Tennessee's Death Penalty: Costs and Consequences

John G. Morgan
Comptroller of the Treasury
Office of Research
July 2004

STATE OF TENNESSEE

John G. Morgan
Comptroller

COMPTROLLER OF THE TREASURY

STATE CAPITOL
NASHVILLE, TENNESSEE 37243-0264
PHONE (615) 741-2501

July 12, 2004

The Honorable John S. Wilder
Speaker of the Senate
The Honorable Jimmy Naifeh
Speaker of the House of Representatives
The Honorable Curtis S. Person, Jr.
Chair, Senate Judiciary Committee
The Honorable Joe Fowlkes
Chair, House Judiciary Committee
and
Members of the General Assembly
State Capitol
Nashville, Tennessee 37243

Ladies and Gentlemen:

As requested by the House Judiciary Committee, transmitted herewith is a study prepared by the Office of Research examining the costs of first-degree murder cases in Tennessee. The report compares the costs of Tennessee's life, life without parole, and capital cases. The report also makes recommendations for policy changes that may streamline the decision-making process surrounding death penalty cases, and may reduce future costs.

Sincerely,

John G. Morgan
Comptroller of the Treasury

Tennessee's Death Penalty: Costs and Consequences

Emily Wilson
Senior Legislative Research Analyst

Brian Doss
Associate Legislative Research Analyst

Sonya Phillips
Associate Legislative Research Analyst

Ethel Detch, Director
Douglas W. Wright, Assistant Director
Office of Research
505 Deaderick Street, Suite 1700
Nashville, TN 37243
615/401-7911
www.comptroller.state.tn.us/orea/reports

John G. Morgan
Comptroller of the Treasury
State of Tennessee

July 2004

Comptroller of the Treasury, Office of Research,
Authorization Number 307321, 750 copies, July 2004.
This public document was promulgated at a cost of $2.36
per copy.

Executive Summary

The death penalty is a highly controversial form of punishment, unique both "in its severity and irrevocability," as noted in 1972 by the United States Supreme Court in *Furman v. Georgia*. The Tennessee House of Representatives Judiciary Committee requested the Office of Research examine the costs of Tennessee's death penalty because of the varied judgments and controversy surrounding it. (See Appendix A.) In this report, analysts compare the costs of adjudicating first-degree murder cases subject to the death penalty to those not subject to the death penalty in Tennessee.

Other states and research entities have analyzed the costs of capital punishment. However, none has focused specifically on Tennessee's procedures, background, and individual cases. This analysis tracks cases through every stage in Tennessee's adjudication process. It includes costs to local, state, and federal governmental entities, as well as to private individuals.

The purpose of this study is to:

- Examine case processes for first-degree murder cases including capital cases, life without the possibility of parole cases, and life with the possibility of parole cases in Tennessee.
- Compare the costs of first-degree murder cases in Tennessee.
- Recommend policy changes to streamline the capital case process and increase accountability.

The study concludes:

Overall, first-degree murder cases in which the prosecution has filed a notice to seek the death penalty cost more than life without parole and life with the possibility of parole cases. Death penalty cases cost more because:

- they are more complex
- more agencies and people are involved in the adjudication of the cases,
- both the prosecution and defense spend more time in preparation, and
- the appellate process has more steps. (See page 11.)

Tennessee District Attorneys General exercise considerable discretion when deciding which punishment to seek for individuals accused of first-degree murder: the death penalty, life without parole, or life with the possibility of parole. As such, prosecutors are not consistent in their pursuit of the death penalty. Some prosecutors interviewed in this study indicated that they seek the death penalty only in extreme cases, or the "worst of the worst." However, prosecutors in other jurisdictions seek the death penalty as a standard practice on every first-degree murder case that meets at least one aggravating factor. Still, surveys and interviews indicate that others use the death penalty as a "bargaining chip" to secure plea bargains for lesser sentences. Meanwhile, defense

attorneys must prepare their cases, often without knowing the punishment the prosecutor intends to seek. (See pages 13-15.)

Capital *trials* cost more than life without the possibility of parole and life with the possibility of parole trials. Survey data indicates that capital trials cost an average of $46,791; life without the possibility of parole trials cost an average of $31,494; and life with the possibility of parole trials cost an average of $31,622. The life without parole average does not include defense attorney costs, as the defense counsel did not respond to data requests. (See page 16.)

- Capital trials take longer than non-capital first-degree murder trials because attorneys for both the prosecution and defense file more motions and raise more issues. (See page 16.)
- Capital and life without parole jury trials have two separate phases: 1) guilt/ innocence, and 2) sentencing, which lead to increased costs. (See pages 16-17.)
- Tennessee employs five capital case attorneys to assist trial judges with capital cases in an effort to eliminate court delays. (See page 17.)
- In addition to Public Defenders, judges appoint some private attorneys to represent indigent defendants. Appointed attorneys represent more defendants than public defenders in all three types of cases. (See pages 17-18.)
- Tennessee Supreme Court Rule 13 entitles all capital defendants to two attorneys. Further, Rule 13 specifies qualifications that both attorneys must meet. (See page 18.)
- The *Tennessee Rules of Criminal Procedure* differentiates between capital and non-capital trials by entitling both the prosecution and defense to additional peremptory juror challenges when the offense is punishable by death. (See page 21.)
- Judges sequester juries more frequently in capital trials than other types. This results in lodging expenses and additional food for the individual jurors. (See page 21.)
- Among the cases in the sample, capital and life with the possibility of parole defendants received mental health evaluations more frequently than life without parole defendants. (See page 22.)

Death penalty cases have a more complex appellate process than other first-degree murder cases. Capital cases have an automatic appeal, while non-capital cases have discretionary appeals to the Tennessee Supreme Court. All defendants have the right to appeal to the United States Supreme Court; however, the court has the authority to decide whether each case merits review except in capital cases. (See pages 22-24.)

Researchers found that the Tennessee Court of Criminal Appeals reversed 29 percent of capital cases on direct appeal. A 2000 study focused on error rates in capital cases. From 1977-1995, Tennessee Courts of Criminal Appeals reviewed 109 capital cases on direct appeal. Of those, the court reversed 32, or 29 percent, for errors made during the trials. (See page 23.)

The General Assembly created the Office of the Post Conviction Defender in 1995 to provide representation for any person convicted and sentenced to death who is unable to secure counsel because of indigence. The average cost per case ranges from $27,281 in fiscal year 1995-96 to $18,459 in fiscal year 2003-04. The number of cases ranged from 14 in fiscal year 1995-96 to 54 in fiscal year 2002-03. The average cost per case has decreased because the number of cases increased. (See pages 25-28.)

Tennessee Code Annotated, Section 40-27-101 authorizes the Governor to "grant reprieves, commutations, and pardons in all criminal cases after conviction." The Board of Probation and Parole receives numerous clemency applications every year, for all types of criminal sentences, not just capital cases. The Board also holds parole hearings for inmates sentenced to life with the possibility of parole. The Board considered 272 parole applications for inmates sentenced to life with the possibility of parole since 1993. Of those, the Board placed 77 on parole. The Board revoked parole for nine parolees, or 11.7 percent. (See pages 31-33.)

Incarceration

The annual incarceration costs for Tennessee death row inmates are the same as other maximum-security inmates (such as individuals incarcerated for rape or non-capital first-degree murder). According to department staff, the Department of Correction calculates an operation cost per day for each facility, which applies to all inmates regardless of sentence type. As of April 2004, Tennessee has 97 people on death row. According to the department, death row inmates spend an average of 13.22 years on death row. (See pages 36-38.)

The execution of an inmate saves the state approximately $773,736 for the future imprisonment of the inmate when compared to an inmate sentenced to life without parole. **Executions save $680,549 when compared to inmates sentenced to life with the possibility of parole.** (See pages 36-37.)

Administering the Death Penalty

Robert Glen Coe's execution by lethal injection cost Riverbend Maximum Security Institution $11,668. The total cost of execution includes additional security, medical supplies, medical personnel, and the necessary chemicals for the procedure. The institution also places lighting outside the gates, portable restrooms, and additional security to prevent disputes among demonstrators. (See page 38.)

The Indirect Effects of the Death Penalty

The Tennessee Bureau of Investigation provides greater investigative services in capital cases than in other non-capital first-degree murder cases. Local law enforcement agencies initially conduct all investigations similarly. They do not know what type of punishment the prosecutor will pursue until late in the investigation. (See pages 38-39.)

First-degree murder causes emotional stress and pain for jurors, the victims' family, and the defendant's family. Although any traumatic trial may cause stress, the

pressure may be at its peak during capital trials. Jurors serving on traumatic trials are six times more likely to suffer from symptoms of depression than jurors serving on non-traumatic trials. While many victims' families seek retribution or closure in an execution, others renounce the death penalty as causing more suffering to themselves and others. Defendants' family members may face shame and social isolation from media coverage or health problems from stress-related conditions. (See pages 39-41.)

Previous research provides no clear indication whether the death penalty acts as a method of crime prevention. Some research supports the death penalty as a deterrent, other studies support the notion that it is not a deterrent, and still others indicate that the death penalty stimulates acts of first-degree murder. (See pages 41-44.)

Administrative Issues

The State of Tennessee does not have a comprehensive, integrated criminal justice information system. Office of Research staff found inconsistencies in Administrative Office of the Courts data, Department of Correction data, and data from local clerks, including: missing persons, inconsistent spelling of defendant names, inaccurate or missing dates of birth, and inaccurate or missing sentence types. An integrated information system would ensure that authorities have accurate information concerning people in state custody; increase efficiency during decision-making and case processing; and reduce the risk of human error during data entry. (See pages 44-45.)

Neither attorneys nor judges in Tennessee track the time they spend on individual cases. Attorney and judge time is one of the greatest expenses of the total cost of the death penalty. Office of Research staff found anecdotal information regarding the differences between capital and non-capital cases. Although anecdotal information is useful, measurable criteria to compare capital and non-capital cases would also reveal important information. Tracking time would allow outside consultants and analysts to understand caseloads and to evaluate performance. It would also provide a mechanism for calculating an accurate cost of the death penalty and other public policy issues. (See page 46.)

No accurate record of death notices and life without parole notices filed exists in Tennessee. An accurate record of death and life without parole notices would enable interested parties (judges, attorneys, legislators, and analysts) to monitor and track cases and to plan for future resource expenditures. (See page 46.)

Tennessee Supreme Court Rule 12 requires that trial judges file reports on all first-degree murder convictions. However, Office of Research staff noted that judges do not file these reports for every case and in a timely manner. Rule 12 reports contain case information including the trial, defendant, the defendant's representation, co-defendants, and victims. (See pages 46-47.)

Recommendations

Legislative Recommendations

The General Assembly may wish to establish a formal protocol describing the criteria that local District Attorneys General would use to determine whether to seek the death penalty in first-degree murder cases. Implementing standard guidelines could assist prosecutors during the decision making process and with resource allocation. Decision making guidelines seek to protect every defendant's Constitutional right to due process and can remove some of the arbitrariness of prosecutorial discretion. Such guidelines may also strengthen capital cases, insuring that prosecutors have reviewed all cases in a stringent, yet consistent manner. This may lead to fewer grounds for appeal and help prosecutors be more certain that they have appropriately sought the death penalty. (See page 48.)

The General Assembly may wish to create a timetable for the creation of an integrated criminal justice information system to ensure the timeliness of the project. (See page 48.)

The General Assembly may wish to consider legislation requiring judges, district attorneys general, and district public defenders to account for their time to provide more detailed cost information. Currently, private attorneys paid through the Indigent Defense Fund are required to submit lengthy, detailed forms to ensure accountability. The state funds most judges, district attorneys general, and district public defenders, and therefore has an interest in more closely tracking time. This would help ensure that the state has the appropriate numbers of officials and that they and their staff spend their time efficiently and effectively. Tracking time would further allow outside consultants and analysts to understand caseloads and to evaluate performance. Finally, it would provide a mechanism for calculating an accurate cost of the death penalty and other public policy issues. (See page 48-49.)

Judicial Recommendations

The state Supreme Court may wish to compile Rule 12 data in a format that can be analyzed more readily, such as a database, instead of maintaining scanned documents on CD-ROM. The Court may also wish to expand the format to include additional information from the district attorneys general and defense counsel. (See page 49.)

Table of Contents

Introduction 1
Methodology 1
Background 5
- How have the courts viewed capital punishment? 5
- How many other states have the death penalty? 6
- Who can Tennessee sentence to death? 7
- Why do death penalty cases take so long in Tennessee? 8
- Who is on Tennessee's death row and what institution houses them? 9

Analysis and Conclusions 11
- Costs of First-Degree Murder Cases in Tennessee 11
  - District Attorney Decision and Defense Preparation 13
  - State Trial Court 16
  - Court of Criminal Appeals 22
  - Tennessee Supreme Court 23
  - United States Supreme Court 24
  - Post Conviction: Trial Court 25
  - Post Conviction: Court of Criminal Appeals 27
  - Post Conviction: Tennessee Supreme Court 27
  - Post Conviction: United States Supreme Court 27
  - Federal District Court 28
  - United States Sixth Circuit Court of Appeals 29
  - United States Supreme Court 30
  - Executive Clemency 31
  - Qualitative Case Study: Robert Glen Coe 34
- Incarceration 36
- Administering the Death Penalty 38
- The Indirect Effects of the Death Penalty 38
  - Law Enforcement 38
  - Emotional Pain and Suffering 39
  - Deterrence 41
- Administrative Issues 44

Recommendations 48
- Legislative Recommendations 48
- Judicial Recommendation 49

Appendices.....50
Appendix A: Letter of Request from General Assembly.....50
Appendix B: Methodology in Detail.....53
Appendix C: List of Fixed and Variable Costs Associated with the Death Penalty in Tennessee.....56
Appendix D: List of Interviewees.....57
Appendix E: Statutory Aggravating and Mitigating Factors.....61
Appendix F: House Bill 409/Senate Bill 441.....63
Appendix G: Administrative Office of the Courts Claim for Attorney Fees.....66

List of Exhibits

Exhibit 1: Population Groups of First-Degree Murder Cases, January 1, 1993, through April 1, 2003.....3
Exhibit 2: Office of Research Survey Response Rate.....4
Exhibit 3: Capital Punishment Frequency by State.....6
Exhibit 4: Prisoners under Sentence of Death by State.....7
Exhibit 5: Tennessee's 13-Step Death Penalty Appeals Process.....8
Exhibit 6: Execution Breakdown by State, 1976 – 2003.....10
Exhibit 7: Tennessee Capital Case Process.....12
Exhibit 8: Distribution of Cases in Sample by Judicial District.....14
Exhibit 9: Comparison of Average Trial Costs per Case.....16
Exhibit 10: Average Number of Days from Offense Date to Sentence Date.....17
Exhibit 11: Defendant Representation.....18
Exhibit 12: Qualifications for Lead Counsel in Capital and Non-Capital Cases.....18
Exhibit 13: Compensation to Appointed Lead Counsel in Capital and Non-Capital Trials, as specified in Rule 13.....19
Exhibit 14: Tennessee Indigent Defense Spending, 1997-2003.....19
Exhibit 15: Tennessee Indigent Defense Costs.....20
Exhibit 16: Percentage of Cases with Juries.....21
Exhibit 17: Percentage of Cases in which Judges Sequestered Juries.....21
Exhibit 18: Percentage of Cases in which the Defendant Received a Mental Health Evaluation.....22
Exhibit 19: Court of Criminal Appeals per Case Cost Information.....23
Exhibit 20: Tennessee Capital Case Process.....25
Exhibit 21: Office of the Post Conviction Defender, Average Cost per Case.....26

Exhibit 22: Post Conviction Defense Costs for Private, Appointed Attorneys 26
Exhibit 23: Tennessee Capital Case Process 28
Exhibit 24: Tennessee Capital Case Process 31
Exhibit 25: Clemency Applications, 1993-2003.....33
Exhibit 26: Commutations and Pardons Granted, 1993-2003 33
Exhibit 27: Timeline of Coe's Case, 1979-2000 35
Exhibit 28: 2003 Operation Costs per Day at Tennessee Institutions 36
Exhibit 29: Estimated Incarceration Costs for First-Degree Murder Sentence Types 37
Exhibit 30: Executions in Texas and All Other States Combined, 1992-2002.....42
Exhibit 31: Murder Rates in Death Penalty and Non-Death Penalty States, 1990-2000 44

Introduction

The death penalty is a highly controversial form of punishment, unique both "in its severity and irrevocability."[1] The state House of Representatives Judiciary Committee requested the Office of Research examine the costs of the death penalty in Tennessee because of the varied judgments and controversy surrounding it. (See Appendix A.) In this report, analysts compare the costs of adjudicating first-degree murder cases subject to the death penalty to those not subject to the death penalty in Tennessee.

United States Supreme Court Justice Thurgood Marshall explained the costs associated with the death penalty in *Furman v. Georgia*, the 1972 case that voided the death penalty in 40 states, commuting the sentences of 629 death row inmates.

> As for the argument that it is cheaper to execute a capital offender than to imprison him for life, even assuming that such an argument, if true, would support a capital sanction, it is simply incorrect. A disproportionate amount of money spent on prisons is attributable to death row. Condemned men are not productive members of the prison community, although they could be, and executions are expensive. Appeals are often automatic, and courts admittedly spend more time with death cases.
>
> At trial, the selection of jurors is likely to become a costly, time-consuming problem in a capital case, and defense counsel will reasonably exhaust every possible means to save his client from execution, no matter how long trial takes.
>
> During the period between conviction and execution, there are an inordinate number of collateral attacks on the conviction and attempts to obtain executive clemency, all of which exhaust the time, money, and effort of the state. There are also continual assertions that the condemned prisoner has gone insane. Because there is a formally established policy of not executing insane persons, great sums of money may be spent on detecting and curing mental illness in order to perform the execution. Since no one wants the responsibility for the execution, the condemned man is likely to be passed back and forth from doctors to custodial officials to courts like a ping-pong ball. The entire process is very costly.
>
> When all is said and done, there can be no doubt that it costs more to execute a man than to keep him in prison for life.

Other states and research entities analyzed the costs of capital punishment. However, none has focused specifically on Tennessee's procedures, background, and individual cases. This analysis tracks cases through every stage in Tennessee's adjudication process. It includes costs to local, state, and federal governmental entities, as well as private individuals.

Methodology

There is not one simple "price" for the death penalty; rather, there are multiple costs, depending on individual definitions. The Office of Research approached this project with the following guiding question: "How much does the death penalty in Tennessee cost and how does that compare to other first-degree murder cases?" As simple as it sounds, this question evolved into a complex assessment of Tennessee's judicial system. Analysts found that there are multiple stages in capital cases, each stage overlapping in an effort to insure various

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

constitutional guarantees. While this discussion of methodology is broad, Appendix B contains a detailed description of the methodology employed.

Analysts found many easily determinable **fixed costs** related to the death penalty in Tennessee, which are dedicated solely to capital punishment. State and local offices devoted to capital cases and the cost of execution supplies represent fixed costs of the death penalty. Appendix C contains a complete list of fixed costs.

More difficult to estimate are the **variable costs** for which there is no itemized bill, such as attorney and judge preparation time. Apparently, no state or local agency tracks attorney or judge time related to cases, with the exception of the Administrative Office of the Court's (AOC) Indigent Defense Fund. Therefore, close estimates illustrate, albeit often imperfectly, the costs of capital cases. The AOC requires that private, appointed attorneys account for all time spent on cases prior to reimbursement, so these attorney costs are readily available. (See Appendix C.)

In addition to fixed and variable costs of capital cases, a thorough analysis must consider **opportunity costs** resulting from the death penalty in Tennessee. Resources, such as attorney and courtroom time, used in capital cases are not available for other cases. For example, capital cases may cause court dockets to run behind schedule because they take so much time. Judges and attorneys make the same salary, regardless of the type of case; however, a capital case may delay other cases.

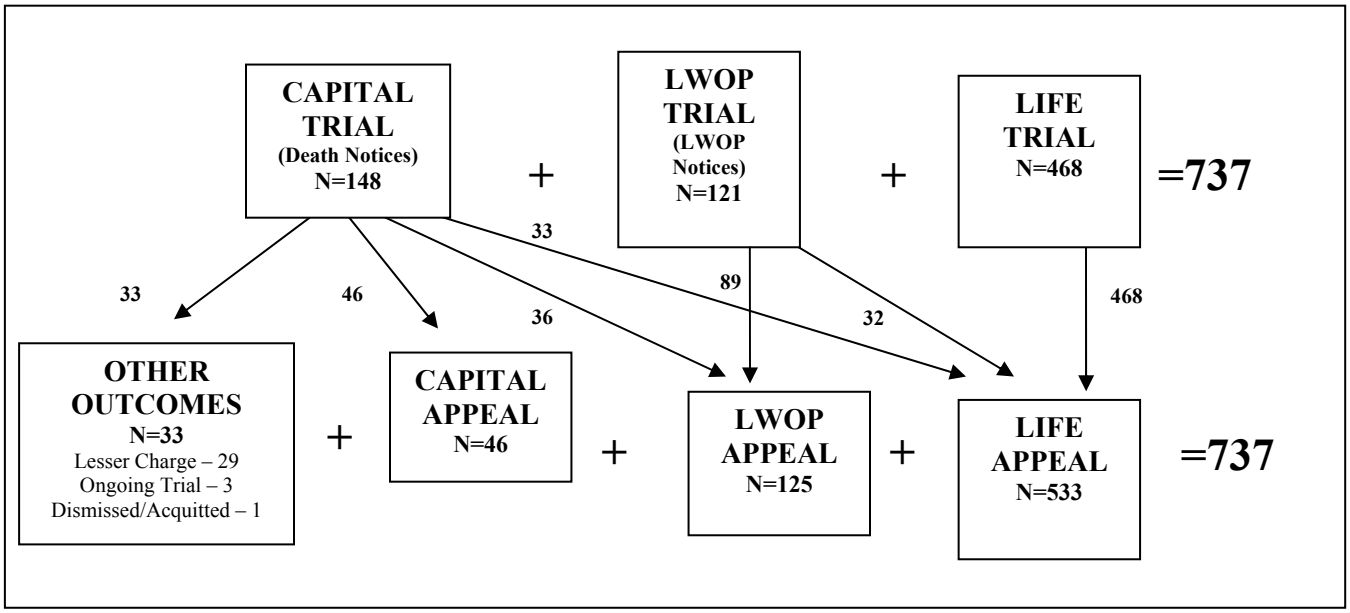
Finally, any discussion pertaining to the costs of capital punishment must include costs associated with all capital cases, not just those defendants who end up on death row. For example, from January 2003 to April 2003, prosecutors sought the death penalty in approximately 33 cases, but only six of those defendants received a death sentence. In this example, the total cost of the death penalty includes costs for the six defendants who received death sentences as well as the remaining 27 trials in which the defendant was tried as a capital offender, but received a lesser sentence.

Using data obtained from the AOC and the Department of Correction (TDOC), Office of Research staff determined that Tennessee had 737 death penalty, life without parole, and life with parole cases from January 1, 1993 through April 2003. Analysts then determined the number of each type of case in the appeals process. Exhibit 1 illustrates the six groups and the total population for each.

Analysts selected a statistically random sample that proportionally represented the total population of 737 first-degree murder cases. The population consisted of 20.1 percent capital cases, 16.4 percent life without parole cases, and 63.5 percent life with parole cases. Sampling was in accordance with the proportion of cases that comprised the population. Analysts selected a conservative sample using a 95 percent confidence interval due to the large number of variables present. The original sample was composed of 250 cases from the total population of 737: 53 capital cases, 38 life without parole cases, and 159 life with the possibility of parole cases. The composition of the sample changed slightly based on information gathered during survey data collection. The Office of Research received no

information (from any source) on 14 of the subjects, and analysts removed them from the data analysis to avoid negatively skewing the results. The total sample included 240 people.

Exhibit 1: Population Groups of First-Degree Murder Cases, January 1, 1993 through April 1, 2003



Source: Office of Research Data Analysis, 2003.

Analysts used surveys to measure case-specific information, such as attorney time and office resources. The surveys were sent to all parties involved with individual cases in the sample: the respective public defenders (and assistants), district attorneys (and assistants), trial court judges, circuit and criminal court clerks, the Tennessee Attorney General's Office, the Administrative Office of the Courts (for defendants that received Indigent Defense Funds), and the Federal Public Defender's Office. Analysts sent only 61 surveys to Public Defenders. Private counsel appointed by judges represented the remainder of the subjects in the sample. The Administrative Office of the Court's Indigent Defense Fund compensates these attorneys. The AOC provided analysts directly with the costs when relevant. Analysts have reported survey data only in aggregate form and individual responses are confidential. The following table describes survey response rates.

Exhibit 2: Office of Research Survey Response Rate

	Survey Returned		Survey not Returned		Total	
Agency	Number	Percent	Number	Percent	Number	Percent
Court Clerks	212	88%	28	12%	240	100%
Trial Judges	94	39%	146	61%	240	100%
District Attorneys (lead counsel)	111	46%	129	54%	240	100%
Public Defenders (lead counsel)	35	57%	26	43%	61	100%
State Attorney General	156	65%	84	35%	240	100%
Total	***608***	***60%***	***413***	***40%***	***1,021***	***100%***

Source: Office of Research Survey Data.

The findings and recommendations of this report are based on:

- review of relevant laws, regulations, policies, and procedures
- a literature review of relevant articles and research
- examination of other states' and groups' studies on the cost of the death penalty
- interviews of representatives from all entities involved with first-degree murder cases
- review of budgetary documents
- review of data from the following sources:
  - Administrative Office of the Courts
  - Tennessee Department of Correction
  - Tennessee Public Defender's Conference
  - Tennessee Office of the Post Conviction Defender
  - Tennessee Attorney General's Office
  - Tennessee Board of Probation and Parole
  - Tennessee Bureau of Investigation
  - Tennessee Department of Personnel
- surveys of the following entities:
  - District Public Defenders
  - District Attorneys General
  - Trial Court Judges
  - Court Clerks
  - Staff of the Tennessee Attorney General's Office
- Robert Glen Coe case information

A Cautionary Note

Capital cases are typically lengthy and frequently take years to complete the appellate process. Office of Research staff selected cases dating back 10 years to insure that the sample included cases near completion. Data collection required attorneys and judges to recollect information regarding time and resources on some cases up to 10 years old. This was often difficult and sometimes impossible because public attorneys and judges keep no time records. Additionally, because of turnover, in many cases the respective offices no longer employed staff who worked on the sampled cases. Therefore, some information included in

the study, particularly attorney and judge time spent on cases, represents estimates at best. Analysts purposely selected a large sample to compensate for potential data problems.

Background

How have the courts viewed capital punishment?

In a 1972 landmark case, *Furman v. Georgia* (408 U.S. 238), the United States Supreme Court ruled that the death penalty, as it was administered, violated the Eighth and Fourteenth Amendments to the United States Constitution. The Court held that the administration of the death penalty was "cruel and unusual punishment." As a result, 40 states, including Tennessee, commuted the sentences of 629 inmates and declared their states' death penalty statutes null and void.[2]

The Court held that the discretionary statutes resulted in an arbitrary application of the death penalty, and was discriminatory. Because statutes did not uniformly impose the death penalty on certain offenses, the Court considered it a "capricious" punishment, applied only to a handful of defendants. This violates the constitutional protection against cruel and unusual punishment and the guarantee of due process.[3]

The United States Supreme Court approved death penalty procedural reforms in *Gregg v. Georgia,* allowing states to reinstate capital punishment in 1976. Subsequently, the State of Georgia enacted several changes in the adjudication of death penalty cases to make the death penalty a constitutional form of punishment. First, the state adopted a bifurcated trial system, which created separate deliberations for the guilt and penalty phases in capital cases. The changes also required the introduction of aggravating and mitigating circumstances in determining sentencing. Barron's law dictionary defines aggravating circumstances as "special circumstances tending to increase the severity of the crime charged or the severity of the punishment," and mitigating circumstances as "circumstances that do not exonerate a person from the act with which he is charged, but which reduce the penalty connected to the offense, or the damages arising from the offense." The state also initiated automatic appeals and a proportionality review. As defined by Black's Law Dictionary, a proportionality review seeks to insure that the death penalty is administered "in a rational, non-arbitrary, and even-handed manner, fairly and with reasonable consistency."

In 1977, in *Coker v. Georgia*, the United States Supreme Court considered crimes for which the death penalty is appropriate. The Court held that the death penalty is an unconstitutional punishment for adult rapes that do not result in the death of the victim. Because Tennessee's statute included rape as an offense punishable by death, the Tennessee Supreme Court held the state statute unconstitutional.

As a result, the Tennessee General Assembly adopted new legislation in 1977, which is the basis for the current law, *Tennessee Code Annotated* § 39-13-202. However, new issues

---

[2] Administrative Office of the Courts, *Capital Punishment in Tennessee: A Brief Timeline History and Overview of the Legal Process*, http://www.tsc.state.tn.us/geninfo/publications/dpbrochure.pdf (accessed September 9, 2002).

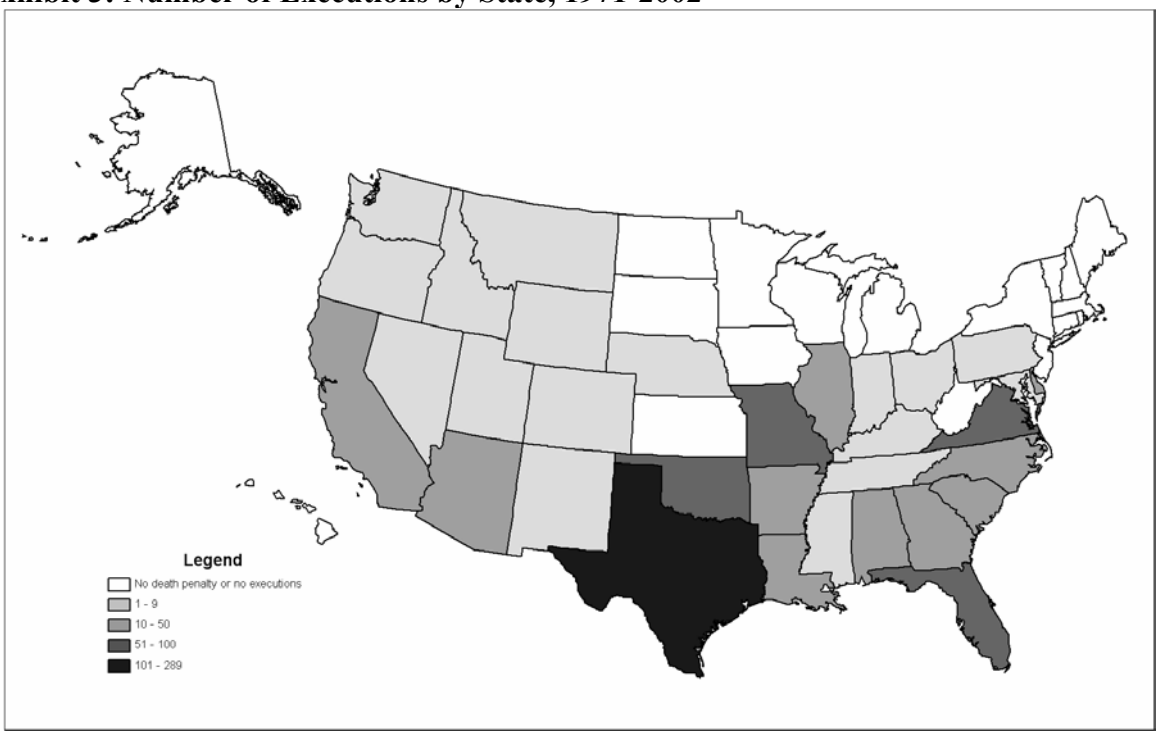
[3] Furman v. Georgia, 408 U.S. 238 (1972).

raised by case law often necessitate amendment of the statute. For example, courts have since found that it is against the law to sentence a mentally retarded person to the death penalty.[4]

How many other states have the death penalty?

As of 2002, 37 states had the death penalty; however, six have had no executions since 1976. Those without are Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, New Hampshire, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. The following map illustrates the frequency of capital punishment by state between 1971 and 2002. Tennessee has had only one execution since the reinstatement of the death penalty statute in 1977.

Exhibit 3: Number of Executions by State, 1971-2002



Source: United States Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Capital Punishment, 2002,* November 2003, p. 9.

[4] Atkins v. Virginia, 536 U.S. 304, 321 (2002) and Van Tran v. Tennessee, 66 S.W. 3d 7905 (2001).

Exhibit 4: Prisoners under Sentence of Death by State

State	Number of Death Row Inmates		State	Number of Death Row Inmates
Alabama	194		Montana	6
Alaska	No death penalty		Nebraska	7
Arizona	127		Nevada	88
Arkansas	41		New Hampshire	No death penalty
California	625		New Jersey	15
Colorado	6		New Mexico	2
Connecticut	7		New York	6
Delaware	19		North Carolina	214
Florida	380		North Dakota	No death penalty
Georgia	116		Ohio	207
Hawaii	No death penalty		Oklahoma	110
Idaho	21		Oregon	31
Illinois	7		Pennsylvania	241
Indiana	39		Rhode Island	No death penalty
Iowa	No death penalty		South Carolina	77
Kansas	7		South Dakota	4
Kentucky	38		Tennessee	95
Louisiana	92		Texas	453
Maine	No death penalty		Utah	11
Maryland	15		Vermont	No death penalty
Massachusetts	No death penalty		Virginia	29
Michigan	No death penalty		Washington	12
Minnesota	No death penalty		West Virginia	No death penalty
Mississippi	69		Wisconsin	No death penalty
Missouri	69		Wyoming	2

Source: NAACP Legal Defense and Educational Fund, Inc., The Criminal Justice Project, *Death Row U.S.A.,* Summer 2003, p. 27.

Who can Tennessee sentence to death?

Tennessee Code Annotated § 39-13-202(a) defines first-degree murder as:

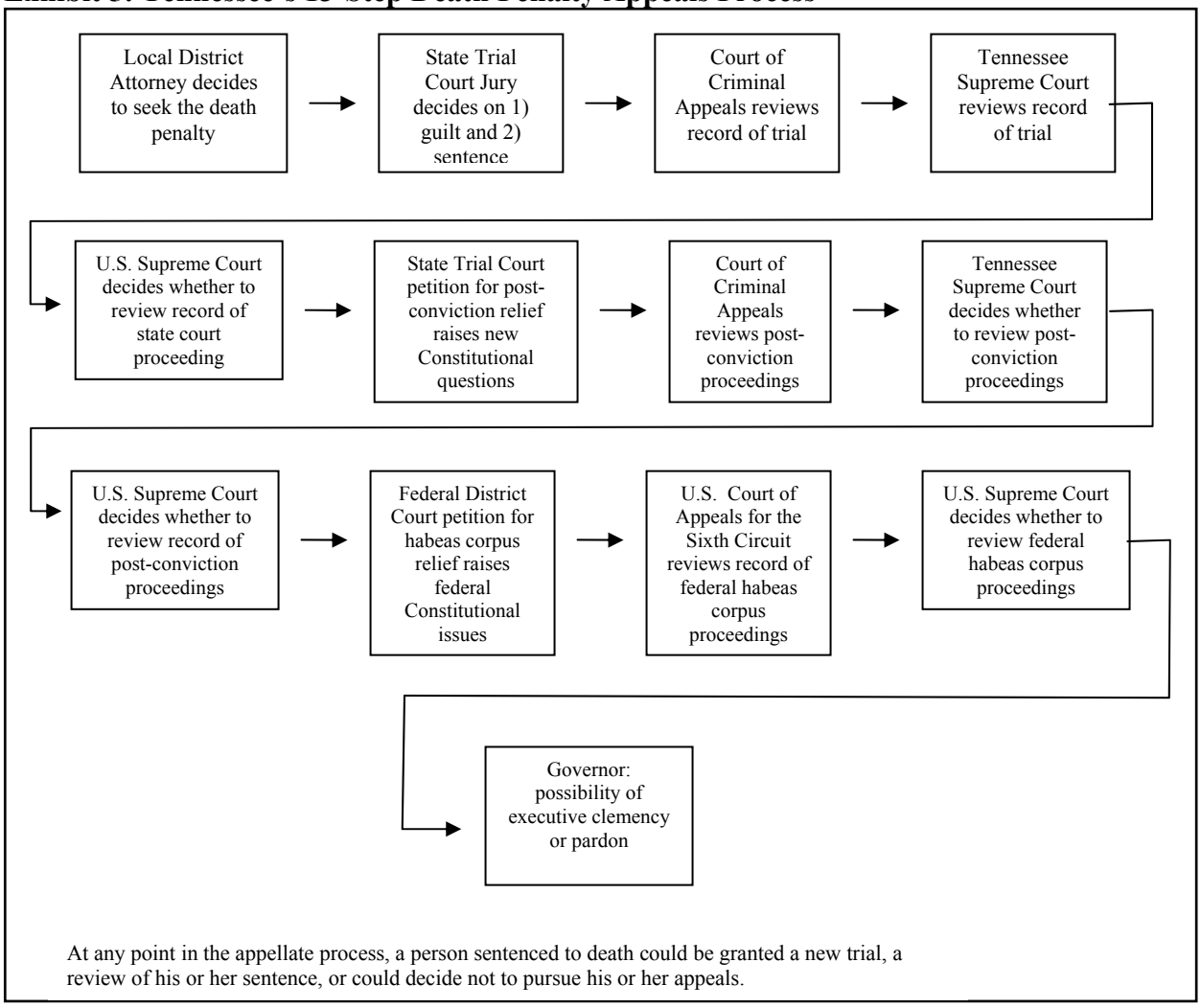
> (1) A premeditated and intentional killing of another; (2) A killing of another committed in the perpetration of or attempt to perpetrate any first-degree murder, arson, rape, robbery, burglary, theft, kidnapping, aggravated child abuse, aggravated child neglect or aircraft piracy; or (3) A killing of another committed as the result of the unlawful throwing, placing or discharging of a destructive device or bomb.

Tennessee Code Annotated § 39-13-202(c) grants the state the authority to punish anyone convicted of first-degree murder by death, life imprisonment without parole, or life imprisonment with the possibility of parole. However, such individuals may receive lesser punishments. Public Chapter 473 enacted life without parole, which has been a sentencing option only since 1993. At least one of 15 aggravating factors must be present to seek the death penalty for first-degree murder. At the trial level, the District Attorney General elects whether to pursue the death penalty in a first-degree murder case. He or she also considers

any mitigating circumstances for the defendant. Appendix E lists statutory aggravating and mitigating factors.

Why do death penalty cases take so long in Tennessee?
According to Tennessee Attorney General, Paul G. Summers, Tennessee's 13-step appellate death penalty process is "one of the most lengthy criminal appeals processes in the United States." The following chart provides a general overview of Tennessee's appellate process. Analysts did not include each specific motion and hearing on this broad outline of the legal process.

Exhibit 5: Tennessee's 13-Step Death Penalty Appeals Process



Source: Administrative Office of the Courts, *Capital Punishment in Tennessee: A Brief Timeline History and Overview of the Legal Process*.

A defendant may retain private counsel, but the majority of Tennessee defense counsel is court-appointed. Ideally, the judicial district's elected public defender represents the defendant. However, public defenders cannot represent some defendants, because of conflicts of interest. Additionally, the public defender (or any of his or her staff) may not meet the capital case standards for representation listed in Tennessee Supreme Court Rule 13. In these

cases, the AOC maintains a list of qualified private attorneys available for appointment by the court. The Indigent Defense Fund finances these attorneys.
Within the legal guidelines, the District Attorney has wide latitude to decide whether to seek the death penalty. When the District Attorney takes the case to trial, a jury decides whether the defendant is guilty, and if guilty, the appropriate sentence. There are two separate phases of the trial: guilt and sentencing. In the first phase, the jury hears evidence from the prosecution and defense to determine the defendant's guilt or innocence. In the sentencing phase, the jury again hears testimony from the prosecution and defense to determine the appropriate sentence.

Pursuant to TCA Section 39-13-206(a), the defendant has a right to appeal directly to a Tennessee Court of Criminal Appeals, which automatically reviews the trial record. If the Court of Appeals affirms the conviction and death sentence, the Tennessee Supreme Court automatically reviews the trial record. Automatic appeal is the primary difference between the appellate processes for capital cases and non-capital cases. Both types of cases have a right to appeal, but the Tennessee Supreme Court may decide not to hear non-capital cases.

The case then proceeds to the United States Supreme Court, which decides whether to review the record of the state court proceeding; the U. S. Supreme Court review is not automatic. If the U.S. Supreme Court does not provide any relief, the defendant may initiate post conviction review in the state trial court, typically arguing violation of constitutional rights. For example, the Sixth Amendment to the United States Constitution guarantees defendants the right to effective counsel.

The Office of the Post Conviction Defender, as mandated in TCA Section 40-30-205(g), has the legal duty to represent indigent defendants who have been convicted of capital offenses. In some instances, private attorneys handle post conviction appeals. Conflicts of interest may prevent post conviction attorneys from assignment. This matter also follows the appeals process to the U.S. Supreme Court; however, unlike the automatic review by the Tennessee Supreme Court in direct appeal, all post conviction appeals are discretionary.

If the defendant is unsuccessful in post conviction appeals, he or she may initiate habeas corpus proceedings in federal district court, alleging violation of federal constitutional rights. The defendant may then appeal to the Sixth Circuit Court of Appeals, then to the U.S. Supreme Court. The case finally goes to the Board of Probation and Parole and then to the Governor with a request for executive clemency or pardon as allowed for in *Tennessee Code Annotated* § 40-27-101.

Who is on Tennessee's death row and what institution houses them?
In February 2004, the Tennessee Department of Correction reported 97 people on death row. Of the 97, two are females. Demographically, 55 inmates are white, 39 African American, one Hispanic, one Asian, and one Native American. According to the department, Tennessee death row inmates spend an average of 13.22 years on death row. The total death row population includes defendants sentenced as far back as 1977, when Tennessee reinstated the death penalty. All of Tennessee's male death row inmates are housed at Riverbend Maximum

Security Institution, with the exception of two housed at Brushy Mountain. The two females are housed at Tennessee Prison for Women.

Tennessee Code Annotated § 40-23-114(a), enacted in March 2000, specified that all inmates sentenced to death after January 1, 1999, shall receive lethal injection. Those inmates sentenced prior to January 1, 1999, may request electrocution in lieu of lethal injection. The minimum age authorized for capital punishment in Tennessee is 18. The state may not seek the death penalty for defendants that are under the age of 18. Exhibit 6 illustrates the frequency of executions across the country since 1976, when some states reinstated the death penalty.

Exhibit 6: Execution Breakdown by State, 1976 - 2003

State	Number of Executions		State	Number of Executions
Alabama	27		Montana	2
Alaska	No death penalty		Nebraska	3
Arizona	22		Nevada	9
Arkansas	24		New Hampshire	No death penalty
California	10		New Jersey	0
Colorado	1		New Mexico	1
Connecticut	0		New York	0
Delaware	13		North Carolina	23
Florida	56		North Dakota	No death penalty
Georgia	33		Ohio	8
Hawaii	No death penalty		Oklahoma	64
Idaho	1		Oregon	2
Illinois	12		Pennsylvania	3
Indiana	11		Rhode Island	No death penalty
Iowa	No death penalty		South Carolina	28
Kansas	0		South Dakota	0
Kentucky	2		Tennessee	1
Louisiana	27		Texas	305
Maine	No death penalty		Utah	6
Maryland	3		Vermont	No death penalty
Massachusetts	No death penalty		Virginia	88
Michigan	No death penalty		Washington	4
Minnesota	No death penalty		West Virginia	No death penalty
Mississippi	6		Wisconsin	No death penalty
Missouri	60		Wyoming	1

Source: NAACP Legal Defense and Educational Fund, Inc., The Criminal Justice Project, *Death Row U.S.A.*, Summer 2003, p. 9.

Analysis and Conclusions

This report makes conclusions in five general areas:

1. costs of Tennessee's first-degree murder cases,
2. incarceration,
3. administering capital punishment,
4. the indirect effects of capital punishment, and
5. administrative issues.

Costs of First-Degree Murder Cases in Tennessee

Overall, first-degree murder cases in which the prosecution has filed a notice to seek the death penalty cost more than life without parole and life with the possibility of parole cases. Death penalty cases cost more because:

- they are more complex;
- more agencies and people are involved in the adjudication;
- both the prosecution and defense spend more time in preparation; and
- the appellate process has more steps.

Most parties involved in capital cases largely attribute the difference in cost to the greater complexity of capital cases. Anecdotal information suggests that attorneys for both sides file more motions in capital cases, which in part leads to more documents and case records. Capital cases involve more legal issues than non-capital cases, such as proving aggravating factors and further, weighing them against mitigating circumstances.

More agencies and people are involved with death penalty cases, which contribute to the higher cost. Different attorneys defend capital defendants at trial, post conviction, and during federal habeas corpus appeals. The law entitles capital defendants to two attorneys, while non-capital defendants typically have only one. Prosecutorial staff also differs at each stage in the appellate process. Various courts hear all types of cases, regardless of sentence sought. However, assistance is available for judges on capital cases. Tennessee has five capital case attorneys assigned to judges across the state. Anecdotal information indicates that all parties involved with first-degree murder cases have additional staff assistance, but more so in capital cases: investigators, administrative assistants, social workers, paralegals, and victim-witness coordinators.

Because they are more complicated, both the prosecution and defense counsel spend more time preparing for capital cases at all levels of the adjudication process. Survey data indicate that prosecutors and public defenders spend more time on capital cases than non-capital first-degree murder cases.

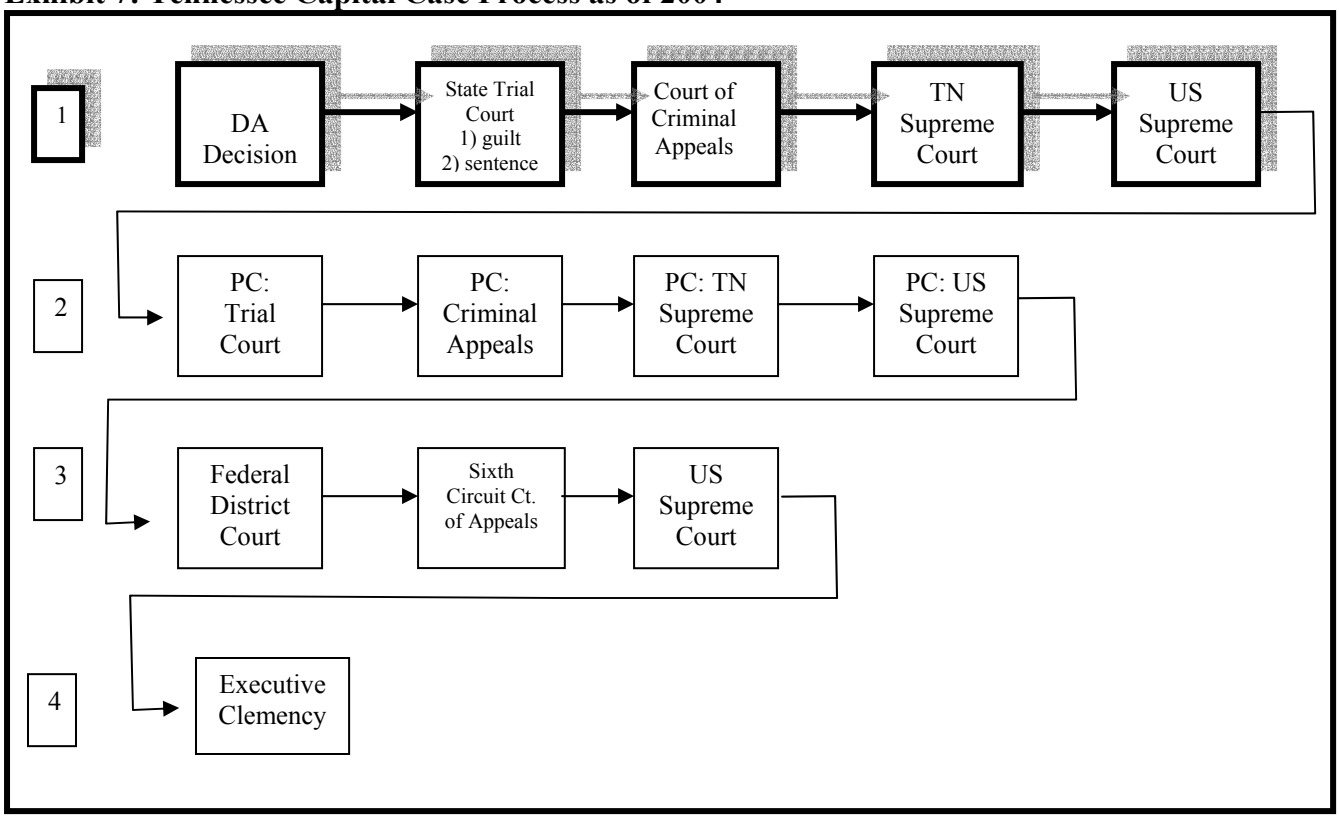
Death penalty cases have a more stringent appellate process than non-capital first-degree murder cases. The Tennessee Supreme Court automatically reviews all death penalty cases affirmed by the Court of Criminal Appeals, but not non-capital first-degree murder

cases. Additionally, interviews indicate that courts hear capital cases on discretionary appeal more often than non-capital cases because of the seriousness of the punishment.

Because cost and time records were not maintained, the Office of Research was unable to determine the *total, comprehensive cost* of the death penalty in Tennessee. However, the analysis yields cost information about several components of capital cases and non-capital first-degree murder cases in Tennessee that shows that death penalty cases cost more than non-capital first-degree murder cases. Cost data does not exist in many state and local agencies across the state. When cost information was not available, analysts presented qualitative descriptions of components to illustrate the procedural issues involved in each stage.

Exhibit 7 illustrates chronological order of the Tennessee appellate process separated by phase: 1) trial and direct appeal; 2) post conviction; 3) federal habeas corpus; and 4) executive clemency. A flowchart introduces each phase in bold type. The discussions include information about all three types of cases: capital, life without parole, and life with the possibility of parole. Additionally, the discussion for each stage includes information about all agencies and/or people involved with that stage and the associated costs.

Exhibit 7: Tennessee Capital Case Process as of 2004



Source: Administrative Office of the Courts, *Capital Punishment in Tennessee: A Brief Timeline History and Overview of the Legal Process*.

District Attorney Decision and Defense Preparation

Tennessee District Attorneys General exercise considerable discretion when deciding which punishment to seek for individuals accused of first-degree murder: the death penalty, life without parole, or life with the possibility of parole. Prosecution, as defined by Barron's Law Dictionary, is "the act of pursuing a lawsuit or criminal trial." Prosecutors are a key figure in the criminal justice system: they decide which statutes are enforced, and the extent of the enforcement. They set the tone for both the justice system and society in general by deciding who is prosecuted and how. Further, case selectivity is crucial in that prosecutors must identify and select only a minimal number of cases that the judicial system is capable of handling.

Prosecutors are not consistent in their pursuit of the death penalty. Some prosecutors interviewed in this study indicated that they seek the death penalty only in extreme cases, or the "worst of the worst." However, prosecutors in other jurisdictions make it a standard practice on every first-degree murder case that meets at least one aggravating factor. Still, surveys and interviews indicate that others use the death penalty as a "bargaining chip" to secure plea bargains for lesser sentences. Many prosecutors also indicated that they consider the wishes of the victim's family when making decisions about the death penalty.

All prosecutors indicated that some first-degree murder cases are clearly capital cases, such as cases with multiple victims or situations in which the act was particularly brutal and cruel. Tennessee Rules of Criminal Procedure require district attorneys general to submit written notice of intent to seek the death penalty, specifying relevant aggravating factors. The prosecution submits the notice to the court and defense counsel no less than 30 days prior to trial, as required by Tennessee Rules of Criminal Procedure (Rule 12.3).

The sample used in this analysis illustrates the variation in first-degree murder cases across the state. (See Exhibit 8.) The sample of 240 first-degree murder cases is concentrated primarily in Tennessee's four urban areas (highlighted below). Nearly half (44.7 percent) of the capital cases in the sample originated in the thirtieth judicial district, Shelby County. The majority of life without parole cases (39.5 percent) originated in Davidson County.

Exhibit 8: Distribution of Cases in Sample by Judicial District

	Case Type					
Judicial District	**Capital Cases**		**Life Without Parole Cases**		**Life With Parole Cases**	
	Number	**Percent**	**Number**	**Percent**	**Number**	**Percent**
1	1	2.1%	0	0%	4	2.6%
2	1	2.1%	0	0%	5	3.2%
3	1	2.1%	0	0%	0	0%
4	0	0%	1	2.6%	5	3.2%
5	2	4.3%	0	0%	1	.6%
6 (Knox County)	1	2.1%	1	2.6%	14	9%
7	0	0%	0	0%	0	0%
8	1	2.1%	1	2.6%	0	0%
9	0	0%	0	0%	1	.6%
10	4	8.5%	2	5.3%	2	1.3%
11 (Hamilton County)	1	2.1%	5	13.2%	9	5.8%
12	0	0%	3	7.9%	3	1.9%
13	0	0%	0	0%	6	3.9%
14	0	0%	0	0%	1	.6%
15	0	0%	0	0%	4	2.6%
16	0	0%	0	0%	5	3.2%
17	1	2.1%	0	0%	0	0%
18	0	0%	0	0%	3	1.9%
19	0	0%	2	5.3%	4	2.6%
20 (Davidson County)	3	6.4%	15	39.5%	24	15.5%
21	1	2.1%	0	0%	2	1.3%
22	0	0%	1	2.6%	3	1.9%
23	0	0%	0	0%	3	1.9%
24	0	0%	1	2.6%	5	3.2%
25	1	2.1%	1	2.6%	7	4.5%
26	4	8.5%	1	2.6%	4	2.6%
27	1	2.1%	1	2.6%	1	.6%
28	1	2.1%	1	2.6%	1	.6%
29	2	4.3%	0	0%	1	.6%
30 (Shelby County)	21	44.7%	2	5.3%	35	22.6%
31	0	0%	0	0%	2	1.3%
Total	***47***	***100.0%***	***38***	***100%***	***155***	***100%***

Sources: Office of Research data analysis, Administrative Office of the Courts, Felony Judgment Database, 1993-2003.

Prosecutors confront a serious decision when considering capital punishment. The District Attorney General for the Twentieth Judicial District (Davidson County) developed *Death Penalty Guidelines* in 2001 to "establish a professional benchmark and to assist in the exercise of prosecutorial discretion." The guidelines include:

- The assigned assistant district attorney shall review every case indicted for first-degree murder. The assistant will determine if any statutory aggravating factors justify legally seeking the death penalty or life without parole. If not, the assistant completes a "First-Degree Murder Evaluation Form" indicating neither death nor life without parole is legally possible, and forwards the form to the District Attorney.
- If one or more aggravating factors are arguably present in the case, the assistant shall complete a "First-Degree Murder Evaluation Form," discuss punishment options with the team leader, consult the victim's family, and discuss the case with the District Attorney.
- The assigned attorney must contact defense counsel if the death penalty remains an option after the initial review. The prosecution then requests mitigating information from the defense counsel to assist in making the final punishment decision.
- Defense counsel has an opportunity to provide mitigation and plea bargain options are considered during the review process.
- The District Attorney will personally review the case and mitigating evidence before making a final decision. The District Attorney then notifies the court and defense counsel if he intends to seek the death penalty.
- The office shall decide to seek the death penalty as promptly as possible to provide ample notice to the court and defense counsel, who should have ample time for preparation.

Representative Rob Briley and Senator Steve Cohen introduced House Bill 409 (Senate Bill 441) during the 103rd Tennessee General Assembly, entitled "The Capital Punishment Equal Protection Act of 2003." The proposed legislation would have applied to judicial districts statewide and established a decision-making protocol for first-degree murder cases. The bill additionally required district attorneys to maintain a record of defendant and victim demographic information for death penalty cases. The bill, however, did not receive legislative consideration.

Meanwhile, defense attorneys must begin to prepare their cases, often without knowing the punishment the prosecutor intends to seek. Many defense attorneys interviewed indicated that they have to start preparing for the death penalty before the prosecution has filed a death notice to have adequate time. One defense attorney stated that he prepares cases as thoroughly as possible before the prosecution has decided on the punishment. He believed that his preparation often deters prosecutors from seeking the death penalty. This strategy may save future costs at the trial and appellate levels, but it is impossible to account for the resources spent during preparation.

State Trial Court

Capital *trials* cost more than life without the possibility of parole and life with the possibility of parole trials. Capital trials take longer than non-capital first-degree murder trials. Attorneys for both the prosecution and defense file more motions and raise more issues in capital trials than non-capital first-degree murder trials. They generally request more forensic tests, which results in a much greater expense. Additionally, capital trials require more expert testimony than other non-capital first-degree murder trials. Both the prosecution and defense may call a number of investigators and forensic specialists to testify throughout the trial, depending on their individual roles in the investigation. Exhibit 9 illustrates the differences in the average trial costs for each case type.

Exhibit 9: Comparison of Average Trial Costs per Case

	Capital Cases	Life Without Parole Cases	Life With Parole Cases
Public Defender	$14,890	NA[5]	$9,311
Prosecution	$11,427	$6,904	$8,923
Judge	$11,318	$12,008	$8,005
Other[6]	$9,156	$12,582	$5,383
Total	***$46,791***	***$31,494***	***$31,622***

Source: Office of Research survey data, 1993-2003.

Capital and life without parole jury trials have two separate phases: 1) guilt/innocence, and 2) sentencing, which lead to increased costs. *Tennessee Code Annotated* § 39-13-204(a) and 39-13-207(a) stipulate that the jury must first determine a defendant's guilt or innocence. If the jury returns a guilty verdict, a sentencing phase follows in which both parties present evidence to establish and rebut aggravating factors and mitigating evidence. The state must prove beyond a reasonable doubt the existence of one or more aggravating circumstances to impose a sentence of death or life without parole.

In capital cases, judges instruct the juries to consider sentences of life without parole, and life with the possibility of parole if the jury is unable to agree on a death sentence. If the jury still cannot agree on a sentence after further deliberation, the trial judge dismisses the jury and the judge imposes a sentence of life with the possibility of parole. In a life without parole trial, if the jury determines no aggravating circumstances exist, the court sentences the defendant to life with the possibility of parole. If the jury determines the state has proven one or more aggravating factors beyond a reasonable doubt and the aggravating factors outweigh the mitigating factors, the jury sentences the defendant to either life without the possibility of parole or life with the possibility of parole. If the jury ultimately cannot agree on the punishment, the judge dismisses the jury and sentences the defendant to life with the possibility of parole.

In both capital and life without parole trials, judges cannot instruct the jury prior to deliberations about the result of failing to agree on a punishment. Some officials interviewed

[5] The randomly selected sample included only one life without parole case defended by a public defender. The selected public defender did not respond to the Office of Research survey.

[6] "Other" includes witness fees, jury per diem, lodging, and food expenses.

explain the preparation time for the sentencing phase of capital cases is often greater than for non-capital cases because of the severity of the punishment. They must prepare for both phases of the trial, including gathering extensive mitigating information about the defendant.

On average, capital cases take longer to process from the date of offense to the date of sentence than other cases. Exhibit 10 analyzes the difference in days measured from the date of the offense to the sentence date. The difference in the number of days between capital cases and life without the possibility of parole cases is approximately 188 days. While it is not possible to determine the eventual charge at the offense date, this method follows a case from the arrest until the eventual sentence and includes cases in which a person pleads to a lesser charge prior to trial.

Exhibit 10: Average Number of Days from Offense Date to Sentence Date

	Average Days
Type of Case	
Capital	847
Life Without Possibility of Parole	659
Life	665

Source: Office of Research analysis of information from the Administrative Office of the Courts, 1993-2003.

Tennessee employs five capital case attorneys to assist trial judges with capital cases. In 1996, the Tennessee Supreme Court requested and the General Assembly funded the capital case attorney program, part of several initiatives to limit judicial delays. The state funds one attorney for each of the five Supreme Court Judicial Districts. The trial judges in each district hire and supervise the attorneys. The attorneys may assist judges in capital trial and post conviction proceedings and some of their responsibilities include attendance at pretrial hearings, assistance with drafting jury questionnaires, attendance at hearings regarding motions for new trials, and drafting orders granting or denying the motion. According to the Tennessee Administrative Office of the Courts, the salary range for the capital case attorneys in fiscal year 2002-03 was $42,156 to $75,096. Capital case attorneys additionally receive benefits calculated on 30 percent of their salary. Office of Research staff did not determine the cost of the attorneys for cases in this study. The state designed the program to eliminate court delays, potentially resulting in long-term cost savings, but it also represents an additional cost to processing capital cases.

In addition to Public Defenders, judges appoint some private attorneys to represent indigent defendants. Appointed attorneys represent more defendants than public attorneys, in all three types of cases.

Exhibit 11: Defendant Representation

	Trial Type					
	Capital Cases		**Life Without Parole Cases**		**Life With Parole Cases**	
Type of Representation	Number	Percent	Number	Percent	Number	Percent
Retained by defendant	7	15%	10	26%	43	28%
Appointed	22	47%	27	71%	58	38%
Public Defender	12	26%	1	3%	48	31%
Unknown	6	13%	0	0%	6	4%
Total	*47*	*100%*	*38*	*100%*	*155*	*100%*

Sources: Administrative Office of the Courts Felony Judgment Database and Office of Research Survey data, 1993-2003.

Tennessee Supreme Court Rule 13 entitles all capital defendants to two attorneys. Further, Rule 13 specifies qualifications that both attorneys must meet. Rule 13 stipulates qualifications and procedures for the appointment, compensation, and the payment of reasonable expenses for indigent defendants. The rule includes both capital and non-capitally charged defendants, and allows for representation during the trial and appellate proceedings. The requirements for lead counsel in capital cases exceed those for non-capital cases. Exhibit 12 lists required attorney qualifications for both capital and non-capital cases.

Exhibit 12: Qualifications for Lead Counsel in Capital and Non-Capital Cases

Capital Cases (Rule 13, 3c)	**Non-Capital Cases** (Rule 13, 2a)
• Member of the Tennessee bar in good standing; • Regularly represented defendants in criminal jury trials for at least three years; • Minimum of 12 hours of specialized training in representing defendants charged with a capital offense; *and* • Have at least *one* of the following: - Experience as lead counsel in at least one capital jury trial; - Experience as co-counsel in at least two capital trials; - Experience as co-counsel in a capital trial and lead or sole counsel in at least one murder jury trial; or - Experience as lead counsel or sole counsel in at least three murder jury trials; or one murder jury trial and three felony jury trials.	• Court shall be satisfied that attorney is capable of providing defendant with effective assistance of counsel

Source: Tennessee Supreme Court Rule 13.[7]

The state compensates appointed lead and co-counsel a higher hourly rate in capital cases than lead counsel in non-capital cases. Exhibit 13 compares the payments for

[7] The above chart illustrates Rule 13 qualifications prior to a recent June 1, 2004, amendment, which modified attorney qualifications. For example, the rule as amended requires a minimum of six hours of specialized training and the completion of six hours every two years instead of 12 hours as listed. Analysts did not incorporate the amended text into this review, as the sampled cases occurred prior to the changes.

privately appointed lead counsel in capital and non-capital trials. The higher hourly rate for capital cases compared to non-capital cases contributes to the higher costs associated with capital trials. Additionally, per case expenditure allowances do not apply in capital cases, whereas Rule 13 enumerates maximum expenditures in non-capital cases. There are, however, some exceptions specified in the rule that allow judges to increase non-capital attorney compensation.

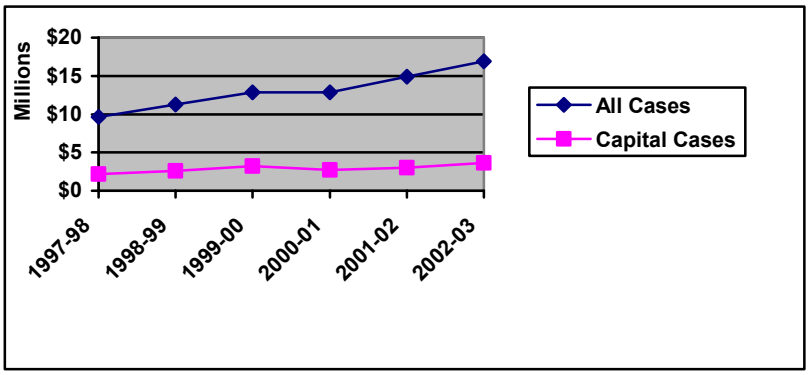
Exhibit 13: Compensation to Appointed Lead Counsel in Capital and Non-Capital Trials, as specified in Rule 13

	Capital Cases	Non-Capital Cases
In-court	$100 per hour	$50 per hour
Out-of-court	$75 per hour	$40 per hour

Source: Tennessee Supreme Court Rule 13.

The AOC maintains a list of private attorneys who meet Supreme Court Rule 13 standards. The vast majority of defendants charged with first-degree murder in Tennessee are indigent. Judges appoint private attorneys when the respective public defender does not meet Rule 13 qualifications, or are not "death qualified." They may appoint private counsel when a conflict of interest exists, such as if the public defender already represents a codefendant in the case. Exhibit 14 illustrates indigent defense expenditures since 1997-98.

Exhibit 14: Tennessee Indigent Defense Spending, 1997-2003



Source: Administrative Office of the Courts Indigent Defense Fund Data, 1997-2003.

Nearly half (47 percent) of the capital defendants in the Office of Research sample had private attorneys appointed by the court. Appointed attorneys also represented the majority (71 percent) of life without parole defendants in the selected cases.
Administrative Office of the Courts' data for life without parole cases reflects information from only one case; therefore, the data does not accurately reflect the entire population. Appointed attorneys represented life with the possibility of parole defendants equally across sample cases. Exhibit 15 illustrates the average costs of indigent defense in Tennessee for

capital, life without parole, and life with the possibility of parole cases. The AOC indigent defense data for life without parole cases reflects information from one case; therefore, the data does not accurately reflect the entire population.

Exhibit 15: Tennessee Indigent Defense Costs

	Average of Capital Cases	Life Without Parole Case	Average of Life With Parole Cases
Lead Counsel	$18,523	$19,448	$4,264
Co-Counsel	$13,326	$46,877	$4,377
Expert Costs	$25,853	$33,001	$5,106
Total	***$57,702***	***$99,326***	***$13,747***

Source: Office of Research statistical data analysis of Administrative Office of the Courts Indigent Defense Data, 1993-2003.

Some private attorneys interviewed indicated that the amount the Administrative Office of the Courts reimburses them is not sufficient to cover actual costs. In addition to public defenders and appointed private attorneys, some defendants have pro bono attorneys, who accept no compensation for their services.

Interviewees indicate that numerous staff persons within their offices assist attorneys (both prosecution and defense) in trial preparation. Investigators, administrative assistants, paralegals, victim witness coordinators, and social workers all play a role in first-degree murder adjudication.

- Victim witness coordinators, authorized in *Tennessee Code Annotated* § 8-7-206, advise victims of their rights and keep victims and witnesses informed about court dates and actions affecting the case.
- Investigators visit and photograph crime scenes and interview clients and witnesses.
- Paralegals research case law and statutes, and draft pleadings and other documents.
- Social workers collect background information on defendants, prepare pre-sentence reports, and treatment plans.
- Administrative assistants maintain records and prepare reports and correspondence.

Survey data indicates that the percentage of cases in which the attorneys selected juries is similar among the three types of cases. Respondents indicated the presence of juries in 79 percent of capital cases, in 74 percent of life without parole cases, and in 72 percent of life with the possibility of parole cases. Rule 23 of the Tennessee Rules of Criminal Procedure requires jury trials in all criminal cases (except small offenses), unless the defendant waives the jury trial with the approval of the court and consent of the district attorney general. *Tennessee Code Annotated* § 22-1-101 authorizes courts to summon Tennessee residents who are United States citizens, ages 18 and older for jury service. The law stipulates occupational and disability exemptions from jury service and certain exclusions such as persons convicted of certain infamous offenses. State law entitles jurors to at least $10.00 for each day of attendance.

Exhibit 16: Percentage of Cases with Juries

	Trial Type					
	Capital Cases		Life Without Parole Cases		Life With Parole Cases	
	Number	Percent	Number	Percent	Number	Percent
No	7	15%	8	21%	34	22%
Yes	37	79%	28	74%	112	72%
Returned survey, but did not answer question	3	6%	2	5%	9	6%
Total	***47***	***100%***	***38***	***100%***	***155***	***100%***

Source: Office of Research survey of court clerks, 2003.

The Tennessee Rules of Criminal Procedure differentiate between capital and non-capital trials by entitling both the prosecution and defense to additional peremptory challenges when the offense is punishable by death. Rule 24 requires that both parties receive 15 peremptory challenges for capital offenses, compared to eight for offenses punishable by incarceration for one or more years. Black's Law Dictionary defines a peremptory challenge as "one of a party's limited number of challenges that needs not be supported by any reason, although a party may not use such a challenge in a way that discriminates against a protected minority." The higher number of challenges may increase the size of the potential jury pool and the duration of the jury selection process.

Judges sequester juries more frequently in capital trials than other types. Sequestering a jury means keeping the jury together throughout the trial and deliberations and guarding the members from improper contact that may influence their decision until dismissal from service. This results in lodging expenses and additional food for the individual jurors. The judges sequestered the juries in 70 percent of the capital trials in the sample, 57 percent of the life without parole trials, and 47 percent for life with the possibility of parole trials.

Exhibit 17: Percentage of Cases in which Judges Sequestered Juries

	Trial Type					
	Capital Cases		Life Without Parole Cases		Life With Parole Cases	
	Number	Percent	Number	Percent	Number	Percent
No	6	16%	10	36%	38	34%
Yes	26	70%	16	57%	53	47%
Data Not Available	5	14%	2	7%	21	19%
Total	***37***	***100%***	***28***	***100%***	***112***	***100%***

Source: Office of Research survey of court clerks, 2003.

Among the sampled cases, capital and life with the possibility of parole defendants received mental health evaluations more frequently than life without parole defendants. The Department of Mental Health performs competency evaluations for the judiciary as a "friend of the courts." In other words, without a court order, the department does not provide any evaluations or treatments. Department of Mental Health staff indicate that the central issue is whether a defendant is suffering from mental illness or mental retardation and, if so, whether he or she is competent to stand trial, regardless of the charge.

The department automatically performs a competency evaluation when the defendant has a history of mental illness. Otherwise, defense counsel, the prosecution, and judges can all request competency assessments. Judges rarely request competency assessments, but they need assurance that the defendant is competent to enter a plea. Therefore, if neither the prosecution nor defense counsel have requested an evaluation prior to the outset of the trial, and the judge has concerns, he or she has the authority to request an assessment. Department of Mental Health staff indicates that the department bears the cost of these evaluations. Further, staff noted that the majority of the department's requests for competency evaluations come from the circuit level.

Exhibit 18: Percentage of Cases in which the Defendant Received a Mental Health Evaluation

	Trial Type					
	Capital Cases		**Life Without Parole Cases**		**Life With Parole Cases**	
	Number	Percent	Number	Percent	Number	Percent
No	25	53%	22	58%	66	43%
Yes	16	34%	9	24%	53	34%
Data Not Available	6	13%	7	18%	36	23%
Total	***47***	***100%***	***38***	***100%***	***155***	***100%***

Source: Office of Research survey of court clerks, 2003.

Court of Criminal Appeals

Appointed defense counsel spend more time, and therefore have greater expenses, for capital cases than life without parole or life with the possibility of parole cases in direct appeal to the Court of Criminal Appeals. Tennessee Supreme Court Rule 13 requires the appointment of two attorneys on capital cases, which leads to the primary difference in cost. Additionally, interviews indicate that preparation time and the complexity of issues in capital cases contributes to greater cost during direct appeal at the Court of Criminal Appeals. The following table illustrates the variation in costs among types of cases.

Exhibit 19: Court of Criminal Appeals per Case Cost Information

	Capital Cases	Life Without Parole Cases	Life With Parole Cases
Lead Counsel	$8,370	$1,935	$1,220
Co Counsel	$12,414	$0	$0
Expert Costs	$0	$0	$0
Total	***$20,784***	***$1,935***	***$1,220***

Source: Office of Research statistical data analysis of Administrative Office of the Courts Indigent Defense data, 1993-2003.

Prosecution costs do not vary significantly among case types at the Court of Criminal Appeals or Tennessee Supreme Court levels. Information collected from the Tennessee Attorney General's Office, which handles cases on direct appeal, suggests that state attorneys spend similar amounts of time on capital, life without parole, and life with the possibility of parole cases. Surveys indicate that Assistant Attorney time equates to average per case costs of $1,610 for capital cases, $2,065 for life without parole cases, and $1,397 for life with the possibility of parole cases.

Tennessee Court of Criminal Appeals staff indicate that while there is no significant difference in the case procedures for non-capital first-degree murder cases and capital cases, capital cases take longer in each step of the process. Court staff indicate several reasons including larger case files, more filings, and attorneys' requests for more time extensions in capital cases. For example, clerks mail opinions to interested parties. They typically send opinions to about five parties for non-capital first-degree murder cases, but to approximately 25 parties for capital cases, thus increasing time and cost.

Researchers found that the Tennessee Court of Criminal Appeals reversed 29 percent of capital cases on direct appeal. A 2000 study focused on error rates in capital cases. The authors included Tennessee as part of their final 28-state cohort. From 1977-1995, Tennessee Court of Criminal Appeals reviewed 109 capital cases on direct appeal. Of those, the court reversed 32, or 29 percent, for errors made during the trials. The study indicates that appellate courts found reversible error in 41 percent of capital cases nationally.[8]

Tennessee Supreme Court

Capital cases have an automatic appeal while non-capital cases have discretionary appeals to the Tennessee Supreme Court. All defendants have the right to appeal to the Supreme Court; however, the court has the authority to decide whether each case merits review except in capital cases. The Tennessee Supreme Court automatically dockets capital cases affirmed by the Court of Criminal Appeals. Defense counsel then prepares appellate briefs to which the state responds. Supreme Court staff indicated that capital cases take precedence over all other cases.

Staff attorneys spend considerable time reading the case record and all of the opinions, which are usually lengthier in capital cases than non-capital cases. They then prepare memos

[8] James Liebman, Jeffrey Fagan, and Valerie West. "Broken System: Error Rates in Capital Cases, 1973-1995," 2000, http://www2.law.columbia.edu/instructionalservices/liebman/ (accessed April 14, 2004).

summarizing the issues presented by defense counsel. The defense attorneys must raise every possible issue in their briefs, or the federal appeals court considers them waived. Both the staff and the justices spend a great deal of time becoming familiar with the cases prior to oral arguments.

The justices typically give each side additional time for oral arguments in capital cases, but specify the issues of interest to the court, after considering all of the issues originally presented in the briefs. Following oral arguments, the justices each spend time reviewing the testimony and discussing their opinion. The assigned judge prepares an opinion. Each justice may request additional research or have questions about the case. Each judge may spend hours, days, or weeks reviewing the case. Their personal staff also assists with research and writing. A judge may write a dissenting opinion if he or she does not agree with the majority opinion. After the release of the opinions, both parties may file a petition to rehear. This process is the same for capital and non-capital first-degree murder cases, but usually takes longer in capital cases.

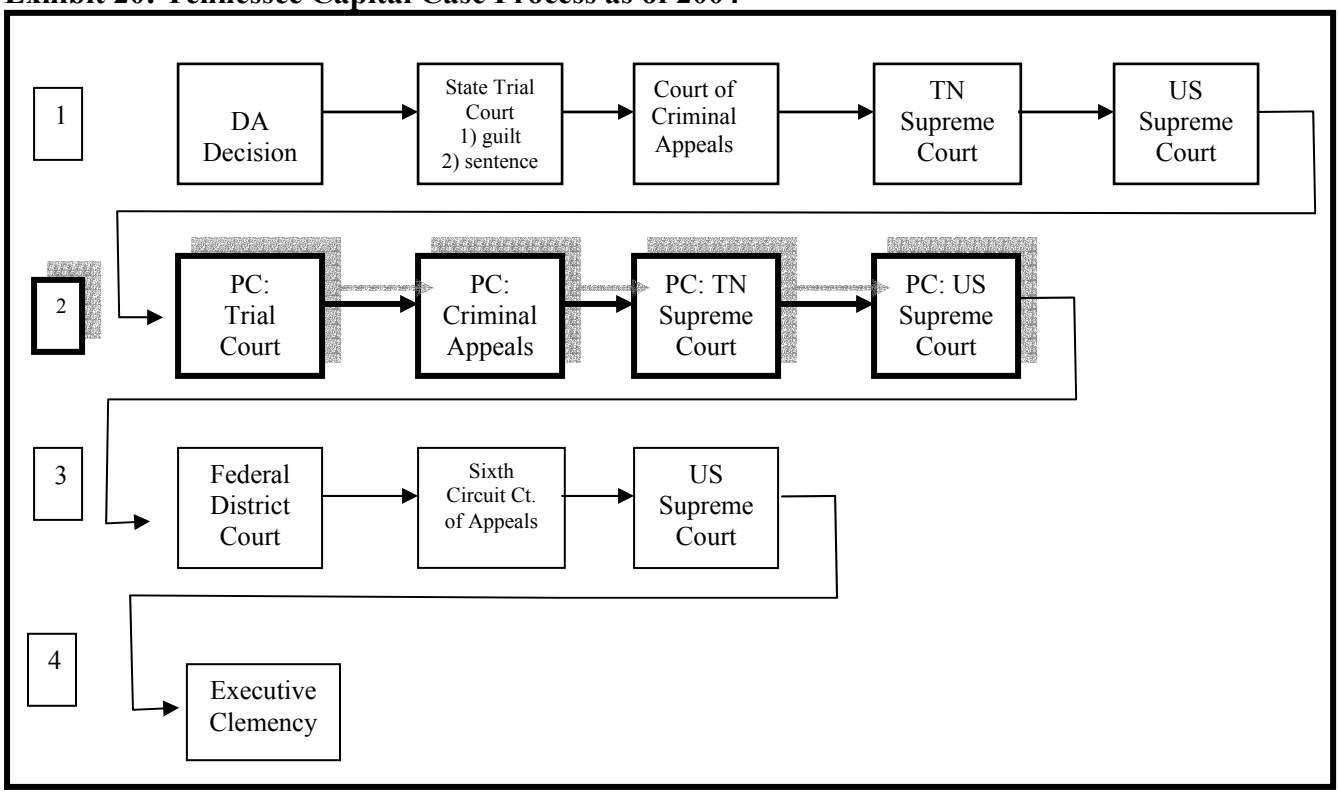
Like the Supreme Court staff, appointed defense counsel spend more time, and therefore cost more, than attorneys in non-capital cases that the Tennessee Supreme Court hears. Data received from the Administrative Office of the Courts indicates that lead counsel on capital cases cost an average of $10,149, while lead counsel on life with the possibility of parole cases average $793. No data was available for life without parole cases at the Tennessee Supreme Court level.

United States Supreme Court

Capital defendants do not have an automatic appeal to the United States Supreme Court on direct appeal, as they do to the Tennessee Supreme Court. Title 28, Section 1257 of the United States Code stipulates that the United States Supreme Court may review final judgments by the highest court of a state when defense counsel files a writ of certiorari. Black's Law Dictionary defines a writ of certiorari as a discretionary writ issued by an appellate court directing a lower court to deliver the case record for review.[9] Of the cases used for the quantitative portion of this study, six petitioners filed a writ of certiorari on direct appeal to the U.S. Supreme Court. Petitioners appealed death sentences in five cases and a life sentence in one. As of November 2003, the court denied petitions in all six cases. This stage in the adjudication process requires preparation and review by several entities.

[9] *Black's Law Dictionary, Seventh Edition,* (St. Paul, MN: West Publishing Company, 1999) p. 220.

Exhibit 20: Tennessee Capital Case Process as of 2004



Source: Administrative Office of the Courts, *Capital Punishment in Tennessee: A Brief Timeline History and Overview of the Legal Process.*

Post Conviction: Trial Court

The General Assembly created the Office of the Post-Conviction Defender in *Tennessee Code Annotated §* 40-30-205(g) in 1995 to provide representation for any person convicted and sentenced to death who is unable to secure counsel because of indigence. The Office of the Post Conviction Defender represents defendants during all post conviction proceedings. Local district attorneys represent the state during the post conviction trial.

Defendants must file petitions for post conviction relief within one year of the completion of their state direct appeal. The defendant files the petition in the original trial court, alleging violations of constitutional rights. Defense counsel raise new legal questions, such as effectiveness of defense counsel at the trial level and prosecutorial misconduct.

The Office of the Post Conviction Defender handles only capital cases, and therefore, is a fixed cost associated with the death penalty in Tennessee. As of fiscal year 2003-04, the office employs a staff of 13; including the Post Conviction Defender, assistant attorneys, investigators, and administrative staff. Exhibit 21 shows expenditures and funding sources since the creation of the office. It further shows the number of cases the office has defended each year and the average cost per case (inflated to 2004 dollars). The average cost per case ranges from $27,281 in fiscal year 1995-96 to $18,459 in fiscal year 2003-04. The number of cases ranged from 14 in fiscal year 1995-96 to 54 in fiscal year 2002-03. The average cost per-case decreased because the number of cases increased. Cases typically last longer than one year.

Exhibit 21: Office of the Post Conviction Defender, Average Cost per Case

	Recommended Budgeted Amount	Actual Expenditure	State Funding	Federal Funding	Other Funding	Actual Expenditure in 2004 Dollars[10]	Number of Cases	Average Cost per Case in 2004 Dollars
1995-96	$0	$312,600	$242,600	$0	$70,000	$381,935	14	$27,281
1996-97	$628,400	$613,000	$597,000	$0	$16,000	$727,447	23	$31,628
1997-98	$655,300	$653,300	$610,000	$43,300	$0	$757,893	30	$25,263
1998-99	$819,800	$823,900	$701,700	$122,200	$0	$941,141	31	$30,359
1999-00	$931,600	$854,500	$787,300	$67,200	$0	$955,075	40	$23,877
2000-01	$940,300	$975,800	$927,300	$48,500	$0	$1,055,133	47	$22,450
2001-02	$1,003,100	$944,000	$918,800	$25,200	$0	$992,522	50	$19,850
2002-03	$1,031,800	$963,100	$949,900	$13,200	$0	$996,809	54	$18,459
2003-04	$1,061,300	$1,032,008[11]	$1,061,300	$0	$0	NA	NA	NA
TOTAL	***$7,071,600***	***$7,172,208***	***$6,795,900***	***$319,600***	***$86,000***	***$6,807,955***	***289***	***$23,556.94***

Source: Tennessee Office of the Post Conviction Defender case data, Annual Budget Documents, 1995-96 through 2003-04.

The Office of the Post Conviction Defender handles the majority of post conviction capital cases. However, some circumstances require the appointment of private attorneys. The Administrative Office of the Courts pays privately appointed attorneys using indigent defense funds. The AOC also funds privately appointed attorneys for defendants charged with non-capital first-degree murder during post conviction proceedings. Exhibit 22 enumerates post conviction indigent defense expenditures for sampled cases.

Exhibit 22: Post Conviction Defense Costs for Private, Appointed Attorneys

	Capital Cases	Life Without Parole Cases	Life With Parole Cases
Lead Counsel	$16,430	$1,281	$1,106
Co-counsel	$14,076	$0	$0
Expert Costs	$17,986	$0	$0
Total	***$48,492***	***$1,281***	***$1,106***

Source: Office of Research statistical data analysis of Administrative Office of the Courts, Indigent Defense Fund data, 1993-2003.

District Attorneys General and Public Defenders can employ additional staff to assist in capital post-conviction cases**.** Tennessee Code Annotated § 8-7-111 and § 8-14-211 authorize district attorneys and public defenders respectively to "employ, reassign, or contract with individuals utilizing special funds appropriated solely for the purpose of providing prompt and fair adjudication of post-conviction proceedings in capital sentence cases." Researchers

[10] Inflation calculated using the Consumer Price Index.

[11] 2003-04 actual expenditures are estimates calculated using the average difference in budgeted amount and actual expenditures from 1996-97 through 2002-03 (1995-96 is not included, as it is the year the agency was formed).

did not collect information to determine how often district attorneys or public defenders employ such additional staff. However, increasing staff assigned to cases adds to costs.

The Post-Conviction Defender Commission is a separate entity also created during the 1995 Legislative Session. The commission is responsible for appointment of the Post Conviction Defender and oversight of the Office of the Post-Conviction Defender. The commission is composed of:

- Two members appointed by the Governor,
- Two members appointed by the Lieutenant Governor,
- Two members appointed by the Speaker of the House of Representatives, and
- Three members appointed by the Supreme Court of Tennessee.

Post Conviction: Court of Criminal Appeals

The Office of the Post Conviction Defender also represents defendants during post conviction appeals. The Tennessee Attorney General's Office represents the state. The Office of Research was unable to determine specific costs of post conviction appeals. However, the case averages presented in Exhibit 21 illustrate the general costs for cases at all steps of the post conviction process.

Post Conviction: Tennessee Supreme Court

State Supreme Court justices hear capital cases more frequently on discretionary appeals than non-capital cases. All cases are discretionary in post conviction, so the process is the same for capital and non-capital cases. The process is not as long as the capital case process in direct appeal. The times are still longer for capital cases in post conviction than non-capital first-degree murder cases because the records are much longer. Defense counsel often raises many rare issues in capital cases during the post-conviction appeals.

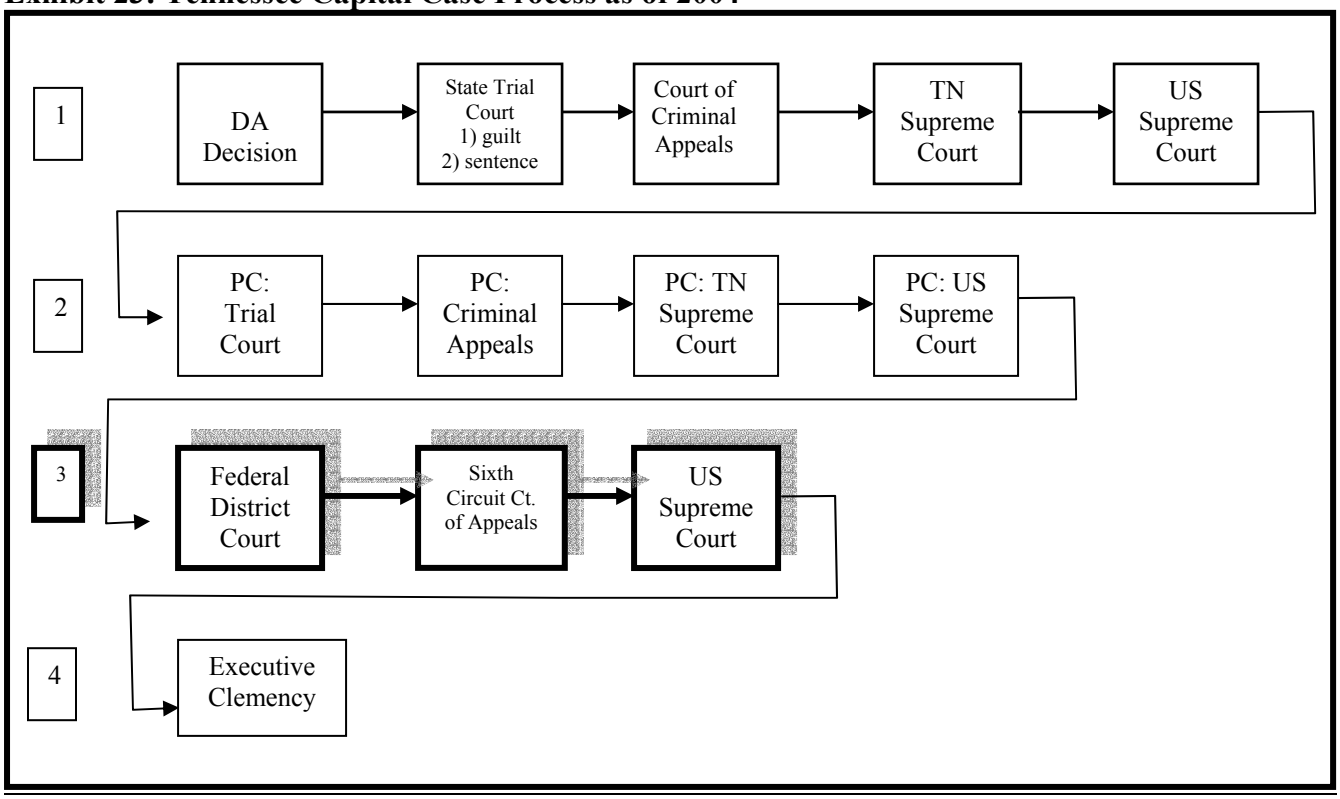
Defense counsel may file a motion to reopen if the court denies post conviction relief. There are only three grounds for reopening a case: 1) scientific evidence, 2) a new Supreme Court rule, or 3) a determination that a bad conviction supports the sentence. The motion to reopen is a short, expedited process, for which the court must grant permission. The court grants very few in criminal cases.

There is a one petition limit on post conviction, but no limits on motions to reopen. The grounds for reopening are limited to three, but defense attorneys can still file on behalf of their clients, which take time for the staff to review.

Post Conviction: United States Supreme Court

Capital defendants do not have an automatic appeal to the United States Supreme Court on state post conviction. Title 28, Section 1257 of the United States Code allows the United States Supreme Court to review state court decisions upon the completion of state post conviction proceedings. Similar to the direct appeal process, the petitioner files a writ of certiorari and the court accepts or denies the petition. Of the sample cases, no cases have had or currently have a writ of certiorari on appeal to the U.S. Supreme Court at the end of state post conviction proceedings.

Exhibit 23: Tennessee Capital Case Process as of 2004



Source: Administrative Office of the Courts, *Capital Punishment in Tennessee: A Brief Timeline History and Overview of the Legal Process*.

Federal District Court

Researchers could not quantify costs associated with state inmates pursuing federal appeals. However, provisions in the federal appeals process set capital cases apart from non-capital cases. For example, both the Federal Public Defender's Office in the Middle and Eastern Districts of Tennessee employ a Capital Habeas Unit. The United States District Court in Middle Tennessee employs a federal death penalty law clerk, and the United States District Court for the Middle District of Tennessee has an administrative order specifying policies and procedures regarding capital habeas corpus petitions.

State inmates must file a petition for a writ of habeas corpus to initiate the federal appeals process. The concept of habeas corpus ensures that an inmate's imprisonment or detention is legal. However, United States Code (28 U.S.C. 2254) specifies that writ for habeas cannot extend to a state inmate unless all available state remedies are exhausted, there is no corrective process at the state level, or the process is not effective in protecting the applicant's rights. Some common issues raised in habeas proceedings are because the conviction is secured:

- using evidence gained pursuant to an unconstitutional search and seizure;
- in violation of the privilege against self-incrimination;
- by the prosecution not disclosing information favorable to the defendant; or

- when the petitioner did not have the effective assistance of counsel.

Each United States district court must create a plan to provide representation to persons financially unable to secure representation. United States Code (18 U.S.C. 3006A) also specifies that a Federal Public Defender Organization or Community Defender Organization (a nonprofit defense counsel service) may represent the petitioner. In Tennessee, if the petitioner is under a sentence of death, the Capital Habeas Unit in the Federal Public Defender's Office in the Middle or Eastern District of Tennessee works the case. The Tennessee Attorney General's Office represents the state in federal court.

The former United States District Court Clerk for the Middle District of Tennessee explained that processing capital and non-capital petitions is the same from the clerk's perspective. Petitioners must file a writ of habeas corpus to initiate the federal appeals process. However, the United States District Court for the Middle District of Tennessee specifies policies and procedures regarding capital habeas corpus petitions. For example, the day before an execution is scheduled, the clerk's office must have a minimum of two experienced personnel on duty, and the office must remain open until the execution occurs or until a court issues a stay of execution.[12]

Once a petition is in the Middle District of Tennessee, a federal death penalty law clerk may assist district court judges. If the judge does not initially dismiss the petition, a variety of proceedings, including evidentiary hearings and oral arguments, may ensue. If the judge ultimately denies the habeas petition at the district court level, the petitioner can appeal to a U.S. Circuit Court of Appeals. In Tennessee, the petitioner appeals to the U.S. Sixth Circuit Court of Appeals.

Death penalty law clerks provide legal advice and assistance to the court regarding capital case habeas corpus petitions. Pro se law clerks have responsibilities similar to death penalty law clerks, but provide assistance with all prisoner petitions.

United States Sixth Circuit Court of Appeals

Staff at the United States Sixth Circuit Court of Appeals indicates that, procedurally, the court handles capital cases like all other types of federal habeas cases. However, capital cases frequently take longer to process because of the numerous, often-complicated issues involved. Additionally, briefs are typically longer because of the complexity of the cases. The court distinguishes capital cases by whether or not the case has a scheduled execution date. Cases with a scheduled execution date take precedence. The court clerk's office assigns each case a docket number upon receipt of the case.

---

[12] The United States District Court for the Middle District of Tennessee, Administrative Order No. 158, *Policies and Procedures for Capital Habeas Petitions*, 2000, p. 2, accessed February 21, 2003, http://www.tnmd.uscourts.gov/158.pdf.

A staff attorney then briefs the case as he or she would any other federal habeas case. Again, work will proceed in an expedited manner if the court has scheduled an execution. The brief will go to the judges assigned to the panel for review and they will discuss the case. The judges will also decide whether they will allow attorneys for both sides to present oral arguments.

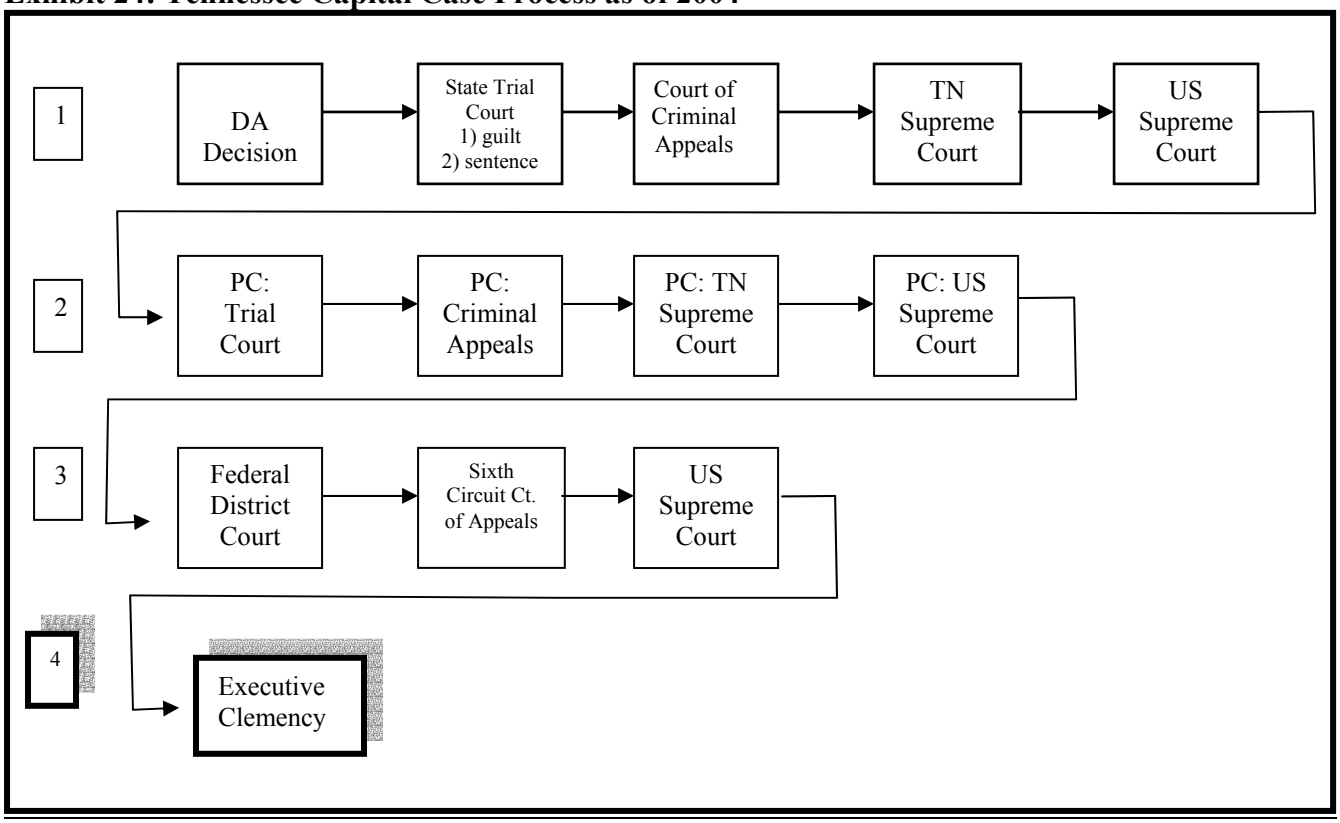
If an execution is pending within a week, court staff will work as needed and are on-call. The judges assigned to the panel may or may not be physically present, but are available. Several staff stays in the office when an execution is pending: the clerk, the chief deputy clerk, the senior motions attorneys, two deputy clerks, and administrative staff.

United States Supreme Court

Defendants may appeal to the United States Supreme Court after the Sixth Circuit Court of Appeals has reached a decision on the case during habeas corpus proceedings. The petitioner files a writ for certiorari, which is a discretionary writ issued by an appellate court directing a lower court to deliver the case record for review.[13] After a review process, the court denies or grants the petition. The court hears oral arguments if the petition is granted, and makes its own decision after hearing the arguments. United States Supreme Court staff explained that, like the other appellate courts, procedurally each case is the same; for example, the petitioner must file a writ in each case. According to court staff, capital cases differ only in that they may be decided after hours if the petitioner is seeking a stay of execution.

[13] *Blacks Law Dictionary, Seventh Edition*, (St. Paul, MN: West Publishing Co., 1999) p. 715.

Exhibit 24: Tennessee Capital Case Process as of 2004



Source: Administrative Office of the Courts, *Capital Punishment in Tennessee: A Brief Timeline History and Overview of the Legal Process*.

Executive Clemency

Tennessee Code Annotated § 40-27-101 authorizes the Governor to "grant reprieves, commutations, and pardons in all criminal cases after conviction." The statute is open to all criminal offenders, and is not limited to capital offenders. Statute further requires the Governor to keep a written record of any reasons for granting pardons or commuting punishment, and to keep all documents used on file for future reference. According to their legal counsel, former Governor Don Sundquist and Governor Bredesen both devised policies for clemency procedures.

Both policies require inmates, regardless of their conviction or sentence, to file clemency applications with the Board of Probation and Parole (the Board). The Board then reviews the application and decides whether to grant a clemency hearing. If the Board decides the inmate should not receive a clemency hearing, it notifies the Governor's office of its recommendation.

If the Board decides that the inmate should receive a clemency hearing, it holds the hearing at the prison. During the hearing, the local District Attorney General who originally prosecuted the defendant represents the state. The local DA may receive assistance from the Tennessee Attorney General's Office, which prosecutes the case during the appeals stage, and is therefore familiar with the case and the issues involved.

The attorney most recently involved with the case, typically with the Office of the Post Conviction Defender, defends the inmate. The inmate may also have assistance from local public defenders and/or private attorneys (appointed by the court, retained by the defendant, or working the case on a pro-bono basis).

The clemency hearing typically takes one day to complete. Both sides have an opportunity to present their cases to the Board of Probation and Parole. Interviewees suggest that this hearing requires extensive preparation by the state's attorney, defense counsel, the Board, and the Governor's Office. The Board makes a formal clemency recommendation to the Governor's Office following the hearing.

According to legal counsel for both administrations, the Governor, the Governor's Legal Counsel, and the Governor's Deputy Legal Counsel spend several weeks prior to the Board's clemency hearing and subsequent recommendation reviewing the case information and familiarizing themselves with the circumstances of the case. Governor Bredesen has a policy to meet with the applicant's defense counsel prior to making a clemency decision. The state's attorneys also typically give the Governor's office information to review (such as affidavits). The Governor has access to trial and appellate records, defendant testimony, and expert witness testimony. After the Governor's staff receives a recommendation from the Board, they spend considerable time reviewing the hearing transcript and testimony in preparation for the Governor's ultimate clemency decision.

Because Robert Glen Coe was the first inmate executed since Tennessee reinstated the death penalty, the Sundquist administration spent significant time working with the Department of Correction. According to Governor Sundquist's legal counsel, both the Sundquist administration and the department planned the execution to insure that the process met legal requirements.

The Board of Probation and Parole receives numerous clemency applications every year, for all types of criminal sentences, not just the death penalty. Exhibit 25 illustrates clemency applications received every year since 1993. Both administrations indicated that the standard clemency procedures apply to all clemency requests, regardless of the case type or sentence. However, the review process may take longer in capital cases because the volume of records is much greater. Governors have granted a small number of commutations since 1993. Exhibit 26 shows the commutations and pardons each year since 1993.

Exhibit 25: Clemency Applications, 1993-2003

	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003
All Crimes											
Commutations	NA	NA	NA	241	168	88	117	127	127	129	374
Pardons	NA	NA	NA	19	17	20	18	18	15	25	25
First-Degree Murder, LIFE											
Commutations	0	3	0	64	41	19	26	33	33	25	35
Pardons	0	0	0	0	0	0	0	0	0	0	0
First-Degree Murder, LWOP											
Commutations	0	0	0	0	0	0	0	1	0	0	2
Pardons	0	0	0	0	0	0	0	0	0	0	0
First-Degree Murder, DEATH											
Commutations	0	0	0	0	0	0	0	2	0	1	0
Pardons	0	0	0	0	0	0	0	0	0	0	0

Source: Tennessee Board of Probation and Parole data.

Exhibit 26: Commutations and Pardons Granted, 1993-2003

	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003
Commutations	0	0	0	2	2	2	1	3	0	7	0
Pardons	0	4	0	0	0	0	3	2	3	7	0

Source: Tennessee Board of Probation and Parole data.

The Board of Probation and Parole also holds parole hearings for inmates sentenced to life with the possibility of parole. The Board considered 272 parole applications for inmates sentenced to life with the possibility of parole since 1993. Of those, the Board placed 77 on parole. The Board revoked parole for nine parolees, or 11.7 percent. Inmates who do not receive parole may appeal. Board of Probation and Parole data indicate that since 1993, the Board received 44 appeals. The Board reported in 2002-03 that community supervision costs an average of $2.61 daily for each offender, as opposed to the average daily cost of incarceration of $49.56.[14]

[14] State of Tennessee Board of Probation and Parole, "2002-03 Annual Report," November 5, 2003, p. 2 (cover letter).

Qualitative Case Study: Robert Glen Coe

Office of Research staff included a case study with a detailed timeline, exhibiting the progression of one case from the commission of the crime until the date of execution. Robert Glen Coe is the only person executed in the State of Tennessee since 1960. Because the case spans several years, the timeline further illustrates the complexity of gathering accurate cost data for capital cases. Analysts found it impossible to ascribe an exact dollar amount for the case.

On September 4, 1979, law enforcement officers arrested Robert Glen Coe for a murder committed in Greenfield, Tennessee (Weakley County). The grand jury proceedings began in December 1979 and jury selection began in May 1980. Coe's attorneys successfully petitioned the court for a change of venue, and the trial began February 9, 1981, in Shelby County. The jury returned a guilty verdict and sentenced Coe to death.

The pre-trial and trial portion of Coe's case stretched over one and a half years, but the appeals process lasted 19 years, from 1981 through 2000. As enumerated in court opinion (*Tennessee v. Coe*, 655 S.W. 2d 903, 1983) some of the issues raised by Coe's attorneys during direct appeal include:

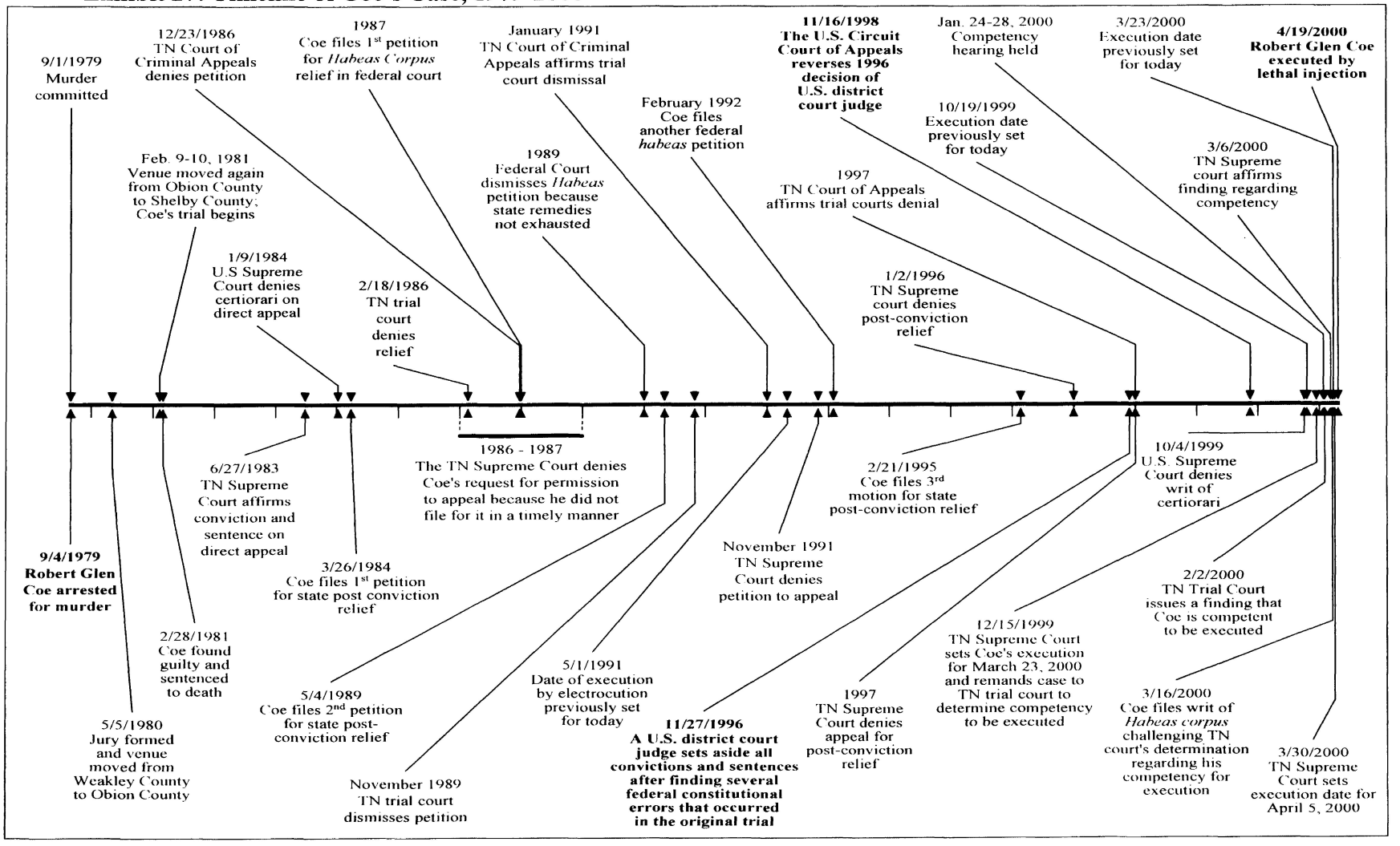
- Coe's confession was not admissible as evidence because there was no probable cause for the arrest.
- The grand jury was not representative of the community; therefore, the original indictment was not valid.
- The judge allowed the prosecution to play the defendant's videotaped confession during their closing argument.
- The sentence of death was excessive and disproportionate to the penalty in similar cases.
- The Tennessee death penalty statutes are unconstitutional.

Some of the issues raised in Coe's third petition for post conviction (*Coe v.* Tennessee, C.C.A. No. 02C01-9606-CR-00200, 1997) relief include:

- Whether Coe was denied effective assistance of counsel at trial and on direct appeal, including the denial of entitlement to investigative funds;
- Whether electrocution constitutes cruel and unusual punishment, as defined by the Eighth Amendment to the United States Constitution; and
- Whether the death sentence unconstitutionally infringes upon the defendant's fundamental right to life.

Exhibit 27 provides a timeline of the events in Robert Glen Coe's case, beginning at arrest through his execution in 2000. The timeline is a compilation of information from numerous sources including court and attorney records.

Exhibit 27: Timeline of Coe's Case, 1979-2000



Incarceration

The annual incarceration costs for Tennessee death row inmates are the same as other maximum-security inmates (such as individuals incarcerated for rape or non-capital first-degree murder). Riverbend Maximum Security Institution in Nashville houses the majority of inmates sentenced to death. The institution keeps these inmates in a separate unit, with the exception of a few who the department transferred to Brushy Mountain Correctional Complex because of behavioral problems or security concerns. Additionally, the Tennessee Prison for Women houses the two females sentenced to death.[15] According to department staff, the Department of Correction calculates an operation cost per day for each facility, which applies to all inmates regardless of sentence type. Exhibit 28 lists the average cost per day at each of Tennessee's correctional facilities.

Exhibit 28: 2003 Operation Costs per Day at Tennessee Institutions[16]

Institution	Operation Cost per Day
Brushy Mountain Correctional Complex	$56.13
Lois DeBerry Special Needs Facility	$97.78
Mark Luttrell Correctional Facility	$69.47
Middle TN Correctional Complex	$58.76
Riverbend Maximum Security Institution	$71.17
Southeastern TN State Regional Correctional Facility	$52.74
Tennessee Prison for Women	$57.89
Turney Center Industrial Prison and Farm	$49.09
Wayne County Boot Camp	$52.65
West Tennessee State Penitentiary	$46.35
Average	$61.20

Source: State of Tennessee, The Budget, Fiscal Year 2004-05, p. B-257-59.

The execution of an inmate saves the state approximately $773,736 for the future imprisonment of the inmate when compared to an inmate sentenced to life without parole. Executions save $680,549 when compared to inmates sentenced to life with the possibility of parole. Inmates sentenced to death may serve shorter sentences than those sentenced to life with and without the possibility of parole, thereby resulting in decreased incarceration costs. Readers should review Exhibit 29 with caution because of these factors.

- Tennessee has executed one person since the reinstatement of the death penalty. The state imprisoned the inmate for approximately 19 years prior to his execution. Researchers used this figure in calculations because it was the only available data. It is not an average because it only represents one case.
- Tennessee has implemented changes that affect incarceration lengths. Public Chapter 473 made life without parole a sentencing option for first-degree murder convictions in 1993. Additionally, Tennessee Code Annotated § 40-35-501(i)(1) increased the minimum time an individual must serve for a life sentence before parole eligibility to 51 years for

[15] Tennessee Department of Correction, "Life on Death Row," http://www.state.tn.us/correction/newsreleases/lifeondeathrow.html (accessed March 11, 2004).

[16] This table does not include institutions managed by Corrections Corporation of America (CCA), as CCA does not house any of the defendants in this review.

offenses committed on or after July 1, 1995. This more than doubles the previous life sentence (25 years). Both of these changes increase the length of incarceration.

- Researchers used only FY 2002-03 Riverbend Maximum Security Institution costs, however, multiple facilities may house an inmate during the total period of incarceration.
- Analysts used a life expectancy of 77 years to calculate the life with the possibility of parole and life without parole total incarceration costs.[17]

Exhibit 29: Estimated Incarceration Costs for First-Degree Murder Sentence Types

	Estimated Incarceration Costs
Type of Sentence	
Capital	$491,202
LWOP	$1,264,938
Life sentence[18]	$1,171,751

Source: Office of Research analysis, 2003.

As of April 2004, Tennessee has 97 people on death row. According to the Department of Correction, death row inmates spend an average of 13.22 years on death row. The Department of Correction publishes population projections each year. The projections include various categories including "lifers," which includes offenders sentenced to life; "life," offenders sentenced to a minimum 25 years; "life without parole"; "death"; and/or those sentenced as "habitual offenders." Researchers were unable to separate projections for each sentence type, however, in July FY 2000-2001, the total population in this category was 1,988 with a projected increase to 2,734 in FY 2009-2010, an increase of 38 percent.[19]

Because of a 1982 lawsuit, *Grubbs v. Bradley,* the Department of Correction established an inmate classification system to use as a management tool that consists of three behavioral levels for inmates sentenced to death. Riverbend Maximum Security Institution considers all inmates sentenced to death maximum security inmates; however, the institution further classifies them into one of three levels: A, B, or C, as established by DOC Policy 404.11.

Riverbend Maximum Security Institution automatically classifies inmates sentenced to death as Level C inmates when they arrive. After 16 months, an inmate with good behavior is eligible for reclassification as a Level B. Finally, the institution may reclassify inmates with exceptionally good behavior as Level A inmates. Inmates with higher classifications have more privileges than those with lower classifications. Privileges include more phone time, more visitation, participation in educational programs, arts and crafts time, and fewer restraints. Misconduct results in a lower classification and loss of privileges. The inmate classification program allows only Level A inmates to apply for available jobs. Work

[17] National Center for Health Statistics, *National Vital Statistics Reports,* Volume 52, Number 3, Hyattsville, MD: 2003.
[18] Only includes inmates convicted under the change in law in 1995, which requires inmates to serve a minimum of 51 years if the offense was committed on or after July 1, 1995.
[19] Tennessee Department of Correction, *The Future Felon Population of the State of Tennessee, 2000-01 Annual Population Projections,* December 13, 2000, p. 8.

consists of cleaning, food preparation, and data entry. It gives inmates opportunities to leave their cell and engage in productive behavior.

Administering the Death Penalty

Robert Glen Coe's execution cost Riverbend Maximum Security Institution $11,668. The majority of the cost associated with Coe's execution was for additional security at Riverbend. The State of Tennessee executed Coe by lethal injection. The total cost of execution includes additional security, medical supplies, medical personnel, and the necessary chemicals for the procedure. The institution also places lighting outside the gates, portable restrooms, and additional security to prevent disputes among demonstrators. This total does not include costs to Department of Correction central office staff, Tennessee Highway Patrol staff and equipment, Tennessee Bureau of Investigation staff, Metropolitan Nashville-Davidson County Police Department, Tennessee Emergency Management staff and equipment, judges and court staff, or Public Information Officers from various state agencies.

The Indirect Effects of the Death Penalty

Law Enforcement

The Tennessee Bureau of Investigation provides more investigative services in capital cases than in other non-capital first-degree murder cases. Smaller, more rural localities lack the capability and staff to provide investigative services necessary for capital cases, so they must rely on TBI. TBI has the only full-service laboratory in Tennessee; often, TBI receives work that local police began for verification and/or completion. Once the TBI gets involved with a case, it can take six to 12 months to produce test results for any one case. TBI staff indicate that because the processes are complex and may require numerous samples to test for one case, TBI consistently runs behind schedule.

TBI's Forensic Services Division can conduct a wide range of tests within the following units: Drug Chemistry, Toxicology, Breath Alcohol, Latent Print Examination, Firearms Identification, Microanalysis/Trace Evidence, Serology/DNA, Evidence Receiving Unit, DNA Profiling, CODIS, and Violent Crime Response Teams. Per sample costs associated with the tests range from $30 for a blood alcohol analysis to $600 for a DNA profile. Furthermore, courts may call anywhere from three to six TBI agents representing the investigative arm or the forensic testing units to testify.

Local law enforcement agencies initially conduct all investigations similarly. They do not know what type of punishment the prosecutor will pursue. Officers generally stay at the crime scene (while the victim is still present) from five to 12 hours gathering evidence. Local law enforcement offices typically perform ballistics tests and fingerprinting, but TBI generally conducts forensic testing. Sometimes over the course of an investigation, local officials must resubmit evidence to TBI for testing because new technologies provide better analyses.

People frequently overlook a plethora of cost factors concerning law enforcement investigations, including capital and non-capital cases. Parking fees, hotel rooms, car rentals,

plane tickets, mail, witness protection, and telephone monitoring within jails are all potential expenses created by witnesses called to testify in first-degree murder cases.

Emotional Pain and Suffering

Capital cases impact much more than analysts can quantitatively measure, or attach a dollar amount. As such, Office of Research staff consider emotional costs of capital punishment as important factors surrounding the issue. Specifically, analysts mention the emotional costs to jurors, victims' families, and defendants' families here as qualitative values worth consideration.

Recent research suggests that during traumatic or high profile trials, jurors may pay an immeasurable emotional cost for their service. Although any traumatic trial may cause juror stress, the pressure may be at its peak during capital trials when the court asks jurors to make a life-or-death decision by weighing the brutality of the crime against the defendant's character and family background. Jurors serving on traumatic trials are six times more likely to suffer symptoms of depression than jurors serving on non-traumatic trials.[20] Other symptoms of juror stress may include gastrointestinal distress, nervousness, heart palpitation, insomnia, and headaches.[21] The level of stress and emotional disturbance varies depending on many variables, including the nature of the trial, its length, and the nature of the evidence.[22] The National Center for State Courts published a manual to help judges and court officials minimize the emotional impact of difficult trials because of increased significance of juror stress.[23]

The United States Supreme Court has provided little sentencing guidance, expressing only the need for jurors to determine a "reasoned moral response."[24] Although no studies have definitively demonstrated that capital trials significantly increase stress levels, anecdotal evidence suggests that capital trials may have a lasting emotional impact on jurors.[25]

---

[20] Daniel Shuman, Jean Hamilton, and Cynthia Daley, "The Health Effects of Jury Service," *Law and Psychology Review*, 18, 1994.

[21] Stanley Kaplan and Carolyn Wingett, "The Occupational Hazards of Jury Duty," *Bulletin of the American Academy of Psychiatry and the Law*, 20(3), 1992, pp. 325-333.

[22] Thomas Hafemeister and Larry Ventis, "Juror Stress: Sources and Implications," *Trial*, October 1994, pp. 68-73.

[23] National Center for State Courts, "Through the Eyes of the Juror: A Manual for Addressing Juror Stress," 1998.

[24] Penry v. Lynaugh, 492 U.S. 302 (1989).

[25] Scott Marshall, "Former Jurors Talk about Experience on Death Penalty Cases," *North County Times*, September 5, 2002.

Murder causes a great deal of pain and suffering to victims' families, the cost of which analysts cannot measure. While many families seek retribution or closure in an execution, others renounce the death penalty as causing more suffering to themselves and others. A recent study of victims who have had a friend, relative, or loved one killed suggests that their support for capital punishment varies based on such factors as race, gender, and religious orientation.[26] For those who seek capital punishment for the offender, the search often involves a need for vengeance and eventually closure. However, anecdotal evidence suggests that victims who have witnessed the murderer's execution find little satisfaction in the event.[27] Some grief counselors believe that years of appeals allow victims' families to circumvent the grieving process while focusing their attention on rage and anger toward the murderer.[28]

Victims' families who renounce the death penalty also face immense hardship. Some have formed an organization called Murder Victims' Families for Reconciliation. Members of this group view the death penalty as a continuation of the same violence that killed their family members. They believe that the legal process involved in capital punishment prolongs anger and postpones healing.[29]

Families of defendants in capital trials face hardships as well. Family members may face shame and social isolation from media coverage or health problems from stress-related conditions.[30] Anecdotal evidence suggests that these family members may also experience guilt for not controlling their loved ones or for being unable to afford adequate legal representation.[31] No studies have yet examined the difference between a death penalty and a life verdict on defendants' families.

---

[26] Marian Borg, "Vicarious Homicide Victimization and Support for Capital Punishment: A Test of Black's Theory of Law," *Criminology*, vol. 36, pp. 537-567.
[27] David Spiegel, "Closure? The Execution Was Just the Start," *The Washington Post*, April 29, 2001, p. B03; and Steve Twomey, "Execution Doesn't End the Nightmare," *The Washington Post*, February 12, 1998, p. B01.
[28] Shannon Brownlee, Dan McGraw, and Jason Vest, "The Place for Vengeance," *U.S. News and World Report*, June 16, 1997, pp. 24-32.
[29] Murder Victims' Families for Reconciliation, *Not in Our Name*, March 2003, accessed August 8, 2003, www.mvfr.org.
[30] Rachel King and Katherine Norgard, "What About Our Families? Using the Impact on Death Row Defendants' Family Members as a Mitigating Factor in Death Penalty Sentencing Hearings," *Florida State University Law Review*, Summer 1999.
[31] Bill Babbit, "My Brother's Guilt Became My Own," New York Times Magazine, January 14, 2001. Renee Worwack-Keels, "How Do You Live Through That?," Murder Victims' Families for Reconciliation, accessed May 21, 2003, www.mvfr.org.

Deterrence

Previous research provides no clear indication whether the death penalty acts as a method of crime prevention. Some research supports the death penalty as a deterrent, other studies indicate that it is not a deterrent, and still others indicate that the death penalty stimulates acts of first-degree murder. Although not directly related to the costs associated with capital punishment, the issue of deterrence, or the prevention of future criminal acts, is important to consider. Researchers relate the potential deterrent effect of capital punishment to the cost of the death penalty in two ways. One, if capital punishment deters crime and the rate of first-degree murders decreases, fewer expenditures associated with investigating, prosecuting, and housing criminals would be necessary. However, some research (known as the brutalization hypothesis) conversely indicates that capital punishment can lead to an increase in crime in that it may appear to legitimize killing. If capital punishment is not a deterrent to crime, but rather crime rates increase following an execution, more money would be spent to investigate and prosecute the increased number of crimes. The research varies, including support for both the deterrent and stimulating effects of capital punishment, as well as research showing that capital punishment has no impact.

Some research suggests that the death penalty is a deterrent to first-degree murder. Isaac Ehrlich authored a now famous study in 1975, which concluded that each execution was associated with an average of eight fewer homicides.[32] Ehrlich used econometric models to examine national homicide and execution rates from the mid-1930s to the late 1960s. He controlled for a number of variables including the probability of arrest, conviction, and execution; the percentage of the civilian population in the workforce; the unemployment rate; the age demographics of 14-24; per capita income; chronological time; percentage of "non-whites" in the population; per capita expenditures of government; and per capita expenditures of police.[33] Ehrlich found that each execution in the United States between the years 1933 and 1967 might have resulted in seven to eight fewer murders.

Critics argued that to use national data, as Ehrlich did, leads to weaker findings given that national data compares execution and murder rates from around the country. Further, they charged that this problem, known as aggregation bias, is inherent in econometric studies such as Ehrlich's, given that these researchers use macro-level associations, national crime data, to interpret micro-level trends, the behavior of individual criminals.[34]

Many studies indicate that capital punishment is not a deterrent to future crime, despite Ehrlich's findings. Researchers critical of the deterrence argument charge that it assumes that criminal behavior is the result of rational individuals performing cost-benefit analyses on varying courses of action, and then choosing the path with the most benefits and fewest costs. Murderers must rationally consider the costs and benefits of their actions for the death penalty to deter criminal behavior.

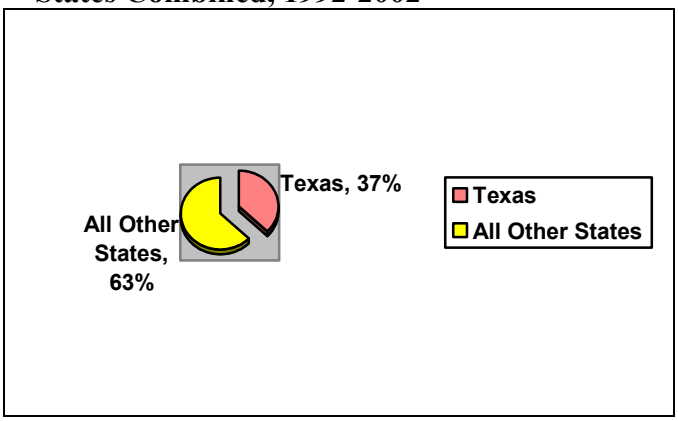
---

[32] Isaac Ehrlich, "The Deterrent Effect of Capital Punishment," *The American Economic Review,* 1975, Volume 65, S, p. 398.
[33] Ibid, p.409.
[34] Ibid, p.414.

A recent survey of the nation's top criminologists indicated that capital punishment is not an effective deterrent of murder.[35] Researchers surveyed all current and past presidents of three prestigious, scholarly organizations (The American Society of Criminology, The Academy of Criminal Justice Sciences, and The Law and Society Association) regarding capital punishment and deterrence. Of the 67 respondents, 87.5 percent believe that the death penalty does not have a deterrent effect, and 86.5 percent reported that they were "sure" or "think" that abolishing the death penalty in any given state would not have a significant effect on the murder rate in that state. Further, nearly 80 percent of the respondents indicated that states with the death penalty *did not* have lower murder rates when compared to states with the death penalty.[36]

Texas has more executions than any other state in the country. It has accounted for one-third of all executions in the United States since the re-establishment of capital punishment by the Supreme Court in 1976.[37]

Exhibit 30: Executions in Texas and All Other States Combined, 1992-2002



Source: Execution Facts, http://www.deathpenaltyinfo.org/facts.html#Executions.

A recent study compared the number of executions between 1984 and 1997 to felony murder rates in Texas.[38] Researchers did not include negligent manslaughter, accidental homicide, or justifiable homicide, considering them undeterrable, given the lack of premeditation. Researchers found no identifiable relationship between the murder rate and the number of executions conducted by the state.[39]

Publicity is also an issue related to the deterrence of first-degree murder. For executions to deter future murders, criminals must be aware of executions and of the possible sanctions

[35] Michael L. Radelet and Ronald L. Akers, "Deterrence and the Death Penalty; The views of the Experts," *Journal of Criminal Law and Criminology*, Volume 87, Number 1, 1996, p. 1.
[36] Ibid, p. 3.
[37] Jon Sorenson, Robert Wrinkle, Victoria Brewer, and James Marquardt, "Capital Punishment and Deterrence: Examining the Effect of Execution on Murder Rates in Texas," *Crime and Delinquency,* Volume 45, Issue 4, p. 483.
[38] Ibid, pp. 483-84.
[39] Ibid, p. 486.

associated with crime.[40] Researchers hypothesized that higher levels of execution publicity would result in lower homicide rates, but found the opposite. Data collected between 1940 and 1986 compared monthly homicide rates for periods before and after all highly publicized executions.[41] Researchers considered executions "highly publicized" if they appeared in both *The New York Times* and the *Facts on File* databases. Despite the amount of publicity, the monthly homicide rate remained unaffected following an execution.[42]

Some researchers argue that the deterrent effect of the death penalty was lost when the United States Supreme Court repealed the four-year moratorium on the death penalty in the case of *Gregg v. Georgia* in 1976 and instituted new standards for the capital case process. The new standards introduced a complex system of capital case appeals at both the state and federal levels. While these standards have reduced the likelihood of an arbitrary death sentence, they have dramatically increased the amount of time that elapses between conviction and execution. Critics charge that this increase has eliminated any deterrent effect of capital punishment in America.[43]

Some studies support the *brutalization theory*, which posits that the death penalty encourages violent behavior. In Oklahoma, killings by strangers increased following the first execution in that state after a 25-year moratorium.[44] This finding is the result of an analysis of homicide data from 1989 to 1991 that included total killings, total felony murders, total death-penalty-eligible murders, total killings involving strangers, felony murders not involving strangers, stranger robbery-related killings, stranger non-felony-related murders, argument-related killings involving strangers, total non-stranger killings, and total robbery-related non-stranger killings.[45] Researchers evaluated the data each week before and after the execution and indicated that only *total* murders involving strangers increased following the execution.[46] However, results also indicate that the number of *felony* murders involving strangers, such as armed robbery, decreased during this same time.[47] These results indicate that capital punishment may discourage some types of homicides while encouraging others.

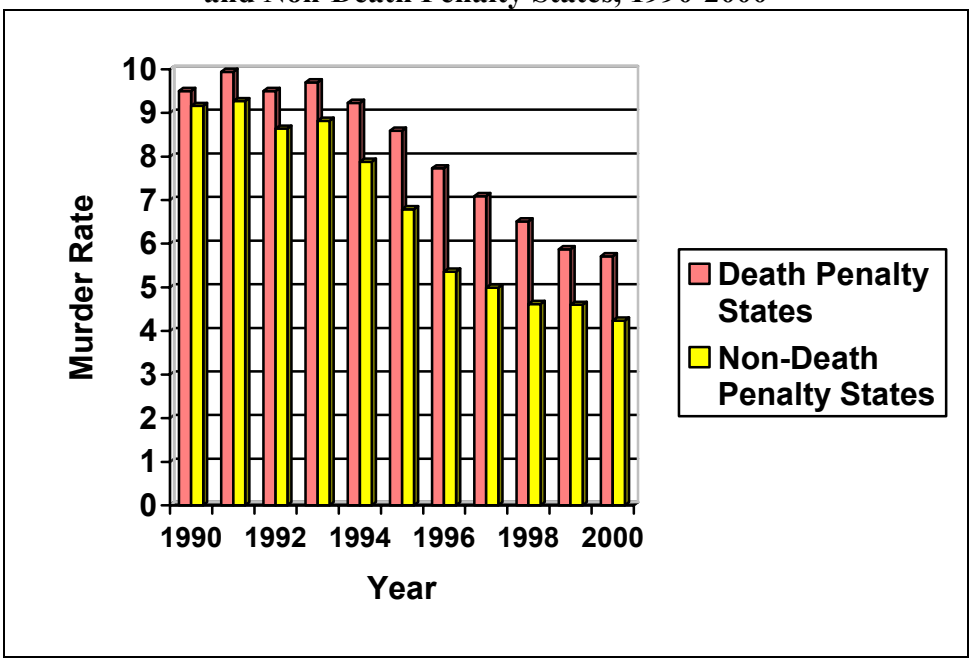
Comparisons of homicide rates among states that do and do not have the death penalty provide a loose illustration of the brutalization hypothesis, *but do not establish a causal relationship*. The gap between the murder rate in death penalty and non-death penalty states grew larger between 1990 and 2000, with death penalty states experiencing an increase. Exhibit 28 illustrates the murder rates in both death penalty and non-death penalty states.[48] These data indicate that in states where capital punishment is both legal and practiced, the

---

[40] William Bailey, "Murder, Capital Punishment, and Television: Execution Publicity and Homicide Rates," *American Sociological Review,* Volume 55, 1990, p.628.
[41] William Bailey and Ruth Peterson, "Murder and Capital Punishment: A Monthly Time-Series Analysis of Execution Publicity," *American Sociological Review*, Volume 54, 1989, p. 726.
[42] Ibid, p. 739.
[43] Allan Johnson, "The Illusory Death Penalty; Why America's Death Penalty Process fails to Support the Economic Theories of Criminal Sanctions and Deterrent," *Hastings Law Journal,* Volume 52, 2001, p. 1102.
[44] William Bailey, "Deterrence, Brutalization, and the Death Penalty: Another Examination of Oklahoma's Return to Capital Punishment," *Criminology*, Volume 36, Number 4, 1998 p. 711.
[45] Ibid, p. 713.
[46] Ibid, p. 730.
[47] Ibid, p. 731.
[48] Ibid, p. 730.

murder rate is significantly higher per capita when compared to states that have abolished capital punishment.

Exhibit 31: Murder Rates in Death Penalty and Non-Death Penalty States, 1990-2000



Source: U.S Murder rates Relative to the Death Penalty, http://www.deathpeanltyinfo.org/DeterMRates.html.

Administrative Issues

The State of Tennessee does not have a comprehensive, integrated criminal justice information system. Office of Research staff found inconsistencies in Administrative Office of the Courts data, Department of Correction data, and data from local clerks. Researchers discovered some data problems including: missing persons, inconsistent spelling of defendant names, inaccurate or missing dates of birth, and inaccurate or missing sentence types. In some cases, analysts eliminated cases from the study because of insufficient or inconsistent information. A single criminal justice information system could strengthen the quality of data for future research efforts along with numerous other benefits. An integrated information system would ensure that authorities have accurate information concerning people in state custody and increase efficiency during decision-making and case processing. Further, one system would decrease the risk of human error during data entry.

An integrated criminal justice information system uses technology to share information among agencies. While some information systems developed many years ago helped to improve reporting and analysis, they may not be effective for sharing and exchanging information between agencies because of increasing caseloads and the complexity of the criminal justice system.[49] Integrated criminal justice information systems can:

[49] National Conference of State Legislatures, *Integrated Criminal Justice Information Systems*, November 2001, p. 1.

- improve efficiency by eliminating redundant data entry;
- reduce data entry error;
- provide timely and complete access to data; and
- improve the quality and reliability of data, which can improve decision-making.

The State of Tennessee began initial efforts to integrate the criminal justice system in Tennessee with a planning grant in September 2000. The state formed the Integrated Criminal Justice Information Steering Committee to assist in this effort and develop a strategic plan.[50] Currently, at least one Tennessee local government already has an integrated criminal justice information system. In 1992, the Metropolitan Government of Nashville-Davidson County enacted Ordinance 092-415 to create the Nashville Justice Information System (JIS). The purpose of JIS is to "improve the administration of justice through the creation and operation of comprehensive integrated management information systems and to promulgate and implement minimum uniform standards for all participating agencies." JIS is comprised of the courts, police department, sheriff's office, district attorney, and public defender.

While separate from the on-going statewide criminal justice integration efforts, the state is currently in the process of implementing a system called TnCIS: Tennessee Court Information System. Initially TnCIS will serve as a stand-alone system in each court but may serve as a building block for future integration efforts. Tennessee Code Annotated § 16-3-803(h) stipulates that the TnCIS system shall provide:

- an integrated case management and accounting software system to address the statutory responsibilities of the general sessions, chancery, circuit, and juvenile court clerks; and
- statewide reporting and data transfer capabilities for numerous agencies including the Tennessee Administrative Office of the Courts, Tennessee Department of Human Services, Tennessee Bureau of Investigation, Tennessee Department of Safety, and other agencies determined either by the Administrative Office of the Courts or by statute.

Some of the anticipated service benefits of TnCIS include the ability to provide immediate access to information, show the history of a person across all cases they may have in one court, provide consistency in reporting and formats for all work, and reduce errors due to information reentry.[51]

---

[50] The State of Tennessee, *Integrated Criminal Justice Information Strategic Plan- Draft*, September 16, 2002, p. 3.

[51] *Tennessee Court Information System Overview and Cost Analysis,* Presented to the State of Tennessee Administrative Office of the Courts, January 2001, pp. 14-15.

Neither attorneys nor judges in Tennessee track the time they spend on individual cases. The law does not require either to keep records. Consequently, no reliable data exists concerning the cost of prosecution or defense of first-degree murder cases in Tennessee. Attorney and judge time is one of the greatest expenses of the total cost of the death penalty, but is not collected. Office of Research staff found anecdotal information regarding the differences between capital and non-capital cases. Although anecdotal information is useful, measurable criteria to compare capital and non-capital cases would also reveal important information.

Judges, district attorney generals, and district public defenders all indicated that they frequently work on several cases simultaneously. This makes it difficult, if not impossible, to estimate time spent on individual cases. Several judges, district attorneys, and public defenders indicated that weighted caseload studies are the only way to understand time spent.

Further, several individuals surveyed indicated that they were unable to remember information about cases from years past. They stated that the best way to collect information about all first-degree murder cases would be to keep a case log as cases occur, similar to the methodology used in weighted caseload studies that are required by law. Most attorneys surveyed provided estimates for hours spent and resources necessary on an individual case level.

No accurate record of death notices and life without parole notices filed exists in Tennessee. For the purposes of the present analysis, analysts used Administrative Office of the Courts status reports, Rule 12 reports, and data from the Administrative Office of the Courts Felony Judgment Database to determine the trial type of the defendants in the population. The AOC already maintains monthly status reports of all capital cases currently in the court system. An accurate record of death and life without parole notices would enable interested parties (judges, attorneys, legislators, and analysts) to monitor and track cases and to plan for future resource expenditures.

Tennessee Supreme Court Rule 12 requires that trial judges file reports on all first-degree murder convictions. However, Office of Research staff noted that judges do not file these reports for every case and in a timely manner. Rule 12 reports contain case information including the trial, defendant, the defendant's representation, co-defendants, and victims. Rule 12 of the Tennessee Rules of the Supreme Court requires trial judges to compile information for all cases where the defendant was convicted of first-degree murder, including cases where the defendant plead guilty. The rule further requires that trial judges file the reports within 15 days of ruling on the motion for a new trial. Supreme Court staff indicate that internal procedures exist for obtaining Rule 12 reports from trial judges who fail to meet the deadline.

Office of Research staff identified a considerable number of cases where defendants convicted of first-degree murder did not have a Rule 12 report, as required by law. Researchers used Rule 12 reports for background information about cases and as a point of reference when other data sources were inconsistent. Rule 12 reports also provide a consistent source of information for decision-makers and increase efficiency when reviewing

case files. Rule 12 reports are paper documents, which are scanned and maintained on CD-ROM. The format does not permit data analysis.

Recommendations

Legislative Recommendations

The General Assembly may wish to establish a formal protocol describing the criteria that local District Attorneys General would use to determine whether to seek the death penalty in first-degree murder cases. Implementing standard guidelines could assist prosecutors during the decision making process and with resource allocation. Decision making guidelines seek to protect every defendant's Constitutional right to due process and can remove some of the arbitrariness of prosecutorial discretion. Such guidelines may also strengthen capital cases, insuring that prosecutors have reviewed all cases in a stringent, yet consistent manner. This may lead to fewer grounds for appeal and help prosecutors be more certain that they have appropriately sought the death penalty.

Currently, the District Attorney General in Davidson County uses such a policy to insure that his office seeks the death penalty only in "the worst of the worst cases." The United States Justice Department implemented a similar authorization process for cases eligible for the death penalty. However, this authorization process has produced unintended costs and "produces another forum in which defense counsel must advocate for their client."[52]

House Bill 409 (Senate Bill 441) introduced during the 103rd Tennessee General Assembly sought to create a standardized decision-making policy for first-degree murder cases, but did not advance in the General Assembly. (See Appendix F.)

The General Assembly may wish to create a timetable for the creation of an integrated criminal justice information system to ensure the timeliness of the project.

The General Assembly may wish to consider legislation requiring judges, district attorneys general, and district public defenders to account for their time to provide more detailed cost information. Office of Research staff found anecdotal information regarding the differences between capital and non-capital cases. Although anecdotal information is useful, measurable criteria to compare capital and non-capital cases would also reveal important information. Currently, private attorneys paid through the Indigent Defense Fund are required to submit lengthy, detailed forms to ensure accountability. Appendix G contains the form required for private attorney reimbursement.

The State of Tennessee funds most judges, district attorneys general, and district public defenders, and therefore has an interest in more closely tracking time. This would help ensure that the state has the appropriate numbers of officials and that they and their staff spend their time efficiently and effectively. Tracking time would further allow outside consultants and analysts to understand caseloads and to evaluate performance. Finally, it would provide a mechanism for calculating an accurate cost of the death penalty and other public policy issues.

---

[52] Honorable James R. Spencer, Honorable Robin J. Cauthron, and Honorable Nancy G. Edmunds, *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation*.

Survey data indicates that most judges, district attorneys, and public defenders work more than 37.5 hours a week, the workweek for a salaried state employee. Tracking time could illustrate the amount of time that these employees work and may provide justification for salary increases or for hiring additional staff if they indicate that these officials consistently work more than the average state-employee workweek.

Judicial Recommendations

The state Supreme Court may wish to compile Rule 12 data in a format that can be analyzed more readily, such as a database, instead of maintaining scanned documents on CD-ROM. This would make information more accessible. The Court may also wish to expand the format to include additional information from the district attorneys general and defense counsel. This information could be part of a larger, comprehensive criminal justice system as discussed in this report.

Appendix A: Letter of Request from General Assembly

House of Representatives
State of Tennessee

House Judiciary Committee

OFFICERS
Rep. Frank Buck, Chairman
Rep. Kim McMillan, Vice Chairman
Rep. Bobby Sands, Secretary

Suite 32, Legislative Plaza
Nashville, TN 37243-0095

Phone: 615-741-1351
Fax: 615-741-4324

MEMBERS
Rep. Mae Beavers
Rep. Jim Boyer
Rep. Rob Briley
Rep. Henri Brooks
Rep. Joe Fowlkes
Rep. Michael Locke
Rep. Chris Newton
Rep. Larry Scroggs
Rep. John Mark Windle

October 23, 2002

The Honorable John G. Morgan
Comptroller of the Treasury
First Floor, State Capitol
Nashville, TN 37243-0260

Dear Mr. Morgan:

Please accept this formal request that the Office of the State Comptroller undertake a comprehensive study of the monetary costs to the taxpayers of Tennessee in connection with the state's administration of the death penalty. Specifically, I would like to know, not only the specific costs of administering the state's Indigent Defense Fund but, at a minimum, the following:

- Costs of the Offices of the District Public Defenders for the additional time of the public defender, the assistant public defenders, and district investigators when their offices are appointed to represent a death penalty defendant.
- Costs of the Capital Case Division of the Office of the Public Defenders' Conference.
- Costs of the Office of the Post Conviction Defender.
- Costs of the defense of the death penalty cases at the United States District Court, the United States Circuit Court for the Sixth Circuit, and the United States Supreme Court which is paid by the Office of the Federal Public Defender.
- Costs for the additional time of the district attorneys general, assistant district attorneys general, criminal investigators, and victim/witness coordinators to prosecute death penalty cases.
- Costs of consultants and expert witnesses and witnesses for the prosecution.
- Costs of the additional time of the Tennessee Bureau of Investigation's investigators and staff.

- Costs of the staff of the Office of the State Attorney General-Capital Cases Division to advise and assist the district attorneys general in prosecuting death penalty cases at the trial level.

- Costs of the Office of the State Attorney General to represent the state in death penalty cases before the Tennessee Court of Criminal Appeals and the Tennessee Supreme Court.

- Costs of the Office of the State Attorney General to represent the state on appeals in death penalty cases before the United States District Courts, the United States Circuit Court for the Sixth Circuit and the United States Supreme Court.

- Costs of the additional time of the trial courts for numerous hearings, motions, and other complex procedures unique to death penalty cases.

- Costs of the capital case attorneys to assist and advise the trial judges when hearing a death penalty case.

- Costs of the additional time of the trial courts for death penalty sentencing phase.

- Costs of the additional court time for appeals in death penalty cases by the State Court of Criminal Appeals.

- Costs of the additional court time for appeals in death penalty cases by the State Supreme Court.

- Costs of the United States District Court, United States Circuit Court of the Sixth Circuit and the United States Supreme Court to review death penalty cases.

In addition, to the extent ascertainable, it is clear that local governments must also pay for the additional costs for additional persons called as potential jurors and any costs of sequestering those juries over the amount reimbursed by the state. Local governments pay costs associated with jury pools coming from other localities in some death penalty cases.

I believe that it is important for members of the General Assembly to understand the fiscal issues relating to the administration of the death penalty when compared to housing an inmate for life without parole. I understand that this study request is a complex one and I would value your advice and counsel relative to how the state should best go about determining the "cost" of the death penalty.

Having supported the death penalty for many years, I am aware of how strong the feelings are on both sides of this issue. It is important that the public and the General Assembly know the real cost. I am asking you for an unbiased opinion as to the costs associated with the death penalty.

Sincerely,

Frank Buck

pf

cc: House Judiciary Committee Members
Judge Barbara Haynes

Appendix B: Methodology in Detail

The Office of Research collected both quantitative and qualitative data from several agencies to illustrate the capital case process and to compare the three types of first-degree murder cases. Surveys provide specific cost data, while a case study provides procedural descriptions. Together, these two methodologies demonstrate the resources necessary to adjudicate first-degree murder cases in Tennessee.

Quantitative Analysis

Analysts attempted to calculate the average costs of the three types of first-degree murder cases in Tennessee using data spanning from 1993 when life without the possibility of parole became a sentencing option in Tennessee.

Staff selected a statistically random sample of all cases that began in trial court after January 1, 1993, to determine these averages. Case averages are important because they demonstrate a variety of case circumstances and account for individual differences over an extended period.

After the sample was drawn, analysts traced each selected case throughout its entire adjudication: from the date the original trial began to its present position within the judicial process. Based on the survey data, analysts tabulated a cost for each case in the sample where data was available. To calculate the total cost of cases, analysts converted attorney and judge time estimates into dollar amounts. The surveys asked respondents to select a range of hours that they worked on individual cases. Analysts used the midpoint of each range to determine the average time spent per case. The Office of Research calculated the approximate number of annual work hours using the length of the workweek for state employees and holiday, leave, and training information.

Calculation of Available Annual Attorney Hours

Work Year		**Time (in Hours)**
Work Day		7.5
Work Week		37.5
Work Year (without leave)		1950
Revised Work Year	**Days per Year**	**Time (in Hours)**
State Holidays	12	90
Annual Leave	10	75
Sick Leave	5	37.5
Official Conferences	5	37.5
Continuing Legal Education Training	10	75
Annual Leave Sub-Total	42	315
Total Available Attorney Hours into Year		*1635*

Source: The Spangenburg Group, *Tennessee Public Defender Case-Weighting Study, Final Draft Report*, April 1999, p. 56-57.

The Department of Personnel supplied the Office of Research with average salaries for relevant state positions for the year 2003. Analysts then divided the average salary for a position by the annual hours to arrive at an estimated cost per hour. Finally, analysts multiplied this hourly rate by the number of hours each attorney specified they spent on individual cases in the surveys.

To determine the average cost of each stage in the adjudication process, analysts added individual costs per stage and divided by the total number of cases in the sample for received responses. Analysts found the average total cost of each case by adding up the cost of each stage and dividing by the number of cases.

Data for every stage in the Tennessee appellate process was not available. In such instances, no cost information is included, but analysts did provide detailed procedural descriptions to illustrate the similarities and differences among the types of cases. For example, the Office of Research staff did not send surveys to the United States Supreme Court Justices for time estimates on specific cases. When a Tennessee case reaches the U.S. Supreme Court, whether on direct appeal, post-conviction, or habeas corpus, analysts provide procedural descriptions gathered from U.S. Supreme Court staff in lieu of cost data. The following tables illustrate the basic cost and average calculations used for each case.

Example of Total Cost and Average Calculations for Hypothetical Cases

CASE 1	**Trial**	**Direct Appeal**	**Post-Conviction**	**Habeas Corpus**	**Executive Clemency**	
Defense	$100	$100	$100	NA	NA	
Prosecution	$100	$100	$100	NA	NA	
Judge	$50	$50	$50	NA	NA	
Total Cost	$250	$250	$250	NA	NA	*$750*

CASE 2	**Trial**	**Direct Appeal**	**Post-Conviction**	**Habeas Corpus**	**Executive Clemency**	
Defense	$200	$200	$200	NA	NA	
Prosecution	$200	$200	$200	NA	NA	
Judge	$100	$100	$100	NA	NA	
Total Cost	$500	$500	$500	NA	NA	*$1,500*

	Trial	**Direct Appeal**	**Post-Conviction**	**Habeas Corpus**	**Executive Clemency**	**Case Total**
Case 1	$250	$250	$250	NA	NA	$750
Case 2	$500	$500	$500	NA	NA	$1,500
Total	*$750*	*$750*	*$750*	*NA*	*NA*	*$2,250*
Stage-Average	*$375*	*$375*	*$375*	*NA*	*NA*	*$1,125*

Qualitative Analysis

The Office of Research also conducted a qualitative case study in addition to the quantitative analysis of first-degree murder cases. The purpose of the case study is to illustrate the events that can, and often do, occur during capital cases. All cases are different and have many variables that could affect how the case proceeds. The case analyzed represents only one example, among potentially thousands, of the courses cases can take through the judicial system.

The qualitative case study presents a detailed timeline for one case that illustrates the capital case process. The qualitative case study provides a real-life example of a case and illustrates relevant procedural issues in Tennessee's capital cases. Office of Research staff performed a qualitative case study on Robert Glen Coe's case. Coe is the only person Tennessee has executed since 1977, when the state reinstated the death penalty. As such, he is the only defendant that has been completely through the appellate process. Analysts traced the case from the arrest through execution, which involved an intensive document search and review.

Appendix C: List of Fixed and Variable Costs Associated with the Death Penalty in Tennessee

Fixed Costs

The following fixed costs are solely attributable to the death penalty in Tennessee.

- The Capital Division of the Tennessee Public Defender's Office (which is now defunct)
- Capital Case Attorneys
- The Tennessee Office of the Post Conviction Defender
- Tennessee Office of the Attorney General, Capital Case Division
- Indigent Defense Fund: Private Counsel Appointed to Capital Cases
- Indigent Defense Fund: Costs of Expert Witnesses in Capital Cases
- Tennessee Department of Correction: Execution Supplies

Variable Costs

The following costs are variable costs of the death penalty in Tennessee. Unlike fixed costs, these costs are not easily measurable and in most cases required estimation.

- Attorney time for each stage in the trial and appellate process
- Attorney's staff time (administrative support, paralegals, and investigators)
- Judges' time
- Courtroom time
- Other indirect costs:
  - Back-up of court dockets
  - Ineffective counsel to attorney's non-capital clients
  - Situations where capital punishment is used as a "political bargaining chip"
  - Preparation of first-degree murder cases as capital cases, where the prosecution eventually decides not to seek the death penalty
  - Costs to victim's family and friends
  - Costs to defendant's family and friends
  - Costs to the jurors in capital cases
  - Cost of crime to society as a whole

Appendix D: List of Interviewees

Ross Alderman, Public Defender, 20th Judicial District

Jay Ballard, Legal Counsel for Governor Sundquist

Kevin Batts, Director of Information Systems, Tennessee Public Defender's Conference

Ricky Bell, Warden, Riverbend Maximum Security Institution

Andy Bennett, Chief Deputy Attorney General, Tennessee Attorney General's Office

Teresa Berry, Evidence Technician Supervisor, Tennessee Bureau of Investigation

Donna Blackburn, Executive Director, Tennessee, Board of Probation and Parole

The Honorable Rob Briley, Tennessee State Representative

Gabriel Chapman, Director, Planning and Research, Tennessee Department of Correction

Michael Chisick, Federal Death Penalty Law Clerk, United States District Court, Middle District of Tennessee

Connie Clark, Executive Director, Tennessee Administrative Office of the Courts

Dr. Mark Cohen, Professor of Management, Vanderbilt University

Dr. Neil Cohen, College of Law, University of Tennessee

Bob Cooper, Legal Counsel for Governor Bredesen

Gloria Dale, Senior Staff Attorney, Tennessee Supreme Court

Don Dawson, Tennessee Post-Conviction Defender

Richard Dieter, Director, The Death Penalty Information Center

Kathryn Reed Edge, Attorney at Law, Miller and Martin LLP

Steve Elkins, Deputy Legal Counsel for Governor Bredesen

Beth Ford, Federal Public Defender, Eastern District of Tennessee

The Honorable Joe Fowlkes, Tennessee State Representative, Chairman of the Judiciary Committee

Alice Franklin, Statistical Analyst Supervisor, Tennessee Department of Correction

Kelly Gleason, Former Deputy Counsel, Tennessee Public Defender's Conference, Capital Division

Pam Hancock, Administrative Office of the Courts

Andy Hardin, Executive Director, Tennessee Public Defender's Conference

The Honorable Barbara Haynes, Judge, 20th Judicial District

Avon Henderson, Regional Supervisor, United States Sixth Circuit Court of Appeals

Jeff Henry, Director of Research and Training, Tennessee Public Defender's Conference

Joseph Ingle, Director, Neighborhood Justice Center

Claudia Jack, Public Defender, 22nd Judicial District

Victor Johnson, District Attorney General, 20th Judicial District

David Keefe, Former Chief Counsel, Tennessee Public Defender's Conference, Capital Division

Wally Kirby, Executive Director, Tennessee Attorney General's Conference

Randy Lockmiller, Captain, Knoxville Police Department

Jeff Loy, Tennessee Capital Case Attorney

Larry Marshall, Center for Wrongful Convictions, Northwestern University School of Law

Henry Martin, Federal Public Defender, Middle District of Tennessee

Bradley McLean, Attorney, Stites and Harbison, PLLC

Michael Moore, Solicitor General, Tennessee Attorney General's Office

Roger Mylan, former U.S. District Court Clerk, Middle District of Tennessee

Cathy Posey, Assistant Commissioner of Administrative Services, Tennessee Department of Correction

Pat Postiglione, Sergeant, Nashville Metropolitan Police Department

Steve Puckett, Special Agent In Charge, Criminal Division, Tennessee Bureau of Investigation

Mike Quinn, Major, Memphis Police Department

William Reddick, private attorney and former Director of Tennessee's Capital Case Resource Center

Michelle Richter, Lieutenant, Nashville Metropolitan Police Department

Lisa Rippy, Chief of Staff for Chief Justice Frank F. Drowota, III, Tennessee Supreme Court

Robert Sanders, Assistant District Attorney General, 22nd Judicial District

Barbara Short, Executive Director, Tennessee Association of Criminal Defense Lawyers

Jennifer Smith, Attorney, Tennessee Attorney General's Office

Former State Representative Bobby Sands (handled many capital cases)

Jean Stone, Assistant Director of Court Services and Public Information, Administrative Office of the Courts

Joseph Sweat, Writer and Lobbyist

Libby Sykes, Deputy Director, Tennessee Administrative Office of the Courts

Amy Tarkington, Deputy, Criminal Division, Tennessee Attorney General's Office

Randy Tatel, Executive Director, Tennessee Coalition to Abolish State Killing

Danny Tinnell, Accounting Manager, Riverbend Maximum Security Institution, Tennessee Department of Correction

Marthagem Whitlock, Deputy Assistant Commissioner, Tennessee Department of Mental Health

Hedy Weinberg, Executive Director, American Civil Liberties Union of Tennessee

Martha Wetteman, Research and Statistics, Tennessee Department of Labor and Workforce Development

Lanny Wilder, Supervisor, Nashville Crime Laboratory, Tennessee Bureau of Investigation

The Honorable Thomas A. Wiseman, Jr., Senior Judge, U.S. District Court, Middle District of Tennessee

Karen Yacuzzo, Tennessee Capital Case Attorney (at the time of the review)

Appendix E: Statutory Aggravating and Mitigating Factors

Aggravating Factors, *Tennessee Code Annotated § 39*-13-204(i)
1) murder committed against a person less than 12 years of age and the defendant was eighteen years of age, or older;
2) defendant was previously convicted of one or more felonies, other than the present charge, whose statutory elements involve the use of violence to the person;
3) defendant knowingly created a great risk of death to two or more persons, other than the victim murdered, during the act of murder;
4) defendant committed the murder for remuneration, or employed another to commit the murder for remuneration, or the promise of remuneration;
5) murder was especially heinous, atrocious, or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death;
6) murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another;
7) murder was knowingly committed, solicited, directed or aided by the defendant, while the defendant had a substantial role in committing or attempting to commit, or fleeing after having a substantial role in committing or attempting to commit, and first-degree murder, arson, rape, robbery, burglary, theft, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb;
8) murder was committed by the defendant while the defendant was in lawful custody or in a place of lawful confinement or during the defendant's escape from lawful custody or from a place of lawful confinement;
9) murder was committed against any law enforcement officer, corrections officer, corrections employee, emergency medical or rescue worker, emergency medical technician, paramedic, or firefighter, who was engaged in the performance of official duties, and the defendant knew or reasonably should have known that such victim was a law enforcement officer, corrections official, corrections employee or emergency medical or rescue worker, emergency medical technician, paramedic, or firefighter engaged in the performance or official duties;
10) murder was committed against any present or former judge, district attorney general or state attorney general, assistant district attorney general or assistant state attorney general due to or because of the exercise of the victim's official duty or status and the defendant knew that the victim occupies or occupied said office;
11) murder was committed against a national, state, or local popularly elected official, due to or because of the official's lawful duties or status, and the defendant knew that the victim was such an official;
12) defendant committed "mass murder" which is defined as the murder of three or more persons within the State of Tennessee within a period of forty-eight months, and perpetrated in a similar fashion in a common scheme or plan;
13) defendant knowingly mutilated the body of the victim after death;
14) victim of the murder was particularly vulnerable due to a significant handicap or significant disability, whether mental or physical, and at the time of the murder the defendant knew or reasonably should have known of such handicap or disability;
15) the murder was committed in the course of an act of terrorism.

Mitigating Factors, *Tennessee Code Annotated* 39-13-204(j)
1) defendant has no significant history of prior criminal activity;
2) murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;
3) victim was a participant in the defendant's conduct or consented to the act;
4) murder was committed under circumstance which the defendant reasonably believed to provide a moral justification for the defendant's conduct;
5) defendant was an accomplice in the murder committed by another person and the defendant's participation was relatively minor;
6) defendant acted under extreme duress or under the substantial domination of another person;
7) youth or advanced age of the defendant at the time of the crime;
8) capacity of the defendant to appreciate the wrongfulness of the defendant's conduct or to conform such conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected the defendant's judgment;
9) any other mitigating factor which is raised by the evidence produced by either the prosecution or defense at either the guilt or sentencing hearing.

Appendix F: House Bill 409/Senate Bill 441

AN ACT to amend Tennessee Code Annotated, Title 39, Chapter 13, relative to establishing uniform minimum procedures to ensure fundamental fairness in the application of the death penalty and to enact the "Capital Punishment Equal
Protection Act of 2003."

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. This act shall be known and may be cited as the "Capital Punishment Equal Protection Act of 2003."

SECTION 2. Tennessee Code Annotated, Section 39-13-208, is amended by adding the following new subsections:
(e)

(1) As used in this section:

(A) "Prosecutor" means the attorney who has been assigned primary responsibility for prosecuting the case to which the term applies. If it cannot be ascertained that the district attorney general or person acting lawfully in his or her place has assigned primary responsibility for a case to someone other than himself or herself, then the district attorney or person acting lawfully in his or her place shall be regarded as the prosecutor for purposes of this section.

(B) "First-degree murder evaluation form" means a form upon which the prosecutor notes the presence or absence of statutory aggravating circumstances and upon which the district attorney general signifies his or her approval of any settlement of a death-penalty case for a sentence less than death.

(2) Every case in which a defendant is indicted for first-degree murder shall be reviewed by the prosecutor to determine whether any statutory aggravating factors exist which would legally justify seeking a sentence of death or life without possibility of parole. In those cases in which no statutory aggravating factors are present, the prosecutor shall so indicate on the first-degree murder form, which form shall be signed by the supervisor, if any, of the prosecutor and forwarded to the district attorney general, who shall acknowledge by affixing his signature to the same. The first-degree murder form shall be kept in the case file and a copy thereof attached to the district attorney general's portion ("Section C") of the trial judge's report in first-degree murder cases required under Rule 12 of the Rules of the Supreme Court upon final disposition of the case in the trial court.

(3) In first-degree murder cases in which it appears that one (1) or more statutory aggravating factors are present, the prosecutor shall indicate on the first-degree murder form which aggravating factors, in the prosecutor's judgment, apply to the case. The first-degree murder form shall be signed by the prosecutor and kept in the case file and a copy thereof attached to the district attorney general's portion of the trial judge's report in first-degree murder cases required under Rule 12 of the Rules of Supreme Court upon final disposition of the case in the trial court. After discussing the case with the family of each victim, the prosecutor shall review the case in detail with the prosecutors supervisor, if any, and with the district attorney general.

(4) If after initial review the district attorney general determines that a sentence of death remains a possible sanction, the district attorney general shall so notify counsel for the defendant in writing and shall, prior to making a final determination whether to seek a sentence of death, afford counsel a reasonable opportunity to:

(A) Provide mitigating information in writing or by live presentation; and

(B) Explore bona fide plea negotiations on behalf of the defendant.

(5) The district attorney general shall personally review the case and consider:

(A) Any mitigating information known to the office or provided by defense counsel; and

(B) The advice of the prosecutor and supervisor, if any.

(6) Only after the district attorney general has determined that a sentence of death shall be sought may notice of such determination be provided to the court and to defense counsel.

(7) The decision whether to seek a sentence of death shall be made as promptly as practicable in order to provide ample notice to the court and defense counsel, ensure adequate preparation time for the defense, allow appointment of additional counsel where appropriate, and select an appropriate trial date.

(8) Once notice has been filed of the state's intention to seek a sentence of death, the prosecutor shall not be authorized to settle the case upon a plea of guilty to a lesser crime or for a punishment less than death without the approval of the district attorney general.

(9) The district attorney general shall seek a sentence of death only in those cases in which the evidence of guilt is substantial. A sentence of death shall not be sought in cases in which the evidence consists of the uncorroborated testimony of a single eyewitness or of a cooperating codefendant or accomplice. Informants who are serving sentences of confinement, or who have cases or investigations pending which could result in a sentence of confinement, may be used as corroborative witnesses but a death-penalty prosecution shall not be based principally upon testimony from such witnesses.

(10) Only a defendant who performed the acts resulting in the death of the victim or who planned or procured the victim's murder shall be eligible for consideration for a sentence of death. A codefendant who was present and who aided or abetted the murder shall only be eligible for consideration for a sentence of death where the facts establish that such codefendant knowingly engaged in actions that carried a grave risk of death and where, in so acting, the codefendant exhibited a reckless indifference to the value of human life.

(11) Until the review process has been completed, neither the district attorney general nor any member of the district attorney generals staff shall make any public comment about whether a particular case is appropriate for the death penalty. A prosecutor may comment that a particular case is legally eligible for death-penalty consideration in the future and may argue in open court that the defendant be held without bond because he or she is eligible for death penalty consideration.

(12) The district attorney general shall maintain a record of the age, sex and race of all defendants and victims in each case in which a notice of intention to seek a sentence of death was filed.

(f)

(1) In all cases in which notice of intent to seek a sentence of death has been filed, the prosecutor shall provide liberal discovery to defense counsel. Defense counsel shall be provided with copies of all written materials, audiotapes and videotapes, which the

prosecutor could reasonably know, are relevant to the case. Defense counsel shall initial every document in the file to indicate that it has been reviewed or shall furnish the prosecutor with other mutually agreeable documentation for that purpose. Pretrial statements of witnesses, which are subject to disclosure during trial "Jencks" material, may be reviewed during the discovery process in the discretion of the prosecutor. Copies of these statements shall be given to defense counsel when the statements are reviewed or at such time as the court directs, but no later than at the conclusion of jury
selection. Copies of all statements in possession of the state shall be provided to defense counsel and filed with the court at the conclusion of jury selection. Notwithstanding the provisions of this section to the contrary, the prosecutor may withhold or delay disclosure of information for the safety of a witness or the public, provided, that any nondisclosure or delay is in conformance with the laws and rules governing discovery in criminal cases generally.

(2) The district attorney general shall cause written demand to be made for the production of all relevant information by all law enforcement agencies, laboratories and other agencies engaged in the investigative process.

(3) The district attorney general shall take all reasonably necessary steps to facilitate defense counsel's review of physical evidence in the possession of any agency of state or local government.

(4) The district attorney general shall cause appropriate DNA testing to be performed on all items of physical evidence for which there is reason to believe that the results of such testing will be relevant to determining the guilt or innocence of the defendant.

(5) The district attorney general shall not oppose the testing of any physical evidence by experts retained by defense counsel, provided that adequate safeguards are implemented to ensure the integrity of the process.

(g) Notwithstanding the limitations of § 40-30-209, a defendant who is under a sentence of death may review any and all relevant files in the possession of a district attorney general upon written request. Such files shall be made available to the defendant's attorney or other representative under the terms and conditions applicable to public records requests.

SECTION 3. This act shall take effect upon becoming a law, the public welfare requiring it.

Appendix G: Administrative Office of the Courts Claim for Attorney Fees

FORM AF-1 (Rev. 2003) CLAIM FOR ATTORNEY FEES (APPELLATE/TRIAL)

INSTRUCTIONS: Type and submit in duplicate to the appropriate clerk of court. Please complete the form in full or it will be returned. Both copies must be signed by the attorney and judge. For trial court claims, the clerk shall retain one copy for the court files and shall forward the original to the Administrative Office of the Courts, Nashville City Center, Suite 600, 511 Union Nashville, TN 37219. For appellate claims, the appellat court clerk shall retain one copy for its files and shall forward the original to the appropriate Appellate Court Judge.

STATE OF TENNESSEE

COUNTY OF: _____ ☐ Court _____ (please specify court) ☐ Court of Criminal Appeals ☐ Supreme Court ☐ Court of Appeals

NAME OF CLIENT: _____

Trial Court No.: _____ Appeal No.: _____

1. _____ in violation of TCA Section _____
Original Offense

2. Type of case: ____ Felony ____ Misdemeanor ____ Petition for Early Release ____ Juvenile
____ Post Conviction ____ Probation Violation ____ Contempt ____ Other: _____

____ First Degree Murder ____ Lead ____ Co-Counsel
Did the DA file a notice of intent to seek the death penalty? ____ Yes ____ No
If notice was withdrawn give date _____

3. Conviction offense_____ Sentence received_____

4. Date of disposition_____ Date of last activity in relation to the case_____

5. Disposition of case:
____ Plea of guilty ____ Nolle prosequi ____ Trial by jury ____ Trial by judge ____ Other ____ Cert. question

SUMMARY OF ACTIVITY TOTALS (From itemized list on back of form)	(A) IN-COURT HOURS (Tenths)	(B) OUT-OF-COURT HOURS (Tenths)	(C) NECESSARY EXPENSES
TOTALS	0	0.0	0

I certify that the foregoing represents an accurate, complete statement of time and expenses in connection with the above action or proceedings.

_____
Signature of Attorney

Soc. Sec. No.: _____

Enter FULL Name, Address and Phone Number Here
(Please supply full address and phone number.)

Attorney: _____

Address: _____

_____

City: _____ State: ____ Zip _____

Phone: _____

TO BE COMPLETED BY JUDGE

(A) _____ Total Approved In-Court Hours @ $50 Per Hour.....
(In capital cases, lead counsel @ $100 Per Hour; co-counsel @ $80 Per Hour)
(In capital post - conviction cases @ $80 Per Hour)

(B) _____ Total Approved Out-of-Court Hours @ $40 Per Hour.....
(In capital cases, lead counsel @ $75 Per Hour; co-counsel @ $60 Per Hour)
(In capital post - conviction cases @ $60 Per Hour)

(C) Total Approved Necessary Expenses .....

TOTALS.....

Subject to the provisions of T.C.A. ' 40-14-207, the Court finds this to be reasonable compensation for work done in the above-style caselappeal.

This the _____ day of _____, _____.

_____
Signature of Judge

DATE	**ACTIVITY** Itemize in-court and out-of court hours spent working on this case. Itemize any out-of-pocket expense. Itemize any other approved expenses & attach to this claim a certified copy of the court's prior approval of such expense.	(A) IN-COURT HOURS (Tenths)	(B) OUT-OF COURT HOURS (Tenths)	(C) NECESSARY EXPENSES
	TOTALS:	0.0	0.0	$0.00

Offices of Research and Education Accountability Staff

Director
◆Ethel Detch

Assistant Director (Research)
◆Douglas Wright

Assistant Director (Education Accountability)
Jason Walton

Principal Legislative Research Analysts
Phillip Doss
◆Kim Potts

Senior Legislative Research Analysts
Denise Denton
◆Margaret Rose
Melissa Jo Smith
Greg Spradley
◆Emily Wilson

Associate Legislative Research Analysts
Bonnie Adamson
◆Brian Doss
Kevin Krushenski
Russell Moore
Bintou Njie
◆Sonya Phillips

Executive Secretary
◆Sherrill Murrell

◆indicates staff who assisted with this project

Former Staff who Assisted with this Project
Jennifer Hause Crowell
Alisa Palmisano
Karen Tolbert