calculation of costs using daily averages for all inmates likely underestimates the costs for incapacitating defendants facing the death penalty, who are often placed in higher security cells/locations within these various county jails. Therefore, all jail-cost estimates are conservative.

Defense Costs – Sub-Categories

The ECJA Defense Costs main category is comprised of three sub-categories within the ECJA database. These three sub-categories include: 1) attorney costs; 2) expert witness costs; and, 3) investigation costs. Costs in each of these categories were adjusted using base year 2010 annual CPI figures and all final figures are presented as 2010 dollars prior to the final merge, as each data point was tied to a petition year and case, and most of the cases had records that covered multiple years. Additionally, we assume these figures include costs for salaries, benefits,

building maintenance, direct and overhead costs, and administration costs. We did receive raw data on defender costs through public disclosure requests from various counties. A vast majority of these files, however, were exact replicas of the ECJA data for these specific cases, which allowed us to check the validity of the data in the ECJA records. After cross-referencing the data from the given county defenders with the ECJA data, we are confident that the ECJA cost figures are accurate.

Prosecution Costs – Sub-Categories

The ECJA Prosecution Costs main category is comprised of three sub-categories within the ECJA database. These three sub-categories include: 1) attorney costs; 2) expert witness costs; and, 3) discovery costs. Costs in each of these categories were adjusted using base year 2010 annual CPI figures and all final figures are presented as 2010 dollars prior to the final merge, as each data point was tied to a petition year and case, and most of the cases had records that covered multiple years. Additionally, we assume these figures include costs for salaries, benefits, building maintenance, direct and overhead costs, and administration costs. The ECJA prosecution costs data were the only monetary-based data that were available during the course of this study. Efforts are currently being made by three counties to estimate percentage effort expended by prosecuting attorneys on the aggravated murder cases that had been tried in their respective counties. Once these data are collected, we will perform data quality comparisons similar to those used for the defense costs, in order to gain more certainty as to the reliability of the ECJA petition figures. We are confident however, that similar to all of the ECJA costs the prosecutor cost figures are valid, as they are vetted by county officials prior to submission, as well as vetted by a task force of key stakeholders who are required by law to review and prioritize the costs and reimbursement funds requested in the petitions.

Court, Police/Sheriff, and Miscellaneous (CPSM) Costs – Sub-Categories

The CPSM main category is comprised of multiple additional sub-categories. Some sub-categories were likely unique to a particular case and county, as some had very few observations. Due to the low observations in certain categories, we elected to combine these categories into courts, police/sheriff, and miscellaneous. These sub-categories include court/superior court costs associated with: clerks/clerks papers, courtroom reporters, community surveys, docketing, evidence specialists/forensics, interpreters, judge costs, mitigation specialists, court staff, mental health specialists, witnesses, photography/video, transcripts, voir dire/jury costs, and miscellaneous costs. Additional cost sub-categories included in this broad section, but not necessarily incurred by the courts, include costs associated with: police and sheriff overtime/trial costs, security and transportation, and other policing/security related costs, emergency room/medical procedure costs, and "other" costs. Costs in each of these categories were adjusted using base year 2010 annual CPI figures and all final figures are presented as 2010 dollars prior to the final merge, as each data point was tied to a petition year and case, and most of the cases had records that covered multiple years. Additionally, we assume these figures include costs for salaries, benefits, building maintenance, direct and overhead costs, and administration costs.

Although cost data could not be easily gathered and supplied by the Administrative Office of the Courts, the possible differences between DPS and DPNS cases in length of time from trial begin

date to sentencing were collected and coded using the trial reports. Although these are not monetary figures, they will provide context to the cost figures, as it is a common understanding that time is positively correlated with expense.

Post-Conviction Personal Restraint Petition/Appeals (PRPA) Costs

The Washington State Office of Public Defense provided cost data on post-conviction PRP and Appeals. The cost data were provided as case-linked total costs, so we assume these figures include costs for salaries, benefits, building maintenance, direct and overhead costs, and administration costs. Furthermore, the raw data was not linked to date of service, so we used the year of sentence as the time marker for adjusting for inflation. PRPA costs were adjusted using base year 2010 annual CPI figures and all final figures are presented as 2010 dollars prior to the final merge, as each data point was tied to a petition year and case, and most of the cases had records that covered multiple years.

Department of Corrections (DOC) Costs

Post-conviction (DOC) incarceration costs were calculated using two methods. First, DOC matched records using trial report case numbers within the DOC OMNI system. For the records that were positive matches, DOC analysts provided a file that included all movements within and between facilities. This was done to account for time spent outside direct DOC supervision, such as when offenders may need to appear in court, as we did not want to double count costs of supervision/incarceration between DOC and county jails. Although we could not specify costs associated with segregation of death-sentenced inmates within the DOC, we could differentiate between facilities. The average daily costs per offender, per day for each of the ten facilities included in the data were used to calculate total costs. The average daily cost is for *all offenders* and it includes costs for health care by facility.[113]

Second, because we cover at least 20 years of cases in Washington, we needed to adjust the DOC cost figures to account for time, as those cases occurring in the 1990s would have accumulated more costs than a case where the defendant was sentenced to life last year, artificially skewing the results. Therefore we used a two-step process: first, the existing DOC records, up to 2014, were retained; next we calculated age at sentence and forecasted time past 2014 using both an average life sentence of 470 months and an in-prison life expectancy of 65 years.[114] The retained and forecasted costs were then adjusted using base year 2010 annual CPI figures and all final figures are presented as 2010 dollars. CPI figures were forecasted using an average rate of about 2.1 percent (the R^2 for the linear model was .9998). These findings, as well as the sensitivity analysis are provided below, in Table 5.

As discussed in the Executive Summary above, there are many reasons to support a conclusion that post-sentencing incarceration costs for "death row" inmates are greater than for non-death-sentenced inmates. For example, even if a death-sentenced inmate has good behavior and might

[113] As per DOC, the average daily cost excludes administrative service costs, sewer bond payments for one of the facilities (SCCC), and cashout of COPS leases S-310-1310 through 1312.
[114] For average life sentence, see:
http://www.ussc.gov/amendment-process/public-hearings-and-meetings/appendix-0.

otherwise qualify for a reduced security classification, the inmate is held in segregation at the Penitentiary. Please see the further discussion of this below.[115]

Assessment of Data Quality – Multivariate Imputation

As illustrated in both the Sample and Measures sections above, many of the cases had missing data in some respect, which prompted additional missing values analysis. To begin, we separated the DPS and DPNS cases into two separate files. For each file we performed a simple estimated means (EM) test to test whether or not the data were missing at random or missing completely at random. We then performed a visual analysis of missing data patterns to test for monotonicity and determine which missing data patterns were the most frequent. Last, we employed multivariate imputation to replace missing values. The process was similar for both files.

For the DPS file, the EM analysis indicated non-systematic missing values (Little's MCAR test: χ^2= 40.880, DF= 42, Sig.= .520). Overall, 75.21 percent of the cells had complete data, and there was a distinct visual difference between the most frequently occurring pattern (complete) and the next nine patterns, further indicating data missing at random rather than systematic missing data (which minimizes the chance of bias in the missing and imputed values). For the DPNS file, the EM analysis indicated non-systematic missing values (Little's MCAR test: χ^2= 75.461, DF= 80, Sig.= .623). Overall, 76.85 percent of the cells had complete data, and there was a distinct difference between the most frequently occurring pattern (complete) and the next nine patterns. Next, the imputation model was set: the active random number generator was set as mersenne twister, and the starting value was default fixed. Automatic model selection was indicated, as further tests for monotonicity, and the chosen model used was regression. Five imputation models were returned with complete data for both the DPS and DPNS files. The five complete data sets were then aggregated on the six main categories, using the average of the five models as the final cost for each category. The DPS/DPNS files were then merged and prepped for final analysis.

Analytic Plan

To reiterate, the primary goal of this study was to estimate the costs associated with pursuit of the death penalty, as compared to cases where the death penalty was not sought (DPNS), for aggravated first-degree murder cases in Washington State. Prior to describing the analytic plan, several general observations need to be made about the costs contained herein. First, like other research (e.g. Cook, 2009) we consider cost differentials to be opportunity costs; that is, in the absence of a death penalty option, the funds that would have been used to pursue the death penalty would likely be shifted to other cases and other locations within the criminal justice and public support systems. We do not provide any suggestions as to whether this would be the case, and further, what (if any) percentage of any differentials would be redistributed across the system – such matters are well beyond the scope of this study. Second, we do not make any

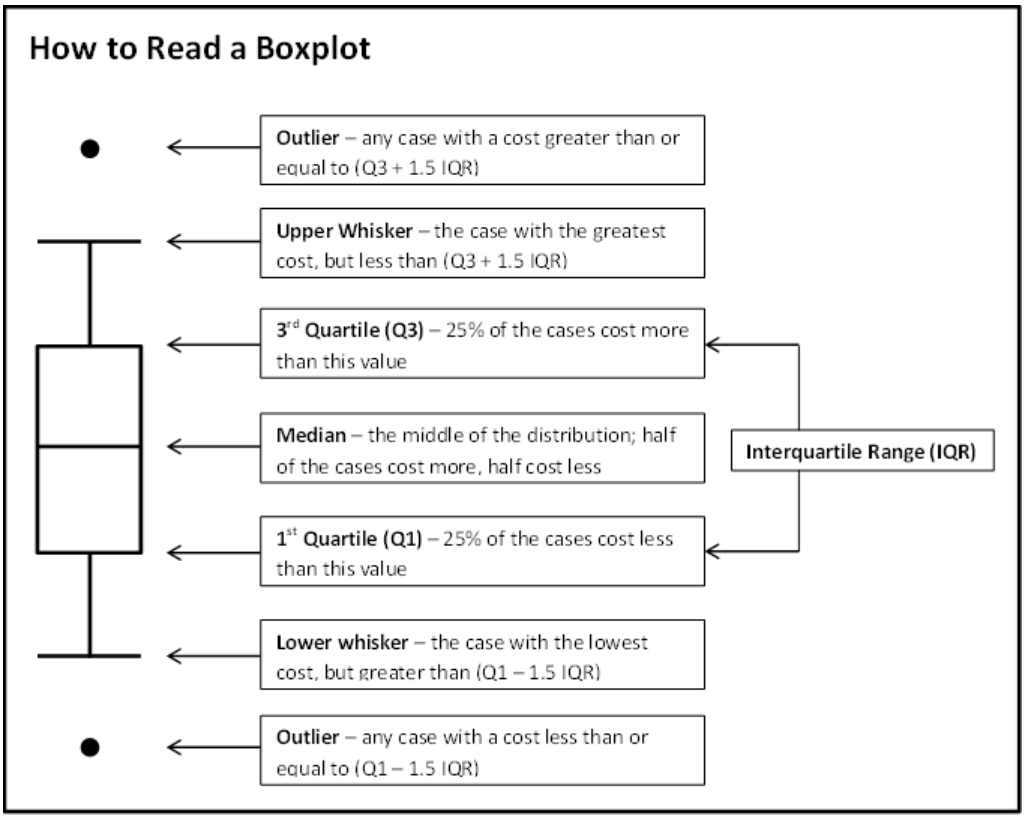
[115] Arizona has reported that it spends more than $20 per day more to imprison a death row inmate than to incarcerate a minimum-security inmate. See, Cooper Rummell, "The Real Cost of the Death Penalty in Arizona", KTAR News, September 30, 2014, available at: http://ktar.com/22/1770745/The-real-cost-of-the-death-penalty-in-Arizona.

normative assumptions as to the social utility of the death penalty. We are simply providing evidence as to the nature of the costs of DPS compared to DPNS cases. The decisions regarding whether or not to support "too costly" or "worthy investment" arguments are for Washington voters and legislators.

We present two sets of results below. The first set of results provides averages, average differences, and within category ratios of the six cost categories and total costs between DPS and DPNS cases prior to propensity score matching (N= 147). The second set of results provides averages, average differences, and within category ratios of the six cost categories and total costs between DPS and DPNS cases after propensity score matching (N= 70). We chose to provide both the matched and unmatched analyses so that differences between the two methods could be scrutinized. We also provide additional information regarding trial duration as well as some visual tools (boxplots) for understanding the distribution of cases and costs and particularly outliers in the distribution of costs within the DPS and DPNS cases.

RESULTS

As described above, the full (N= 147) cost differentials model is presented first, followed by the post-match PSM model. We first present visual and quantitative descriptive statistics for each category, and summarize the overall findings below. For those not accustomed to reading boxplots, we provide a helpful guide below (see the box entitled, "How to Read a Boxplot").



We first examine the distribution of cases in terms of jail-related costs. As can be seen in the boxplot to the right, the median cost for DPS cases is higher than for DPNS cases.

Although there are several DPNS cases that had extreme costs relative to other DPNS cases, the overall distribution is toward the lower end of the scale, with about 75% of the cases falling below $100,000. About 50% of DPS cases fall below that threshold.

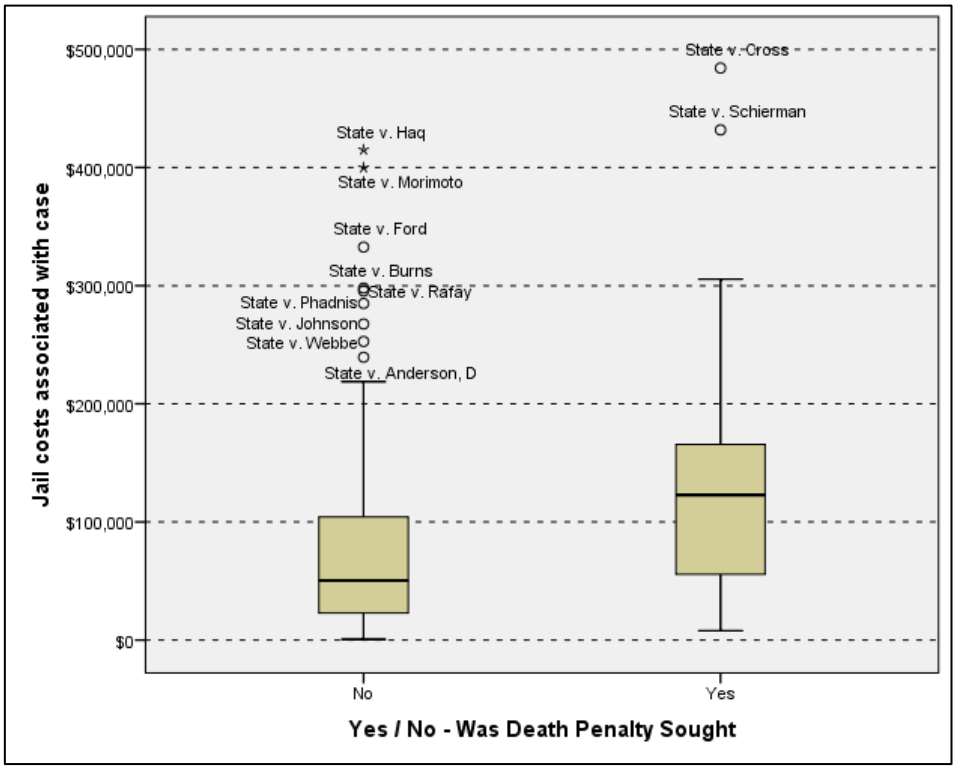
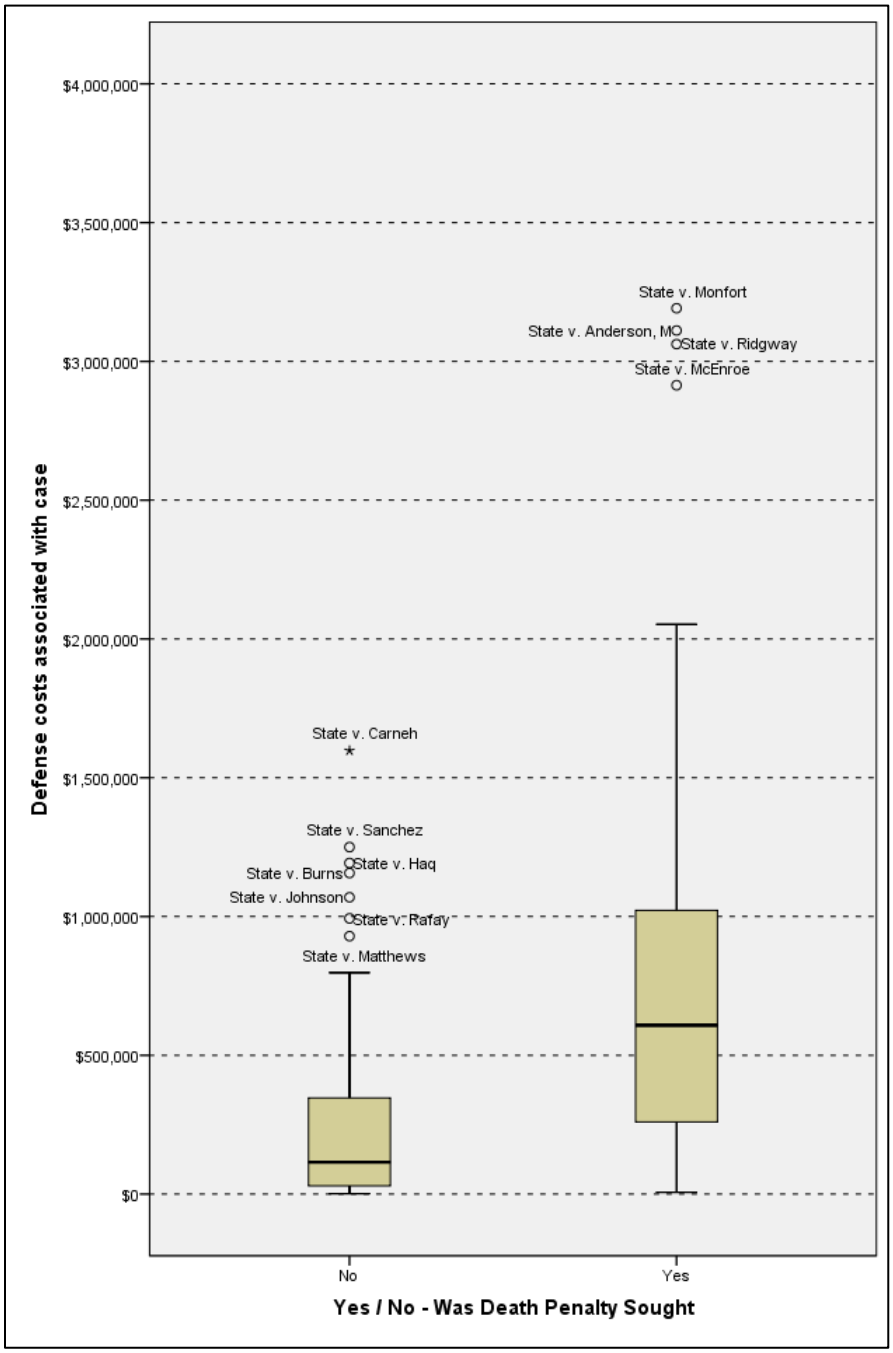


Figure 3. Jail Costs Associated with Case



Defense costs, displayed in the boxplot to the left, are clearly higher for DPS cases as compared to DPNS cases. Four outliers include the *Monfort*, *Anderson*, *Ridgway*, and *McEnroe* cases, each having estimated defense costs in the range of $3 million.

The median defense cost is substantially higher for DPS cases ($608,500) as compared to DPNS cases ($115,000).

Seventy-five percent of the DPNS cases had total defense costs less than $350,000. In contrast, 75% of the DPS cases had total defense costs greater than $250,000.

The interquartile range (the middle 50% of the cases, or the "heart" of the distribution) is between $29,500 and $346,900 for DPNS cases. For DPS cases, the IQR is much larger, from $245,200 to $1,027,700.

Figure 4. Defense (Trial) Costs Associated with Case

Prosecution costs, displayed in the boxplot to the right, are higher for DPS cases as compared to DPNS cases. Two extreme outliers for DPS cases include *Ridgway* (nearly $4 million) and *Dodd* (nearly $1 million).

The median prosecution cost is about double for DPS cases ($109,500) as compared to DPNS cases ($53,600).

The interquartile range is between $22,500 and $85,500 for DPNS cases. For DPS cases, the IQR is larger, from $18,500 to $321,800.

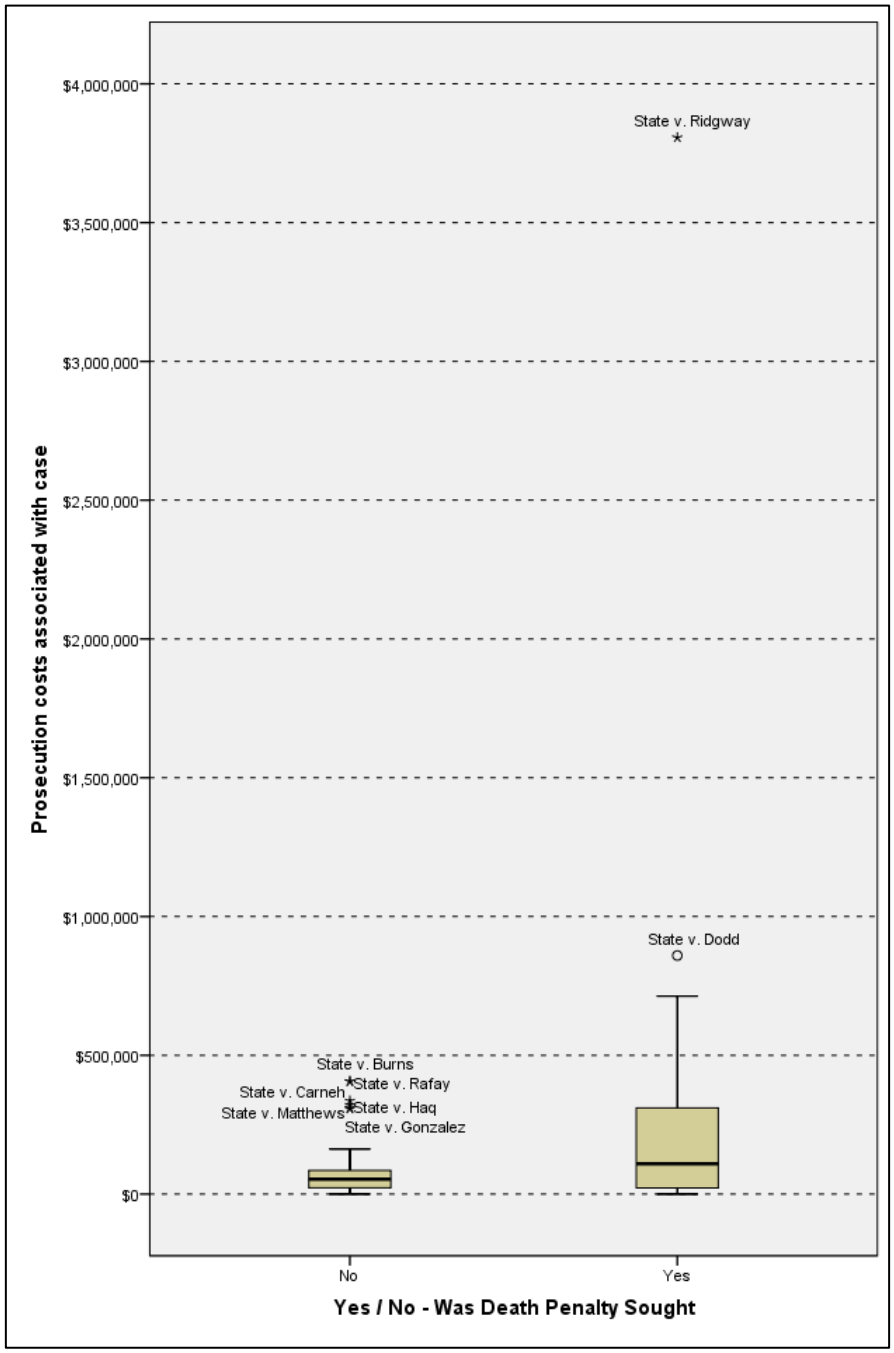


Figure 5. Prosecution (Trial) Costs Associated with Case

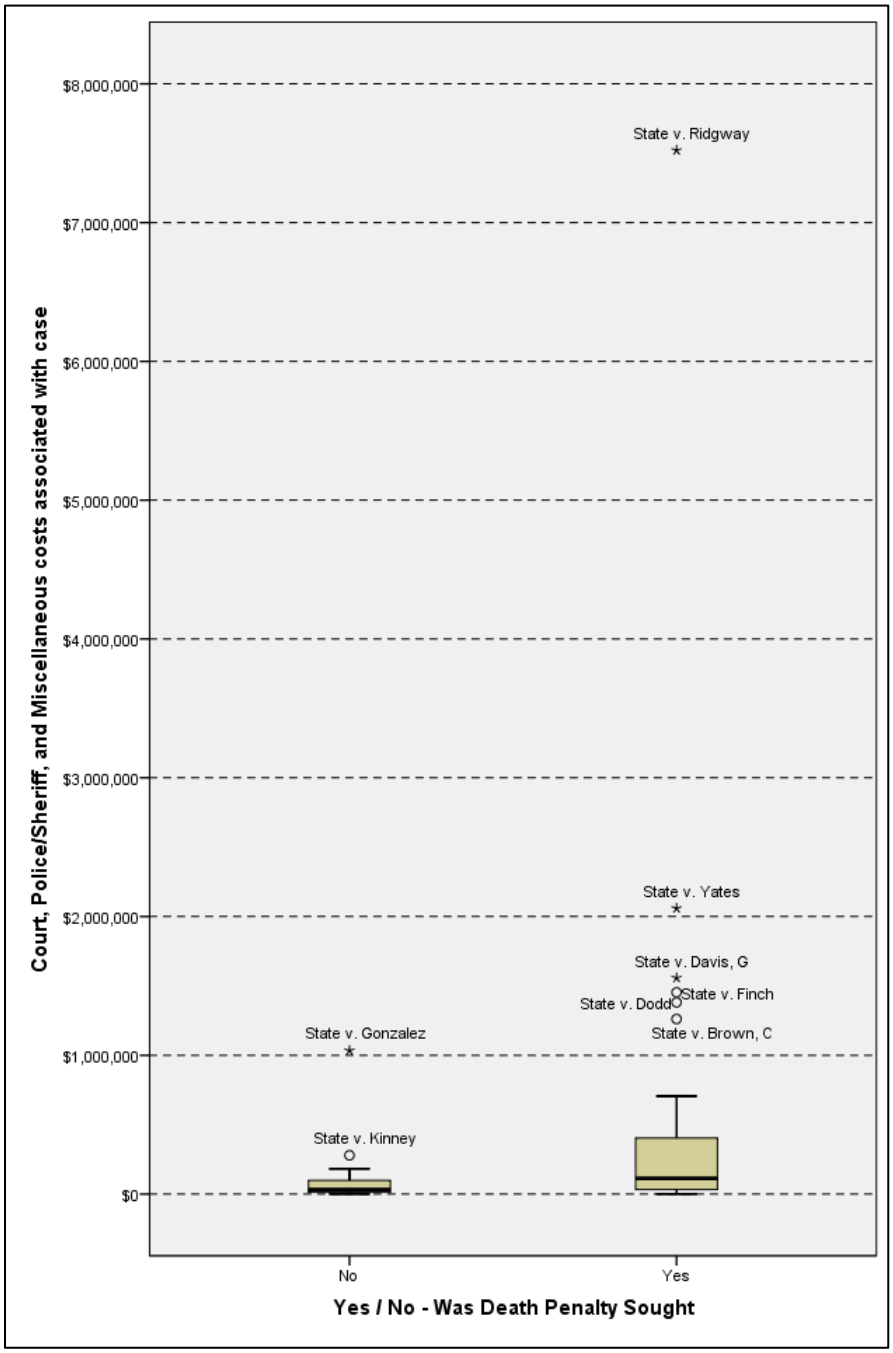


Figure 6. Court, Police/Sheriff, and Miscellaneous Costs Associated with Case

Court, Police/Sheriff, and Miscellaneous costs are higher for DPS cases as compared to DPNS cases. The distribution for DPNS cases is very compact, while there is greater dispersion among the DPS cases.

The median costs in this category are $33,300 for DPNS cases, versus $113,300 for DPS cases.

As with earlier cost categories reviewed, the interquartile range is larger for DPS cases. The IQR is between $12,400 and $99,100 for DPNS cases, between $28,700 to $416,000 for DPS cases.

Costs associated with post-conviction personal restraint petitions and appeals are substantially higher for DPS cases as compared to DPNS cases.

The median costs in this category are $15,600 for DPNS cases, versus $123,900 for DPS cases.

Seventy-five percent of the DPS cases cost more than $71,000 in this category. In contrast, 75% of the DPNS cases cost less than $28,100 in this category.

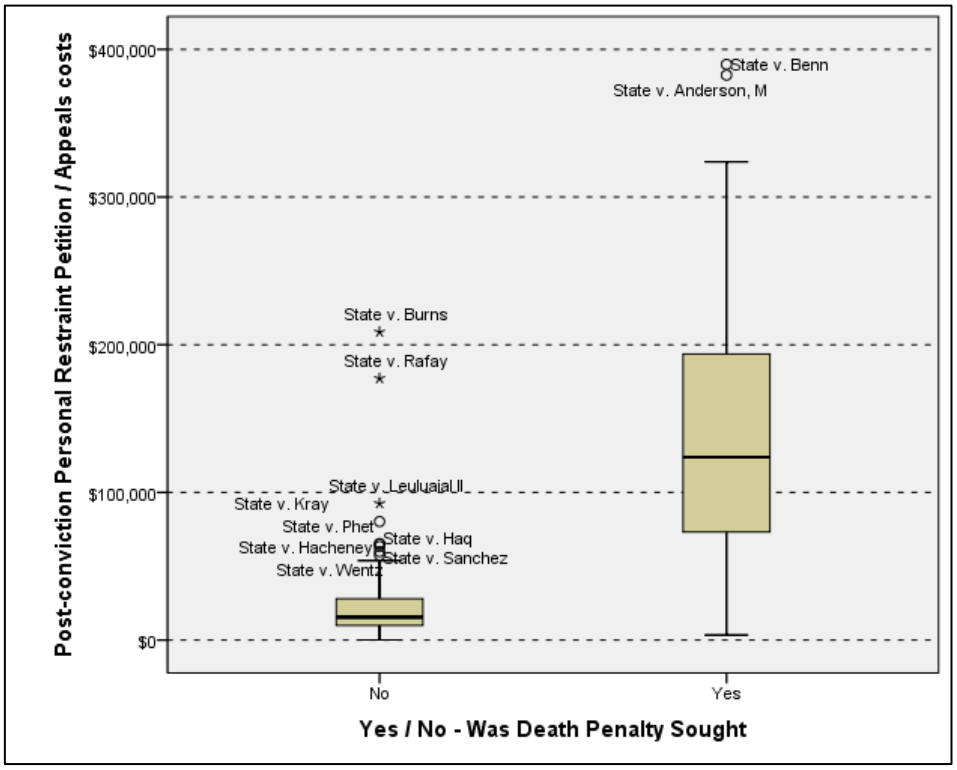


Figure 7. Post-conviction Personal Restraint Petition / Appeals Costs Associated with Case

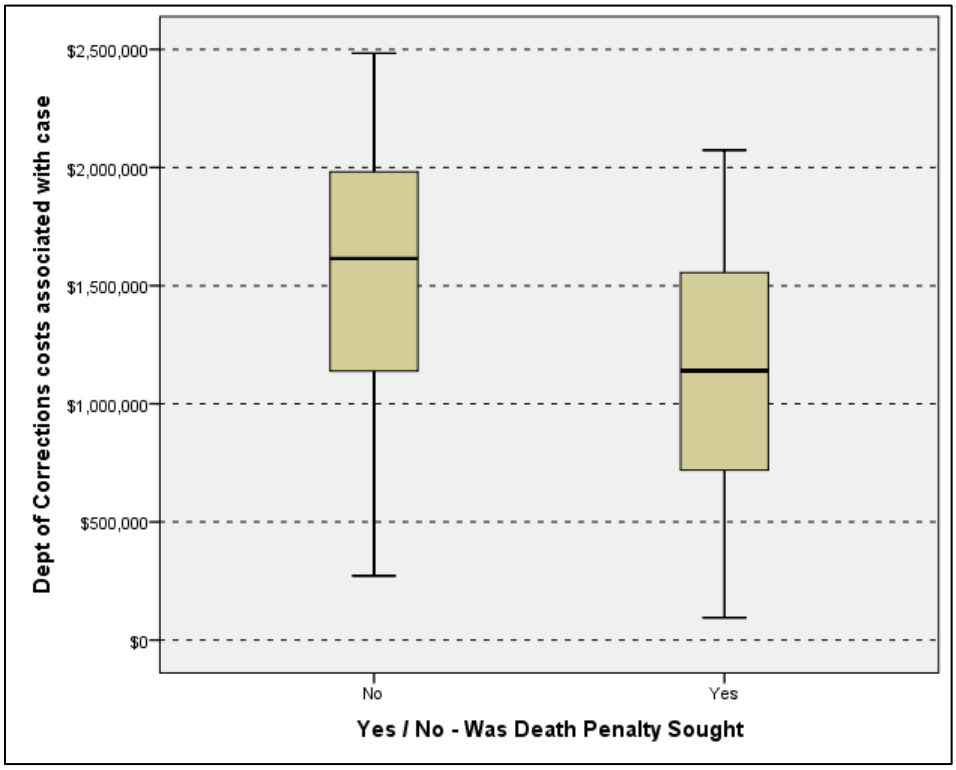


Figure 8. Post-conviction Department of Corrections Costs Associated with Case

Post-sentence life-time incarceration costs were lower on average for DPS cases, as compared to DPNS cases. The median DOC cost was $1,140,000 for DPS cases, compared with $1,614,600 for DPNS cases. Both distributions are fairly normal about their medians.

Finally, with regard to the total combined costs associated with pursuit of the death penalty, as compared to cases where the death penalty was not sought, DPS cases cost more on average than DPNS.

The median cost for a DPS case was $2,629,046, compared with a median $2,084,639 for DPNS cases.

Outliers among DPS cases include *Ridgway* ($15.2m) and *Monfort* ($5.7m). Among DPNS cases, *Carneh* ($4.1m) is an outlier.

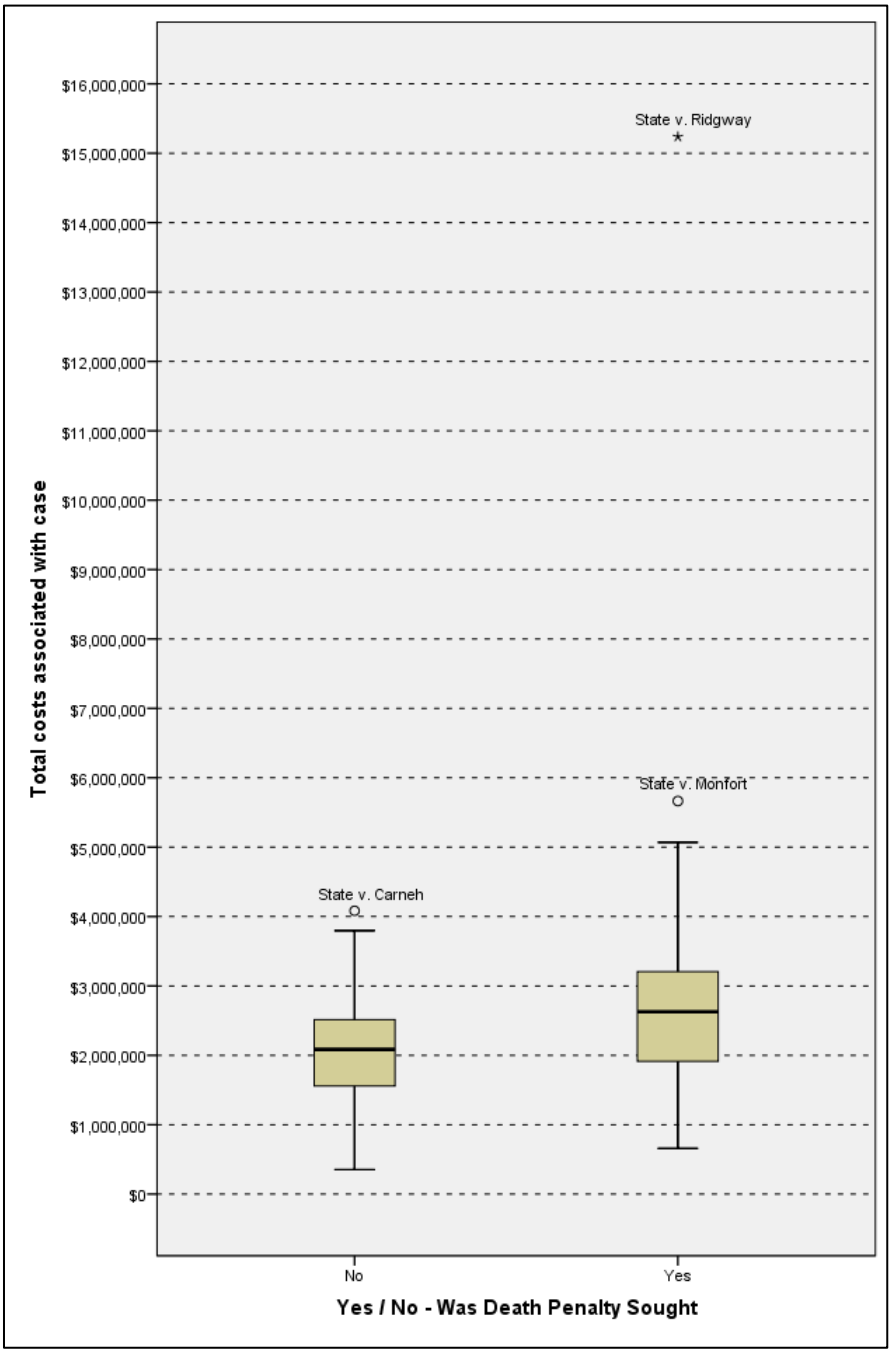


Figure 9. Total Costs Associated with Case

Table 3, below, presents both the average and median values for each of the six main cost categories, as well as the combined total. The largest average difference between DPS and DPNS cases was found in the defense category, followed by the CPSM category, and then DOC, prosecution costs, and jails categories, respectively. The total average difference in costs when the death penalty is sought is $1,058,885, in 2010 dollars.

Table 3. Average Costs and Differences Between DPS (n=39) and DPNS (108), Pre-PSM.

	Jails	Def.	Pro.	CPSM	PRPA	DOC	Total
DPS Avg.	$130,739	$848,948	$290,508	$528,779	$140,388	$1,134,250	$3,073,612
Med.	($122,761)	($608,496)	($109,514)	($113,326)	($123,851)	($1,139,987)	($2,629,046)
DPNS Avg.	$82,428	$245,989	$69,396	$65,075	$24,657	$1,527,182	$2,014,727
Med.	($50,415)	($115,030)	($53,617)	($33,330)	($15,561)	($1,614,608)	($2,084,639)
Avg. Difference	$48,311	$602,959	$221,112	$463,704	$115,731	-$392,932	$1,058,885
Ratio	1.59	3.45	4.19	8.13	5.69	0.74	1.53

Notes: Ratio represents difference between DPS/DPNS cases. Jails = jail costs; Def. = defense costs; Pro. = prosecution costs; CPSM = courts, police/sheriff, miscellaneous costs; PRPA = county/state appeals costs; DOC = department of corrections incarceration costs.

An additional analysis was conducted to further investigate differences in case process duration. A simple t-test was performed using case process dates gathered from the trial reports. There was a statistically significant difference between DPS and DPNS cases on the number of days from trial begin and sentence date ($t = 2.727$ (df 110), $p = .007$). On average, the DPS cases took 167.26 days from beginning to end, while the DPNS cases took 72.47 days on average. The mean difference in trial days was just about 95 days. These duration measures do not account for whether the case was actually in court during the entire time, and we assume that they were not. These figures, however, are useful in understanding that case complexity and duration relate positively with increased case costs. In addition, it is worth noting that the recent King county death penalty cases each have been pending more than three years.

Table 4 below, provides the final figures for the post-match PSM model data (N=70). Both the average and median values for each of the six main cost categories, as well as the combined total are presented. As with the previous model, the largest average difference between DPS and DPNS cases was found in the defense category, followed by the CPSM category, and then DOC, prosecution costs, and jails categories, respectively. The total average difference in costs when the death penalty is sought is $808,802, in 2010 dollars. Again, a simple t-test was performed using case process dates gathered from the trial reports. There was a statistically significant difference (at the $p = .10$ level) between DPS and DPNS cases on the number of days from trial begin and sentence date ($t = 1.851$ (df 27), $p = .075$). On average, the DPS cases took 182.73 days from beginning to end, while the DPNS cases took 72.45 days on average. The mean difference in trial days was just about 110 days.

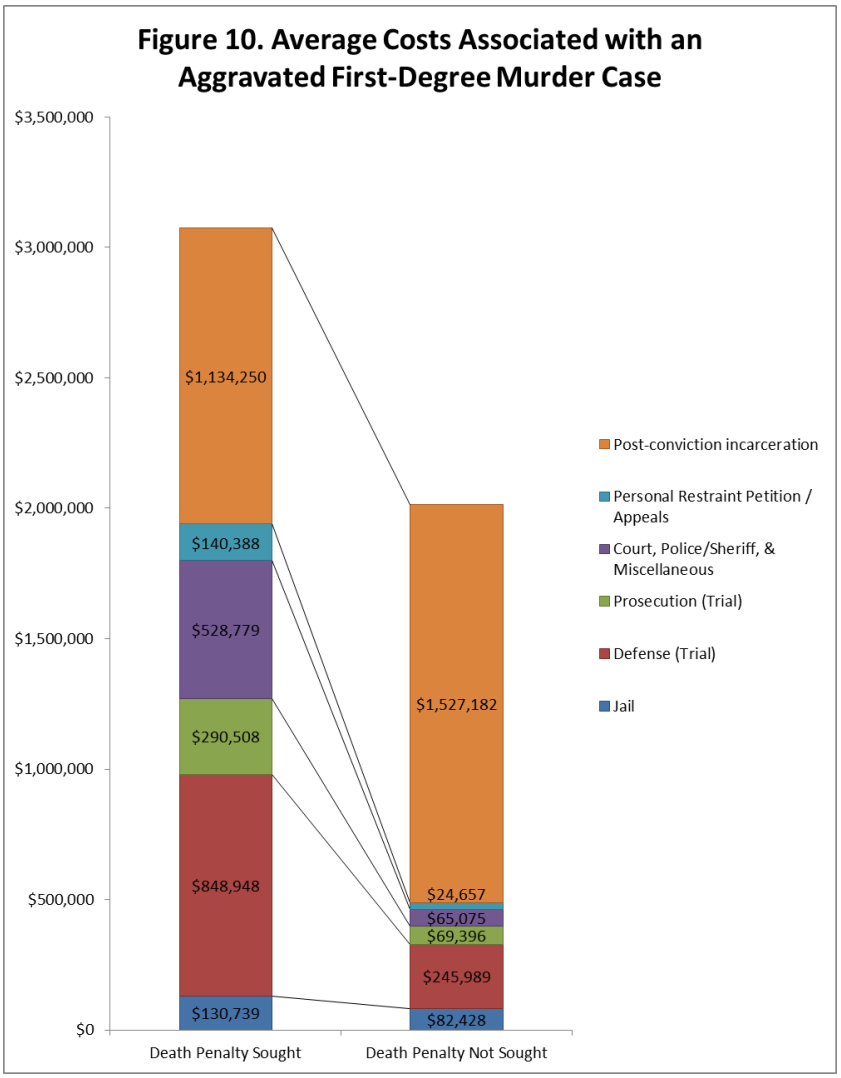
Table 4. Average Costs and Differences Between DPS (n=35) and DPNS (35), Post-PSM.

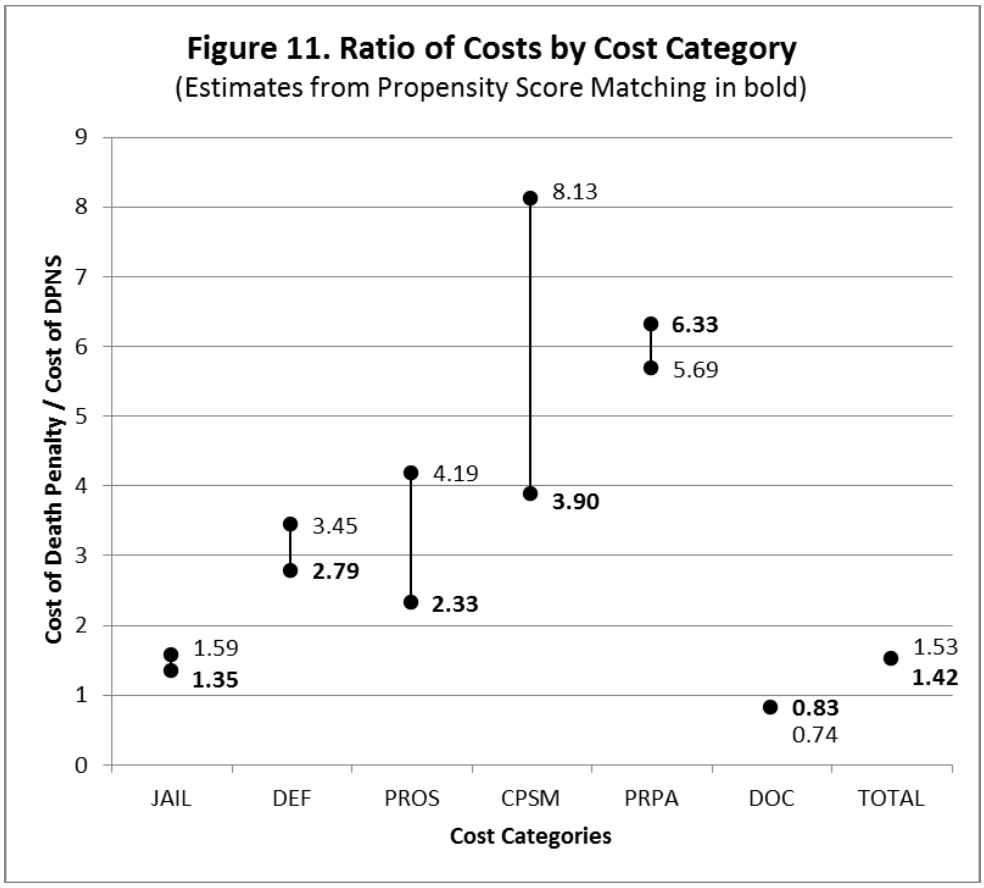
	Jails	Def.	Pro.	CPSM	PRPA	DOC	Total
DPS Avg.	$126,147	$819,698	$189,907	$334,193	$144,303	$1,141,593	$2,755,840
Med.	($120,107)	($608,496)	($109,514)	($113,326)	($129,061)	($1,139,987)	($2,629,046)
DPNS Avg.	$93,736	$293,421	$81,536	$85,642	$22,798	$1,369,905	$1,947,038
Med.	($66,931)	($207,177)	($59,717)	($35,554)	($22,957)	($1,494,823)	($2,212,418)
Avg. Difference	$32,411	$526,277	$108,371	$248,551	$121,505	-$228,312	$808,802
Ratio	1.35	2.79	2.33	3.90	6.33	0.83	1.42

Notes: Ratio represents difference between DPS/DPNS cases. Jails = jail costs; Def. = defense costs; Pro. = prosecution costs; CPSM = courts, police/sheriff, miscellaneous costs; PRPA = county/state appeals costs; DOC = department of corrections incarceration costs. DPS cases removed post psm: TRN: 76, Dodd; TRN: 175, Clark; TRN: 185, Parker; TRN: 265, Ridgeway.

Figure 10 presents the average costs for DPS versus DPNS cases, by cost category, using all of the eligible cases. The stacked bars in the chart sum to the total cost associated with DPS and DPNS cases. The total average cost for DPS cases is $3.07 million, versus $2.01 million for DPNS cases, a difference of $1.06 million (in 2010 dollars). Adjusted to 2014 dollars, the difference is $1.15 million.

The differences in costs might also be understood in terms of ratios. Figure 11, below, presents the ratio of costs (where the ratio is the average cost for DPS cases, divided by the average cost for DPNS cases) by major cost categories, including the overall total. The ratio resulting from the more conservative Propensity Score Matching technique is listed in boldface.





For example, average jail costs (JAIL) related to pursuit of the death penalty are 1.4 to 1.6 times more expensive than DPNS cases. Average trial level defense costs (DEF) related to pursuit of the death penalty are 2.8 to 3.5 times more expensive than DPNS cases. Average trial level prosecution costs (PROS) related to pursuit of the death penalty are 2.3 to 4.2 times more expensive than DPNS cases. Court, Police/Sheriff, and Miscellaneous (CPSM) costs related to pursuit of the death penalty are 3.9 to 8.1 times as much for DPNS cases. Personal restraint petition / appeals (PRPA) costs related to pursuit of the death penalty are 5.7 to 6.3 times more expensive than DPNS cases.

Post-conviction lifetime incarceration costs (DOC) are lower for DPS cases (.7 to .8 times DPNS cases). However, as was noted in the Executive Summary, these figures are based on a very conservative cost estimation method. In the next section, we discuss this issue in detail and present a cost sensitivity analysis.

Combining all cost categories, the average total costs to the justice system related to pursuit of the death penalty are about 1.4 to 1.5 times more expensive than DPNS cases. The total average difference in costs when the death penalty is sought is $1,058,885 in 2010 dollars, or $1,152,808 in 2014 dollars.

DOC Costs Sensitivity Analysis

Table 5 below, provides estimated differences in DOC costs between death penalty imposed (DPI) and death penalty not-sought (DPNS) cases. These costs were estimated over the projected lifetime of a prison sentence, assuming the death penalty imposed cases were commuted to life without the possibility of parole (in the absence of the death penalty, the costs would be...). There have been several empirical studies that have shown that "death row" inmate management costs more, on average, than the management of non-death row inmates.[116] The reasons for these cost differences can be attributed to inmate-to-staff ratios, generally higher security levels, as well as differences in the physical space, as many high-risk violent offenders are placed in cells of their own, among other cost-generators. Because we cannot assess where exactly each inmate was located (or will be located in the future) in the system as well as calculate the average daily costs specific to death row, we were forced to estimate costs associated with a average life sentence and at baseline, use the same average daily cost post-2013 for both the DPS and DPNS groups. This resulted in an underestimation of DPS/DPI DOC costs, as viewed in the previous table. Additionally, the death penalty sought and imposed groups were slightly older, on average, than the not-sought group, which also artificially decreased the overall incarcerations cost estimations associated with the DPS/DPI groups.

To control for these underestimations of incarceration costs, we present a sensitivity analysis (Table 5, below) where the total costs for DPI cases are increased in increments of 10-percent, up to double the costs. Again, this is assuming that DPI cases cost the DOC more to manage, on average, than LWOP cases. In order to provide even further care and conservatism with these estimates, we selected the propensity score-matched groups to analyze and further omitted DPS cases that were not imposed. The average difference, at baseline, is similar to the full and PSM models presented above. The overall, lifetime cost differences begin to shift from total average savings, to total average costs per case between +30 and +40 percent above baseline.

In order to give these figures some context, a recent report by the Washington State Criminal Justice Planning Services[117] provided estimates of the costs associated with housing inmates in max/close custody settings, as well as inmates in minimum security settings. The difference between the figures, although somewhat extreme, was 2.46 or 246 percent ($64,581 per close custody male offender vs. $26,224 per min custody male offender, per year). This cited difference is 200 percent greater than the point at which the costs switch, as indicated above. Again, the overall DOC estimates must be interpreted with caution, as they are very conservative estimates. Moreover, we cannot assume differential costs based on security level, as many of the DPNS inmates were likely in max/close custody as well. Thus, an important question that should be investigated in future studies is whether incarceration costs associated with death-sentenced offenders are likely more disparate compared to DPNS offenders during the first years of their sentences and, if the sentence is commuted to LWOP, do the costs level-off thereafter?

[116] Id. at 4.
[117] Id. at 4, (2012:8).

Table 5. DOC Sensitivity Analysis: Costs of Death-Imposed Commuted to LWOP Cases (DPI n = 20; DPNS n = 35).

	Baseline	110%	120%	130%	140%	150%
DPI (n = 20)	$1,011	$1,112	$1,214	$1,315	$1,416	$1,517
DPNS (n = 35)	$1,370	$1,370	$1,370	$1,370	$1,370	$1,370
Total Diff	-$359	-$257	-$156	-$55	$46	$147
Ratio	0.74	0.81	0.89	0.96	1.03	1.11
	cntd	160%	170%	180%	190%	200%
DPI (n = 20)		$1,618	$1,719	$1,820	$1,922	$2,023
DPNS (n = 35)		$1,370	$1,370	$1,370	$1,370	$1,370
Total Diff		$248	$349	$451	$552	$653
Ratio		1.18	1.26	1.33	1.40	1.48

Notes: 1. Average per case costs are reported in thousands. 2. DPI = Death Penalty Imposed; DPNS = Death Penalty Not-Sought. 3. Only propensity score matched cases were used for this analysis. 4. Estimates are reported in adjusted 2010 dollars.

Federal Habeas Corpus Proceedings

A death-sentenced defendant is entitled to seek reversal of the conviction and sentence in a habeas corpus proceeding in federal district court. In Washington there have only been a few of these cases involving appointed counsel. Those cases have been quite expensive, with five cases costing more than $100,000 and two cases more than one million dollars each. Those two cases occupied lawyers for parts of 12 years or longer. Because of the small number of cases, we have not included these federal defense costs in our comparative cost analysis. But it is important to consider that if a death-sentenced defendant loses his/her appeal in the Washington Supreme Court, the potential cost in federal court can be in the hundreds of thousands of dollars.

Table 6. CJA Panel Attorney Payments on Capital Cases in Western Washington Federal Court.

Case	Atty fees	Atty Expenses	Experts	Years
Stenson	$157,322	$13,539	$875	2001 to 2009
Gentry	$471,201	$9,039	$392	1999 to 2009
Brown	$153,673	$13,827	$23,899	2001 to 2011
Benn	$100,592	$11,874	$8,805	1998 to 2003
Yates	$49,498	$2,927	-	2013 to 2014
Elmore	$129,463	$418	-	2008 to 2012
Totals	$1,061,749	$51,624	$33,971	
	Total (all)	$1,147,344		

Federal Defender Costs on Habeas and Appellate

Case	Attorney Cost	Staff Cost	Years
Stenson	$439,126	$393,951	1999 to 2012
Gentry	$457,815	$357,890	1999 to 2014
Elledge	$14,182	$683	2001
Totals	$911,124	$752,524	
	Total (all)	$1,663,648	

Note: Figures in this table are not adjusted for inflation.

Limitations and Recommendations for Future Studies

This study is not without its limitations. To begin, although we did both collect and receive an extremely large amount of data for this project, there are still a few system- or case-process-based sources of data/information that could be tapped for future study. These sources of data include courts, prosecution, and police/sheriff, as well as the refinement of current sources of data from defense and DOC sources. Data collection strategies will likely include a variety of survey-based estimation techniques meant to capture time and effort commitments on a case-by-case basis, such as those that were attempted with key prosecutors' offices for this study.

Future studies may also incorporate more data from the courts and prosecution, including more comparisons focused on duration of key stages in the pre-trial processes, including capturing arraignment dates, as well as the date that a prosecutor decides to file the death notice for each case. As stated elsewhere in this report, all aggravated murder cases are considered death-eligible prior to the decision of whether or not to pursue death. Therefore, many of these cases begin incurring large costs during the pre-trial phases. We were not able to separate these costs out for comparison in this report, therefore, some of the costs for DPNS cases may indeed be related to the death penalty, but without more information, disentangling these costs is impossible.

Although private attorneys of necessity keep track of the hours they spend on cases (otherwise they are unable to bill clients or submit reimbursements), many public attorneys are neither required to keep track of their hours nor do they do so as a matter of routine. They do not bill clients for the work performed on specific cases (although the ECJA does provide such a mechanism), rather they provide the services that need to be provided with whatever resources are available to them.

While some public defenders and prosecutors do track hours for particular cases or cases generally, the vast majority do not. Like most organizations, personnel expenditures are the lion's share of costs associated with defense and prosecution. In the absence of knowledge about typical labor hours associated with cases, rational resource allocation is challenging at best, and guess work at worst. Rationality in budgetary decision making about public defense and prosecution would be vastly improved if these data were systematically collected.

We relied on ECJA petitions to estimate the costs associated with both defense and prosecution. Where information was available directly from defenders or prosecutors, we used it to verify the accuracy of the ECJA data. We gratefully acknowledge the ongoing assistance of the prosecutor's offices in King, Snohomish, and Pierce Counties for helping to collect such information specific to this study; in future work, we will use these data to help refine estimates associated with prosecutors' costs.

Relative to other states, Washington has a low homicide rate, and with that, a lower aggravated murder rate. Previous studies have benefited from larger sample sizes and the statistical power that comes with having more observations.[118] We are confident that the costs estimations that we provided in this report are as accurate as possible given the data and number of observations that were available. Future studies could build on the work presented here by incorporating data on additional cases that met the statutory criteria for aggravated murder, but were not tried at that level.

As detailed in the analysis above, the DOC data were rich; however, we lacked the ability to document the costs associated with managing inmates who have a death sentence and the costs associated with administering the death penalty. Furthermore, although the DOC-based daily averages included costs associated with health care, a more comprehensive study on the fiscal impact to DOC in the absence of the death penalty is warranted. Questions related to capacity, end-of-life, and the influence that LWOP prisoners may have on other prisoners should be investigated.

We succeeded in dampening the negative effects of selection bias and missing data within the current study; however, there is always room for improvement or expansion. This expansion may come in the form of additional study designs, possibly a top-down estimation design, where each cost-category within the chronology of a case is estimated based on time and effort of staff, operational costs and overhead, as well as capital costs (see Roman et al., 2009 for a list of strategies). We also took a systems-specific cost perspective, where only agency or system specific costs associated with aggravated murder cases were enumerated. We did not estimate costs from a societal perspective, nor did we attempt to gauge willingness to pay. These

[118] Id. at 97.

techniques may be applied in future studies where the focus shifts from case-process costs, to broader questions related to normative arguments surrounding capital punishment, public opinion, and the social utility of the death penalty.

We also noticed a lack of integration across available data sources. Case-level data should be maintained across all sectors using common identifiers. This continues to present difficulties for all state agencies, as they wrestle with their own data management issues. Access to records as well as increased transparency regarding budgeting and expenditures for services are highly recommended for all agencies, as system-based pressures surrounding cost efficiency increase. Bottom line, this type of study would be far less challenging (and would ideally become a routinized process) if criminal justice agencies in Washington State invested in the data infrastructures necessary to collect systematically important information about their operations, and if these data collection systems were integrated across agencies. In the present age, this is not an insurmountable task.

CONCLUSION

As previously stated, the purpose of this study was to provide accurate estimates to inform debate and decision-making regarding the costs associated with pursuit of the death penalty (as compared to the costs associated with cases where the death penalty was not sought), for aggravated first-degree murder cases in Washington State. Although we do not draw any normative conclusions regarding the death penalty, we have identified several concerns related to data collection practices that have direct bearing on rationality in criminal justice decision making, particularly with regard to budgeting. We also identified several possible future research directions.

In conclusion, this study documents that it costs more than one million dollars on average to seek the death penalty in a given case than to seek life without possibility of parole. Moreover, recent DPS cases and some that are ongoing suggest that the observed differences in costs may be greatly increasing beyond the levels presented here. In Washington, in 75 percent of cases involving death sentences, either the conviction and/or the death sentence have been reversed. The information provided in this report can assist policy makers and citizens more broadly in assessing the impact of the costs of pursuing death sentences.

CHRONOLOGY OF A CAPITAL CASE

We are providing in this section of our report a discussion of the chronology of a capital case so that the reader may have a more comprehensive picture of the complexity of death penalty proceedings that are related to increased costs.

Capital Trials

Generally, homicide cases take longer and require more resources than other criminal cases. Homicide cases, for example, may not involve a witness and rely primarily on scientific evidence (e.g., DNA, fingerprints, ballistics) and expert testimony. The prosecution, therefore, may commit vast resources toward its efforts to prove an individual guilty. In turn, the defense is legally required to review thoroughly the prosecution's case, develop its own theory, and, when necessary, obtain its own experts.[119]

Capital cases are profoundly different than all other types of criminal cases, including non-capital homicide cases. Besides the irrevocable punishment, capital cases are factually more detailed, legally more complex, and procedurally more involved. Commenting on these differences, the American Bar Association has noted:

> [D]eath penalty litigation is extraordinarily complex, both for the courts and for the attorneys involved. Not only do the cases incorporate the evidentiary and procedural issues that are associated with virtually every noncapital case, but they also involve a host of issues that are unique to capital cases. These include: special voir dire of jurors; presentation of evidence going to guilt or innocence and punishment; special penalty procedures, including additional factual findings by the jury. [...] It is well established that representation of an individual in a capital case is an extraordinary responsibility placed on any lawyer. [...] 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.[120]

---

[119] See e.g., *Strickland v. Washington*, 466 U.S. 668 (1984); To provide constitutionally adequate assistance, "counsel must, at a minimum, *conduct a reasonable investigation* enabling [counsel] to make informed decisions about how best to represent [the] client". *In Re Brett*, 142 Wn.2d 868, 873 (2001) (*emphasis in the original*); *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994); *State v. Visitacion*, 55 Wn. App. 166 (1989) (trial counsel's failure to interview witnesses based upon their police statements fell below the prevailing professional norms) and *State v. Jury*, 19 Wn. App 256, *review denied*, 90 Wn.2d 1006 (1978) (counsel's failure to acquaint himself with the facts of the case by interviewing witnesses was an omission which no reasonably competent counsel would have committed.); *ABA Standards for Criminal Justice*: *Defense Function Standard* 4-4.1, 4-6.1; *National Legal Aid and Defender Association Performance Guidelines for Criminal Defense Representation*, Guideline 4.1 (1997) ("Investigation"). Additionally, defense counsel is simultaneously obligated to investigate evidence "to rebut any aggravating evidence that may be introduced by the prosecutor". *ABA Guidelines* 11.4.1(C); *Wiggins v. Smith*, 539 U.S.510, 524 (2003).

[120] See American Bar Association, Toward A More Just And Effective System Of Review In State Death Penalty Cases, at 43, 49, 50 (October 1989); see also *Irving v. State*, 441 So. 2d 846, 856 (Miss. 1983) cert. denied (death penalty litigation is "highly specialized... [and] few attorneys have 'even a surface familiarity with seemingly innumerable refinements put on Gregg v. Georgia , 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976) and its progeny'") (citation omitted); *Bailey v. State of South Carolina*, 424 S.E. 2d 503, 506 (S.C. 1992) ("the attorney [in a capital case] must be conversant with constantly new interpretations of constitutional law by not only the United

Because "death is different"[121] capital cases have unique procedural and substantive requirements not found in aggravated murder cases where the death penalty is not sought.

Trial Level

The Defense Team

In 2003, the American Bar Association issued *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (*ABA Guidelines*).[122] The ABA Guidelines recommend that a capital defense team consists of at least two attorneys (one who is qualified in capital cases), at least one mitigation specialist; at least one fact investigator; at least one member qualified by training and experience with screening individuals with mental illnesses; and any other member needed to provide high quality legal representation. ABA Guideline 10.4 – The Defense Team.

In 2007, the Washington State Bar Association (WSBA) *Final Report of the Death Penalty Subcommittee of the Committee on Public Defense (WSBA Report)* also recommended that the defense team in a death penalty case should include, at a minimum, two attorneys, a mitigation specialist and fact investigator, and "psychiatrist, psychologists and other experts and support personnel should be added as needed". *WSBA Report*, Recommendation 2, pg. 33.[123] This recommendation was subsequently enacted as a court rule. See Criminal Rule 3.1 – Standard 14.2 A.

Appointment of Counsel

While the death penalty remains a sentencing option, special rules dictate the appointment of counsel. In 1997, the Washington State Supreme Court, acknowledging the complexity of potential capital cases, adopted Superior Court Special Proceeding Rules – Criminal Rule 2 (SPRC), which set out specific qualification for the appointment of lead counsel in a potential capital case. The Rule requires that at least two attorneys be appointed on a potential death penalty case; both counsel must have five years experience in the practice of criminal law; both counsel must be familiar with and experienced in the utilization of expert witness and evidence;

States Supreme Court, but by courts of all jurisdictions, both Federal and State"); *White v. Board of County Commissioners*, 537 So. 2d 1376, (Fla. 1989) (death penalty cases involve "'extraordinary circumstances and unusual representation'") (quoting *Makemson v. Martin County*, 491 So. 2d 1109, 1110 (Fla. 1986)); *Arnold v. Kemp*, 813 S.W. 2d 770 (Ark. 1991); *People v. Bigelow*, 37 Ca. 3d 731 (1984) appeal after remand (death penalty cases "raise complex additional legal and factual issues beyond those raised in an ordinary felony trial"); Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U.L. Rev. 299, 317 (1983); Gredd, Washington v. Strickland : Defining Effective Assistance of Counsel at Capital Sentencing, 83 Colum. L. Rev. 1544 (1983). *State v. Benn*, 120 Wn.2d 631, 660 (1993); RCW 10.95 et.al and SPRC Rules 2.

[121] *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (A sentence of death is qualitatively different from any other sentence.); *State v. Luvene*, 127 Wn.2d 690, 719 (1995).

[122] The ABA Guidelines can be found: http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_representation/2003guidelines.authcheckdam.pdf.

[123] The WSBA Report can be found: http://www.wsba.org/~/media/Files/WSBA-wide%20Documents/wsba%20death%20penalty%20report.ashx.

and at least one (although both may be) must be on the list of Qualified Counsel for Appointment on potential capital trial.[124]

In 2012, the Washington State Supreme Court adopted additional standards for the qualification of lead counsel in a capital case. In addition to the qualifications set out in SPRC Rule 2, counsel must have prior experience as lead counsel in no fewer than nine jury trials of serious and complex cases which were tried to completion; and have served as lead or co-counsel in at least one aggravated homicide case; and have experience in preparation of mitigation packages in aggravated homicide or persistent offender cases. CrR 3.1 Standard 14.2 A.

Mitigation Investigation

Under Washington's capital punishment statute, the prosecutor has 30 days from the date a person is charged with aggravated murder to decide whether to file a death notice.[125] As noted above, in making the decision whether to file a death notice, the statute directs the prosecutor to determine whether "there are not sufficient mitigating circumstances to merit leniency".[126] During this pre-decision period, the defense directs much of its focus on collecting mitigation evidence to present to present a "mitigation packet" to the prosecutor.[127] Therefore, the 30-day decision period is often extended for "good cause" to conduct mitigation investigation. Mitigation evidence is also collected to present to a penalty phase jury if the prosecutor files a death notice and the defendant is convicted of aggravated first-degree murder.[128]

Defense counsel is legally obligated to investigate the facts of the crime and the aggravating circumstances charged.[129] These obligations apply regardless whether the death penalty is being sought. However, until or unless the prosecutor decides not to file a death notice, defense counsel is legally and ethically obligated to conduct extensive investigation into mitigation evidence.[130] Mitigation investigation can be extremely difficult, time-consuming and costly, especially when the defendant, witnesses and documentation come from different and multiple states or countries.

---

[124] SPRC Rule 2 was amended on January 1, 2003, to make the appointment of qualified list counsel mandatory. Prior to the amendment, the appointment of SPRC Rule 2 qualified counsel was permissive: "A list of attorneys qualified for appointment in death penalty trials and for appeals will be recruited and maintained by a panel created by the Supreme Court. In appointing counsel for trial and on appeal, the trial court and the Supreme Court will consider this list. However, the courts will have the final discretion in the appointment of counsel in capital cases". Id. (emphasis added).

[125] RCW 10.95.040.

[126] RCW 10.95.040(2).

[127] The determination whether to seek the death penalty should require an elected prosecutor to become as informed as thoroughly and completely as possible. *State v. McEnroe*, 179 Wn.2d 32, 43, 309 P.3d 428 (2013). Although receiving mitigation evidence from the defense is not required by the plain language of the statute, it is "normally desirable". *State v. Monfort*, 179 Wn.2d 122, 135 (2013).

[128] RCW 10.95.060 - .070.

[129] See fn. 110 above.

[130] *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v. Taylor*, 529 U.S. 362 (2000); *Jackson v. Calderon*, 211 F.3d 1148 (9th Cir.2000); *In re Brett*, 142 Wn.2d 868 (2001); Rules of Professional Conduct (RPC) 1.1: A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Mitigation evidence is any "aspects of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death".[131] The United States Supreme Court elaborated that the depths of mitigation investigation "should comprise efforts to discover all reasonably available mitigation evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor", incorporating medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences.[132]

As part of this investigation, defense counsel is duty-bound to locate and interview prospective mitigation witnesses and recover necessary documents. The potential witnesses include the client's family members and virtually everyone else who knew the defendant and his family, including neighbors, teachers, clergy, case workers, doctors, mental health professionals, and correctional, probation and parole officers.[133] Additionally, when applicable, defense counsel is obligated to retain necessary and specialized experts in preparation for a potential penalty phase trial.[134] Case law demonstrates that a complete mitigation investigation is absolutely essential to effective representation of a client facing a possible death sentence. Reversals of capital cases are predominately due to inadequate mitigation investigation.[135]

Because mitigation investigation is crucial in capital cases, it is standard practice to seek the assistance of a mitigation specialist.[136] A mitigation specialist is experienced in identifying, locating and interviewing relevant persons in a culturally competent manner. This process involves the knowledge, skill and ability to, at a minimum, obtain all relevant records of the client's life history, recognizing and eliciting sensitive information, and establish a rapport with

---

[131] *Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978).

[132] *Wiggins v. Smith*, 539 U.S. 510, 524, (2003), citing and adopting approvingly *ABA Guideline for the Appointment and Performances of Defense Counsel in Death Penalty Cases.*

[133] *ABA Guidelines* 10.7, support commentary (2003).

[134] *Caro v. Woodford*, 2002 U.S. App. 2557 (9th Cir. Feb. 19, 2002) (Court found attorneys' failure to investigate and provide appropriate experts with the information necessary to evaluate defendant's neurological system for mitigation constituted deficient performance for ineffective assistance of counsel claim). *Wallace v. Stewart*, 184 F.3d 1112 (9th Cir. 1999); *Bean v. Calderon*, 163 F.3d 1073 (9th Cir. 1998).

[135] See e.g., *In re Brett*, 142 Wn.2d 868 (2001) (failure to present a mitigation packet, promptly investigate relevant mental health issues, retaining experts as to relevant mitigation evidence may lead to ineffective assistance of counsel); *see also Williams v. Taylor*, 529 U.S. 362 (2000) (defense counsel's failure to investigate defendant's mental health background found ineffective); *Rompilla v. Beard*, 125 S. Ct. 2456, 2462 (2005) (counsel found ineffective for failing to obtain mitigating evidence from available institutional records); *Jackson v. Calderon*, 211 F.3d 1148 (9th Cir. 2000) (counsel fell below the appropriate standard for effective assistance of counsel by failing to prepare and present mitigation evidence); *Ainsworth v. Woodford*, 268 F.3d 868 (9th Cir. 2001) (failure of defense counsel to investigate educational, occupational and criminal records for penalty phase constituted ineffective assistance where defendant had history of drug abuse, child abuse and mitigating behavior in prison); *Jennings v. Woodford*, 290 F.3d 1006 (9th Cir. 2002) (failure to investigate mental health and drug abuse issues related to innocence and penalty phase was ineffective); *Siripongs v. Calderon*, 35 F.3d 1308 (9th Cir. 1994) (Failure to present evidence necessary to a bridge cultural gap may constitute ineffective assistance of counsel); *Hendricks v. Calderon*, 70 F.3d 1032 (9th Cir. 1995) (Failure to investigate a defendant's organic brain damage or other mental impairments may constitute ineffective assistance of counsel.).

[136] ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 4.1—The Defense Team and Supporting Services and Supplementary Guidelines for The Mitigation Function of Defense Teams in Death Penalty Cases. The Supplementary Guidelines can be seen at: https://law.hofstra.edu/pdf/Academics/Journals/LawReview/lrv_issues_v36n03_CC1a-Guidelines.pdf.

witnesses.[137] Mitigation specialists have the specialized training to identify, document and interpret records and information about "symptoms of mental and behavioral impairments, including cognitive deficits, mental illness, developmental disability, neurological deficits; long-term consequences of deprivation, neglect and maltreatment during developmental years; social, cultural, historical, political, religious, racial, environmental and ethnic influences on behavior; effects of substance abuse and the presence, severity and consequences of exposure to trauma".[138]

Although the prosecution is not required to receive and review mitigation evidence from the defense before making a decision whether to pursue the death penalty, it is "normally desirable".[139] It is more desirable because the prosecutor, in exercising their executive function, better serve the public by taking a holistic approach in considering whether to seek the death penalty.[140] Generally, the defense provides the prosecutor a "mitigation packet" which sets out reasons why the death penalty should not be sought. These "mitigation packets" often include the mitigation as discussed above, potential proof problems in the prosecutor's case, a proportionality comparison to other cases, and any other legal or factual reasons why the prosecutor should not seek the death penalty.

Pre-trial Motions

Pretrial motions and legal challenges are more complex and expansive in death penalty cases. In addition to challenges surrounding homicide cases generally - such as inclusion or exclusion of forensic evidence, challenges to searches or statements - capital cases require an additional layer of challenges not found in non-capital cases. In order to preserve the defendant's rights be reviewed on appeal, should a review become necessary, defense counsel has a duty to raise all legal challenges in the trial court.[141] Because capital jurisprudence changes dramatically, defense counsel must still raise and litigate constitutional challenges that have been previously decided.

> [T]he courts have shown a remarkable lack of solicitude for prisoners—including ones executed as a result—whose attorneys through no fault of the prisoners were not sufficiently versed in the law to . . . consider the possibility that a claim long rejected by local, state, and federal courts nonetheless might succeed in the future or in a higher court.

ABA Guideline 1.1, Objective and Scope of Guidelines.[142]

---

[137] Supplementary Guidelines for The Mitigation Function of Defense Teams in Death Penalty Cases, Guideline 5.1.

[138] Id.

[139] *State v. Monfort*, 312 P.3d 637, 644 (2013).

[140] *State v. McEnroe*, 179 Wn.2d 32, 43 (2013).

[141] ABA Guidelines 10.8 Commentary fn 227: "One of the most fundamental duties of an attorney defending a capital case at trial is the preservation of any and all conceivable errors for each stage of appellate and post-conviction review. Failure to preserve an issue may result in the client being executed even though reversible error occurred at trial". Citing, Stephen B. Bright, Preserving Error at Capital Trials, The Champion, Apr. 1997, at 42-43.

[142] See e.g., *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding that the Constitution bars execution of individuals with intellectual disability) overruling *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989) (holding that the Constitution does not bar the execution of individuals with intellectual disability); *Ring v. Arizona*, 536 U.S. 584, 608 (2002)

Defense counsel is therefore obligated to raise more complex and extensive pre-trial challenges in capital cases. As a result, the prosecutor must file replies to these challenges and the court must consider and decide these issues, resulting in substantially more time and resources spent by the court and parties addressing pre-trial motions and challenges not found in non-capital cases.

Jury Selection

Capital cases take longer to try, likely attract a large amount of pre-trial publicity, and require the attorneys and the court to extensively inquire into jurors' opinions about the death penalty. These unique aspects of death penalty cases result in a significantly prolonged and more expensive jury selection than the jury selection process in a non-capital aggravated murder case. Although there is no legal directive how judges are to conduct jury selection for capital cases, a typical procedure is as follows:

- Juror Summons – a county clerk of jury administrator mails out summons to prospective jurors.[143] This process applies to both capital and non-capital trials. A prospective juror may seek to be excused upon a showing of undue hardship, extreme inconvenience, public necessity, or any reason deemed sufficient by the court for a period of time the court deems necessary.[144] Because capital cases are longer in duration, a large number of jurors may seek and be excused at this initial stage due to hardship. As such, summonses mailed to prospective jurors for a capital case far exceed those mailed for a non-capital aggravated murder trial.[145]

- Jury Introduction and Questionnaires – Prospective jurors who received summons and were not excused under RCW 2.36.100 are directed to appear in court for preliminary instructions. The number of prospective jurors can reach hundreds and even over a thousand.[146] Due to the large number of jurors summoned to appear in court, the preliminary introductions process may take place in the courthouse's largest courtroom or, as often the case, in a rented larger facility.[147]

(applying *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to capital cases); and *Roper v. Simmons*, 543 U.S. 551 (2005) overruling *Stanford v. Kentucky*, 492 U.S. 361 (1989) to conclude the execution of individuals under the age of 18 years old violates the Eighth Amendment of the United States Constitution.

[143] RCW 2.36.095.

[144] RCW 2.36.100.

[145] See discussion at footnotes 37 and 38 above.

[146] In *State v. Monfort*, a King County capital case, the court noted that 1170 jurors were present during the introductory meeting. See Order. See also Washington State Bar Association Report, pg. 16: "Since a very large number of potential jurors likely will be excused, it is not uncommon for the court to summon over 1,000 potential jurors. In one capital case, 1,700 jurors were summoned. In a non-capital case, fewer than 100 potential jurors are typically summoned."

[147] For instance, in a recent capital case in Snohomish County, the number of prospective jurors was too many to hold the introductory procedure in the courthouse. As a result, Snohomish County had to rent out the Comcast Center in order to hold the large number of prospective jurors. "Jury Selection Begins in Scherf Murder Trial, Herald Net", April 2, 2013, Diana Hefley, available at: http://www.heraldnet.com/article/20130402/NEWS01/704029840.

At this first meeting, prospective jurors are provided additional information about the case. For instance, the court will generally introduce the attorneys, court-staff, defendant and other members associated with the case; the anticipated length of the case; and read introductory remarks outlining various aspects the case, including the charges (often referred to as an indictment), the *voir dire* process, and trial and potential sentencing hearing.[148]

At the conclusion of the court's introductory remarks, prospective jurors are provided a jury questionnaire that was previously drafted by the parties and the court. Although jury questionnaires may be provided in non-capital cases, they are often always provided in a capital cases. Moreover, the jury questionnaires submitted in capital cases are lengthier than questionnaires in non-capital cases.[149] The jury questionnaires are then copied/scanned and provided to the attorneys and the court.

- Individual *Voir Dire* - After the parties are given an opportunity to review the jury questionnaires, prospective jurors are directed to return for individual *voir dire*. Generally, at this stage, prospective jurors are asked questions about publicity, undue hardships and their opinions about the death penalty. As a balance to ensure jurors are forthcoming about their beliefs and biases, yet not to contaminate other prospective jurors, this procedure is done on an individual basis.

  To conduct individual *voir dire* of each prospective juror takes weeks. Instead of having a large number of jurors sitting around during this process, courts will often conduct individual *voir dire* in small groups. For instance, courts will often direct a small number of jurors (5-10) to arrive in the morning and another set of jurors arrive in the afternoon on a certain date. A prospective juror may be brought into court separately, asked to sit in the jury box or witness stand, and asked questions about their opinion about the case, defendant, publicity and the death penalty. Jurors who are categorically opposed to the death penalty; or who believe that the death penalty must be imposed in all instances of aggravated murder; or who would otherwise not be able to follow the law are excused.[150] This process continues until the court believes there are enough jurors to ultimately impanel a jury.

- General *Voir Dire* - After individual *voir dire* is completed, the court may allow for general *voir dire*. During this process, the attorneys can ask questions of the prospective jurors as a whole.

  It is not unusual for jury selection in capital case to take over 30 days, compared to 2 – 3 days in a non-capital case. Given the number of prospective jurors, lengthier

[148] A template of the introductory jury instruction may be found at: https://govt.westlaw.com/wcrji/Document/Iefa6c750e10d11daade1ae871d9b2cbe?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default).
[149] See Appendix for sample jury questionnaires used in capital cases.
[150] See e.g., *Morgan v. Illinois*, 504 U.S. 719 (1992); *Wainwright v. Illinois*, 469 U.S. 412 (1985).

questionnaires associated, individual and general *voir dire*, the administrative and judicial costs are higher in capital cases.[151]

Capital Trials

Capital cases have two phases: merit (guilt or innocence) and penalty. The merit phase is a traditional trial where a jury is asked whether the prosecuting agency has proven every element of the crime beyond a reasonable doubt. This merit phase is the same for both a capital and non-capital case.

In capital cases, if a jury finds the defendant guilty of aggravated murder, then a special sentencing proceeding (the "penalty phase") conducted before the same jury to determine the punishment.[152] A penalty phase has all the aspects of the merit phase: the prosecutor and defense counsel are allowed to make opening statements; present witnesses, evidence and exhibits; cross-examine opposing party's witnesses; present rebuttal evidence; and closing arguments.[153] Upon the conclusion of the evidence and argument at the special sentencing proceeding, the jury is directed to deliberate on the following statutorily mandated question: "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?"[154] If the jury unanimously answers the question in the affirmative, the sentence is death. If, however, the jury does not unanimously answer the question in the affirmative, then the sentence must be life in prison without the possibility of parole.[155]

The penalty trial often runs days or weeks, dictated by the amount of evidence, witnesses and arguments each side presents. In a non-capital case, a judge rather than a jury imposes sentence after a brief hearing (less than a few hours).

Appellate Level

Capital Appeals - State

Washington's statute provides for automatic review and appeal to the Washington Supreme Court of all death penalty sentences.[156] Direct appeals for capital cases also involve special rules for appointment of counsel, length of appellate record, pleadings to be filed; and time for argument. Under special rules, two attorneys must be appointed for the direct appeal, at least one of whom must be from the Washington Supreme Court's list of death-penalty qualified list.[157]

---

[151] Additionally, jurors are paid a per diem plus mileage for each day in attendance at court. RCW 2.36.150.
[152] RCW 10.95.050. Furthermore, in a capital case, this penalty phase occurs even if a defendant enters a plea of guilty.
[153] RCW 10.95.060(2).
[154] RCW 10.95.060(4).
[155] RCW 10.95.080.
[156] RCW 10.95.130.
[157] Special Proceeding Rule – Criminal 2: "At least one counsel on appeal must have three years experience in the field of criminal appellate law and be learned in the law of capital punishment by virtue of training or experience. In appointing counsel on appeal, the Supreme Court will consider the list, but will have the final discretion in the

Capital direct appeals also consist of a longer record since every hearing conducted during the trial must be transcribed and exhibits transmitted to the Supreme Court and retained until the defendant's death.[158] Capital direct appeals also involve expansive legal pleadings and longer permitted time for argument than non-capital direct appeals.[159]

In addition to any issues raised by the parties on direct appeal, the Washington Supreme Court is statutorily required to review four issues: (1) whether sufficient evidence existed to justify the jury's determination of insufficient mitigating circumstances; (2) whether the sentence was a product of passion or prejudice; (3) whether the sentence is excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant; and (4) whether the defendant had an intellectual disability.[160] The defendant may waive the direct appeal if competent and after a determination of whether the waiver is knowing, intelligent and voluntary; however, the Court must still conduct the mandatory review.[161]

Personal Restraint Petition

If the Washington Supreme Court affirms the capital conviction and sentence on direct appeal, the defendant may, within one year of the date of the decision, file a Personal Restraint Petition (PRP) in the Supreme Court to raise issues not considered in the trial or on direct appeal.[162] Unlike other PRPs, there is a statutory right to have counsel appointed on a capital PRP.[163] And like counsel appointed for capital trials or direct appeal, two attorneys will be appointed, least one of whom must be qualified.[164]

A person under sentence of death who files a PRP may request the Supreme Court to issue an order for discovery and/or for experts, investigators or other services when there is a showing that discovery will produce information that would support relief.[165]

A PRP is different than a direct appeal. In a direct appeal, the issues are limited to matters that occurred at the trial. A PRP, however, allows a person sentenced to death to raise claims based

---

appointment of counsel."

[158] SPRC Rule 3; SPRC Rule 7; and RCW 10.95.110.

[159] Briefs for non-capital appeals are set at: 50 pages for opening brief and response briefs and 25 pages for a reply brief. Rules on Appeal (RAP) 10.4. By comparison, the rules allow for capital direct appeal opening and response briefs to reach 250 pages and 75 pages for a reply brief. RAP 16.22. RAP 16.23(c): "Each side is allowed 120 minutes for oral argument." Non-capital appeals are generally afforded 20 minutes per side.

[160] RCW 10.95.130.

[161] *State v. Sagastegui*, 135 Wn.2d 67 (1998).

[162] RCW 10.73.150.

[163] RAP 16.25.

[164] RAP 16.25: "Appointed counsel must have demonstrated the necessary proficiency and commitment which exemplifies the quality of representation appropriate to capital cases. At least one attorney so appointed must have at least three years of experience in handling appeals or collateral reviews on criminal convictions and must be learned in the law of capital punishment by training or experience. A list of attorneys qualified for appointment in death penalty personal restraint petitions will be recruited and maintained by a panel created by the Supreme Court. In appointing counsel, the Supreme Court will consider this list. However, the Supreme Court will have the final discretion in the appointment of counsel in personal restraint petitions in capital cases."

[165] RAP 16.26; RAP 16.27.

on evidence from outside the trial and appeal record. For instance, claims of ineffective assistance of counsel, prosecutorial misconduct or newly discovered evidence may be raised in a PRP. As such, PRP counsel are obligated to examine the entire trial record to evaluate whether trial counsel provided constitutionally adequate representation. PRP counsel must read the trial transcripts (which as noted below, may be voluminous); review jury selection; read the appellate record; review trial counsel's file; as well as conduct its own investigation and interviews.[166]

A PRP with appendices can reach 800 to 1,000 pages. A reference hearing may occur, at which testimony, evidence and exhibits are introduced.

Federal Habeas Corpus Proceedings

A capital defendant may file a petition for Habeas Corpus in the United States District Court.[167] Often the PRP lawyer and a federal public defender are appointed. Counsel are paid at public expense borne by the federal government. The Washington Attorney General represents the state.

The federal habeas corpus proceeding is procedurally complex. The petitioner generally has one year from the date the sentence becomes final upon direct appeal conclusion to file a federal habeas petition.[168] This one year statute of limitations is tolled while the personal restraint petition is pending in state court.[169] Federal habeas review is commenced with the filing of a civil complaint by the defendant and an answer by the state. Review in federal court is limited to claims arising under federal law, and with some exceptions, may only pursue claims that were previously presented to the Washington State Supreme Court.[170]

If claims were not presented to the Washington Supreme Court, and the state law prevents the petitioner from now raising the claims in state court, the claim is "procedurally barred" and the federal court will not review it. There are exceptions to the procedural bar if, for example, the petitioner can demonstrate the "cause" for the procedural default and "actual prejudice" stemming from the alleged error.[171] Recently, the United States Supreme Court has limited federal courts from expanding on the record developed in state court; however, the Supreme

---

[166] See e.g., American Bar Association: Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 10.15.1 – Duties of post-conviction counsel, commentary, Hofstra Law Review, Vol. 31: 913, 1086: "Two parallel tracks of post-conviction investigation are required. One involves reinvestigating the capital case; the other focuses on the client. Reinvestigating the case means examining the facts underlying the conviction and sentence, as well as such items as trial counsel's performance, judicial bias or prosecutorial misconduct. Reinvestigating the client means assembling a more-thorough biography of the client than was known at the time of trial, not only to discover mitigation that was not presented previously, but also to identify mental-health claims which potentially reach beyond sentencing issues to fundamental questions of competency and mental-state defenses."

[167] 28 U.S.C. §2254.

[168] 28 U.S.C. §2254(d)(1). The Marshall Project has reported that the one-year statute of limitations for filing a federal habeas petition has been missed at least 80 times in capital cases, and that 16 of those inmates have been executed. See, Ken Armstrong, Death by Deadline, Part One, November 15, 2014, at: https://www.themarshallproject.org/2014/11/15/death-by-deadline-part-one.

[169] 28 U.S.C. §2254(d)(2).

[170] *Duncan v. Henry*, 513 U.S. 364, 365 (1995) and *Rose v. Lundy*, 455 U.S. 509, 522 (1982).

[171] See e.g., *Coleman v. Thompson*, 501 U.S. 722 (1991).

Court has developed an exception to procedural barriers to federal habeas review and permits state prisoners to raise ineffective assistance of counsel claims in federal court.[172] It is too early to determine if these recent developments will increase Washington state costs associated with death penalty cases.[173]

Other Post-Conviction Proceedings

Decisions of the federal district court on habeas corpus petitions may be appealed to the United States Court of Appeals for the Ninth Circuit. Generally, the federal defender is appointed to represent the petitioner, and the Washington State Attorney General for the state.

Review on a writ of certiorari to the United States Supreme Court is discretionary, and will only be granted for "compelling reasons".[174] A denial of certiorari terminates the federal habeas corpus action, resulting in an execution date set 30 days after the date of denial, resulting substantial action being taken leading up to the execution, including challenges to method of execution,[175] competence to be executed,[176]civic rights action pursuant to 42 U.S.C.§1983, additional personal restraint petitions and habeas corpus proceedings.

Post Appellate Proceedings

Clemency

Under Washington law, a defendant may petition the state Clemency and Pardons Board for review.[177] The Board must hold a public hearing, and the prosecuting attorney is required to give notice of the hearing to victims, survivors of victims, witnesses, and the law enforcement agency or agencies that conducted the investigation of the crime.[178] The Board reviews petitions for commutation of sentences and pardoning offenders in extraordinary cases, and shall make recommendations to the governor.[179]

---

[172] *Cullen v. Pinholster*, 131 S.Ct. 1388 (2011). Prior to *Pinholster*, petitioners who were barred from adequately developing their claims in state court could do so in federal court. In *Pinholster*, the Supreme Court examined whether facts presented for the first time during federal habeas proceedings may be considered by a federal court in deciding whether a state court's denial of relief was improper. The Court held that "evidence introduced in federal court has no bearing on 28 U.S.C. §2254(d)(1) review. If a claim has been adjudicated on the merits by state court, a federal habeas petitioner must overcome the limitations of 28 U.S.C. §2254(d)(1) on the record that was before the state court". *Pinholster*, 131 S.Ct. at 1400. A year later, in *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), the Supreme Court concluded that a procedural default will not bar federal courts from hearing substantial claims of ineffective assistance at trial when in the initial review proceeding (e.g., PRP), the post-conviction counsel was ineffective.

[173] For instance, given that federal review may be restricted to the evidence presented at the state post-conviction proceeding (PRP evidentiary hearing), more resources may be necessary and afforded to adequately investigate, present and thus develop the state court record. Additionally, if the state record is insufficient because of PRP counsel's ineffectiveness, it is unknown whether the additional record development, and thus the cost, is absorbed by the federal or state system.

[174] Rules of the United States Supreme Court 10.

[175] See e.g., *Brown, et al. v. Vail*, et al., 169 Wn.2d 318 (2010); *Whitaker v. Livingston*, 741 F.3d 888 (5th Cir. 2013); *In re Lombardi*, 741 F.3d 888 (8th Cir. 2014).

[176] *Ford v. Wainwright*, 477 U.S. 399 (1986); *Panetti v. Quaterman*, 551 U.S. 930 (2007).

[177] RCW 9.94A.885.

[178] RCW 9.94A.885(3).

[179] RCW 9.94A.885(1).

Execution

The protocols and procedures surrounding an execution are set out by statute and the Department of Corrections.[180] If a death sentence is affirmed, a death warrant shall be issued by the clerk of the trial court and signed by a judge of the trial court directing the superintendent of the state penitentiary of a date to carry out the execution.[181] An execution shall be supervised by the superintendent of the penitentiary and "shall be inflicted by intravenous injection of a substance or substances in lethal quantity sufficient to cause death and until the defendant is dead, or, at the election of the defendant, by hanging by the neck until the defendant is dead".[182]

The superintendent determines the number of witnesses that will be allowed to observe the execution. Witnesses may include: (a) no less than five media representatives; (b) judicial officers; (c) representatives of the families of the victims; (d) representatives from the family of the defendant; (e) up to two law enforcement representatives.[183]

The superintendent shall keep in his or her office a book in which shall be kept a copy of each death warrant together with a complete statement of the superintendent's acts pursuant to such warrants. Within twenty days after execution, the superintendent shall return the death warrant to the clerk of the trial court from which it was issued with a showing of all acts and proceedings done by the superintendent.[184]

Status of Cases Resulting in Death Sentences in Washington State

As noted, RCW 10.95.120 requires a "trial report" be filed with the Washington Supreme Court upon every conviction of aggravated first-degree murder. As previously referenced, there have been 339 trial reports filed since 1981, which include minor duplicates.[185] Removing the duplicate trial reports, there are 331 separate trial reports filed with the Washington State Supreme Court, with death notices filed in 83 cases and imposed in 33 cases.[186]

The 33 death sentences that have been imposed are either pending appeal or the appellate review has been completed. There are nine cases (9) currently on appeal in either state or federal courts, and 24 cases that have completed their appellate review. There have been five (5) executions and eighteen (18) cases resulted in either the conviction and/or death sentence reversed.[187]

---

[180] RCW 10.95.160 – 190; Washington State Department of Corrections Policy Number 490.200 (revised 3/1/14).
[181] RCW 10.95.160(1); DOC Policy 490.200.
[182] RCW 10.95.180(1); DOC Policy 490.200.
[183] RCW 10.95.185(2); DOC Policy 490.200.
[184] RCW 10.95.190; DOC Policy 490.200.
[185] See supra note 2.
[186] In some cases death notices were filed but subsequently withdrawn. See e.g., Ridgeway (King County, Trial Report #185) and Vasquez (Franklin County, Trial Report #224). Such cases are not included. There have been 34 death sentences imposed but that includes one individual who was sentenced to death on twice. Mr. Gregory was sentenced to death on May 25, 2001. In 2006, the Washington State Supreme Court affirmed the conviction, but because erroneous evidence was presented during the penalty phase, the death sentence was reversed. *State v. Gregory*, 158 Wn.2d 759 (2006). The death penalty was imposed at a subsequent penalty phase. For purposes of this report, this case is not included the 18 reversal cases, but is one of the nine capital cases on appeal.
[187] One (1) ended when the defendant committed suicide while the matter was on appeal. Hazen (Clark County, Trial Report #039).

By comparison, there are 298 non-death penalty trial reports cases. A search of these 298 non-death penalty trial reports reveals there have been at least 201 cases that have sought appellate review.[188] Of the 201 non-death penalty appeals, 186 have been affirmed and only 15 resulted in reversals.[189]

Thus, since 1981, seventy-five (75%) of death penalty cases that have completed their review have resulted in reversal compared to the 7.5% reversal rate of the 201 non-death penalty appeals.

Death Sentences - Pending Appeals

There are currently nine individuals under a sentence of death in Washington State. Each case is pending an appeal in either state or federal court.

Dayva Cross: A King County jury sentenced Mr. Cross to death on June 22, 2001. On July 14, 2014, a notice of intent to file a First Habeas Petition was filed in federal district court. [Duration on appeal: Over thirteen years].

Cecil Davis: A Pierce County jury sentenced Mr. Davis to death on February 23, 1998. On November 4, 2004, the Washington Supreme Court overturned his death sentence due to error of the trial court for keeping Mr. Davis shackled before the jury.[190] Mr. Davis was resentenced to death on May 18, 2007. The matter is in state court as a personal restraint petition. [Duration on Appeal: six years on appeal until reversed; seven years on appeal since resentence]

Clark Elmore: On May 3, 1996, Mr. Elmore was sentenced to death in Whatcom County. The sentence is currently being reviewed by the Ninth Circuit Court of Appeals. [Duration on Appeal: over eighteen years].

Jonathan Gentry: A Kitsap County jury sentenced Mr. Gentry to death on July 22, 1991. The matter is currently being reviewed by the Washington Supreme Court. [Duration on Appeal: over twenty-three years].

Allen Gregory: Mr. Gregory's death sentence, which was imposed on May 25, 2001, was reversed by the Washington Supreme Court on November 30, 2006.[191] On remand, Mr. Gregory

[188] After reviewing all non-death penalty cases, 97 were not found and therefore unknown whether an appeal was sought. However, over half (60) of the 97 involved individuals who entered pleas of guilty at the trial and thus may not have sought appellate review since pleas are generally the byproduct of bargained for agreements.

[189] See e.g. *State v. Bingham*, 40 Wn. App. 553 (1985); *In re Strandy*, 171 Wn.2d 817 (2011) (Aggravated murder conviction affirmed, felony murder reversed); *State v. St. Pierre*, 111 Wn.2d 105 (1988); *State v. Brinkley*, 100 Wn. App. 1012 (2000) (conviction affirmed, remanded for resentence); State v. Kunze, 97 Wn. App. 832 (1999); *State v. Smith*, 114 Wn. App. 1062 (20002); *State v. Loukaitis*, 82 Wn. App. 469 (1996); *State v. Thang*, 145 Wn.2d 630 (2002); *State v. Goldberg*, 149 Wn.2d 888 (2003) (special verdict vacated, first-degree murder conviction affirmed); *State v. Leuluaialii*, 118 Wn. App. 780 (2003) (conviction affirmed, sentenced reversed); *State v. Hacheney*, 160 Wn.2d 503 (2007) (conviction affirmed, sentence reversed); *State v. Irby*, 170 Wn.2d 874 (2011); *State v. Warren*, 144 Wn. App. 1050 (2008); *State v. Condon*, 174 Wn. App. 1041 (2013), *review granted*, 178 Wn.2d 1010 (2013).

[190] *In re Davis*, 152 Wn.2d 647 (2004). *State v. Ellis*, 136 Wn. 2d 498 (1998).

[191] *State v. Gregory*, 158 Wn.2d 759 (2006).

was sentenced to death on June 13, 2012. The Washington Supreme Court is considering the matter on direct appeal. [Duration on Appeal: five years for the first appeal; two years since resentencing].

Byron Scherf: A Snohomish County jury sentenced Mr. Scherf to death on May 9, 2013. The matter is currently on direct appeal before the Washington Supreme Court. [Duration on Appeal: year and half].

Connor Schierman: A King County jury convicted and sentenced Mr. Schierman to death on May 5, 2010. The matter is currently on direct appeal before the Washington Supreme Court. [Duration of Appeal: over four years].

Dwayne Woods: Mr. Woods was sentenced to death on July 23, 1997, in Spokane, Washington. Mr. Woods's sentence is on review in front of the Ninth Circuit Court of Appeals. [Duration of Appeal: Fourteen years].

Robert Yates: A Pierce County jury sentenced Mr. Yates to death on October 9, 2002. The sentence is currently on review. The matter was stayed in federal court during the pendency of his Personal Restraint Petition in Washington Supreme Court. [Duration of Appeal: twelve years].

Death Sentences – Appellate Review Completed

Executions

Since 1981, five individuals have been executed in Washington State. Two individuals exhausted their appeals before the sentence was imposed and three waived their non-statutorily mandated review.

Cal Brown: Mr. Brown was convicted and sentenced to death by a King County jury on January 28, 1994. He was executed on September 10, 2010. [Duration of Appeal: 16 years].

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

Wesley Dodd: Mr. Dodd was convicted and sentenced to death in Clark County on July 26, 1990. After 29 months, Mr. Dodd waived his right to appellate review and was executed on January 5, 1993. [Duration of Appeal: less than 3 years].

James Elledge: On October 21, 1998, in Snohomish County, Mr. Elledge was convicted and sentenced to death. The limited review took 34 months. He was executed on August 28, 2001. [Duration of Appeal: just short of 3 years].

Jeremy Sagastegui: On February 12, 1996, Mr. Sagastegui was convicted and sentenced to death by a jury in Benton County. After 32 months, Mr. Sagastegui was allowed to waive all additional appellate review. He was executed on October 13, 1998. [Duration of Appeal: 2 years].

Reversals

A significant majority of the death sentences (18 cases) have resulted in an appellate court reversing the conviction and/or death sentence. The reasons for the reversals include constitutional error, judicial error, prosecutorial misconduct, ineffective defense counsel, and jury misconduct.

Dwayne Bartholomew: Mr. Bartholomew was arrested on August 5, 1981. On November 24, 1982 he was sentenced to death. Eleven months later, the Washington Supreme Court reversed his sentence based on constitutional error, concluding Washington's death penalty statute did not limit in any significant way the evidence that the prosecution may present at the sentencing phase of capital proceedings.[192] Mr. Bartholomew was subsequently sentenced to Life in Prison without the Possibility of Parole (LWOP). [Duration of Appeal: Eleven months].

James Brett: In 1992, Mr. Brett was convicted and sentenced to death. In 2001, the Washington Supreme Court overturned the conviction and death sentence concluding that trial counsel provided ineffective assistance.[193] On March 12, 2003, nearly a decade after his initial trial, Mr. Brett was sentenced to LWOP. [Duration of Appeal: 9 years]

Gary Benn: Mr. Benn was sentenced to death on June 6, 1990. On February 26, 2002, the Ninth Circuit Court of Appeals reversed his conviction and sentence concluding that the State withheld exculpatory evidence from the defense.[194] The state did not refile a death notice and Mr. Benn was sentenced to LWOP. [Duration of Appeal: 12 years].

Richard Clark: Mr. Clark was charged, convicted, and sentenced to death for aggravated murder in 1997. In 2001, the Washington Supreme Court reversed the death sentence because the trial court erroneously admitted prejudicial statements during the penalty phase.[195] Mr. Clark was sentenced to LWOP in 2006. [Duration of Appeal: 4 years].

Charles Finch: Mr. Finch was convicted and sentenced to death on June 21, 1995. Mr. Finch appealed. After 47 months on appeal, the Washington Supreme Court overturned his death sentence due to error of the trial court for keeping Mr. Finch shackled before the jury.[196] Mr. Finch was subsequently sentenced to LWOP, but committed suicide a month later. [Duration of Appeal: 4 years].

Michael Furman: Mr. Furman, at the age of 17 years, was charged, convicted, and sentenced to death on March 6, 1990. The Washington Supreme Court - after 42 months on appellate review -

[192] *State v. Bartholomew*, 98 Wn.2d 173 (1982).
[193] *In re Brett*, 142 Wn.2d 868 (2001).
[194] *Benn v. Lambert*, 283 F.3d 1040 (2002).
[195] *State v. Clark*, 143 Wn.2d 731 (2001).
[196] *State v. Finch*, 137 Wn.2d 792 (1999).

overturned the death sentence concluding that statutorily Washington State does not permit the execution of a minor.[197] Mr. Furman was subsequently sentenced to LWOP. [Duration of Appeal: 3 ½ years].

Benjamin Harris: After five months of trial, Mr. Harris was convicted and sentenced to death. Mr. Harris's case was on appeal for 110 months before the Ninth Circuit Court of Appeals reversed the conviction (and thus the death sentence) because trial counsel provided ineffective assistance of counsel.[198] Mr. Harris was subsequently released from prison and considered to be an individual wrongfully convicted and sentenced to death.[199] [Duration of Appeal: over 9 years].

Patrick Jeffries: On November 18, 1983, Mr. Jeffries was convicted and sentenced to death for aggravated first-degree murder. After thirteen years on appeal, the Ninth Circuit Court of Appeals reversed his death sentence because of misconduct by the jury.[200] Mr. Jeffries was re-sentenced to LWOP on May 15, 1998 - nearly fifteen years after his conviction. [Duration of Appeal: 13 years].

Brian Lord: Mr. Lord was convicted and sentenced to death on August 18, 1987. In 1999, the Ninth Circuit Court of Appeals overturned Mr. Lord's conviction and death sentence because trial counsel rendered ineffective assistance.[201] On April 29, 2003, Mr. Lord was sentenced to LWOP. [Duration on Appeal: 11 years].

Sammie Luvene: On August 12, 1993 Mr. Luvene was convicted and sentenced to death. After 26 months on appeal, the Washington Supreme Court reversed the death sentence because of prosecutorial error in filing the death notice.[202] A decade after his arrest, in May 2002, Mr. Luvene was sentenced to LWOP. [Duration on Appeal: 2 years].

Kwan Fai Willie Mak: Mr. Mak was charged with aggravated murder and sentenced to death on October 6, 1983. In 1992, after 9 years on appeal, the Ninth Circuit Court of Appeals overturned the death sentence based on ineffective assistance of counsel, trial court's error in not admitting specific mitigation evidence, and erroneous jury instruction.[203] Nearly 20 years after the initial trial ended, Mr. Mak was resentenced in May 2003 to life without the possibility of parole (LWOP). [Duration on Appeal: 9 years].

Henry Marshall: After nearly four years at the trial level, Mr. Marshall was convicted and sentenced to death on July 19, 2001. On appeal, the Washington Supreme Court reversed the conviction because of trial court error in the competency proceeding.[204] Mr. Marshall was sentenced to LWOP in 2002 - eight years after he was arrested. [Duration of Appeal: 1 year].

---

[197] *State v. Furman*, 122 Wn.2d 440 (1994).
[198] *Harris v. Woods*, 64 F.3d 1432 (1995).
[199] See Death Penalty Information Center (last reviewed December 17, 2014): http://www.deathpenaltyinfo.org/innocence.
[200] *Jeffries v. Wood*, 75 F.3d 491 (9th Cir. 1996).
[201] *Lord v. Wood*, 184 F.3d 1083 (9th Cir. 1999).
[202] *State v. Luvene*, 127 Wn.2d 690 (1995).
[203] *Mak v. Blodgett*, 970 F.2d 614 (9th Cir. 1992).
[204] *State v. Marshall*, 144 Wn.2d 266 (2001).

Blake Pirtle: In July 1993, Mr. Pirtle was convicted and sentenced to death. The Ninth Circuit Court of Appeals overturned his conviction and death sentence because of trial Counsel's failure to provide effective assistance.[205] A decade after initially being convicted and sentenced, Mr. Pirtle was re-sentenced to LWOP in July 2003. [Duration of Appeal: 9 years].

David Rice: Mr. Rice was charged, convicted, and sentenced to death in July 1986. The Ninth Circuit Court of Appeals reversed Mr. Rice's conviction and death sentence because he was not present during a crucial stage of the trial.[206] Subsequently, Mr. Rice entered a plea of guilty and was sentenced to LWOP. [Duration of Appeal: 9 years].

Michael Roberts: Mr. Roberts was convicted and sentenced to death on June 13, 1997. On appeal, the Washington Supreme Court reversed the death sentence because of error in the jury instruction.[207] On September 10, 2002 Mr. Roberts was sentenced to LWOP. [Duration of Appeal: 3 years].

Mitchell Rupe: On June 7, 1982, Mr. Rupe was convicted and sentenced to death. The Ninth Circuit Court of Appeals reversed his sentence because the trial court erroneously excluded relevant mitigation evidence at the penalty phase.[208] Nearly twenty years after his arrest, on March 10, 2000, Mr. Rupe was sentenced to LWOP. [Duration of Appeal: 14 years].

Darold Stenson: Mr. Stenson was sentenced to death on August 17, 1994. On May 10, 2012, the Washington State Supreme Court overturned the conviction and sentence because of prosecutorial misconduct.[209] Mr. Stenson was sentenced to LWOP on December 10, 2013. [Duration of Appeal: 18 years].

Covell Thomas: Mr. Thomas was convicted and sentenced to death in February 2001. Three years later, the Washington Supreme Court reversed the aggravated murder conviction and death sentence because of erroneous jury instructions.[210] In 2008, Mr. Thomas was sentenced to LWOP. [Duration of Appeal: 3 years].

[205] *Pirtle v. Morgan*, 313 F.3d 1160 (9th Cir. 2002).
[206] *Rice v. Wood*, 44 F.3d 1396 (9th Cir. 1995).
[207] *State v. Roberts*, 142 Wn.2d 471 (2001).
[208] *Rupe v. Wood*, 93 F.3d 1434 (9th Cir. 1996).
[209] *In re Stenson*, 174 Wn.2d 474 (2012).
[210] *State v. Thomas*, 150 Wn.2d 821 (2004).

APPENDIX

Sample Trial Report

(Presented as per-page on original form)

DATE FILED:
(to be indicated by Clerk of Supreme Court)

Questionnaire approved
for use pursuant to Laws
of 1981, ch. 138, § 12.

REPORT OF THE TRIAL JUDGE
Aggravated First Degree Murder Case

Superior Court of County, Washington
Cause No.
State v.

INSTRUCTIONS: Please answer each question. If you do not have sufficient information to supply an answer, please so indicate after the specific question. If sufficient space is not allowed on the questionnaire form for answer to the question, use the back of the page, indicating the number of the question which you are answering, or attach additional sheets.

If more than one defendant was convicted of aggravated first degree murder in this case, please make out a separate questionnaire for each such defendant.

The statute specifies that this report shall, within thirty (30) days after the entry of the judgment and sentence, be submitted to the Clerk of the Supreme Court, to the defendant or his or her attorney, and to the prosecuting attorney.

(1) Information about the Defendant

(a) Name: Date of Birth:

Last, First Middle

Sex: M ☐ F ☐

Marital Status: Never Married ☐ Married ☐ Separated ☐ Divorced ☐ Spouse Deceased ☐

Race or ethnic origin of defendant:

(Specify)

(b) Number and ages of defendant's children:

(c) Defendant's Father living: Yes ☐ No ☐

If deceased, date of death:

Defendant's Mother living: Yes ☐ No ☐

If deceased, date of death:

(d) Number of children born to defendant's parents:

(e) Defendant's education--check highest grade completed:

☐ 1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐ 6 ☐ 7 ☐ 8 ☐ 9 ☐ 10 ☐ 11 ☐ 12

Intelligence Level: Low ☐ Medium ☐ Above Average ☐ High ☐

IQ Score:

College: ☐ 1 ☐ 2 ☐ 3 ☐ 4

Further explanation or comment:

(f) Was a psychiatric evaluation performed: Yes ☐ No ☐

If yes, did the evaluation indicate that the defendant was:

(i) able to distinguish right from wrong? Yes ☐ No ☐

(ii) able to perceive the nature and quality of his or her act? Yes ☐ No ☐

(iii) able to cooperate intelligently in his or her own defense? Yes ☐ No ☐

(g) Please describe any character or behavior disorders found or other pertinent psychiatric or psychological information:

(h) Please describe the work record of the defendant:

(i) If the defendant has a record of prior convictions, please list:

Offense	Date	Sentence Imposed

(j) Length of time defendant has resided in:

Washington: _____ County of conviction: _____

(2) Information about the Trial

(a) How did the defendant plead to the charge of aggravated first degree murder?:

Guilty ☐
Not Guilty ☐
Not Guilty by reason of insanity ☐

(b) Was the defendant represented by counsel?: Yes ☐ No ☐

(c) Please indicate if there was evidence introduced or instructions given as to any defense(s) to the crime of aggravated first degree murder:

	Evidence	Instruction(s)
Excusable Homicide	☐	☐
Justifiable Homicide	☐	☐
Insanity	☐	☐
Duress	☐	☐
Entrapment	☐	☐
Alibi	☐	☐
Intoxication	☐	☐
Other specific defenses:		
_____	☐	☐
_____	☐	☐

(d) If the defendant was charged with other offenses which were tried in the same trial, list the other offenses below and indicate whether defendant was convicted:

	Convicted	
_____	Yes ☐	No ☐
_____	Yes ☐	No ☐
_____	Yes ☐	No ☐
_____	Yes ☐	No ☐

(e) What aggravating circumstances, as set forth in Laws of 1981, ch. 138 § 2, were alleged against the defendant and which of these circumstances were found to have been applicable?:

Aggravating Circumstances Alleged	Found Applicable	
_____	Yes ☐	No ☐
_____	Yes ☐	No ☐
_____	Yes ☐	No ☐
_____	Yes ☐	No ☐

(f) Please provide the names of each other defendant tried jointly with this defendant, the charges filed against each other defendant, and the disposition of each charge:

Name: _____

Offenses Charged	Disposition
_____	_____
_____	_____
_____	_____
_____	_____

Name: _____

Offenses Charged	Disposition

(3) Information Concerning the Special Sentencing Proceeding

(a) Date of Conviction: _____

Date special sentencing proceeding commenced: _____

(b) Was the jury for the special sentencing proceeding composed of the same jurors as the jury that returned the verdict to the charge of aggravated first degree murder? Yes ☐ No ☐

If the answer to the above question is no, please explain:

(c) Was there, in the court's opinion, credible evidence of any mitigating circumstances as provided in Laws of 1981, ch. 138, § 7?

Yes ☐ No ☐

If yes, please describe:

(d) Was there evidence of mitigating circumstances, whether or not of a type listed in Laws of 1981, ch. 138, § 7, not described in answer

to (3)(c) above? Yes ☐ No ☐

If yes, please describe:

(e) How did the jury answer the question posed in Laws of 1981, ch. 138, § 6(4), that is: "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?"

Yes ☐ No ☐

(f) What sentence was imposed? _____

(4) Information about the Victim

(a) Was the victim related to the defendant by blood or marriage?

Yes ☐ No ☐

If yes, please describe the relationship: _____

(b) What was the victim's occupation, and was the victim an employer or employee of the defendant?

(c) Was the victim acquainted with the defendant, and if so, how well?

(d) If the victim was a resident of Washington, please state:
Length of Washington residency: _____
County of residence: _____
Length of residency in that county: _____

(e) Was the victim of the same race or ethnic origin as the defendant?

Yes ☐ No ☐

If no, please state the victim's race or ethnic origin:

(f) Was the victim of the same sex as the defendant?

Yes ☐ No ☐

(g) Was the victim held hostage during the crime?

Yes ☐ No ☐

If yes, for how long: _____

(h) Please describe the nature and extent of any physical harm or torture inflicted upon the victim prior to death:

(i) What was the age of the victim? _____

(j) What type of weapon, if any, was used in the crime? _____

(5) Information about the Representation of Defendant

(If more than one counsel represented the defendant, answer each question separately as to each counsel. Attach separate sheets containing answers for additional counsel.)

(a) Name of counsel: _____

(b) Date on which counsel was secured: _____

(c) Was counsel retained or appointed? If appointed, please state the reason therefor:

(d) How long has counsel practiced law, and what is the nature of counsel's practice?

(e) Did the same counsel serve at both the trial and the special sentencing proceeding, and if not, why not?

(6) General Considerations

(a) Was the race or ethnic origin of the defendant, victim, or any witness an apparent factor at trial?

Yes ☐ No ☐

If yes, please explain:

(b) What percentage of the population of the county is the same race or ethnic origin as the defendant?

	Race	Ethnic Origin
Under 10%	☐	☐
10 - 25%	☐	☐
25 - 50%	☐	☐
50 - 75%	☐	☐
75 - 90%	☐	☐
Over 90%	☐	☐

If there appears to be any reason to answer this question with respect to a county other than the county in which the trial was held, please explain:

(c) How many persons of the defendant's or victim's race or ethnic origin were represented on the jury?

Defendant: _____

Victim: _____

Further explanation or comment:

(d) Was there any evidence that persons of any particular race or ethnic origin were systematically excluded from the jury?

Yes ☐ No ☐

If yes, please explain:

(e) Was the sexual orientation of the defendant, victim, or any witness an apparent factor at trial?

Yes ☐ No ☐

If yes, please explain:

(f) Was the jury specifically instructed to exclude race, ethnic origin, or sexual preference as an issue?

Yes ☐ No ☐

(g) Was there extensive publicity in the community concerning this case?

Yes ☐ No ☐

(h) Was the jury instructed to disregard such publicity?

Yes ☐ No ☐

(i) Was the jury instructed to avoid any influence of passion, prejudice or any other arbitrary factor when considering its verdict or its findings in the special sentencing proceeding?

Yes ☐ No ☐

(j) Please describe the nature of any evidence suggesting the necessity for instructions of the type described in 6(f) through 6(i) above which were given:

(k) General comments of the trial judge concerning the appropriateness of the sentence, considering the crime, the defendant, and other relevant factors:

(7) Information about the Chronology of the Case

(a) Date of offense: _____
(b) Date of arrest: _____
(c) Date trial began: _____
(d) Date jury returned verdict: _____
(e) Date post-trial motions ruled on: _____
(f) Date special sentencing proceeding began: _____
(g) Date sentence was imposed: _____
(h) Date this trial judge's report was completed: _____

_____
TRIAL JUDGE

Sample Jury Questionnaire – King County Example[211]

JUROR QUESTIONNAIRE JUROR #_____

Thank you for participating in jury service. The following questions are used by the Court to obtain information about you in order to assist in the jury selection process. Providing complete answers will save time for you and the Court.

Remember, there are no "right" or "wrong" answers. The only correct answers are those that are honest, thoughtful and most accurately reflect your personal attitudes, beliefs, and experiences. It is very important that you answer the questions to the best of your ability and in the most complete manner as possible. Please fill out the answers by yourself without consulting with any other person.

[211] Note: This example jury questionnaire was formatted to fit in this document, some case-specific information was removed, some of the sections and some of the material may differ in official versions.

If you need additional space for your answers, or wish to make further comments, please use the blank page attached at the end of this questionnaire - Please do *not* use the *back* of any page for your comments. Simply identify the question number next to your continued response on the blank pate at the end of the questionnaire.

You are instructed by the Court not to discuss or research anything about this case by any means, including the internet, social media, radio, newspapers, discussions with others, or in any other manner. Your failure to abide by this directive may result in contempt of court proceedings against you.

When you finish answering all of the questions, you are required to sign this questionnaire.

As you fill out this questionnaire please remember that your written answers are given under oath.

Thank you very much for your cooperation

_____

Hon. Ronald Kessler

JUROR QUESTIONNAIRE JUROR #_____

ABILITY TO SERVE

The testimony is expected to begin on January 12, 2014. The Court and parties expect that this trial will last five to six months. Court sessions will last from approximately 9-11 am and 1:15-3:15pm Monday through Thursday for testimony.

1. Jurors who are not excused will be questioned individually for half a day in November and December. There would be no other obligation to appear in November and December. Are there any days in November or December where you believe that you are unavailable for that half day? If so, please indicate dates and explain:

_____

_____

2. Do you wish to apply to the Court to be excused on the grounds that jury service in this case would be a **serious hardship** to you? ☐YES ☐NO If yes, please explain:

_____

_____

3. Do you have any personal, family, or professional obligations that you feel would **seriously interfere** with your ability to focus and concentrate as a juror in this case? ☐YES ☐NO If yes, please explain:

_____

_____

4. Does your employer pay you for time missed as a result of jury service? ☐YES ☐NO ☐UNSURE*
   If you are unsure, please find out before you return to court for jury selection questioning.
5. Do you have any condition, disability, or need that will require any special consideration or accommodation while you are in court? ☐YES ☐NO If yes, please explain:

_____

_____

6. Do you have hearing difficulties not corrected by a hearing aid? ☐YES ☐NO
7. Do you have trouble seeing even with glasses? ☐YES ☐NO
8. a. Do you have any problems with memory or concentration? ☐YES ☐NO
   b. Are you taking any medications that affect your memory or concentration? ☐YES ☐NO

GENERAL INFORMATION

9. Age:_____ 10. ☐ Male ☐ Female 11. Race/Ethnicity:_____

12. Please check all that apply:

☐Employed FT ☐Employed PT ☐Homemaker ☐Unemployed ☐Disabled ☐Student

13. Briefly describe your job title and duties:

_____

_____

_____

_____

14. Do you now or have you ever held a supervisory position? ☐YES ☐NO

If yes, please describe type of work, when, and number of people you supervised:

_____

_____

_____

15. What types of jobs have you held in the past?

_____

_____

_____

_____

16. What special interests or training do you have either as a result of formal education or self-education?

_____

_____

_____

_____

17. What is the highest level of education you have completed, and what degrees/diplomas have you earned?

_____

_____

18. What is your current relationship status? Are you:

Single and . . .	*Married and . . .*	*Widowed and . . .*
☐ Never married	☐ Never divorce	☐ Remarried
☐ Living with someone	☐ Previously divorced	☐ Now single
☐ Divorced	☐ Currently separated	☐ Living with someone

19. If married, or living with someone, please describe your spouse/partner's **occupation**, **place of employment** and **highest level of education:**_____

_____

20. Please indicate how many children you have, their ages, genders, and occupations (if child is employed):

_____

_____

21. If you have ever been in any branch of the armed forces of the United States (including the military reserves, National Guard, or ROTC) please answer the following:

a) List branch of service, approximate years of service, highest rank:

_____

_____

b) Did you ever participate in a court martial? ☐YES ☐NO If yes, please describe your role and charges:

_____

_____

c) Did you serve in active combat duty? ☐YES ☐NO If yes, which conflict, war, combat zone?

_____

_____

d) Did you ever serve as a military police officer? ☐YES ☐NO If yes, please describe, including where you served, your position, and your duties:

_____

_____

KNOWLEDGE AND OPINIONS ABOUT THE CASE

-Text Here Describing the Charges/Case-

22. Please describe in detail everything you have read, seen or heard about this case, the crime, the defendant, the victims, or any other people involved? (Please use extra comment page at end of questionnaire if needed.)

_____

_____

23. Have you participated in or overheard any conversations among others, such as friends, family or coworkers concerning this case, the crime, the defendant, the victims, or any other people involved? ☐YES ☐NO If yes, please explain, including who was involved in the conversation and what was discussed:

_____

_____

24. What opinions, if any, have your formed about this case, the crime, the defendant, the victims, or anyone else involved:

_____

_____

25. Some of the events at issue in this trial allegedly took place at t_____, located at _____ in Seattle, at the intersection of _____ in Seattle, and at the _____, located in _____. Are you familiar with any of those locations? ☐YES ☐NO If yes, please describe:

_____

_____

26. Have you read, seen, or heard any news about the costs associated with this trial or other capital trials in the State of Washington? ☐YES ☐NO If yes, please describe what you have read, seen or heard and your related thoughts and opinions:

_____

_____

27. In February of 2014, Washington Governor Jay Inslee announced a moratorium on the death penalty which suspends executions for the balance of his term as governor. Nonetheless, under Washington law, the death penalty is still one of the possible penalties a jury may consider for someone convicted of aggravated murder in the first degree. Please describe your opinions about this issue, and whether anything about this moratorium could affect your ability to sit as a juror in this case:

_____

_____

28. Have you or anyone you know well such as a friend or family member ever worked with or had any personal or professional relationship with anyone affiliated with the King County Prosecuting Attorney's Office, or any other prosecuting attorney, such as a Federal Prosecutor? ☐YES ☐NO If yes, please explain:

_____

_____

_____

_____

_____

_____

29. Have you or anyone you know well such as a friend or family member ever worked with or had any personal or professional relationship with anyone affiliated with the King County Public Defender Office, or any other criminal defense attorney? ☐YES ☐NO If yes, please explain:

_____

_____

_____

30. Do you, *or* anyone close to you, **know *any* person involved in *any* way with this case or incident**, including the investigators, the lawyers, the victims, the defendant, or any other person directly or indirectly involved with the investigation, prosecution, defense, or people involved? ☐YES ☐NO If yes, please explain:

_____

_____

BELIEFS, VALUES, AND OPINIONS ABOUT PUNISHMENT

In this trial if the defendant is found guilty jurors will be asked to determine punishment for the defendant after consideration of aggravating factors and mitigating circumstances. This is a decision made by each juror individually. Ultimately, the jury can return one of these three final verdicts:

a. unanimous verdict for life imprisonment without the possibility of parole

b. unanimous verdict for the death penalty

c. non-unanimous verdict – judge sentences defendant to life imprisonment without the possibility of parole

31. In general, what is your opinion of the death penalty as punishment for premeditated first degree murder?

Please circle *one* number on the 1 to 7 scale below that is *closest* to your opinion.

STRONGLY OPPOSED to the death penalty	**1**	**2**	**3**	**4**	**5**	**6**	**7**	**STRONGLY IN FAVOR** of the death penalty

32. Please describe in detail your beliefs and opinions about the **death penalty** as punishment for a person who *is guilty* of aggravated first degree murder for the premeditated and intentional killing of a police officer:

_____

_____

33. Why do you feel this way, or what are you reasons for your beliefs about the death penalty?

_____

_____

34. Life imprisonment without the possibility of release or parole is the presumptive penalty for a person who is convicted of aggravated first degree murder. Please describe in detail your beliefs and opinions about the penalty of **life in prison without the possibility of release or parole**, instead of the death penalty, as punishment for a person who is *guilty* of aggravated first degree murder for the premeditated and intentional killing of a police officer with no legal excuse or justification:

_____

_____

35. Why do you feel this way, or what are you reasons for your beliefs about the punishment of life in prison without the possibility of probation or parole?

_____

_____

36. In your opinion, should the death penalty be imposed: ☐More Often ☐About The Same ☐Less Often

Please explain your thoughts:

_____

_____

37. a. Is the cost to taxpayers for housing an inmate in prison for life a concern to you? ☐YES ☐NO Please explain why or why not:

_____

_____

_____

_____

b. Even if you heard no evidence about the cost of incarceration, would concerns about taxpayer dollars spent on a life sentence be something you would consider in favor of the death penalty? ☐YES ☐NO

c. Even if you heard no evidence about the cost, would concerns about taxpayer dollars spent in pursuit of the death penalty be something you would consider in choosing between a life without parole sentence

and the death penalty ☐YES ☐NO

38. Do you believe in "an eye for an eye"? ☐YES ☐NO Please explain why or why not:

_____

_____

39. a. In your opinion, what role, if any, do you believe extremely positive or negative childhood experiences, such as love and acceptance, abuse and neglect, or racial acceptance or discrimination experienced as a child, play in a person's behavior and choices as an adult?

_____

_____

_____

_____

_____

b. Do you consider information like that relevant when making a decision about punishment for an adult who is guilty of premeditated first degree murder with no legal excuse or justification?

☐YES ☐NO

Please explain why or why not:

_____

_____

_____

_____

_____

40. In your opinion, what role, if any, should *mercy* play in a decision between the death penalty or life in prison without release for a person who is guilty of intentional capital murder?

_____

_____

_____

_____

_____

41. What would you want to consider as a juror in deciding between the death penalty or the penalty of life in prison without the possibility of release or parole for a person who is convicted of the premeditated and intentional killing of a police officer?_____

_____
_____
_____
_____
_____

42. Are your views for or against the death penalty influenced by your religious, spiritual, political, or philosophical beliefs? ☐YES ☐NO Please explain:

_____
_____
_____
_____
_____

43. Would anything about your religious, spiritual, political, or philosophical beliefs make it difficult for you to sit in judgment of another person? ☐YES ☐NO Please explain why or why not:

_____
_____
_____
_____
_____

44. If the judge gives you an instruction regarding the law you must follow which conflicts with a belief or opinion that you hold, how will you deal with that conflict?

_____
_____
_____
_____
_____

COURTS AND THE LAW

45. Do you know any attorneys or judges? ☐YES ☐NO

If yes, please indicate who you know and how you know them:

_____

_____

_____

_____

46. Have you ever worked, trained, applied for work, or volunteered for any law enforcement agency, in corrections, or in a related field (such as police, FBI, TSA, probation officer, private security officer, etc.)?

☐YES ☐NO If yes, please indicate when, where, the job or nature of experience, and the approximate dates:

_____

_____

_____

_____

_____

47. Has anyone you know well, such as a friend or family member, ever worked, trained, applied for work, or volunteered for any law enforcement agency, in corrections, or in a related field (such as police, FBI, TSA, probation officer, private security officer, etc.)? ☐YES ☐NO

If yes, please indicate who, how you know them, where they work, the job or nature of experience, and the approximate dates:

_____

_____

_____

_____

_____

48. Have you ever been employed, trained, applied for work, or volunteered in the legal field (for example a law office, courthouse, Prosecuting Attorney, Attorney General, US Attorney, defense attorney, Public Defender or paralegal)? ☐YES ☐NO If yes, please describe where, your experience, and the approximate dates:

_____
_____
_____
_____
_____

49. Have you ever had any legal training or experience? ☐YES ☐NO If yes, please explain:

_____
_____
_____
_____
_____

50. Have you ever visited a jail, prison, or other correctional facility for any reason? ☐YES ☐NO

If yes, please describe the circumstances and your reactions and impressions of the people and the place:

_____
_____
_____
_____
_____

51. Please describe anything you have you read, seen, or heard in recent months concerning the Seattle Police Department, and your related thoughts and opinions:

_____
_____
_____
_____
_____
_____

52. Please describe anything you have read, seen, or heard in recent months concerning the King County Sheriff's Office, and your related thoughts and opinions:

_____
_____

53. Do you have any strong opinions about law enforcement in general, or specific law enforcement agencies?

☐YES ☐NO If yes, please explain:

54. Have you ever been a victim of any violent crime? ☐YES ☐NO

If yes, please explain, including the nature of incident, and any police investigation or prosecution:

55. Has anyone you know well, such as a friend or family member, ever been a victim of any violent crime?

☐YES ☐NO If yes, explain who was involved, nature of incident, and any investigation or prosecution:

56. Have you ever known anyone who suffered a loss due to the murder of a family member or close friend?

☐YES ☐NO If yes, please explain who was involved, and what impact this experience had on this

person and the other friends and family of the murder victim:

_____

_____

_____

_____

_____

57. Have you ever been accused of, charged with, convicted, or acquitted of a crime? ☐YES ☐NO

If yes, please describe the situation, when it occurred, who was involved, and the outcome:

_____

_____

_____

_____

58. Has anyone you know well, such as a friend or family member ever been accused of, charged with, convicted, or acquitted of a crime? ☐YES ☐NO If yes, please describe the situation, when it occurred, who was involved, and the outcome:

_____

_____

_____

_____

59. What are your opinions about psychiatrists, psychologists, or other mental health professionals who come to court and testify in some criminal cases?

_____

_____

_____

_____

60. What are your opinions about defendants who claim insanity as a defense to violent crimes such as murder?

_____

_____

_____

61. Do you believe that mentally ill or insane defendants should be convicted the same as any other person when they commit violent acts, such as killing innocent people? ☐YES ☐NO
Explain:

62. Do you believe that mentally ill or insane defendants should be punished the same as any other person when they commit violent acts, such as killing innocent people? ☐YES ☐NO
Explain:

63. What is your opinion about insanity as a defense to a violent crime, like murder?

64. In general what are your opinions about gun control laws and legislation in the US and the State of Washington? (i.e., Should we have more or less regulation? Which laws do you approve or disapprove of?)

65. Do you or anyone in your household currently own any guns? ☐YES ☐NO If yes, please explain who owns the gun(s), the types of guns owned, and the purpose (i.e. hunting, collecting, self-defense, etc):

_____

_____

_____

_____

66. In your personal opinion, are people of certain ethnic or racial groups more likely to commit violent crimes than others? ☐YES ☐NO Please explain your thoughts:

_____

_____

_____

_____

67. Have you ever served as a juror before? ☐YES ☐NO If yes, how many times? _____

a) In what type of case(s) have you served as a juror (*Examples: car wreck, burglary, malpractice, etc)?*

_____

_____

_____

b) Where was the court located where you performed your previous jury service?

_____

_____

c) Were you ever the foreperson? ☐YES ☐NO If yes, how many times? _____

d) Have you ever served on a jury where you did not reach a verdict? ☐YES ☐NO If yes, please explain:

_____

_____

e) Without disclosing the verdict, were you satisfied or dissatisfied with the outcome(s) of the trial(s) where you served? Please explain:

_____

_____

_____

f) Were you ever responsible for determining the sentence in a criminal trial? ☐YES ☐NO
If yes, what procedure did you follow?

_____

_____

68. Have you ever testified as a witness in court or in a deposition? ☐YES ☐NO If yes, please explain:

_____

_____

_____

69. In your opinion, what are three of the biggest problems with our criminal justice system today?

_____

_____

_____

70. In your opinion, what are three of the best things about our criminal justice system today?

_____

_____

_____

PERSONAL LIFE EXPERIENCES

71. Have you *or* anyone close to you ever been mentally, physically, or emotionally abused or neglected as a child? (check all that apply) ☐YES (self) ☐YES (other) ☐NO If yes, please describe who, the circumstances, and how the abuse or neglect affected those involved as they grew up and in their current life:

_____

_____

_____

_____

72. Have you *or* anyone close to you ever been diagnosed or treated for any mental or thought disorder such as delusional disorder, bipolar disorder, schizophrenia, depression, obsessive

compulsive disorder, or any other similar issue? ☐YES (self) ☐YES (other) ☐NO If yes, please explain:

_____

_____

_____

_____

73. Do you have any personal or professional experience, training or education related to psychology, psychiatry, or persons with mental or thought disorders such as delusional disorder, bipolar disorder, schizophrenia, depression, obsessive compulsive disorder, or similar issues? ☐YES ☐NO If yes, explain:

_____

_____

_____

_____

74. Have you ever had any personal or professional experience with a person suffering with permanent paralysis such as paraplegia or quadriplegia? ☐YES ☐NO If yes, please explain:

_____

_____

_____

_____

75. Have you ever experienced or witnessed racial discrimination or prejudice directed towards a child by individuals or a community? ☐YES ☐NO If yes, please explain:

_____

_____

_____

_____

COMMUNITY AND MEDIA INTERESTS

76. What social or professional groups, organizations, or volunteer groups do you belong to or support with financial or other contributions?

_____

_____

_____

_____

77. Have you ever held an office or position of leadership in a group or organization? ☐YES ☐NO

If yes, please explain:

_____

_____

_____

_____

78. What are your favorite hobbies and spare-time activities?

_____

_____

_____

_____

79. Please indicate which of the following *best* describes your political views:

☐ Very liberal ☐ Somewhat liberal ☐ Moderate ☐ Somewhat conservative ☐ Very conservative

80. Of the following, which cable news channel do you watch most often?

☐ Fox News Channel ☐ CNN ☐ MSNBC ☐ Other:_____

81. What local or national radio news or talk shows do you listen to most often?

_____

_____

_____

_____

82. What television shows do you regularly like to watch?

_____

83. What magazines, newspapers or websites do you regularly read?

84. What types of books do you like to read?

85. Do you have an online blog or web page, or have you participated in online discussions on sites like that? ☐YES ☐NO If yes, please explain:

86. Do you have an online social network account, such as “Facebook”, “MySpace,” “Twitter,” or “Instagram? ☐YES ☐NO If yes, please explain and describe:

87. In your opinion, is there **anything else** you now know about this case, the crime, the issues, or the people involved, or your own background, experience, or circumstances, that might hinder you, even slightly, from being as fair and impartial a juror as you would like to be?
☐YES ☐NO If yes, please explain:

_____
_____
_____
_____
_____
_____

88. Is there anything in this questionnaire, or anything else at all, which you would like to discuss with the judge and attorneys during individual voir dire, outside the presence of the other jurors? ☐YES ☐NO

_____
_____
_____
_____

Please review the names and entities on the attached list before answering this final question:

89. Are you familiar with any of the individuals or organizations named? ☐YES ☐NO ☐UNSURE

If yes or unsure, indicate who you know, or may know, and how you are or may be familiar with them:

_____
_____
_____
_____

***** You are instructed by the Court not to discuss or research anything about this case by any means, including the internet, social media, radio, newspapers, discussions with others, or in any other manner. Your failure to abide by this directive may result in contempt of court proceedings against you.*****

With my signature below, I solemnly swear or affirm that the answers given above and on the attached sheets are true, correct and complete.

Signature: _____ **Date:** _____

ADDITIONAL COMMENT PAGE

(Please mark your responses to reflect the question number you are responding to. Thank you!)