Report to the Committee on Defender Services
Judicial Conference of the United States
Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases

Jon B. Gould
Lisa Greenman

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Executive Summary

It has been more than 10 years since publication of the Spencer Report of the United States Judicial Conference Committee on Defender Services Subcommittee on Federal Death Penalty Cases, which contained findings on the cost, quality, and availability of defense representation in federal death penalty cases. The Subcommittee's recommendations for the judiciary and defense counsel, aimed at containing costs while ensuring high quality defense services in capital cases, were approved by the Judicial Conference in September 1998. At the request of the Defender Services Committee and the Office of Defender Services of the Administrative Office of the U.S. Courts, these issues have been re-examined and the findings updated.

Part I of this report offers an introduction and overview of the research.

Part II examines the way prosecution policies and practices have developed from 1989, the beginning of the modern federal death penalty era, through the end of 2009. Prosecution decisions – whether, where, and how to charge death-eligible cases in the federal courts; whether or not to pursue a sentence of death for an eligible defendant; and how that death penalty "authorization" decision is made – are significant drivers of the cost of defense representation. Among the findings discussed in Part II are the following:

- The 1994 Federal Death Penalty Act vastly increased the number of crimes eligible for capital prosecution, with dramatic effect on the number of cases requiring capital defense services. The impact of this increase was only partially felt by the time the Spencer Report was published in 1998 and has had greater impact in the years since then.

- The process by which the Attorney General decides whether to seek the death penalty for a defendant charged with a capital offense (i.e., "authorizes" capital prosecution for a "death-eligible" defendant) has changed, increasingly removing discretion from local prosecutors and centralizing decisionmaking in the Department of Justice. Among other things, this has resulted in more defendants being authorized for capital prosecution without the request of local prosecutors.

- A higher proportion of authorized cases has been proceeding to trial rather than reaching settlement through a plea agreement.

- As the Justice Department has sought to nationalize the federal death penalty, more capital cases have been authorized in states that historically did not prosecute many (or any) capital cases in state court.

- Since 1989, the Attorney General has sought the death penalty against approximately 463 federal defendants. Approximately 262 of those defendants have stood trial, and 66 individuals, or approximately one quarter of those tried, have received a sentence of death.

Parts III, IV, and V of this report discuss the costs associated with defending a federal capital case. All authorized federal death penalty representations furnished by panel attorneys that began and ended between 1998 and 2004 were examined, along with a sample of cases in which the defendant was eligible for capital prosecution but the case was not authorized. Cost and other quantitative data from those cases were collected and analyzed to determine the factors that influence defense costs.

Among the findings are:

- The median cost of a case in which the Attorney General authorized seeking the death penalty was nearly eight times greater than the cost of a case that was eligible for capital prosecution but in which the death penalty was *not* authorized.

- The median cost of a case that was authorized and went to trial was more than twice the cost of a case that was authorized but resolved through a plea agreement.

- The cost of defending cases has increased substantially since the 1998 Spencer Report. Numerous factors likely account for this increase, including inflation, a higher degree of complexity in the cases, legal developments heightening obligations on counsel, expanded areas of litigation, advances in forensic science, as well as the geographic location where prosecutions are brought.

The following chart summarizes median defense costs in cases between 1998 and 2004:

Median Costs for Defense Representation by Panel Attorneys in Federal Capital Cases, 1998-2004

Type of Case	Total Cost	Attorney Cost	Attorney Total Hours	Attorney In-Court Hours	Attorney Out-of-Court Hours	Expert Cost	Transcript Cost
Death Eligible, Not Authorized	$44,809	$42,148	436	34	350	$5,275	$210
Authorized	$353,185	$273,901	2,014	306	1,645	$83,029	$5,223
Trials	$465,602	$352,530	2,746	353	2,373	$101,592	$10,269
Pleas	$200,933	$122,772	1,028	42	992	$42,049	$82

It should be noted that the figures in this chart are medians, and therefore the subparts do not sum to the whole (e.g., attorney in-court and out-of-court hours cannot be added to yield attorney total hours, and so on). In addition, it should be noted that the maximum hourly rate of compensation in capital cases for panel attorneys during the period of the study was $125. The maximum hourly rate effective January 1, 2010, is $178.

This section of the report also takes a closer look at the cases at the high and low end of the cost continuum, finding that:

- As a group, the highest cost cases (top 20 percent) were distinguishable from the group of all other cases based on the presence of a number of factors associated with higher costs. In general, in the higher cost cases there were more offenses alleged and a greater number of defendants and victims, and these cases also were more likely to include complex conspiracy-related charges, such as Continuing Criminal Enterprise (CCE), Racketeering Influenced and Corrupt Organizations Act (RICO), and terrorism-related offenses, as well as allegations of "future dangerousness" of the defendant. In addition, the group of highest cost cases generally was more likely to involve, singly or in combination, such factors as geographically far-ranging investigations, non-English speaking persons, diverse cultures, and complex issues of mental health or forensic science. In contrast, an absence of the aforementioned cost-increasing factors did not distinguish the group of low-cost cases (lowest 30 percent) from the group of all other cases.

- There was a strong association between a lower cost defense representation and an increased likelihood of a death sentence at trial. For trial cases in which defense spending was among the lowest one-third of all trial cases, the rate of death sentencing was 44 percent. For trial cases in which defense resources were in the remaining two-thirds of cost, the likelihood of a death sentence was 19 percent. Thus, the lowest cost cases were more than twice as likely to yield sentences of death.

- Geography and state court death penalty practices appear to be significantly correlated both with defense cost and with the likelihood of a death sentence at trial. There was a strong association between the state in which a prosecution was brought and the likelihood of a death sentence.

Section VI describes qualitative data obtained through interviews of federal judges who had presided over a federal death penalty case and experienced federal capital defense counsel on topics such as the quality of defense representation, case budgeting and case management practices, the role of experts, and the death penalty authorization process. Reported findings include the following:

- Judges expressed satisfaction with the quality and availability of defense counsel, while lawyers identified some concerns about the quality of representation.

- Judges voiced concern about the length of time that passes before a decision is made by the Attorney General regarding whether or not a case will be authorized for capital prosecution, and lawyers highlighted concerns about the lack of deference to the wishes of local U.S. Attorneys, particularly when the prosecution and defense have arrived at a mutually acceptable plea agreement.

- The assistance of the Federal Death Penalty Resource Counsel Project and an expansion to include separate projects for trial, appellate, and post-conviction cases was viewed favorably by lawyers and judges, who found the services to be helpful.

- Case budgeting is now the norm in federal death penalty trials, and the process is valued by both judges and lawyers.

- Expert services, including expert witnesses, investigators, and all services other than counsel, are a significant component of capital defense costs.

- Federal capital trials are extremely complex from a case management perspective. They consume enormous amounts of time and other resources and also exact a significant emotional toll on all participants. Particular areas of focus were court practices relating to severance, discovery, and jury selection.

Finally, in Sections VII and VIII, the Recommendations of the 1998 Spencer Report are reaffirmed, and the Commentary associated with those recommendations is updated to reflect the past 12 years of experience with federal capital litigation. The Recommendations suggest strategies to contain costs while ensuring the high quality of defense representation that

capital cases demand. They address areas including qualifications for appointed counsel, case management and case budgeting, the number of appointed counsel, appointment of federal defender organizations, and death penalty training programs. Updated Commentary addresses numerous areas, including:

- The skills and experience required for capital defense counsel at trial, on appeal, and in post-conviction, and what is meant by the policy that capital defense counsel have "distinguished prior experience" in capital representation.

- The benefits of appointing new counsel on appeal.

- The need for courts to consult with the district's federal defender organization or the Administrative Office of the U.S. Courts with respect to each capital case, and the availability of Resource Counsel to assist in this process at every stage of litigation.

- The potential benefits of relying on federal defender organizations to provide representation in capital cases where appropriate resources are available.

- Encouragement for communication between the judiciary and the Department of Justice about federal death penalty policies and practices that may enhance efficiency and cost savings.

- Case management practices, such as approaches to discovery, that are intended to have a beneficial impact on defense costs.

The 1998 Spencer Report remains pertinent today. It is a helpful primer on the distinguishing characteristics of a federal death penalty case and the unique demands these cases place on counsel. Its Recommendations, likewise, remain sound. The following report builds on the Spencer Report's foundation, providing a more current view of federal capital practice, more recent data on the cost of defense representation, and additional ideas on cost containment.

I. Introduction[1]

In May 1998, the United States Judicial Conference Committee on Defender Services approved the document entitled "Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation," which has become known as "the Spencer Report," after the chair of the subcommittee that produced the report, Judge James R. Spencer.[2] In September 1998, the Judicial Conference of the United States adopted the report's recommendations, which have been relied upon by courts and defense counsel ever since. (JCUS-SEP 98, pp. 67-74).

Much of the Spencer Report remains as relevant in 2010 as it was in 1998 – for example, its detailed description of the characteristics of federal death penalty prosecutions and its discussion of the special duties such cases impose on defense counsel. Similarly, its recommendations remain sound, as they endorse policies derived from core values consistently enunciated by the Defender Services Committee: high standards for appointed counsel, fair funding for the defense that is predicated on sound case-budgeting practices, and an appreciation of the scope and depth of counsel's responsibilities. The recommendations encourage the Administrative Office of the U.S. Courts to provide training and technical support for court-appointed counsel, and promote strategic case management and other approaches intended to contain costs while maintaining high-quality representation.

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[1] For the research and writing of this report, the Judicial Conference Committee on Defender Services and the Administrative Office of the U.S. Courts thank Jon Gould, J.D., Ph.D., Director of the Center for Justice, Law, and Society at George Mason University. Professor Gould was assisted by Lisa Greenman, staff attorney with the Federal Public Defender Organization for the District of Maryland. Sylvia Fleming, Information Technology Specialist in the Office of Defender Services, compiled extensive quantitative data from the CJA payment system, and Holly Stevens, doctoral candidate at George Mason University, provided valuable technical and editorial assistance.

[2] The Spencer Report can be found at http://www.uscourts.gov/FederalCourts/AppointmentOfCounsel/Publications/RecommendationsCostQuality.aspx

On the other hand, case-related data in the Spencer Report, including the cost information frequently relied upon by defense counsel and the courts in assessing the reasonableness of individual case budgets, are substantially outdated. The Spencer Report examined cases from 1989 to 1997, the first years of the modern federal death penalty.[3] Only a limited number of cases had reached resolution in the trial courts by that time, and no case had proceeded through the appellate and post-conviction stages. In the years since, there have been significant changes in the way cases are charged, investigated, and litigated. As of the close of 2009, more than 450 federal death penalty prosecutions have been authorized, resulting in more than 200 federal death penalty trials involving about 250 defendants. Direct appeals for approximately 60 death sentence cases have been resolved or are pending, and approximately 30 capital post-conviction proceedings pursuant to 28 U.S.C. § 2255 have concluded or are underway.

For these reasons, the Administrative Office's Office of Defender Services undertook this re-examination of the cost, quality, and availability of defense representation in federal death penalty cases since the time of the Spencer Report, with research progressing in two phases. In the first phase, cost data on federal death penalty cases between 1998 and 2004, as well as data on prosecution trends from 1988 through 2007 were collected and analyzed. A preliminary report summarizing those data and employing statistical techniques to elucidate the factors that affect case cost was released in June of 2008. The second phase of research delved deeper into the quantitative findings and expanded upon these statistical results through interviews and other qualitative research techniques to understand the effect these factors may have on the cost,

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[3] Congress revived the federal death penalty in 1988, when it authorized capital punishment for the narrow category of "drug kingpin" murders. 21 U.S.C. § 848, *codifying* Pub. L. 100-690, 102 Stat. 4382 (1988). In 1994, Congress passed the Federal Death Penalty Act, which expanded the number of federal crimes punishable by death to approximately 50. 18 U.S.C. §§ 3591-3598, *codifying* Pub L. 103-322, 108 Stat. 1959 (1994).

quality, and availability of defense representation in federal death penalty cases. A basic familiarity with the elements of a federal death penalty case is presumed here. An introduction to that material can be found in the Spencer Report. See Footnote 2, supra.

Drawing on both phases of research, this final report presents information on the authorization, defense, and management of federal capital cases.[4] In succeeding sections, data are offered on the changing frequency and geography of capital authorizations, the costs and comparative expenses of defending capital cases, and the various factors involved in a capital representation. Additional sections address the impressions and concerns of federal judges who have presided over these matters and lawyers who have defended the accused, examining in more depth the availability and quality of capital defense in the federal system. With these findings as a guide, the report concludes by re-affirming the Spencer Report's recommendations and, as appropriate, providing updated commentary.

II. Decisions by the Department of Justice to Seek the Death Penalty: Their Implications for Defense Costs

A. Defendants Subject to Capital Prosecution: Potential Death Penalty Cases, 1989-2009

Although this study focuses primarily on what happens after the Attorney General has authorized capital prosecution for a defendant ("authorized" cases), both the total number of potential capital prosecutions ("death-eligible" cases) and the process by which the Department of Justice chooses from among those cases those individual defendants against whom it will seek the death penalty (the death penalty "authorization" process) have profound consequences for

[4] This report incorporates the findings published in the June 2008 preliminary report on Phase I of the research and therefore supersedes that report. In addition, data for the years 2008 and 2009 was added to the analysis of prosecution trends.

defense representation.[5] It is therefore necessary to develop an understanding of patterns and trends.[6]

As previously noted, in 1994 Congress expanded the number of offenses punishable by death to approximately 50. As a result, in the second half of the 1990s the number of death-eligible federal capital defendants surged. According to the Federal Death Penalty Resource Counsel Project, which monitors federal prosecutions for the Defender Services program, there were 26 death-eligible defendants in 1993, 63 in 1994, and then upwards of 150 in almost every subsequent year.[7]

Figure 1 illustrates this trend, showing, by year of indictment, the number of federal defendants charged with offenses punishable by death between 1989 and 2009.[8] These numbers should be viewed as a good estimate, but not a precise count of each and every such case.

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[5] The number of such "death-eligible" prosecutions affects the availability of qualified capital defense attorneys and the cost of representation because, pursuant to 18 U.S.C. §3005, any defendant charged with an offense punishable by death must be appointed two counsel, at least one of whom has special qualifications, who are paid, pursuant to 18 U.S.C. § 3599, at the higher hourly rate applicable to death penalty cases. Unless and until the Department of Justice notifies the court that it will not seek the death penalty against the defendant, these appointments remain in effect and the increased rate of compensation for both counsel applies. Since a significant portion of costs in capital defense relate to developing mitigation evidence in preparation for a separate sentencing trial, these costs similarly continue to accrue until the government decides not to seek the death penalty.

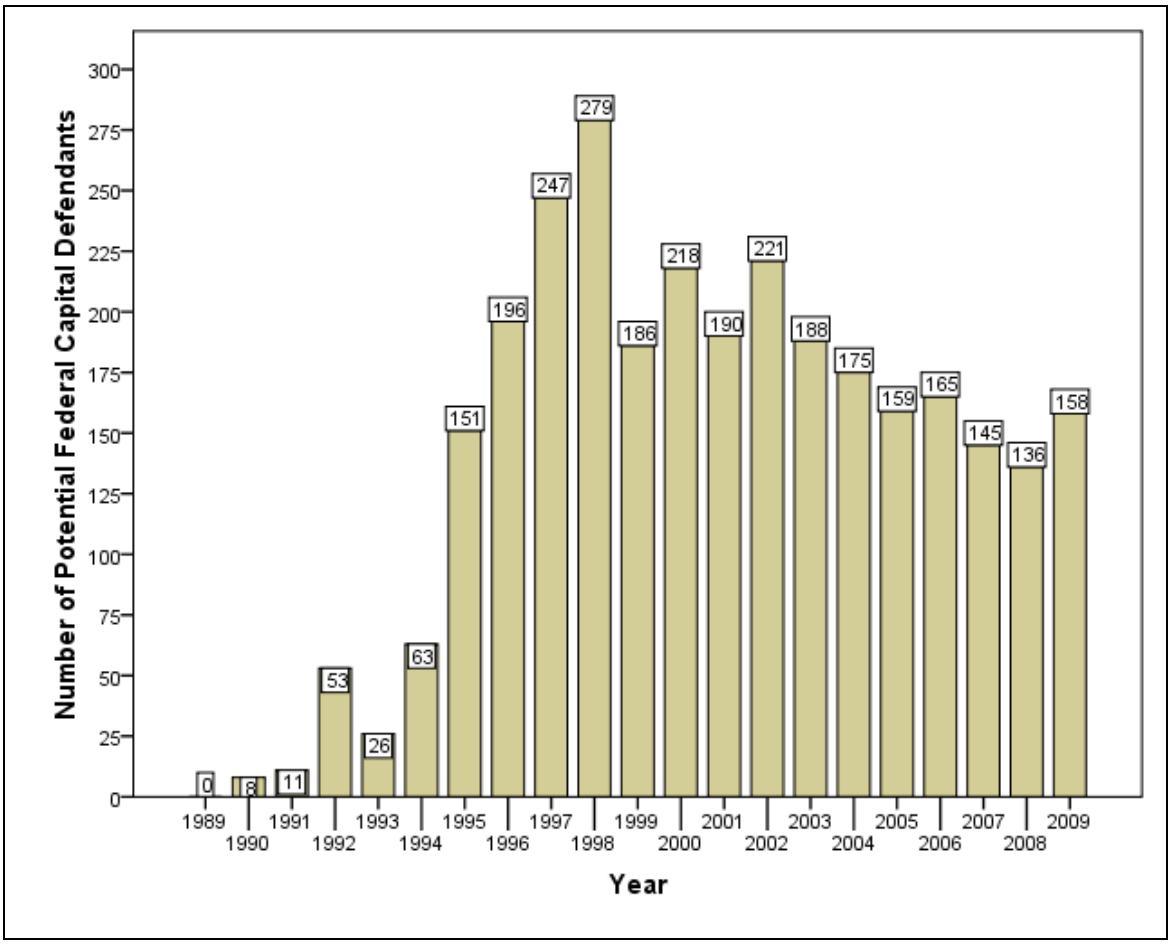
[6] In this report, the term “death-eligible” refers to a case that is expected to be or already has been filed in federal court and in which at least one count of the indictment alleges or is expected to allege an offense for which the death penalty is a possible punishment. It is essential to note that such federal death-eligible cases do not constitute the entire universe of “potential” federal death penalty prosecutions. Rather, these death-eligible federal cases are themselves the result of a selection process. As a jurisdictional matter, most federal death penalty cases could be prosecuted in either federal court or state court. Federal authorities, often in consultation with state law enforcement agencies, determine whether and where to bring the prosecution, a decision that may turn on any one of a number of factors. This research has found no source from which the number of all such potential federal death penalty cases can readily be ascertained.

[7] The Federal Death Penalty Resource Counsel Project, established by the Administrative Office's Office of Defender Services, provides training and advice regarding trial issues to appointed counsel and the courts. (See infra, pages 61-63.) It is one of three Death Penalty Resource Counsel Projects referred to throughout this report as “Resource Counsel” or “the Resource Counsel Projects.” The Federal Capital Appellate Resource Counsel Project and the Federal Capital Habeas Project provide similar support for cases on appeal, and in post-conviction cases pursuant to 28 U.S.C. § 2255, respectively.

[8] The Federal Death Penalty Resource Counsel Project provided the data in Figures 1 through 7.

Figure 1

"Death-Eligible" Federal Capital Defendants, 1989- 2009, by Calendar Year of Indictment



B. The Attorney General's Decision-Making and How It Has Changed[9]

As indicated in footnote 6, supra, it has not been possible to examine in this research the universe of all cases in which federal capital prosecution is an option. However, once the government has determined that it will charge a defendant with a death-eligible offense in federal court and has obtained an indictment, it must decide whether or not it will seek the death penalty for the defendant. This decision and the process by which it is made have significant cost

[9] We note that as this report was completed in 2010, the Department of Justice was engaged in a review of its authorization procedures.

consequences. As described in Section IV.A. (pp. 24-26) of this report, cases in which pursuit of the death penalty was authorized were substantially more costly to defend than those not authorized. In addition, authorized cases that went to trial were significantly more expensive than those resolved with a guilty plea.

The Department of Justice does not permit a federal prosecutor to seek the death penalty for a defendant unless specifically authorized to do so by the Attorney General of the United States.[10] Prior to 1995, a local prosecutor was required to present a death-eligible case to the Attorney General only if he sought permission for a capital prosecution. Because the Attorney General had no formal mechanism to learn of death-eligible defendants, there was little possibility that the Attorney General would require a local prosecutor to seek the death penalty where the United States Attorney did not wish to do so. That is, if local federal prosecutors wished to seek the death penalty, the Attorney General could authorize it or not. But the Attorney General would not know of, and thus would not authorize, a capital prosecution if the local prosecutor made no request. Regardless of whether the death penalty was authorized, the U.S. Attorney's Office retained full discretion as to the ultimate disposition of the case. A plea agreement could be negotiated between the parties without further involvement by the Attorney General.

Beginning in 1995, Attorney General Janet Reno promulgated a formal protocol that centralized death penalty decision-making and required Attorney General review of *all* death-eligible cases.[11] This increased the possibility that capital prosecutions would be pursued in cases in which they were not requested by local prosecutors. Once the death penalty was

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[10] U.S. Attorney's Manual, Title 9-10.000.

[11] Id.

authorized, however, the local U.S. Attorney still had the discretion to negotiate a plea bargain. In practice, according to the Federal Death Penalty Resource Counsel, Attorney General Reno rarely exercised her authority to overrule a U.S. Attorney's recommendation against the death penalty. When she did, each such case was ultimately resolved through a negotiated plea agreement resulting in a sentence other than death. These plea agreements were facilitated by the previously described policy that vested decision-making authority respecting plea bargains in the local U.S. Attorney's Office.

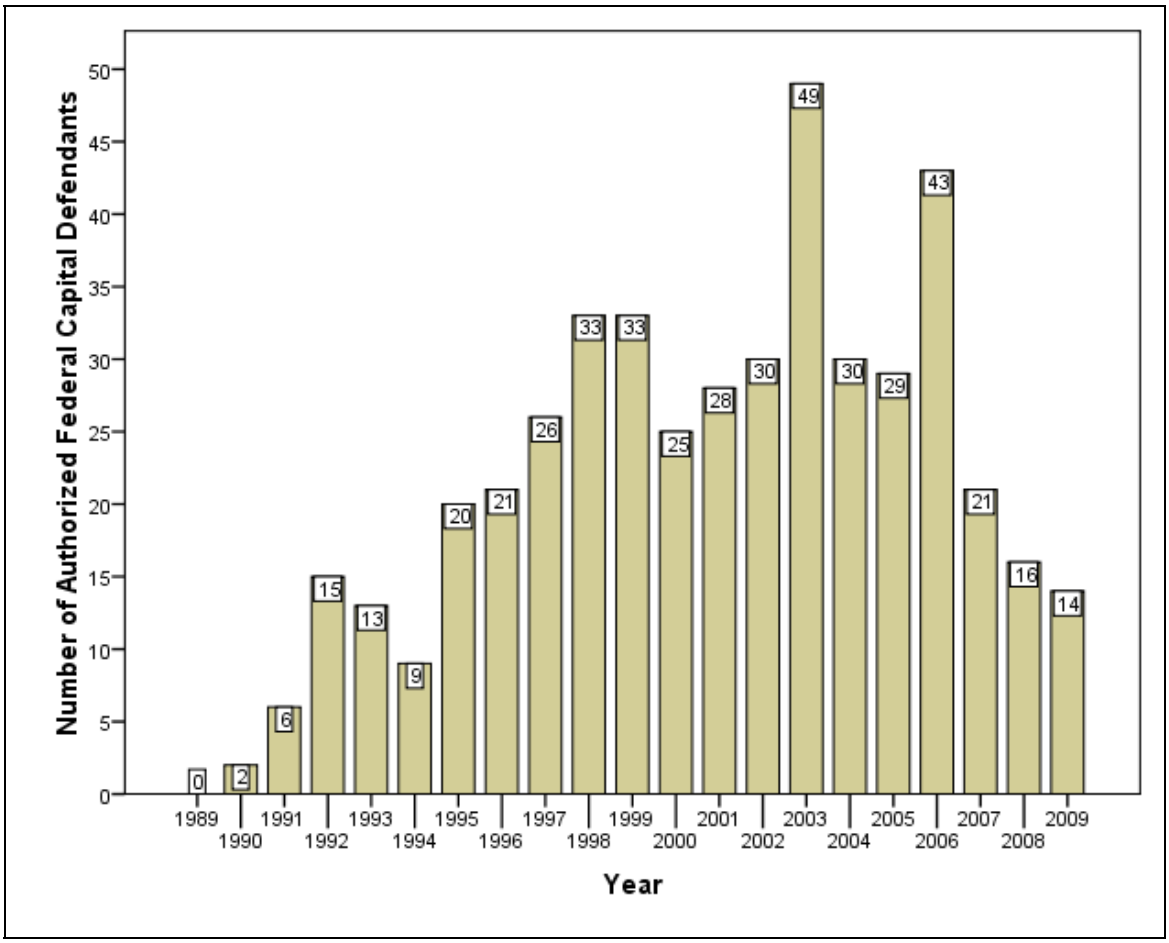
Death penalty decision-making changed again in 2001. The authorization decisions of the next Attorney General, John Ashcroft, were less deferential to local prosecutors, and the number of capital prosecutions authorized without the recommendation of the local U.S. Attorney increased substantially.[12] Attorney General Ashcroft also instituted a formal policy requiring approval from his office before an authorized case could be settled by plea agreement. These new policies and practices had significant impact. Over time, proportionally fewer cases reached a negotiated resolution and a greater proportion of cases went to trial.

Figure 2 (p. 8) reflects the number of defendants for whom the Attorney General authorized a capital prosecution each year between 1989 and 2009, a total of 465. The pattern of prosecutions in Figure 2 matches the trend in death-eligible offenses found in Figure 1 (p. 5), with cases rising significantly following passage of the 1994 Federal Death Penalty Act and then remaining at or above the 1995 level through 2007. Interestingly, the number of cases

[12] According to data compiled by the Federal Death Penalty Resource Counsel Project, Attorney General Reno required a death penalty prosecution without a request for permission from the local prosecutors 14 percent of the time (26 of 182 authorization decisions) and Attorney General Ashcroft did so 30 percent of the time (42 of 139 authorization decisions).

authorized annually by the Department of Justice has varied from 2002 through 2009, rising in 2003 and 2006 and dropping thereafter.[13]

Figure 2
U.S. Department of Justice Capital Authorizations, 1989-2009, by Year of Authorization



C. Resolution of Authorized Cases

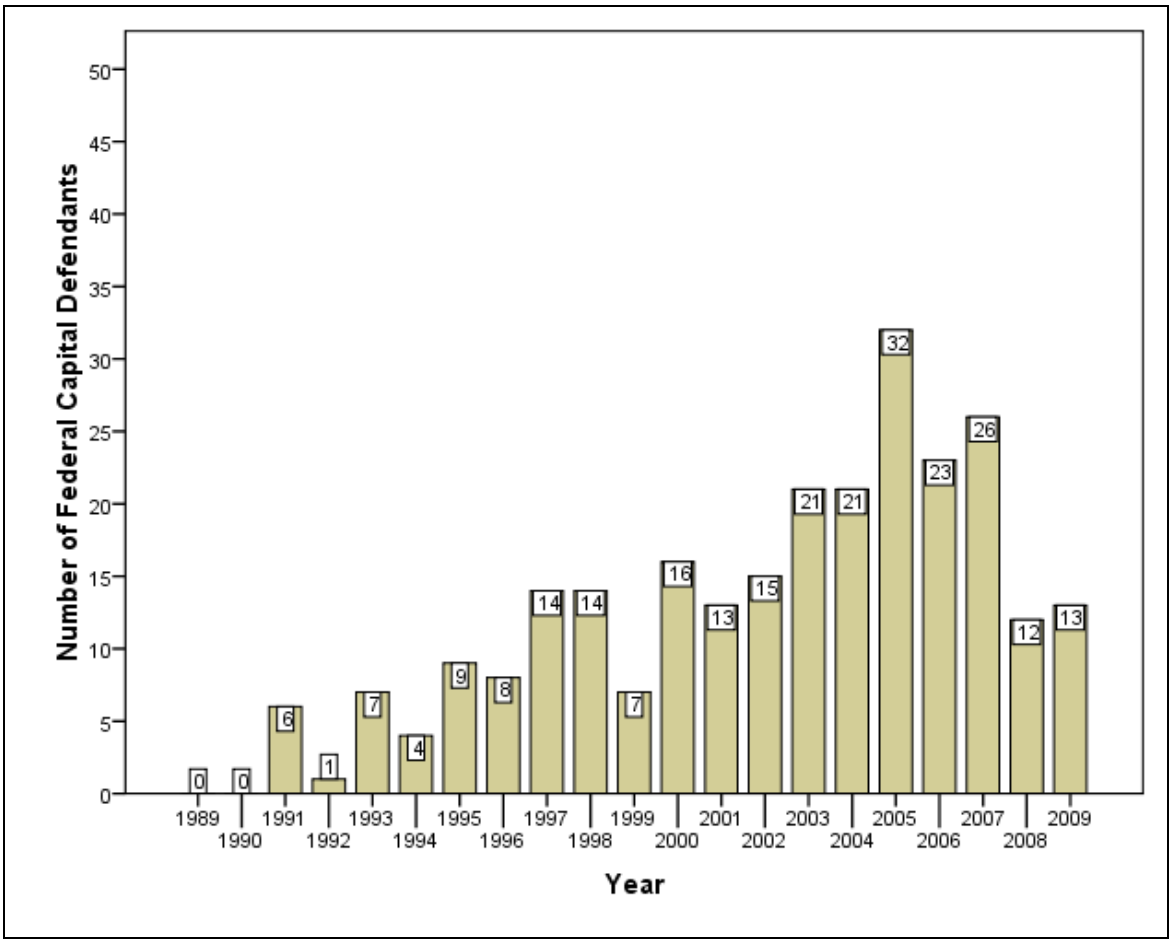
By the end of 2009, 262 authorized defendants had been tried.[14] Figure 3 (p. 9) shows the number who went to trial each year between 1989 and 2009. There was a total of 204 trials

[13] As a point of clarification, Figure 2 does not reflect the total number of authorized federal death penalty cases pending trial in the courts each year, but rather the number of times the Department of Justice authorized a new capital prosecution.

for these 262 defendants, reflecting the fact that some trials involved more than one capital defendant.[15]

Figure 3

Number of Federal Capital Defendants Tried, 1989-2009, by Calendar Year



[14] The vast majority of these defendants proceeded through both guilt and penalty phases, although in some instances a two-phase capital trial was not completed (e.g., the guilt phase verdict acquitted the defendant of the capital charge), and in others the case was resolved in another fashion (e.g., after trial commenced, there was a negotiated guilty plea to a sentence other than death or the death penalty authorization was withdrawn). Cases are assigned to the calendar year in which trial began.

[15] A chart showing both the number of capital trials and the number of defendants tried by calendar year is provided in Appendix B (p. 125).

The number of capital trials rose at a relatively consistent rate between 1989 and 2007, even while the number of death penalty prosecutions authorized by the Attorney General varied. Stated differently, regardless of the number of federal capital prosecutions authorized, proportionally fewer authorized defendants each year resolved their cases through pretrial guilty pleas, and a greater proportion went to trial.

Among the authorized cases that proceeded to trial, approximately one quarter ended with the defendant being sentenced to death. Through the end of 2009, 68 of the 262 capital defendants who proceeded to trial were sentenced to death.[16] Figure 4 (p. 11) shows the number of federal death sentences returned each year from 1989 through 2009, and Table 1 (p. 12) provides summary data. A chart reflecting the number of defendants under sentence of death as of March 2010, and the states and federal circuits in which their cases were tried, is provided in Appendix B (p. 126-27).

[16] Among the 463 defendants for whom capital prosecution has been authorized, the cases of many of those authorized later in the time period are still pending. Of the 262 that went to trial, two defendants were sentenced to death twice, the second death sentence following an appellate reversal and retrial. For purposes of this report, each death sentence is recorded.

Figure 4

Number of Federal Death Sentences, 1989-2009, by Calendar Year

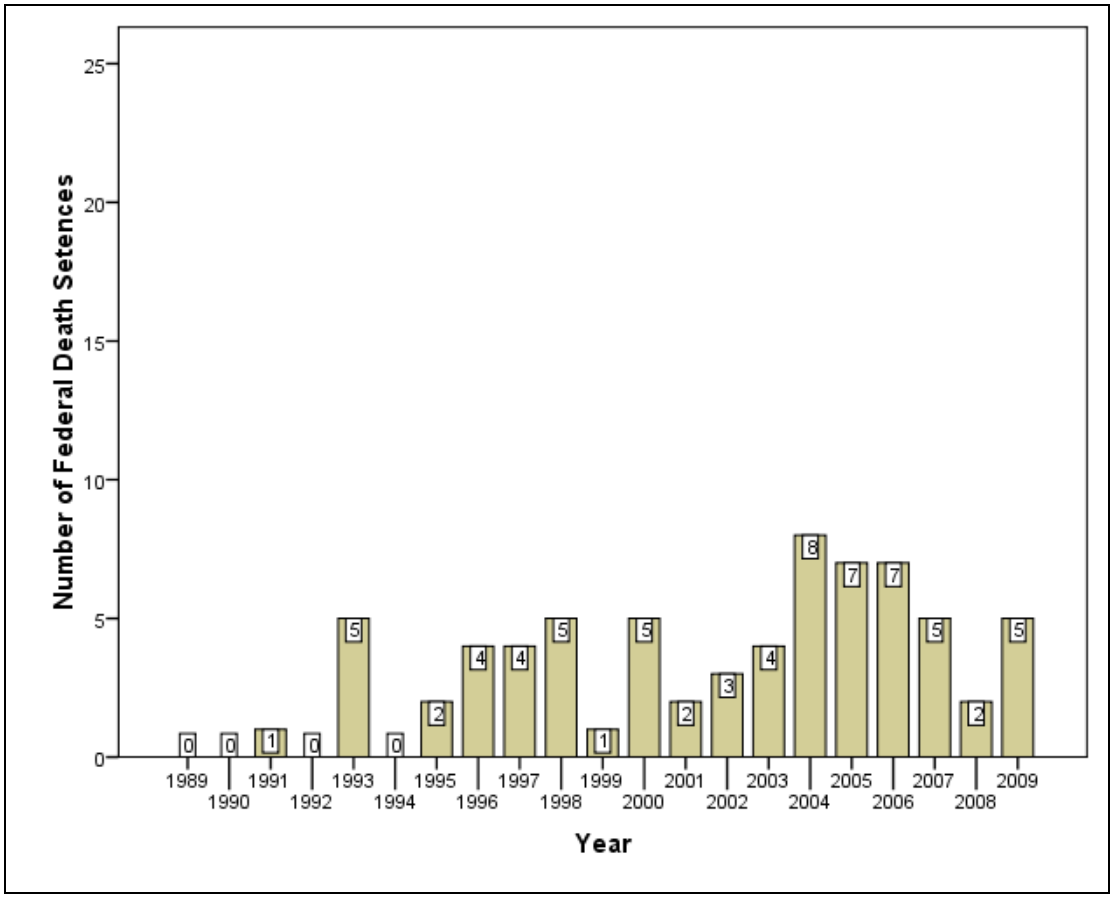


Table 1
Federal Death Penalty Prosecutions, 1989-2009

Defendants Authorized	463
Capital Trials	204
Capital Defendants Tried	262
Defendants Sentenced to Death	68[17]
Death Verdicts as a Percentage of Capital Defendants Tried	26%

D. Geographic Distribution of Authorized Cases

The geography of the federal death penalty has changed as well. In the period analyzed in the Spencer Report, just after the federal death penalty was reinstated, federal capital prosecutions clustered mainly in states with active state court death penalty prosecutions, such as Texas, Virginia, Missouri, and Georgia. Subsequently, however, the Department of Justice began authorizing cases more broadly, explaining that it sought to establish national consistency and eliminate geographic disparities.[18] Thus, the proportion of prosecutions brought in jurisdictions with little or no death penalty experience has increased.[19] Figure 5 illustrates this

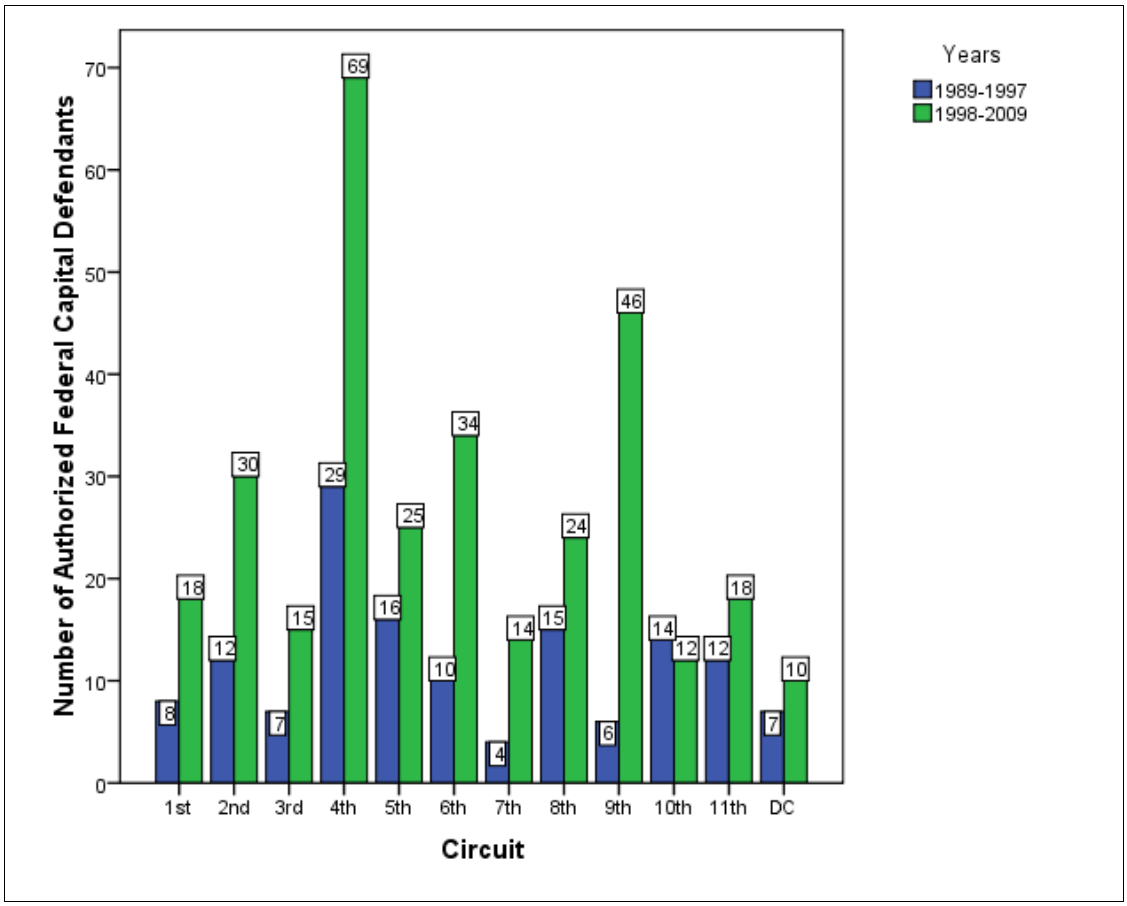
[17] This number includes two death sentences that were imposed by a jury but not imposed by the court because a new trial motion was granted.

[18] "[T]he goal of the Department's death penalty review and decision-making process is nationwide consistency in the fair and even-handed application of federal capital sentencing laws in appropriate cases, irrespective of geography or local predisposition for or against the death penalty." Statement of Barry Sabin, Dep. Ass't Att'y Gen. of the United States. *Oversight of the Federal Death Penalty*: *Hearing before the Senate Committee on the Judiciary*, 110th Cong. (2007).

[19] For example, in Puerto Rico, where a comparatively large number of federal capital prosecutions have been authorized, there is a constitutional prohibition against the death penalty. The District of Columbia has rejected by referendum an effort to establish a local death penalty. Additional non-death penalty states where federal capital prosecutions have been authorized include Iowa, Michigan, West Virginia, Vermont, and Massachusetts. *See also*, Rory K. Little, *Good Enough for Government Work? The Tension Between Uniformity and Differing Regional Values in Administering the Federal Death Penalty*, 14 Fed. Sentencing Rep. 7 (2001); Benjamin Weiser & William Glaberson, *Ashcroft Pushes Executions in More Cases in New York*, N.Y. Times, Feb. 6, 2003, at A1.

trend. In the first decade of the federal death penalty, cases were authorized in each of the 12 federal circuits, although the distribution was uneven. The Fourth Circuit had the most authorized cases, while the Seventh Circuit had the fewest.

Figure 5
Number of Authorized Federal Capital Defendants, 1989-1997 and 1998-2009, by Circuit

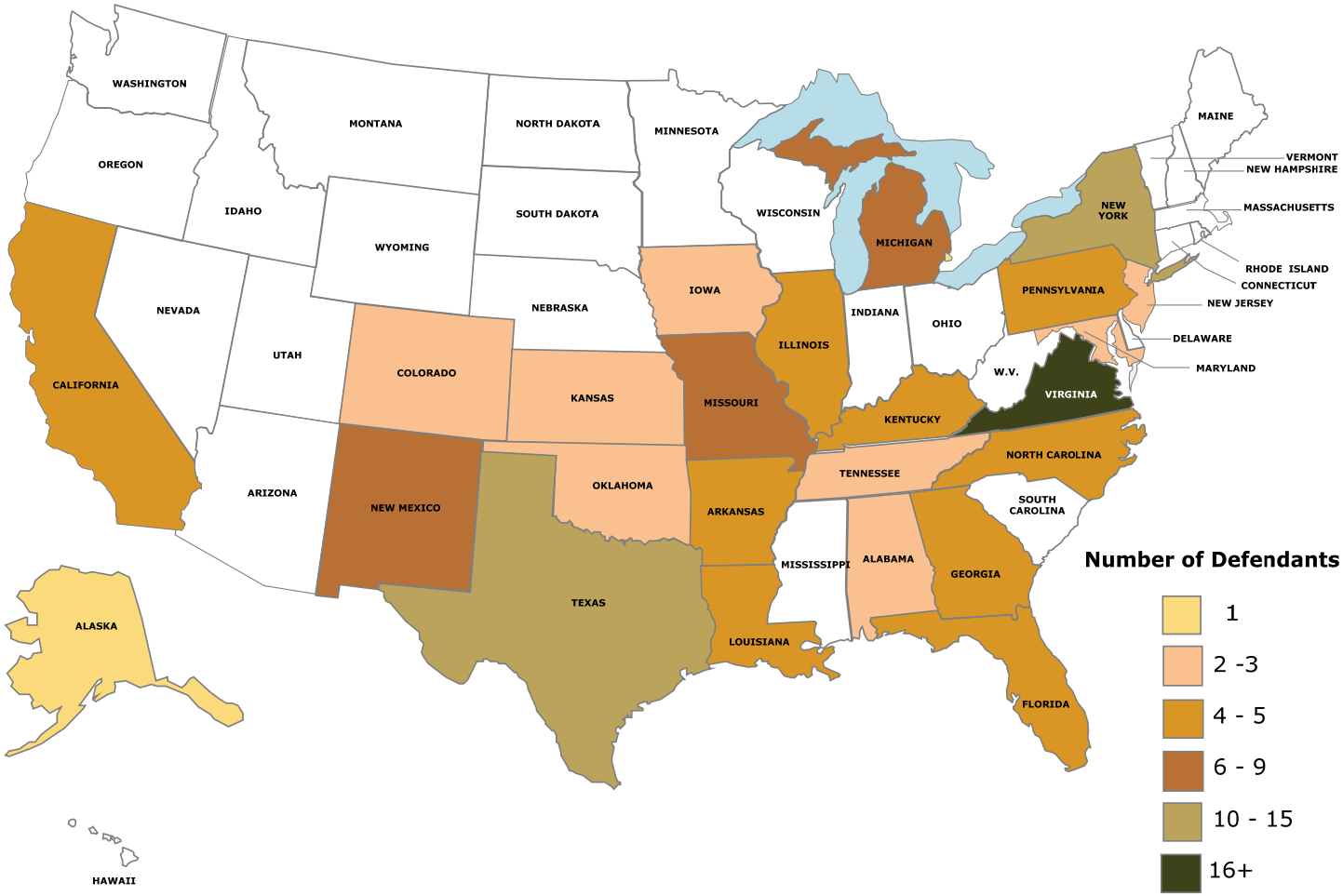


A decade later, the Fourth Circuit still had the largest federal capital caseload – about one-fifth of all federal death penalty cases brought nationwide – but the proportional shares among the circuits changed significantly. Whereas the Ninth Circuit had only 4 percent of federal capital cases between 1989 and 1997, its proportion increased more than threefold to 14

percent of the national docket in 1998-2009. Similarly, the Second Circuit's percentage rose from 8.5 to 12.3 percent of the national capital caseload, while the Fifth, Eleventh, and DC Circuits represented a smaller share of the expanded national docket. In the period between 1998 and 2009, the number of authorized federal capital prosecutions increased in each circuit except the Tenth.

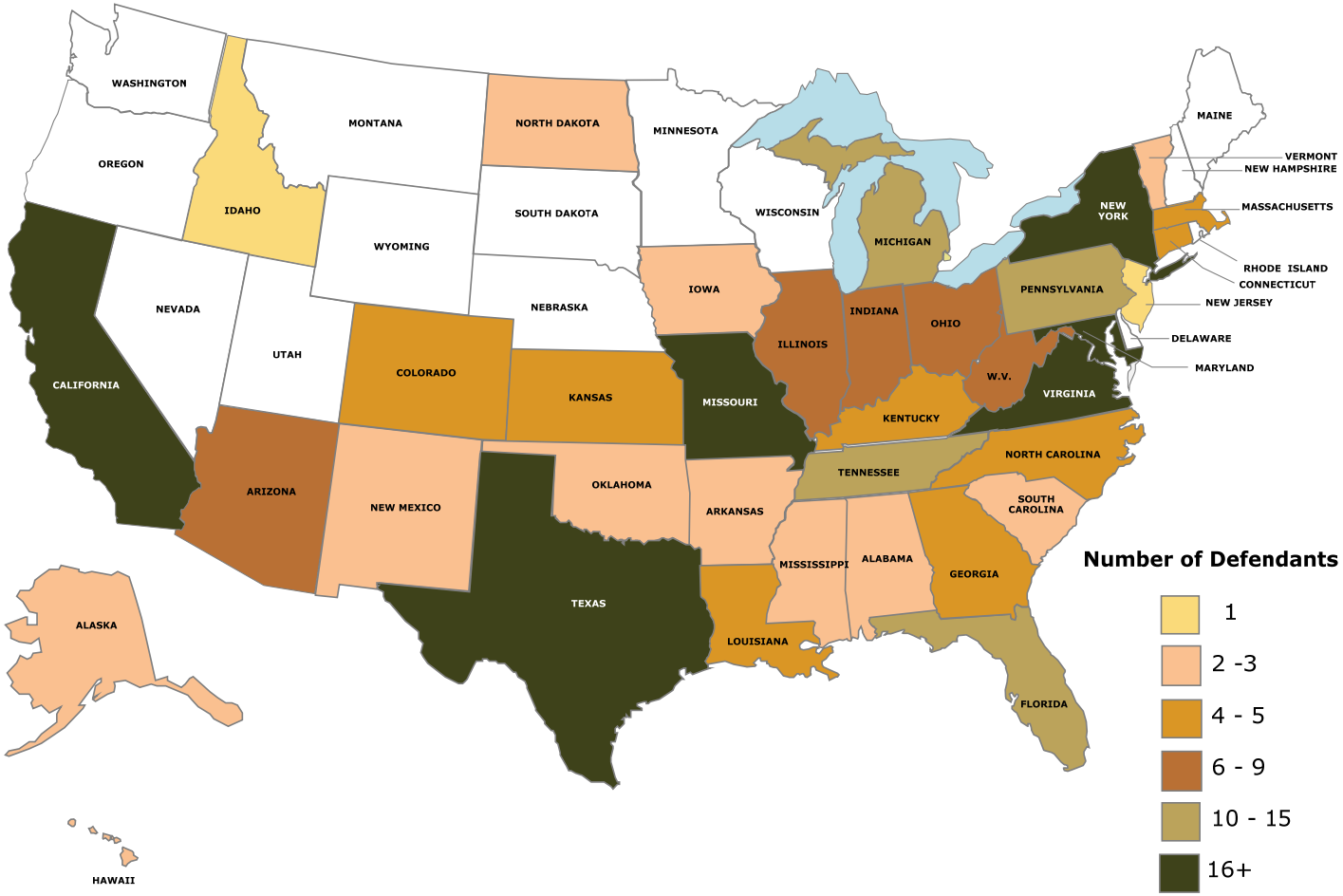
These dynamics are displayed at the state level in Figures 6 and 7 (p. 15 and 16). Although Figure 5 (p. 13) includes all authorized cases, both pleas and trials, Figures 6 and 7 portray the geographic distribution of the trial cases, comparing the period of the present study with the years addressed in the Spencer Report. As these maps illustrate, the Department of Justice has brought the federal death penalty to a larger group of states in the past decade, resulting in more cases being tried in jurisdictions where non-federal death penalty prosecutions are rare or non-existent.

Figure 6. Number of Federal Defendants Authorized for Capital Prosecution, by State, 1989 -1997



State	AK	AL	AR	CA	CO	DC	FL	GA	IA	IL	KS	LA	MD
# Def.	1	3	5	5	2	7	5	4	2	4	3	5	3
State	MI	MO	NC	NJ	NM	NY	OK	PA	PR	TN	TX	VA	
# Def.	8	8	5	2	6	12	3	5	8	2	11	21	

Figure 7. Number of Federal Defendants Authorized for Capital Prosecution, by State, 1998 -2009



State	AK	AL	AR	AZ	CA	CO	CT	DC	FL	GA	HI	ID	IA	IL	IN	KS	KY	LA	MA
# Def.	2	3	2	6	36	4	4	10	10	5	2	1	2	8	6	4	4	5	4
State	MD	MI	MO	MS	NC	ND	NJ	NM	NY	OH	OK	PA	PR	SC	TN	TX	VA	VT	WV
# Def.	23	11	18	3	5	2	1	2	32	6	2	14	14	3	13	17	31	3	7

III. Costs of Defending Federal Capital Cases

As later sections of this report explain, changes initiated by Congress and the Department of Justice have had profound effects on the cost of defending federal capital cases. The 1994 Federal Death Penalty Act vastly increased the number of capital-eligible crimes, but the cost impact could not be fully captured at the time of the Spencer Report. In addition, in the past decade, the Department of Justice has authorized capital prosecutions more frequently, and more often without the request (or even against the expressed recommendation) of local prosecutors, than previously. More of these cases are being brought in jurisdictions where non-federal death penalty prosecutions are rare or non-existent, and a greater percentage of federal capital prosecutions are proceeding to trial rather than being settled by plea agreement.

A. Cases Examined

To analyze the cost of defense representation in authorized federal death penalty cases, a database of such cases was developed. As with the Spencer Report, research focused on panel attorney appointments – those cases in which a capital defendant is represented by private attorneys appointed pursuant to the Criminal Justice Act (CJA), whose compensation by the federal courts is recorded in the CJA payment system. All federal death penalty representations that began between 1998 and 2004 and concluded in the district court by the end of 2004 were examined, and almost all were included in the database.[20]

Excluded from the database were those very few cases in which representation was provided, in whole or in part, by privately retained counsel, or by counsel whose services were

[20] This time period immediately follows the years covered by the Spencer Report and represents a span in which the maximum rate of compensation for appointed defense counsel remained constant at $125 per hour (the same hourly rate that applied during the Spencer Report). In a few cases, payments were made for services performed after December 31, 2004. Because the amounts were small and comparatively insignificant, these cases were retained in the research. Those few cases with incomplete data were excluded from the analysis.

provided *pro bono,* without compensation. For purposes of cost analysis, cases in which representation was provided, in whole or in part, by a federal defender organization were excluded because the cost of representation is not captured by the CJA payment system.[21] These federal defender cases were identified, coded, and made part of the database for other purposes, however. Federal defender organizations were involved in a higher proportion of cases during the period of this study than during the period of the Spencer Report.

Also excluded from the database were authorized cases that did not proceed as capital prosecutions through ultimate disposition, either because the death penalty authorization was withdrawn by the Department of Justice or the notice of intent to seek the death penalty was dismissed.[22] In both sets of circumstances, the representation then would have gone forward as a non-capital matter and thus costs could not reasonably be compared with those in cases that proceeded to conclusion as capital matters. However, as with the Spencer Report, a companion group of death-eligible, non-authorized cases was drawn in order to examine the increased cost of representation when the Department of Justice authorizes a death penalty prosecution.

All reported data refer to the defense of an individual defendant in a single case, or as the CJA payment system uses the term, a "representation." When the term "case" is used (e.g., "median case cost"), it refers to the representation of a single defendant who may or may not have been among multiple defendants joined in an indictment.

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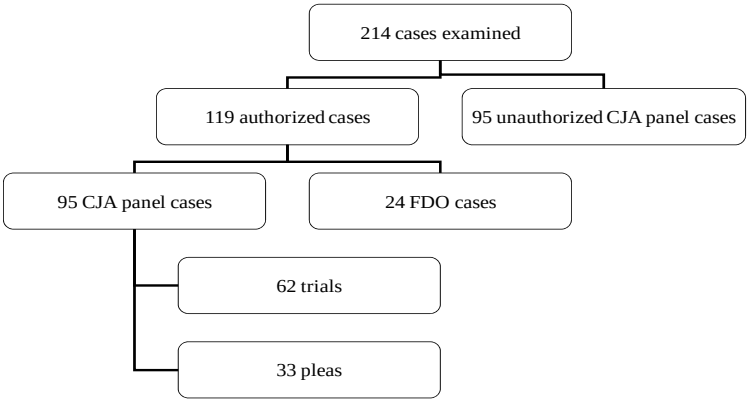
[21] The CJA Panel Attorney Payment System is a judiciary-wide application in which all attorney and expert service provider vouchers for representation-related work performed are recorded, processed and paid.

[22] Authorization might be withdrawn if, for example, new information relevant to guilt or punishment convinced prosecutors and the Attorney General that death would not be an appropriate sanction. Notice of intent to seek the death penalty might be dismissed upon the order of a judge for a legal reason, such as having been filed too close to an already established trial date, or because the defendant was diagnosed with mental retardation. Cases in which the defendant entered a plea of guilty to the death-eligible charge in exchange for the prosecution agreeing to a life sentence and dismissing the death penalty request were retained in the research.

Figure 8 illustrates the dataset of federal death-eligible cases examined. For the period 1998-2004, the study examined 214 cases, of which 119 were authorized as capital prosecutions. Of these, 95 were CJA panel attorney representations and 24 involved representation by federal defenders. Thirty-three of the 95 authorized panel cases were resolved by plea agreement, and 62 were tried. The costs from the 95 authorized panel cases were compared with the costs in 95 death-eligible but not authorized CJA panel attorney cases.[23]

Figure 8

Federal Death-Eligible Cases Studied, 1998-2004



[23] The non-authorized cases were chosen at random from a list maintained by the Federal Death Penalty Resource Counsel Project. Because these 95 cases were selected for comparison of costs with the 95 authorized CJA panel attorney cases, only representations that did not involve a federal defender organization were included.

B. Data Examined

This report analyzes the cost of federal death penalty representations and examines the factors that may influence case cost. For each of the 95 CJA panel attorney representations reflected in Figure 8, more than 40 sets of data were collected and coded. The list of recorded data is delineated in Appendix A (p. 123). Initially, seven elements of case cost were coded from data collected from the CJA payment system. These included:[24]

- Total case cost
- Cost of counsel
- Cost of experts
- Attorney hours
- In-court attorney hours
- Out-of-court attorney hours
- Cost of transcripts

These cost variables ("dependent variables") were matched against factors that may have influenced case cost ("independent variables"). The latter were collected from a variety of sources, including the CJA payment system, the electronic public access service that provides case and docket information from federal courts (PACER), and the Federal Death Penalty Resource Counsel Project. In some cases, the attorneys of record were contacted to obtain necessary information.

Some of the independent variables are straightforward and easily understood:

- Defendant's name
- Circuit of prosecution
- District of prosecution
- State of prosecution
- Whether the case was resolved by trial or plea
- How the case concluded – whether acquittal, dismissal, or verdict of guilt

[24] "Total case cost" reflects the combined costs of counsel and experts (or, in CJA terminology, "services other than counsel"), but does not include transcript costs or certain travel costs that may be billed directly through the court rather than through CJA vouchers. "Cost of transcripts" reflects payments to the official court reporter for producing a record of court proceedings.

- Defendant's sentence (if not acquitted or dismissed)
- Number of defendants named in the indictment

The remaining factors are more complex and are discussed in some detail in the paragraphs following this list. They include:

- Number of defense counsel
- Number of prosecutors
- Number of defendants
- Number of homicides alleged in the indictment
- Race, gender, and ethnicity of defendant and victims
- Involvement of victims in criminal activity
- Prosecution's allegation of "future dangerousness"
- Number of offenses alleged in the indictment
- Nature (magnitude) of offenses alleged in the indictment
- Case length
- Features of the Department of Justice's capital authorization process
- Experts utilized by the defense
- State history and experience with death penalty litigation

The number of attorneys who staffed each side of a case was noted. The recorded number reflects all lawyers whose appearance in the case, as reflected on PACER, lasted longer than 30 days. As required by 18 U.S.C. § 3005, in all cases, defendants were represented by at least two lawyers, and in some cases more lawyers entered appearances, either to substitute for or to supplement the two statutorily required counsel. These numbers do not reflect additional counsel, if any, permitted to assist appointed counsel for limited purposes. The number of prosecutors showed greater variability, ranging from one to as many as seven lawyers who entered an appearance and remained in the case for longer than 30 days.

The numbers of defendants and of charged homicides in each representation were coded. These data included the number of codefendants joined in the case, regardless of whether they were charged with a capital crime, as one measure reflecting the size of the case. Also recorded was the number of homicides attributed in the indictment to the defendant named in the representation, as an indicator of the scope of criminal responsibility for that defendant. (The

number of homicides alleged as "aggravating factors" in support of a death sentence was not included in this figure, as the data could not be easily verified.) The race, ethnicity, and gender of victims and defendants, as well as whether victims were themselves connected to criminal activities, were recorded. Where prosecutors alleged "future dangerousness" of the defendant as an aggravating factor in support of the death penalty, this was noted.

The total number of indicted offenses in each case, whether charged against that particular capital defendant or a codefendant, was recorded. In most cases, the capital defendant faced the greatest number of charges, but even when he did not, this variable was another measure of the size and scope of the case. A category was created to note three types of indictments that are generally complicated and multifaceted, indicating case magnitude: continuing criminal enterprise (CCE), racketeering (RICO), and terrorism.

Several measures reflecting the length of a case were recorded. The date of the first appointment of counsel was noted as a "start date." The date on which the government filed notice of its decision to authorize capital prosecution was recorded, as was the date of conclusion in the district court, whether by acquittal, dismissal, or sentence. The data also indicate which of two Attorneys General authorized the capital prosecution (the study period encompassed part of the tenure of Attorney General Reno and the full tenure of Attorney General Ashcroft).

Several variables were collected to reflect the use of experts in each representation. The term "experts" is used here, as in the Spencer Report, to embrace the "services other than counsel" that are authorized under the Criminal Justice Act. 18 U.S.C. § 3006A(e); 18 U.S.C. § 3599(f). Thus, in addition to professionals traditionally thought of as experts, such as doctors or scientists, the term includes fact investigators, paralegal assistants, reproduction services, as well as fingerprint examiners, pathologists, mitigation specialists, jury consultants, etc. Information

was drawn from the CJA payment system reflecting notations contained in the form CJA 31 that defense counsel use when itemizing claims for such expenditures. The CJA 31 provides 24 potential categories of services other than counsel that may be used in a representation.[25] The data include these itemized costs from each case.

Finally, data were collected to reflect the history and experience of states with the death penalty. These variables are used later to examine the relationship between state court capital practice and case cost in federal capital prosecutions. Data were collected indicating whether there was a state death penalty statute in the jurisdiction where the federal prosecution was brought; the number of years following *Furman v. Georgia*[26] before that state reinstituted the death penalty; the number of years following *Gregg v. Georgia*[27] before the state executed a defendant;[28] the number of defendants on that state's death row as a percentage of its population; the number of executions in the state post-*Gregg* as a percentage of its population; and the size of the state's death row as related to its crime rate.

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[25] The CJA 31 was revised to capture these 24 categories in 1995, and includes a category designated as "other," for types of services not identified. Prior to that, only 12 categories (including "other") were available on the form.

[26] *Furman v. Georgia*, 408 U.S. 238 (1972), held execution to be cruel and unusual punishment under the Eighth Amendment based on its randomness, effectively bringing capital punishment to a halt while states re-evaluated their sentencing procedures.

[27] *Gregg v. Georgia*, 428 U.S. 153 (1976), upheld the constitutionality of capital sentencing statutes drafted to comply with *Furman* by providing for guided decision-making.

[28] In states that have not reinstituted the death penalty, these figures reflect, respectively, the time between *Furman* and the present and the time between *Gregg* and the present.

IV. Findings

A. Total Case Costs

The costs of defending federal death-eligible cases spanned a wide range between 1998 and 2004. As Table 2 (p. 25) indicates, the cost of death-eligible, non-authorized cases ranged from a high of $681,556 to a low of $1,613. The median cost was $44,809. Because the median reflects the middle case of a group, it is generally a better measure of a "typical" case than an average, or mean cost figure.[29] Nevertheless, Table 2 also provides the mean cost, which at $76,665 indicates that costs varied more extensively in cases above the median than in cases below the median (or, put another way, the highest cost cases were further from the median than were the lowest cost cases).

Authorized cases are substantially more expensive than non-authorized cases. The median amount of $353,185 for authorized cases in Table 2 (p. 25) indicates that cases in which a capital prosecution was authorized cost almost eight times as much as those death-eligible cases that were not authorized. (This median figure reflects all authorized cases, both those resolved by a guilty plea and those that went to trial. Trial cases are significantly more costly, as explained below.) Authorized cases ranged in cost from a high of $1,788,246 to a low of $26,526. As this wide range from high to low is present in the non-authorized cases as well, it probably reflects (among other things) an inherently broad range of litigation complexity that exists in all death-eligible cases, authorized and non-authorized. Even so, there is no mistaking

[29] The median reflects the middle unit in a group of cases. In a collection of 101 cases, for example, the 51st case would be the median. The mean, or average, adds costs from all of the cases and divides by the number of cases.

the vast increase in cost when the Department of Justice decides to authorize a capital prosecution.[30]

As Table 2 shows, the median cost for authorized cases that were tried ($465,602) is 2.3 times greater than for those that were pled ($200,933). It is not surprising that trials would generally be more costly than pleas. Nor is it surprising that, in the context of capital litigation, a case that is resolved with a guilty plea is, nevertheless, resource intensive, as Figure 9 (p. 26) illustrates. In order to reach disposition in a capital case, defense counsel must thoroughly investigate and prepare for trial. Figure 9 contains two plea cases that are "outliers" by virtue of their high cost. If these are removed from the analysis, the range of plea costs narrows considerably.

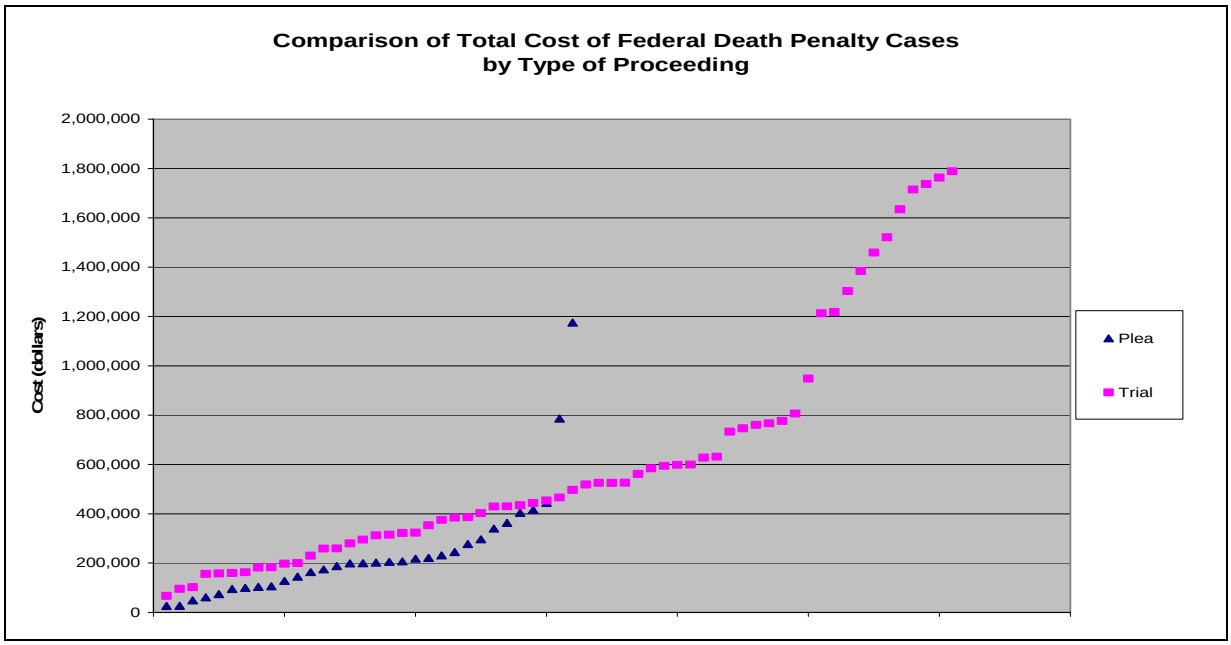
Table 2

Total Cost for Defense Representation in Federal Capital Cases, 1998-2004

Type of Case	Median	Mean	High	Low
Not Authorized	$44,809	$76,665	$681,556	$1,613
Authorized	$353,185	$491,905	$1,788,246	$26,526
Trials	$465,602	$620,932	$1,788,246	$67,366
Pleas	$200,933	$245,946	$1,174,942	$26,526

[30] Appendix C (p. 128) summarizes the differences in various case costs between authorized and non-authorized capital cases.

Figure 9
Cost Variance in Authorized Capital Cases, Trials vs. Pleas (1998-2004)



B. Comparison to the Spencer Report

Case costs have changed substantially since the period covered by the Spencer Report. As Table 3 (p. 26) shows, costs have risen for each category of death-eligible cases, whether authorized or not, trials or pleas.[31] Unfortunately, it is not possible to offer a direct comparison between current data and those compiled in the Spencer Report. Although the Spencer Report published mean data on case cost, it excluded from its analysis some exceptional cases. The Spencer Report did not include certain cases that had atypically high costs (e.g., the Oklahoma City bombing cases), and included cases that would have been excluded from the present study because they had no penalty phase trial (for example, the jury's guilt phase verdict precluded the death penalty, or a guilty plea to a non-death sentence was entered before verdict).

[31] This report is necessarily retrospective, comparing costs from 1998-2004 to those from 1989-1997. Appendix D (p. 129) provides an estimate for the costs of capital defense in 2010 dollars.

It can be stated, however, that costs have risen across all categories of cases and that they have risen more considerably among authorized cases than non-authorized cases, and in trials more than in pleas. Indeed, the most significant change in case cost between the time of the Spencer Report and the current update is that the cost of trials has increased substantially. Not only did a higher percentage of federal capital cases proceed to trial between 1998 and 2004 than in the period covered by the Spencer Report (Figure 3, p. 9), but the cost of those trials was also higher (Table 3). Later sections of this report offer likely explanations for these developments.

Table 3
Total Case Cost – Spencer Report Compared to Update

Type of Case	1998-2004 Mean Median	Spencer Report Adjusted Mean Only
Not Authorized	$76,665 $44,809	$55,773
Authorized	$491,905 $353,185	$218,113
Trials	$620,932 $465,602	$269,139
Pleas	$245,946 $200,933	$192,333

Some of the increase in total case costs is probably attributable to a rising Consumer Price Index (CPI) between the time of the Spencer Report and the present update. Over the period of this update, the CPI rose at an annual rate of 2.45 percent. Inflation does not explain the entire rise in case costs since the time of the Spencer Report, nor does it distinguish between rates for authorized and non-authorized cases or pleas and trials, but the CPI does suggest that some portion of rising costs is due to forces outside of litigation. Although the maximum hourly

rate for defense counsel remained fixed between both periods, expert expenses, attorney travel, and the cost of associates (if paid less than $125) and paralegals were subject to inflation.[32]

C. Attorney Costs

Defense counsel's time, both in- and out-of-court, and the use of experts on behalf of the defense influence case cost. Tables 4 through 8 present these findings from the current study, and (in all but Table 4) compare these data with those presented in the Spencer Report. Table 4 provides data on attorney cost in the 1998-2004 cases. (It is not possible to compare total attorney cost from the most recent cases to those at the time of the Spencer Report because the earlier study did not separate these data as a portion of total costs.) Similar to total case cost, the median expense for an attorney's time was significantly greater – 6.5 times more – in authorized cases than in death-eligible, non-authorized prosecutions. Attorney cost in authorized cases was 2.8 times greater in trials than for pleas.

Table 4
Attorney Cost – 1998-2004

Type of Case	Median	Mean
Not Authorized	$42,148	$62,336
Authorized	$273,901	$363,776
Trials	$352,530	$462,037
Pleas	$122,772	$176,464

These same trends are reflected in Table 5 (p. 29), which presents the total attorney hours. In death-eligible cases between 1998 and 2004, defense attorneys spent 4.6 times more

[32] As indicated on p.129, infra, the maximum hourly rate of compensation for appointed counsel during the period of this study was $125. That rate has increased over the intervening years. Since January 1, 2010, the maximum hourly rate has been $178.

hours on authorized than non-authorized cases (comparing medians), and 2.6 times more time on trials than on pleas for authorized cases. The fact that the ratio between authorized and non-authorized cases is greater in Table 4 (p. 28) than in Table 5 probably reflects the fact that, in most instances, attorneys are paid a lower hourly rate in death-eligible cases that are not authorized as capital prosecutions than in those cases that are authorized.[33] In addition, attorney cost includes certain travel and other expenses that do not correlate with hours, and these are presumably higher in authorized than in non-authorized matters.

Table 5
Attorney Hours – Spencer Report Compared to Update

Type of Case	1998-2004 Mean Median	Spencer Report Adjusted Mean Only
Not Authorized	637 436	429
Authorized	2,815 2,014	1,464
Trials	3,557 2,746	1,889
Pleas	1,403 1,028	1,262

As previously mentioned, it is difficult to make a direct comparison to the Spencer data, which reflects adjusted mean costs and hours. Still, it is instructive to note that attorney hours have risen over time for each type of case, but much more significantly in authorized cases that go to trial. Whatever forces drive case cost – which this report addresses in a later section – they appear to influence attorney hours more extensively in authorized capital trials than in other representations.

[33] Guide § 630.30.20 identifies the factors a court should consider in deciding whether to reduce the hourly rate and/or number of counsel when the government decides not to seek the death penalty.

Tables 6 and 7 (p. 30) compare attorneys' time in- and out-of-court when representing death-eligible defendants. Attorneys spent more time in- and out-of-court in authorized cases than in non-authorized matters and more in trials than pleas. Moreover, attorney time has risen in all forms of representation from the time of the Spencer Report (even accounting for the hybrid quality of the Spencer data). The data clearly show that the ratio of attorney time spent in-court to out-of-court is greater for trials than pleas. In capital trials, defense counsel spent a median 353 hours in-court and 2,373 hours out-of-court. In pleas, they spent a median 42 hours in-court and 992 hours out-of-court.

Table 6
Attorney In-Court Hours – Spencer Report Compared to Update

Type of Case	1998-2004 Mean Median	Spencer Report Adjusted Mean Only
Not Authorized	106 34	38
Authorized	401 306	231
Trials	537 353	409
Pleas	142 42	61

Table 7
Attorney Out-of-Court Hours – Spencer Report Compared to Update

Type of Case	1998-2004 Mean Median	Spencer Report Adjusted Mean Only
Not Authorized	531 350	391
Authorized	2,414 1,645	1,233
Trials	3,019 2,373	1,480
Pleas	1,261 992	1,201

D. Expert Costs

The use of experts has a substantial influence on case cost. For purposes of this report, the term "experts" refers not only to expert witnesses but also to investigators and all service providers other than counsel. As Table 8 (p. 31) indicates, experts were utilized in both authorized and non-authorized cases. There is a significant difference, however, in the prevalence, and hence cost, of expert assistance between authorized and non-authorized cases. Whereas the median for expert costs was $5,275 in non-authorized cases, it was $83,029 in authorized cases. Further, experts were utilized more extensively in capital trials, where the median cost for experts was $101,592, than in pleas, where the median was $42,049.

Although the comparison between the Spencer Report and the present update is imperfect, Table 8 (p. 32) suggests expert costs have risen substantially in capital trials. As discussed in Section V, this trend likely reflects, among other developments, counsel's increased emphasis on developing information about the defendant's background and life history, as required by U.S. Supreme Court cases such as *Wiggins v. Smith*, 539 U.S. 510 (2003).[34] There has also been a significant increase in the investigation and presentation of scientific evidence and litigation that challenges such evidence. The geographic shift in where federal capital prosecutions are authorized and the increase in the complexity of prosecutions also may influence the use and cost of experts.

[34] *Wiggins* discussed defense counsel's responsibility to conduct a full social history investigation of a capital defendant and cited the American Bar Association's standards as guidance as to what constitutes reasonable performance of counsel in a death penalty case.

Table 8
Expert Costs – Spencer Report Compared to Update

Case Type	1998-2004 Mean Median	Spencer Report Adjusted Mean Only
Not Authorized	$14,330 $5,275	$10,094
Authorized	$128,129 $83,029	$51,889
Trials	$158,895 $101,592	$53,143
Pleas	$69,482 $42,049	$51,028

E. Transcript Costs

Finally, another contributor to the cost of defense representation is the expense of acquiring the transcript of district court proceedings. These figures are not included in the data in Table 2 (p. 25) that report total case cost; [35] however their expense, especially in capital trials, is noteworthy, with a median cost per capital trial defendant of $10,269. Table 9 (p. 33) presents data on transcript costs per representation, which show a sizeable difference between costs expended for transcripts in capital trials when compared to other proceedings. It should be noted that transcript costs are incurred separately by each defendant in a case (as well as by the court and by the prosecution). That the mean costs for non-authorized cases ($4,144) and capital pleas ($1,337) are substantially higher than the median costs in these cases ($210 and $82, respectively) indicates that there are some unusual cases in these categories that have substantially higher transcript costs than the other more "typical" cases. By contrast, whereas

[35] Although transcripts of all pretrial and trial proceedings must be produced for an appeal, they are also typically ordered for counsel's use during the pendency of a case in the trial court, as verbatim records are relied upon for pleadings, examinations, and arguments. Because some transcript costs reflected in the CJA payment system for the cases included in this analysis may have been incurred in connection with an appeal, while others were generated during the course of the trial representation, they were not included in the "total case costs." Regardless of when in the process they are incurred, the costs of transcript production are an expense associated with capital trials. It should be noted that in a co-defendant case, one defendant will pay the full rate for production of a transcript and other defendants will be charged the lower rate applicable to copies of that transcript.

some transcripts in capital trials cost more than the median case, the relative similarity between mean and median costs ($16,487 versus $10,269) shows that most capital trials carry a considerable transcript expense.

Table 9
Transcript Cost Per Defendant, 1998-2004

Case Type	Median	Mean
Not Authorized	$210	$4,144
Authorized	$5,223	$11,274
Trials	$10,269	$16,487
Pleas	$82	$1,337

V. Explanations for and Predictors of Case Costs

A. Hypotheses

Numerous factors likely account for the increase in overall case costs in the years following the Spencer Report. These explanations, which are complementary, include:

- Inflation. Some of the increase in case costs is likely related to inflation. The rate of inflation from 1998 to 2004 averaged approximately 2.45 percent annually, which over six years could compound to approximately 15 percent. Although the CJA hourly rate of $125 remained constant between the time of the Spencer Report and this update, all costs other than legal fees, including those of experts (including investigators and mitigation specialists), paralegals, associate counsel paid less than $125, travel, copying, technology, etc., were subject to inflation.

- Differences in cases studied. The collection of cases in the Spencer Report was constructed differently from the present study. For example, the Spencer Report excluded certain high cost cases, like the two representations arising out of the Oklahoma City bombing, and included certain cases that did not proceed through a penalty phase trial, either because the government withdrew its request for the death penalty or because the defendants were acquitted of the capital charge. (See Spencer Report at 8, n. 13.) For those reasons, costs reported in the Spencer study may have appeared lower than they would have using the current methodology.

- Expanded areas of litigation. Defense practice has continued to evolve and become more sophisticated since the first decade of the federal death penalty. For example, both the prosecution and the defense now make greater use of scientific evidence and experts and mount more extensive challenges to such evidence. The issue of the defendant's future dangerousness within the Federal Bureau of Prisons is one such area.

- Pretrial litigation of mental health issues. As a result of changes in case law and new Federal Rule of Criminal Procedure 12.2, which governs mental health evaluations of the defendant, both the prosecution and defense now engage in more extensive pre-trial litigation over mental health issues. In addition to more time being spent on these issues, the hourly rate paid to mental health experts appears to have risen significantly since the time of the Spencer Report. See pages 72-73.

- Higher expectations for performance of defense counsel in death penalty cases. In recent years, standards of practice for providing constitutionally adequate defense representation have been clarified, particularly with respect to the duties of counsel vis-a-vis investigating and presenting evidence in mitigation of sentence. See *Wiggins v. Smith,* 539 U.S. 510 (2003), and the American Bar Association's *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* 31 Hofstra L. Rev. 913 (2003) and *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases,* 36 Hofstra L. Rev. 677 (2008).

- Geographic shift. As discussed earlier in this report, the Department of Justice has changed its charging practices and authorized more capital prosecutions in areas where there is little or no capital punishment under state law and therefore there are few or no local capital defense practitioners. Disparities between local practice and federal policy may well raise the cost of litigation. A lack of capital experience might require a greater investment of time, for example. In addition, a higher proportion of cases being tried in jurisdictions known for more extensive advocacy by both prosecution and defense, as discussed below (pp. 50-56), would increase cost.

- Changing nature of capital prosecutions. Data suggest that a greater proportion of the 1998 – 2004 cases involve highly complex issues at the guilt and penalty phases than at the time of the Spencer Report, requiring more extensive defense work. This hypothesis is supported by the increased number of in-court attorney hours, indicating that substantially more court time is being required for cases to reach resolution. This hypothesis suggests that a greater proportion of the overall number of prosecutions contains features that increase litigation costs. For example, many cases in the current study include all or some of the following features:

    - Multiple codefendants
    - Multiple homicides (in the indictment and/or as aggravating factors alleged in support of the death penalty)
    - Complex offenses (such as CCE, RICO, and terrorism allegations that involve numerous instances of conduct over an extended period of time and in multiple locations, including outside the United States)

- Foreign national and/or non-English speaking defendants, family members, or victims
- Voluminous discovery

B. Use of Experts

The research connects several of the factors above to the cost of defending federal capital cases. As Table 8 (p. 32) illustrates, expert costs were higher during the period studied than during the period covered by the Spencer Report, but constituted the same percentage of overall case costs. Spencer Report at 10-11. The cost of "experts" here references the costs associated not just with "expert witnesses" but with all services other than those of counsel, including investigators, mitigation specialists, and numerous others whose efforts are required in a capital representation. As Figures 10 and 11 (pp. 36-37) demonstrate, almost 60 percent of expert expenses were attributable to two types of experts: investigators and mitigation specialists. The categories "investigator" and "mitigation specialist" are imprecise, however, because in some cases mitigation investigation was recorded under the generic heading "investigator" on the CJA 31.[36] Expenses for mitigation specialists could not be broken out for the Spencer Report analysis – the CJA payment system did not identify such costs at the time – but as the courts have come to authorize additional work for this important part of capital representations, mitigation specialists have become a significant portion (25 percent) of expert expenses. So too, investigative expenses represented almost one-third of total expert costs, likely reflecting the additional work necessary to investigate an increasingly complex set of capital charges, many involving multiple jurisdictions, or defendants or witnesses who reside in other countries.

[36] Services provided pursuant to the Criminal Justice Act other than those of defense counsel are recorded on a CJA Form 31, which is submitted to the court for authorization and payment. Counsel services are recorded on a CJA Form 30.

Interestingly, while the total cost of expert expenses in capital trials is different from pleas, the proportions are similar. Regardless of whether it was resolved by trial or plea, a capital case required the same type of preparation, including the use of experts. Table 8 (p. 31) indicates that total expert expenses were almost 2.5 times greater in trials than pleas, but Figures 10 and 11 (pp. 36-37) demonstrate that in both types of authorized cases, expenditures for investigation and mitigation experts each accounted for about 30 percent of expert costs.

Figure 10
Division of Expert Costs for Trial Cases

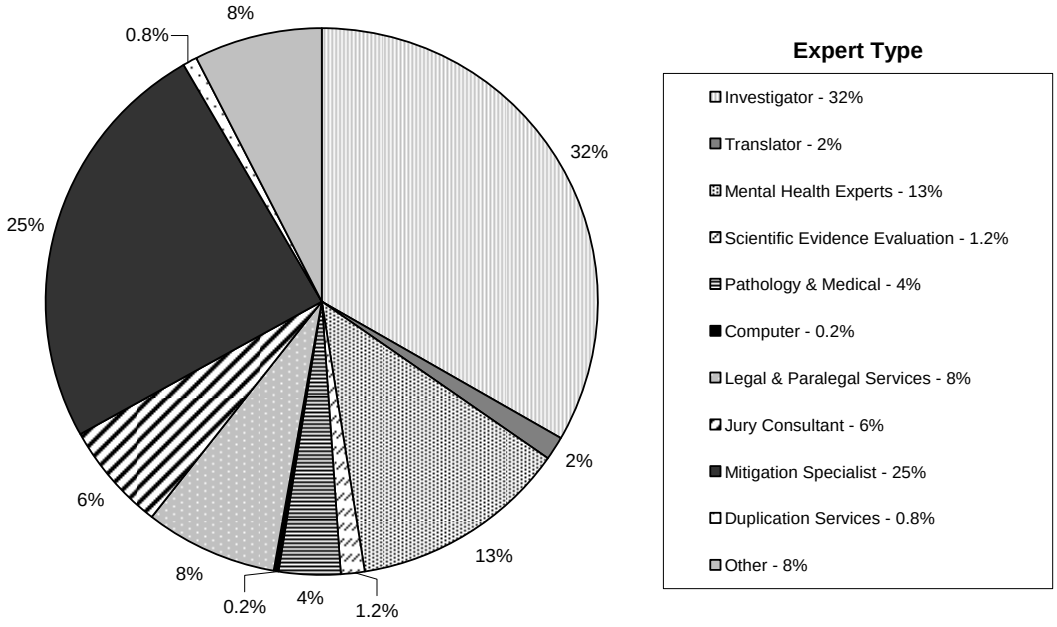
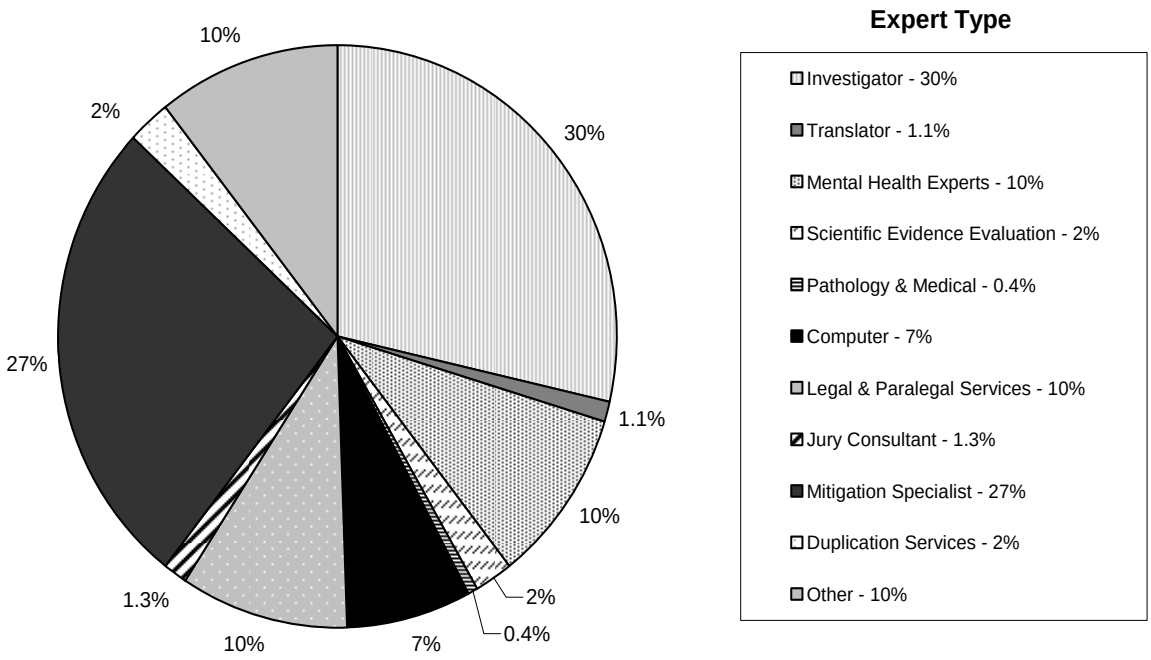


Figure 11
Division of Expert Costs for Plea Cases



C. Case Characteristics

Quantitative research was conducted to examine the relationship of case cost with several factors that reflect particular aspects of a representation's complexity.[37] Initially, it is important to note those factors that did not predict case cost. Neither the defendant's nor the victim's race or gender affected the cost of federal capital defense representation.[38] The same was true for whether or not the victim was connected to the criminal activity of the defendant. Finally, the prosecution's allegation of future dangerousness did not predict case cost.

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[37] The variables were tested in bivariate, or one-to-one, relationships, assessing the influence of a single variable on total case costs.

[38] Interestingly, the interplay between a defendant's and a victim's demographics (e.g., a cross-racial homicide) influenced case costs, but the small number of cases analyzed was insufficient to achieve statistical significance. In panel appointments, median total case cost for white defendants tried for capital offenses against white female victims was $631,382. By contrast, median total case costs for non-white defendants tried for capital offenses against white female victims were $248,477. A larger number of cases or qualitative research could help to elucidate the nature of this relationship.

The factors that did predict increased case costs, whether in capital trials or pleas, included:

- Number of offenses
- Number of defendants
- Number of victims
- Offense complexity
- Number of defense counsel
- Number of prosecutors

Most of these influences make intuitive sense and are shown in Table 10 (p. 39). As the number of offenses, defendants, and victims rises in a case, so do the number of facts and circumstances that counsel must investigate. These require additional attorney and expert time. Similarly, while every death penalty case is complex to defend, certain offenses – in particular CCE, RICO, and terrorism – present multi-faceted and wide-ranging fact patterns that require additional investigators, attorney time, and expert consultation.

It may also seem apparent that the number of defense counsel is related to case cost: generally, the greater the number of defense attorneys involved, the higher the cost. But as data from both the Spencer Report and this update show, the number of prosecutors is an even stronger predictor of case cost, at least in trials. The number of prosecutors can be an effective signal for the complexity of a case – presumably the Department of Justice assigns additional prosecutors to those cases that are most involved and will require the greatest effort. In addition, defense teams also require more attorney time and expert assistance in an effort to keep pace with the prosecution's presentation of evidence, as reflected by its resources.

Table 10 (p.39) provides additional details on the relationships between these factors and case cost, displaying all variables tested that had a statistically significant (i.e., reliable) relationship to case cost. Case length is positively correlated with case cost – the longer a case

lasts the more expensive it is.[39] Conversely, a state's "capital culture" – its history and experience with the death penalty – was negatively associated with trial costs. Federal capital trials are more expensive when brought in districts where there is no state death penalty, or where the state has neither sentenced to death nor executed many capital defendants. This phenomenon is discussed further in section V.E.2.c. (pp. 50-56) below.

Table 10
Factors that Predict Increased Case Cost – Bivariate Relationships

Factor	Case Cost Influenced	Bivariate Correlation
Case Length	Trial	.487
Case Length	Plea	.428
Number of Defendants	Trial	.244
Number of Defendants	Plea	.748
Number of Victims	Trial	.466
Number of Victims	Plea	.557
Number of Offenses	Trial	.530
Number of Offenses	Plea	.414
Number of Prosecutors	Trial	.612
Number of Defense Counsel	Trial	.480
Offense Type	Trial	.356
State Capital Culture	Trial	-.370

Note: All relationships statistically significant at .05 level.

D. The Attorney General Making the Authorization Decision

Case lengths varied considerably depending on the Attorney General who authorized the capital prosecution. As Table 11 (p. 40) illustrates, within the study period, trial cases authorized by Attorney General Janet Reno were completed in a median 688 days, compared to 836 days in

[39] In Table 10, the "Bivariate Correlation" column reflects the strength of the relationship between the variables in the first two columns. A negative number reflects a relationship that reduces cost. Thus, "case length" has a strong positive correlation with the cost of both trial and plea cases, and increases cost.

cases authorized by Attorney General John Ashcroft.[40] Capital cases involving guilty pleas were also shorter when they were authorized by Attorney General Reno, taking a median 578 days, compared to 744 days under Attorney General Ashcroft. Put another way, the time required to prepare and complete capital trials was 22 percent shorter, and capital pleas were 29 percent faster, when begun under Attorney General Reno than Attorney General Ashcroft. Moreover, authorized cases in this group were much more likely to be resolved by a guilty plea when begun by Attorney General Reno (27 trials, 31 pleas) than by Attorney General Ashcroft (48 trials, 12 pleas). Since capital cases resolved by guilty pleas are less expensive to litigate than capital trials (see pp. 23-24), and cases of shorter duration are generally less expensive than those that last longer (see p. 28-29), capital litigation was generally less costly for cases authorized by Attorney General Reno than Attorney General Ashcroft.

Some of these differences between Attorneys General are explained by the amount of time it took each to decide to authorize a capital prosecution, because the authorization process was faster in the Reno Justice Department than it was under Attorney General Ashcroft. As Table 11 (p. 40) indicates, the Department of Justice took a median 178 days to authorize capital prosecutions under Attorney General Reno. With Attorney General Ashcroft, this figure was two-thirds greater (297 days). Judges and lawyers interviewed for this report had additional thoughts on the impact of the authorization process on case costs, which are discussed in Section VI. below.[41]

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[40] These statistics relate only to those death-eligible cases that were ultimately authorized for capital prosecution. The analysis here does not include case length data for death-eligible cases that were not authorized.

[41] In 2007, after consultation with the Department of Justice, the Judicial Conference adopted a policy designed to facilitate prompt decision-making on the part of the government as to whether or not to seek the death penalty. The policy urges judges to set reasonable deadlines for various stages of the authorization process. See *Guide to Judiciary Policy*, Volume 7A, Guidelines for Administering the CJA and Related Statutes (Guide), § 670 "Scheduling of Federal Death Penalty Case Authorization to Control Costs."

Table 11
Effect of Attorney General's Decision-Making on Capital Case Length and on Plea vs. Trial
(Includes cases litigated by federal defenders as well as panel attorneys)

Attorney General Who Authorized	Number of Capital Trials	Median Case Length	Number of Capital Pleas	Median Case Length	Median Days To Authorize
Janet Reno	27 cases	688 days	31 cases	578 days	178 days
John Ashcroft	48 cases	836 days	12 cases	744 days	297 days

Note: All relationships statistically significant at the .05 level.

E. Exceptional Cases

In addition to examining federal capital cases as a whole, this update analyzed those cases at either extreme of defense cost – both the highest cost cases and the lowest cost cases – to better understand why certain representations are most costly while others are well below average.

1. High Cost Trials

Many high cost capital trials – those at the 80th percentile or higher, costing $749,000 or more to defend – present a particular set of extraordinary circumstances when compared to capital trials as a whole. Whereas other capital trials averaged six defendants, for high cost cases it was 11; whereas other cases averaged seven counts in the indictment and two homicide victims, the high cost representations averaged 61 counts and 36 victims. Table 12 (p. 41) illustrates these differences, showing that the high cost trials also were more likely to involve exceptionally complex offenses (e.g., CCE, RICO, and terrorism) and prosecutors' allegations of the defendant's future dangerousness.[42] Most of these factors were identified as cost-drivers in

[42] This last finding is especially telling since future dangerousness does not predict overall cost in trial cases generally (see discussion, page 45-46).

capital trials as a whole, but in the high cost cases they occur more frequently and often in tandem with each other (e.g., multiple victims and offenses). Further analysis revealed the presence, in many high cost cases, of additional cost-drivers that affect both the guilt and sentencing phases and that are not as likely to be found in other capital trials. These include international (or otherwise geographically far-ranging) guilt and/or penalty investigations; non-English speaking defendants, family members, victims, and witnesses; and complex mental health, forensic science, or cultural issues relevant to guilt, penalty, or both.[43]

Table 12: Cost Drivers in High Cost Capital Trials[44]

	Average Number of Defendants	**Average Number of Victims**	**Average Number of Offenses**	**Exceptionally Complex Offenses**	**Future Dangerousness**
High Cost Trials (80th percentile)	11	36	61	75 percent	81 percent
All Other Trial Cases	6	2	7	40 percent	64 percent

Note: All relationships statistically significant at the .05 level

These findings are fairly intuitive in explaining the relationship between defense costs and case facts: put simply, many high cost cases had more complex facts. These comparisons become clearer when examining how the *very* highest of the high cost trial cases – the nine in the

[43] These additional cost-drivers were more difficult to identify and measure than those factors related more directly to the guilt phase of defense. As a result, they were not included in the quantitative analysis but were revealed and considered in the qualitative research.

[44] The high cost trials include two U.S. Embassy bombing cases. But, even excluding those two cases from the analysis, high cost trials included significantly more complex facts than did other cases.

90th percentile, costing more than $1,269,100 to defend – differ from other cases, as the representations present very different fact patterns. On average:

- The highest cost cases each had 15 indicted defendants (both eligible and not eligible for the death penalty) compared to 6 in other cases.
- Prosecutors charged 101 offenses in the highest cost cases, whereas they charged 9 offenses in other cases.
- The highest cost cases had 59 victims compared to two in other cases.
- 78 percent of the highest cost cases involved exceptionally complex charges (CCE, RICO, terrorism), whereas 48 percent of other cases had these charges.
- Prosecutors alleged the defendant's future dangerousness in all of the highest cost cases versus 63 percent of defendants in other cases.

It is not difficult to understand how these differences in case complexity would translate into higher costs. As counsel prepare for trial, the attorneys are faced with the extra efforts of not only understanding case facts but also presenting them in a clear and convincing way in court. Their task becomes more involved when they must deal with complicated facts, which themselves may raise evidentiary and other claims requiring litigation. When many complex facts converge in an individual case – when the defense must investigate multiple victims, offenses, and codefendants; when the events at issue, including both the offense and the defendant's history, span a significant period of time and numerous locations; when counsel must coordinate with lawyers for numerous defendants, and juggle witnesses from various jurisdictions and in multiple languages – it is understandable that defense representation at trial costs more than in other cases.

2. Lowest Cost Trials

Whereas the high cost cases had clear indications that they were extraordinary among federal capital prosecutions, the lowest cost cases did not have similar distinguishing characteristics to explain why they were lower cost. Compared to trial cases as a whole, low cost trials did not evidence appreciable differences in case facts such as the number of defendants,

offenses, victims, or the prosecution's allegation of future dangerousness, except in one area – low cost cases were less likely to involve complex charges such as CCE, RICO, or terrorism. Although many of the fact patterns were relatively similar between low cost trial cases and trials as a whole, the sentencing outcomes of these representations were substantially different.[45] During the period of this study, defendants who received the least amount of attorney and expert time, and whose defense representation thus cost the least, faced a higher probability of receiving a death sentence at trial. Specifically, as Table 13 shows, individuals whose defense cost less than $320,000 in combined attorney and expert assistance – the lowest one-third of federal capital trials – had a 44 percent chance of being sentenced to death at trial. Individuals whose total representation costs were above that amount – the remaining two-thirds of defendants – had a 19 percent chance of being sentenced to death. Defendants in the low-cost group thus were more than twice as likely to be sentenced to death.[46] The findings are similar when separately examining the influence of attorney costs and expert expenses on trial verdicts, although because of the smaller numbers involved, the results in both instances approach but do not reach the level of statistical significance.

[45] The lowest cost trials concluded in fewer days than did other capital trials, but it appears that this shorter duration is not because they presented appreciably different case facts.

[46] Among other things, this finding raises the question of whether there is a "floor" of expenditures necessary for a capital representation at trial. If so, the range of relevant cases would span from above $320,000 in defense expenditures. The median cost for this smaller range of cases is $797,000.

Table 13
Relationship Between Defense Cost and Death Sentence

Total Trial Cost	Sentenced to Death	Other Verdicts	Total Cases
Lowest Cost Cases (under $320,000)	44 percent	56 percent	18
Remaining Two-Thirds of Cases	19 percent	81 percent	43
Total Cases	16	45	61

Note: All relationships significant at the .05 level.

Although this update has focused on the cost of defending federal capital prosecutions and the factors that predict or explain case costs, the relationship between case cost and sentencing outcome was too significant to disregard.[47] For this reason, additional research was conducted to explore the possible explanations for this connection. In addition to further quantitative tests, researchers conducted interviews with capital trial attorneys, resource counsel, post-conviction lawyers, and judges. Much of that work is described in section VI of this report (pp. 57-89), addressing the quality and availability of federal capital defense. For present purposes, both quantitative and qualitative data were utilized in assessing the relationship between case cost and sentencing outcome.

[47] This relationship was identified in the preliminary report published in October 2008, which is superseded by this final report.

a. "Bad Facts"

Several possible explanations were examined to explain the relationship between case cost and a death sentence. First, the research considered whether low cost is reflective of a case having "bad facts," that is, whether the low cost cases, on average, are ones in which the crime was so heinous, the prosecution's evidence so clear, or the mitigation evidence so scant that attorneys and/or judges decided that additional defense efforts would have no appreciable benefit in staving off a conviction or a sentence of death. The findings, however, indicate that this explanation is improbable. Throughout the qualitative research, trial judges and defense counsel indicated that none of these factors would be predictive of a case requiring a lesser commitment of time and resources from counsel. To the contrary, they said that strong evidence of guilt or highly disturbing evidence in aggravation would intensify the need for a comprehensive investigation of mitigating factors. With appropriate investigation there should be, in the words of one judge, "no such thing"[48] as a case in which mitigation evidence was so scant that there was little to be done. Lawyers, as well, dismissed the "bad facts" hypothesis, saying it was inconsistent with both their experience and prevailing norms and the standard of practice set by the ABA Guidelines. Both judges and lawyers expressed disbelief that a federal death penalty case could be tried through penalty verdict for the amounts dispensed in the low cost cases.[49]

These findings are underscored by the assessment of quantitative data collected for this study. Those data indicate that the relationship between case cost and outcome is not mediated or "explained" by the presence or absence of several measures of "difficult" case facts, such as

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[48] Interviews with judges and lawyers were conducted with a promise of anonymity and, therefore, are unattributed in this report.

[49] In the lowest cost case in this group, which resulted in a sentence of death, the defense received a total of $67,365 for attorney and expert services.

i) the prosecution's allegation of the defendant's future dangerousness, ii) the victim's criminal activity, or lack thereof, iii) the victim's race and gender in relation to those of the defendant, or iv) the number of defendants, victims, or offenses charged.

The cost-outcome nexus is partially explained by one aspect of case facts – whether an indictment charges a complex criminal enterprise such as gang or organized crime activities or terrorism – but even here the relationship does not fully account for the connection between case cost and death sentence, nor are defendants charged with these arguably more "serious" crimes more likely to be sentenced to death. Of course, cases involving charges of CCE, RICO, or terrorism cost more to defend than do other federal capital charges, since they often involve complex fact patterns that necessitate additional effort to investigate and to explain to jurors. But the heightened seriousness or complexity of such charges does not translate into a greater risk of a death sentence for defendants charged with CCE, RICO, or terrorism.

To be sure, the explanation may flow in the opposite direction – that cases of lower complexity employ fewer resources and that jurors may more readily impose the death penalty when the case facts are less complicated and easier to understand. But, even if this is true, the complexity of charges does not fully explain the connection between low cost cases and a death sentence, as the association between low cost and death outcome still holds when controlling for the complexity of the charge.[50] Put simply, case type may explain some, but not all, of the relationship between defense resources and the defendant's sentence of death.

[50] Examining those cases that did not involve RICO, CCE, or terrorism charges, a defendant had a 50 percent chance of being sentenced to death if the representation cost less than $320,000. By contrast, a defendant had a 35 percent chance of receiving a death sentence if the representation costs were more than $320,000.

b. Defense Experience

The research also considered the efforts of the attorneys involved in a representation. Experienced, zealous, and effective attorneys may investigate and litigate more extensively and make greater use of expert and other resources, ultimately attaining fewer death sentences. Certainly, the quantitative analysis evidenced a positive relationship between defense costs and the hours that defense attorneys spent on a case: the more hours worked, the higher the cost of representation. Further, there is a negative, or inverse, relationship between the attorneys' hours on a case and their client's risk of being sentenced to death; the more hours dedicated to a case, the lower the risk of a death sentence.[51]

The question remains *why* lawyers in low cost cases would dedicate less time to the representation than would lawyers in other cases. Some of the difference can be explained by case facts, as the data show a positive relationship between hours worked and the nature of the charge, the number of defendants in the indictment, and the presence of a victim who had no criminal involvement. In CCE, RICO, and terrorism cases, defense attorneys billed more hours than in other cases, as they did in cases in which there were multiple defendants and victims who had no criminal involvement. But, as indicated earlier, almost none of these factors mediated the relationship between case cost and the defendant's sentence. Even if a few case facts are correlated with additional attorney effort, these facts do not predict the defendant's sentence.

In a related finding, attorneys in low cost trials divided their efforts differently from lawyers in cases that were not low cost. Although attorneys across the board spent more time on out-of-court activities than in-court matters, lawyers in low cost trials spent a lower proportion of their overall time on out-of-court efforts than did lawyers in other cases. That is, lawyers in low

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[51] The bivariate correlation is -.234 with a marginal statistical significance of .06.

cost trials were less likely to engage in out-of-court investigation, research, and preparation than were attorneys in other cases.[52]

During the qualitative stage of research, some respondents suggested that these differences might turn on the death penalty experience of the lawyers involved. To investigate this claim, a panel of distinguished capital attorneys acquainted with the federal capital cases at issue was asked to compare the qualifications of the lawyers in these cases and also to identify whether judges had obtained and followed the recommendation of the federal defender organization or the Administrative Office when appointing counsel for each case. See 18 U.S.C. § 3005.[53] As Table 14 (p. 50) indicates, defendants in low cost cases were much less likely to have been represented by attorneys viewed as having "distinguished prior experience" in capital litigation, as recommended in the Spencer Report, than were defendants in other cases.[54] Further, judges in the low cost cases were significantly less likely to have followed the recommendations of the federal defender organization or the Administrative Office in appointing counsel than were judges in other cases.

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[52] Interestingly, there was no difference in the proportionate use of expert assistance in the two categories of cases. Low cost cases employed fewer expert hours than did others, but there was not a statistically significant difference in the *relative* use of experts between low cost and other cases.

[53] The statute provides that "the court shall consider the recommendation of the Federal Public Defender organization, or, if no such organization exists in the district, of the Administrative Office of the United States Courts" when appointing counsel. 18 U.S.C. § 3005.

[54] Judicial Conference policy calls for appointed counsel in a federal death penalty case to have "distinguished prior experience" in capital litigation. See Spencer Report, Recommendation 1(b) (Qualifications of Counsel), and Guide, § 620.30(e).

Table 14
Attorneys in Low-Cost and Other Cases

	Lowest Cost Trial Cases	**Other Trial Cases**
Counsel with "Distinguished Prior Experience"	21 percent	79 percent
Counsel Recommended by FDO or Administrative Office	17 percent	83 percent

Note: All relationships statistically significant at the .05 level.

The research did not evaluate attorney effort or strategy in particular representations, so it is impossible to apply these assessments of quality to an individual case or to conclude that defendants in higher cost cases necessarily received better, or even minimally effective, representation. Regardless of the amount spent on representation, there are undoubtedly cases in which the lawyers did not use their resources effectively or sufficiently. Still, the evaluation is instructive in appreciating the distinction between low cost and other trial cases. As a whole, defendants in low cost cases were less likely to be represented by lawyers deemed by their peers to have "distinguished prior experience" as capital trial lawyers. They also were less likely to be represented by lawyers who were recommended for the case by the district's federal defender or the Administrative Office.

c. Geography

In capital cases, brought under federal law and under the supervision of federal judges, one might expect a consistent level of defense resources regardless of the state in which a case is tried. Considering as well that the Department of Justice has increasingly "nationalized" federal death penalty prosecutions over the past decade (see Section II.D., pp. 12-16), regional differences in costs ought to be narrowing as more federal districts are exposed to capital

prosecutions. Yet the data for the period encompassed by this study, 1998 through 2004, demonstrate significant geographic variation in the distribution of defense resources. As Table 15 indicates, defense costs were substantially different based on the state in which cases were brought and tried. Among those states with at least two federal capital trials during the study period,[55] six were below the national median of $465,602 in defense resources and nine were above. More significantly, federal capital trials brought in the four highest cost states expended six times greater defense resources than trials conducted in the four lowest cost states.[56]

Table 15
Regional Variation in Capital Trials by State, 1998-2004

State	Circuit	Median Defense Cost at Trial	Number of Capital Trials
Georgia	11	$132,334	2
Texas	5	$197,324	7
North Carolina	4	$208,802	2
Florida	11	$313,243	2
Indiana	7	$419,950	2
Maryland	4	$435,657	4
New York	2	$496,927	7
Virginia	4	$519,108	8
Missouri	8	$525,279	5
Michigan	6	$567,549	2
Pennsylvania	3	$672,204	2
California	9	$1,039,655	2
Connecticut	2	$1,213,063	3
Massachusetts	1	$1,220,267	2
District of Columbia	DC	$1,762,893	3
National	----	$465,602	55

[55] For these purposes, the District of Columbia is treated as a state.

[56] The Spencer Report found no regional cost variation but noted that the number of cases was too small for meaningful analysis. The present analysis not only includes sufficient cases but also suggests that the second decade of the federal death penalty has seen significant regional variation in the cost of capital trials.

Some of the state differences may be explained by varying legal markets and geographic differences in experts' rates.[57] For example, many of the nation's most vigorous legal communities are found in those states where spending for capital defense is above the national median, suggesting that some of the variance in capital costs is reflective of how litigation is generally approached by the local bar.[58] Moreover, unlike the hourly rate for learned counsel, which is constant throughout the country, experts' rates in capital cases vary depending on the location in which a case is brought. The cost of practice for an investigator or a doctor is likely to be higher in New York City than in Roanoke, Virginia, for example.

Still, these explanations do not adequately account for the steep regional differences in defense resources. Even acknowledging varying rates for experts, expert costs make up only a third of total case costs, an amount that would not explain the significant state variations seen in Table 15 (p. 51). Moreover, given the many specialized issues involved in capital litigation, defense lawyers often call on experts from outside the state in which the case will be tried.

Attorney markets are an insufficient explanation, as well. Although vigorous legal communities are found in states where capital spending is above the national median (such as New York, Los Angeles, and Washington, D.C.), many of the same kinds of communities exist in states where federal resources are less plentiful (including Dallas, Atlanta, and Miami). Considering, too, that trial counsel earn the same hourly rate in federal capital cases regardless of where a case is brought, the regional differences cannot adequately be explained by varying private legal markets.

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[57] In addition, all three cases in the District of Columbia were exceptionally complex representations as discussed in Section V.A., page 33.

[58] Such differences in "local legal culture" have been well documented in socio-legal research publications, which describe a process by which common experiences of litigation become shared norms for the local legal market. *See, e.g.*, Thomas W. Church, Jr., *Examining Local Legal Culture*, 10 Law and Social Inquiry 449 (1985).

By contrast, a state's capital culture is strongly correlated with the practice and cost of defending federal capital cases. A state's per capita execution rate[59] was highly predictive of the defense cost of federal capital trials brought in that state. Although there were some exceptions, in general defense resources spent on federal capital trials were lowest in those states that had the highest per capita execution rates. Just six percent of low cost trials were brought in states without the death penalty, whereas 28 percent of all other federal capital trials occurred in states without the death penalty. In states with costs above the national mean of $620,932, there either is no state death penalty statute or executions are exceedingly rare.

Table 16 (p. 54) presents these data, showing the relationship between state capital culture and defense resources at trial. Perhaps more significantly, geography also helps to explain the relationship between low cost cases and death sentences at trial, to the point that the influence of low cost is significantly affected by a state's capital culture. Put another way, it is not just that defendants in low cost cases are disproportionately sentenced to death, but that federal cases brought in states with a historically strong attachment to the death penalty[60] are more likely to be low cost *and* disproportionately end in a death sentence.[61] The findings suggest that the link between low cost cases and death sentence at trial is concentrated in particular states.

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[59] This is defined as the total number of capital defendants executed in a state post-*Gregg v. Georgia*, divided by the state's population in 2000.

[60] See Section III.B, p. 23, for data that were collected to reflect the history and experience of states with the death penalty.

[61] Regression equations confirm this finding, which Table 16 (p.54) illustrates in a more straightforward way.

Table 16
Outcomes of Federal Death Penalty Trials by Cost, 1998-2004
(Excluding federal districts with a single trial)[62]

State	State Per Capita Execution Rate	Median Defense Cost at Trial	% of Trials Resulting in a Death Sentence[63]
Georgia	4.8	$132,334	50 percent
Texas	19	$197,324	71 percent
North Carolina	5.3	$208,802	50 percent
Florida	4	$313,243	0 percent
-------$320,000------	----------	Threshold	----------
Indiana	3.1	$419,950	50 percent
Maryland	0.94	$435,657	25 percent
New York	0	$496,927	0 percent
Virginia	13.8	$519,108	0 percent
Missouri	11.7	$525,279	60 percent
Michigan	0	$567,549	50 percent
Pennsylvania	0.24	$672,204	0 percent
California	0.38	$1,039,655	0 percent
Connecticut	0.29	$1,213,063	0 percent
Massachusetts	0	$1,220,267	50 percent
District of Columbia	0	$1,762,893	0 percent
National	------	$465,602	27 percent

It is possible for a capital defendant to be sentenced to death while receiving considerable defense resources and when tried in a state without a historic attachment to the death penalty; similarly, a defendant may be acquitted or receive a life sentence when tried in a low cost case in a state with a strong capital culture. But, excluding those federal districts that experienced just one capital trial during the period of this report, and excluding cases in which the defendant was represented by a federal defender organization or retained counsel (because cost comparisons are not possible), half of all death sentences issued (7 of 14) were concentrated

[62] Puerto Rico was also excluded. Its cost structure is significantly different from that in states in the continental United States, as the rate for investigators and other local services is much lower, and although learned counsel are paid at the capital CJA rate, other appointed counsel typically are not.

[63] These cases are limited to panel representations and do not include capital trials by federal defenders.

in three states whose median federal defense expenditure fell below the low cost threshold of $320,000. Stated more starkly, 61 percent (8 of 13) of the federal defendants tried in states with low cost trial defense received a death sentence, whereas only 19 percent (8 of 42) of the federal defendants tried in other states were sentenced to death.

Some of this geographic effect may be influenced by policies of the federal courts. For example, federal capital cases brought in the states of the Fifth Circuit are subject to a circuit policy, titled "Special Procedures for Reviewing Attorney Compensation in Death Penalty Cases," that considers attorney compensation in excess of $100,000 at the district court level to be "presumptively excessive," requiring approval of the circuit chief judge. Although capital defendants in the Fifth Circuit are not *necessarily* limited to $100,000 in attorney time – a district judge may issue a special finding to be approved by the chief judge of the circuit – the existence of this rule may limit capital defense expenditures in the states comprising that circuit.[64]

In addition, geographic effects may reflect the influence of juries. In general, the potential universes of jurors in state and federal courts overlap more than they are unique, and the social or political culture of a state likely carries over to federal court as well.[65] If the local culture supports capital punishment and the death penalty is a regular aspect of state criminal law practice, it is not surprising that federal jurors in that state would be as likely to impose the death penalty as state jurors.

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[64] The national median for counsel costs (not including the cost of expert services) for capital cases in the period of this study was about $274,000 for authorized cases overall, $353,000 for trial cases, and $123,000 for guilty pleas. See Table 4, p. 28.

[65] It is not suggested here that state and federal jury pools are entirely comparable. They are not. For obvious reasons – their geographic boundaries are different – there can be a dramatic difference in the demographic composition of a federal district court jury and a state court jury.

Still, this explanation does not account for the relationship between geography and defense resources. Even if jurors are more likely to impose the death penalty in states with an active capital practice, why do federal defendants receive fewer resources for their defense in these same jurisdictions? Judges interviewed reported that they regularly "provide what the defense requests,"[66] and that they are satisfied with the quality of advocacy in the capital cases they tried, and yet some jurisdictions appear to be providing fewer defense resources than others. The qualitative data collected through interviews with lawyers and judges strongly suggest that despite the recognition that prevailing professional norms in capital defense are nationally established, there is within certain jurisdictions a prevailing "local legal culture" that affects counsel's approach to federal capital defense. Certainly, past research suggests that "participants in the federal and state courts in the same locale [have] relatively consensual views of the appropriate length of time to disposition for cases."[67] It would not be surprising, then, if "the lawyers who litigate [death penalty cases] in a given jurisdiction and the judges who hear these [cases] become accustomed to an acceptable range of time and effort for the litigation."[68]

It is important to note that the mandate for this update did not include examining sentencing practices, nor was a complete universe of data collected for such an analysis. As such, the explanations offered here should not be considered a definitive accounting of the relationship among geography, cost, and case outcome. Nevertheless, the findings strongly suggest that more research is needed and that the topic merits additional consideration by the judiciary.

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[66] Similarly, with some exceptions, defense lawyers said that their formal requests for resources are generally received favorably by judges.

[67] Stephen L. Wasby, "Of Note." *Justice System Journal* 21:131 (2007).

[68] *Id*.

VI. Qualitative Data from Judges and Counsel

In addition to quantitative measures, the research considered the experience of federal district judges who have presided over federal death penalty trials, as well as that of Resource Counsel and other defense lawyers, including both CJA panel attorneys and federal defenders with substantial federal capital experience.[69] All subjects were interviewed over the course of one to three hours, using a detailed protocol relating to federal capital practice, including, most particularly, their assessment of the cost, quality, and availability of defense counsel in federal death penalty cases. In addition, qualitative information was collected, less formally, at training programs where capital defense counsel gathered, and at meetings of advisory groups for the defender services program and of the Judicial Conference Committee on Defender Services. Read in tandem with the quantitative data presented in preceding sections, the interviews provide context for the discussion of the cost of capital defense and offer critical assessments of capital case practice and management. The judges and attorneys who participated in the research are not identified in this report (and masculine gender is used throughout), as each was assured anonymity for his insights and experience with respect to federal capital defense practice.

A. Interviewees

The 25 federal district court judges who participated in the interviews are from 17 federal districts and 10 judicial circuits, and each presided over at least one of the 61 trial cases in the database assembled for this report. The judges interviewed reflect the broad geographic range of those cases, and are a diverse group by all measures. Their courts are in urban as well as rural locations and in states that vary in their approach to the death penalty; some of their states have a

[69] The Resource Counsel Projects are described in Section VI.C. (pp.61-63) of this report and in the Commentary accompanying Recommendation 2 (Consultation with Federal Defender Organizations or the Administrative Office, p. 98-101) and Recommendation 6 (Federal Death Penalty Resource Counsel, pp.108-110).

very active death penalty practice while others have little or none. Interviews involved judges appointed by both Democratic and Republican administrations. The judges brought to the bench different types of legal experience and varying levels of involvement with death penalty matters. Before appointment, several judges had spent many years as federal or state prosecutors; some had been in charge of a U.S. Attorney's Office; others had prosecuted or presided over state death penalty trials. Some of the judges had practiced criminal defense, including state death penalty defense, and others took the bench with little or no criminal law experience. While on the federal bench, some of the judges had presided over capital habeas corpus proceedings challenging state death sentences, and others had not. All of the judges interviewed had presided over at least one federal death penalty prosecution that had proceeded through a sentencing phase, and some had presided over several such trials. Most also had presided over additional cases that either were eligible but not authorized for capital prosecution or that were authorized but resolved without a trial. With few exceptions, interviews were conducted in the judges' chambers.

Interviews also were conducted with all of the Resource Counsel Projects and with CJA panel attorneys and federal defenders experienced in defending federal death penalty trials throughout the country. In addition, representatives of the Defender Services Death Penalty Working Group and the Defender Services Advisory Group were interviewed. Interviews were conducted at the lawyers' offices, at national training conferences, at the Administrative Office of the U.S. Courts, and via telephone.

B. Overview of Interviews

1. Judges

In general, judges expressed satisfaction with the quality and availability of defense counsel. Almost universally, judges praised the work of the lawyers who appeared before them in capital cases. Judges also believed the hourly rate and overall amounts paid to counsel in their cases were reasonable given the demands of death penalty representation. Some judges felt that the amounts paid were high but eminently justified, while others viewed similar amounts as "bargains." In general, judges thought the payments they authorized were necessary and appropriate for the defense of these cases. The overwhelming majority of judges believed the lawyers who served on their cases were conscientious, efficient, and gave the court and taxpayers good value. This is due in part, the judges said, to their use of case budgeting, which the judges found helpful in terms of case management and accountability. Almost all judges reported ultimately approving most attorney vouchers that were submitted to them, and authorizing most, but not all, requests for expert services. With respect to services other than counsel, there was a marked change from 1998, when the Spencer Report was written, as now all judges referenced the importance of a thorough social history investigation and the assistance of mitigation specialists. Judges' opinions diverged most sharply with respect to whether or not they permitted counsel to be assisted by a jury consultant at trial. Some judges thought this work essential to the defense, and others believed it unnecessary. The judges interviewed consistently raised a significant concern about capital case processing that has major cost implications. Almost unanimously, they said that the death penalty authorization process takes too long.

2. Defense Counsel

Lawyers' views of the quality of representation in federal death penalty cases spanned a wider range than those of the judges. They identified both excellence and serious deficiencies. They pointed out that although there were exceptions, in most instances deficiencies did not seem to be associated with a denial of compensation or other resources by the court. Rather, they said, problems stemmed from attorneys overlooking important aspects of investigation or litigation. Like the judges, most counsel reported successful experiences with case budgeting and general satisfaction with the way their requests for resources were met by the court. Most said unequivocally that the resources they received in federal court compared favorably to those available to their counterparts (or themselves, in many instances) in state court capital cases. (Lawyers from one state did say their state court afforded greater time than their federal district court for trial preparation and provided more extensive court proceedings, e.g., voir dire). Like the judges, the lawyers who were interviewed suggested that certain Department of Justice policies and practices impeded efficiency and also increased costs. Lawyers suggested that significant cost savings would result if decisions not to seek the death penalty were made more quickly and if, in general, the Department of Justice showed greater deference to the recommendation of the local U.S. Attorney. The delay in deciding not to seek the death penalty, combined with the possibility that the Department of Justice may require capital prosecution notwithstanding the local recommendation, means that counsel cannot triage a case and must treat every case, even the most unlikely, as though it will someday proceed to a penalty phase.

The remainder of this section of the report offers more detail on the comments of judges and defense counsel, and updated information about issues relevant to understanding the quality, availability, and cost of defense representation in federal death penalty cases based on their

experiences over the past decade. The discussions assume familiarity with the components of a federal capital representation. A basic introduction to concepts such as the two phase capital trial process, the scope of the penalty phase, the special obligations of counsel in a death penalty case, the death penalty authorization process of the Department of Justice, and the importance of experts can be found in the 1998 Spencer Report.

C. Federal Death Penalty Resource Counsel

In order to improve the quality of representation and the cost effectiveness of defense services, in 1992 the judiciary established the Federal Death Penalty Resource Counsel Project. Spencer Report at 28-30. When the Spencer Report was published in 1998, that Project consisted of three experienced capital litigators who supported the work of appointed counsel and provided advice to judges and the Administrative Office of the U.S. Courts on a part-time basis. They provided this assistance for cases at all stages of litigation, including at trial, and, to a lesser extent, on appeal and in post-conviction proceedings. Reflecting the expanded need in this area, there are now three separate Resource Counsel Projects that support the three different stages of capital litigation. The Federal Death Penalty Resource Counsel Project addresses trial matters, while appellate and post-conviction assistance is provided by the Federal Capital Appellate Resource Counsel Project and the Federal Capital Habeas Project, respectively. The Resource Counsel Projects serve the courts by recommending counsel for cases at trial, on appeal, and in post-conviction. They also offer consultation, training, and other support to the courts and counsel.[70]

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[70] See Commentary accompanying Recommendation 6 (Federal Death Penalty Resource Counsel):

> Trial level Resource Counsel are assigned to each defense team at the outset of every death-eligible case, and continue to support the efforts of appointed counsel through the conclusion of trial. Appellate and

The expansion of the Resource Counsel Projects has been driven by the increased demand for assistance that is reflected in Section II.C. (p. 8) of this report. The number of federal capital prosecutions being initiated and authorized and the number of defendants whose cases are being tried rather than resolved by a guilty plea have increased substantially, resulting in much greater need for trial level support. Also, as the number of death sentences has risen over the years, more cases have entered the appellate and post-conviction stages as capital representations. Resource Counsel providing trial support may have conflicts precluding continued assistance in these later stages of litigation and, as discussed throughout this report, trial, appellate, and post-conviction litigation require different types of legal expertise. Another reason for the growth of the Resource Counsel Projects stems from recognition on the part of defender services advisory groups that the quality of defense representation was uneven – excellent in many cases, but markedly deficient in others – and that additional support and specialized expertise for appeals and post-conviction representation were necessary. The increasingly large body of federal death penalty law with which counsel need to be familiar was another factor. For all of these reasons, as well as the expansion of the Justice Department's centralized unit of full-time death penalty specialists who assist prosecutors at all stages of litigation,[71] the judiciary has supported expanding the Resource Counsel Projects.

> post-conviction Resource Counsel assume responsibility at the appropriate procedural junctures, and provide consultation and assistance throughout those stages of the case. In addition, the National Mitigation Coordinator provides information, referrals, and case-specific consultation, and is extensively involved in the planning and delivery of training. The four Projects work together on issues of common concern, and support one another in providing training and disseminating information to counsel. They also provide consultation and advice to the Administrative Office and to courts.

Infra, at pp. 108-109.

[71] The Justice Department's Capital Case Unit, described in footnote 72 below, was in formation but unstaffed at the time of the Spencer Report. Spencer Report at 29, n 43.

Many judges and defense counsel spoke with appreciation and admiration about the work of Resource Counsel. Judges emphasized their assistance in recruiting and recommending counsel for appointments and their availability to consult on matters relating to the defense, including case budgeting. Defense counsel found their knowledge, national perspective, and case-specific assistance invaluable. Every year, the Resource Counsel Projects sponsor a variety of training programs, including one national "Strategy Session." Lawyers said they relied on these training programs more than any others to keep up to date on developments in federal capital defense. For the defense function in the federal courts, there is no systemic counterpart to the Criminal Division of the Justice Department, which centrally supports the work of federal prosecutors nationwide, or the Justice Department's National Advocacy Center.[72] Although federal defender organizations are funded from a central source and are administered within the judiciary, the representation they provide is entirely de-centralized. In addition, the majority of federal capital defendants are represented by panel attorneys who, for the most part, are sole practitioners or work in small law firms comprised of fewer than one half dozen attorneys. Thus, the Resource Counsel Projects play a critical role in supporting the delivery of high quality capital defense services. Additional information about their work is found in the following Spencer Report Recommendations and associated Commentary: Recommendations 1 (Qualifications for Appointment), 2 (Consultation with Federal Defender Organizations or the Administrative Office), 6 (Federal Death Penalty Resource Counsel), and 8 (Training).

[72] The Capital Case Unit, a component of the Department of Justice's Criminal Division, oversees capital prosecutions. Its attorneys provide resource counsel support to prosecutors nationwide in death-eligible and authorized cases at all stages of litigation. They also provide direct representation in some cases. In addition to the support offered by the Capital Case Unit, assistance for prosecutors is available from numerous other specialized components of the Justice Department.

D. The Role of Federal Defender Organizations

Federal defender organizations play two primary roles in federal death penalty representation. First, 18 U.S.C. § 3005 imposes a statutory responsibility upon the court to consult with the district's federal defender in every case in which death is a possible punishment.[73] Second, federal defender organization staff attorneys serve as appointed counsel in a growing number of federal death penalty cases. In addition, federal defender organizations support capital trial representation by sponsoring regional capital training, often in collaboration with Resource Counsel; facilitating contact between Resource Counsel and CJA panel attorneys; disseminating information among attorneys who accept capital appointments; convening meetings of capital lawyers in their districts to discuss issues of common concern; and assisting appointed counsel in other ways.

In terms of efficiency and quality of representation, an appropriately staffed and funded institutional defender organization is well suited to the demands of defending a death penalty case. In fact, some experienced capital trial lawyers suggest that, particularly in light of the exceptionally high need for teamwork, a specialized institutional defender is the most advantageous model for capital defense in terms of quality, efficiency, and cost effectiveness. Some sole practitioners said in interviews that their work had been more efficient and effective when they were employed in a well-resourced state capital defender office where lawyers, investigators, mitigation specialists, and paralegals were all at hand. In their federal capital cases, they said, even when the appointing judge provides them with the resources they request,

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[73] "In assigning counsel under this section, the court shall consider the recommendation of the Federal Public Defender organization, or, if no such organization exists in the district, of the Administrative Office of the United States Courts." 18 U.S.C. § 3005. Recommendation 2 (Consultation with Federal Defender Organizations and the Administrative Office), page 98, discusses this role.

their work as panel attorneys costs more and is of lesser quality than that which they achieved in their state defender organization.

Over the past decade, federal defender organizations increasingly have taken responsibility for capital representation at all stages. Just as at the time of the Spencer Report, however, few federal defender offices employ trial or appellate attorneys qualified to serve as "learned counsel" pursuant to 18 U.S.C. § 3005. In most instances in which they are appointed, federal defender organizations are co-counsel with an experienced capital litigator. The defender organization thus benefits from the expertise of the "learned counsel," and the "learned counsel" benefits from the institutional resources and local court expertise of the defender staff.

In interviews, judges, CJA panel attorneys, and federal defender lawyers expressed differing views about the appointment of federal defender organizations in federal capital trial cases. These disparate views likely reflect the fact that each district's defender organization operates independently in many important respects; there are thus many differences among them, including great differences in the size of the offices and in the presence or absence of lawyers with capital experience. In addition, some heads of defender organizations view capital defense as at the core of their mission, while others view it as a distraction that deflects resources away from serving the much larger majority of the organization's clients. One panel attorney who previously worked in a well resourced state capital defender organization suggested that federal defender attorneys generally function more like sole practitioners and less like members of a team, which capital defense work requires. Some judges said the defender office in their district provided the highest quality capital representation available. "Our best defenders are federal defenders," said one judge. Others described their defender organization's capital work less favorably. One called his defender organization's work in capital cases "mediocre."

A number of judges endorsed appointing their district's federal defender whenever possible, but they also emphasized the need to protect the organization from being given too many cases, echoing the Spencer Report's warning that a single death penalty case can significantly disrupt the functioning of an entire defender office. See Spencer Report at 32. Interviews with heads of defender offices that have participated in capital trials confirmed the extraordinary impact they had. The updated Commentary associated with Recommendation 4, like the Commentary published in 1998, encourages courts to appoint federal defender organizations only if sufficient resources and expertise are available and only after consultation between the court and the federal defender. See Recommendation 4 (Appointment of the Federal Defender Organization, p. 103).

E. Quality of Representation: Trial Counsel

The Spencer Report identified specific qualifications designed to ensure that appointed counsel possess the high level of expertise required for federal capital representation. The updated Commentary associated with Recommendation 1 (Qualifications for Appointment, pp. 91-98) in this report updates those criteria. Interviews for this report found judges to be extremely satisfied with the quality of representation provided by trial lawyers in federal death penalty cases. Interviews with lawyers, though, found them to be less satisfied with the quality of work they observed from their colleagues and suggested a mixed picture.

Judges consistently praised the work of the lawyers who appeared before them in capital cases. "Excellent, professional, and hardworking," said one judge. "Superb," said another. A third judge said he thought that taxpayers got a "bargain" even though the costs of counsel were substantial, and suggested that the lawyers' work in his case was "worth two or three times what

they were paid." Although not all judges spoke this glowingly, no judge suggested he was less than satisfied with the quality of appointed counsel.

All judges emphasized that it is important to take great care in the appointment of counsel, and most praised the federal defender or Resource Counsel or both for their recommendations. One judge offered the following list of attributes most important for a capital trial lawyer. He or she should be diligent, intelligent, and an expert on the law; have stamina, emotional stability, and an ability to see ahead; be well-organized and highly experienced; should both seek out and be receptive to advice; have empathy for the client as well as an ability to gain the client's trust and guide his decisions; have the ability to understand a culture other than his or her own; and be zealous without being unreasonable. Another judge added that counsel must be able to work collaboratively as part of a team. This judge, who prosecuted state death penalty cases before being appointed to the bench, also emphasized that successfully counseling a client through a plea agreement or a capital trial requires a particular skill set and a substantial investment of time from the commencement of the case. He said that in evaluating counsel's performance he considers whether the lawyers are meeting with and addressing the concerns of the client during the pretrial period. He finds this a helpful indicator of whether the case will be able to reach trial or disposition without disruption.

In discussing the quality of defense counsel, several judges and many lawyers identified as an important skill the ability to understand a culture other than one's own, pointing out the small number of capital defense lawyers who speak languages other than English or are members of racial or ethnic minorities. This lack of diversity "is not a good thing," said one judge, pointing out that most capital defense lawyers are white and male. Judges and lawyers said efforts should be made to engage women and more people of color, Spanish speakers, and

minority groups in capital defense, and that all lawyers should work to achieve a higher degree of what some called "cultural competence."[74] Some judges described specific efforts made in their districts to attain a more diverse CJA panel, such as reaching out to minority bar associations and establishing mentoring programs. Although he strongly favored such efforts, one judge pointed out how close he believed the lawyers and defendants grew to one another in the death penalty trials over which he presided, seemingly transcending boundaries of race, ethnicity, and class. He attributed this to the emotional intensity of a death penalty case.

Unlike the interviews with judges, the interviews with CJA panel attorneys, federal defenders, and Resource Counsel suggested that the quality of representation in federal death penalty trials is not uniformly excellent and that there are instances of poor quality representation in capital work. Lawyers described an array of deficiencies, some concerning legal issues that were overlooked or not preserved for review, and many more pertaining to the investigation and preparation of the penalty phase of the case. The existence of undeveloped but highly consequential mental health issues, including claims of mental retardation, was another area of concern identified by lawyers who either observed the cases at the trial level or reviewed them later during appellate and post-conviction proceedings. Resource Counsel said that during the past several years they have increased their capacity to provide individualized case assistance to counsel, but that even so, some lawyers resist their offers of help or do not follow suggestions. Queried about why lawyers were more critical than judges concerning the quality of federal capital trial counsel, most attorneys responded that judges are at a disadvantage in assessing counsel. Judges see what has been presented in court, and have some idea about what has been

[74] A "culturally competent" professional is one who possesses the knowledge, attitudes, and skills that allow for working effectively cross-culturally. See Scharlette Holdman and Christopher Seeds, Cultural Competency in Capital Mitigation, 36 Hofstra L. Rev. 883 (2008).

done outside of court, they said, but lawyers view the case from the inside and know what was possible but remained undone.

F. Case Budgeting

Case budgeting was new when the Spencer Report was issued, but is now well established. Budgets are developed by counsel and approved by district courts in virtually every trial level capital case.[75] This is consistent with Judicial Conference policy, which encourages such budgets. *See Guide to Judiciary Policy*, Volume 7A, Guidelines for Administering the CJA and Related Statutes (Guide), § 640, and Recommendation 9 in Part VIII of this report. Judges and lawyers interviewed unanimously and enthusiastically endorsed the budgeting process, identifying a number of ways in which it benefits lawyers, judges, and the taxpaying public.

Judges observed that case budgeting not only saves money but also is an effective case management tool. Descriptions of the impact of budgeting were remarkably consistent. "It makes people feel accountable, makes the lawyers think about the allocation of time," said one judge. "It helps lawyers to plan their cases and allows the judge to know what's coming," said another. "It requires people to focus," said a third. Defense attorneys, said another judge, "are not out to waste time. They think these things through. The [budgets] are obviously the product of lots of thought. They take this responsibility very seriously."

Judges emphasized that case budgeting does not mean micromanaging the lawyers, seeking ways to deny them resources, or "pinching pennies." Rather, they said, the process is intended to ensure that costs are incurred in a way that is mindful of "the big picture." "Be realistic," said one judge. "It's going to cost money." Several judges recommended meeting

[75] This section addresses case budgeting in trial cases only. The research for this report did not address the cost of appellate representation.

regularly with defense counsel to review the budget. Authorizing funding "in increments," one judge explained, helps lawyers focus on proceeding systematically.

Almost all judges said they believed the lawyers they appointed billed responsibly and that their budget requests and individual vouchers were reasonable. They said that although total amounts paid were high, they believed the lawyers' work gave taxpayers good value. However, one judge did say he found it necessary to "rein in" attorney spending and deny requests for counsel fees and expert services he deemed excessive. This judge presides in a district where case costs are low and the rate of death sentencing is high (see pages 43 to 56, supra). This judge also said that when he did approve defense requests he sometimes found himself "caught in the middle" between defense attorneys and the circuit chief judge whose approval he was required to obtain.

Case budgeting is addressed *ex parte*. Guide, § 640.20(b); Recommendation 9(e), page 115. In most district courts, the process is directed by the presiding judge, who sometimes delegates authority to a magistrate judge. In others, a designated court employee serves as an intermediary between the court and counsel.[76] Some of the judges interviewed received help from Resource Counsel either reviewing an entire case budget or evaluating the reasonableness of certain proposed expenditures. Regardless of the method employed, though, almost every judge expressed satisfaction with the way he had approached budgeting. Some judges said they had not budgeted their first trial case, but relied on the process for a later case or cases.

Lawyers expressed appreciation for the way case budgeting helps them plan their legal work and the case investigation. In addition, they said, having a budget in place gives the court

[76] The Administrative Office is currently conducting a pilot program for such case-budgeting initiatives in three circuits, which have employed case-budgeting attorneys. Their mandate includes high cost non-capital as well as capital case budgeting.

more confidence that requests for services are well founded, making voucher review faster and more efficient. Attorneys also endorsed a relatively new practice in which some district courts approve a "starter budget" that authorizes the initial phase of services required to develop a better informed and more detailed budget, and that allows counsel to begin investigating factors to present to the U.S. Attorney and Department of Justice.

While most lawyers did not find the budgeting process itself onerous, there were some exceptions. In a few districts, there were complaints about the way a court employee (not a judge) approached budgeting. In one example, lawyers said that in order to obtain approval for a trip to the jail, they were asked to identify topics they wished to discuss with the client. They felt this was intrusive and imposed on the attorney-client relationship, and said it took time and ultimately cost money to respond to such requests. In another district where budgeting is managed by a court employee, however, attorneys reported very good communication. They said their requests were handled intelligently and respectfully, and that the court employee was helpful and supportive of their work.

G. Expert Services

In death penalty cases, both the prosecution and the defense make more extensive use of investigators, expert witnesses, and other case-related services than they do in non-capital cases.[77] More types of experts are employed, and a wider range of services and more time are required of them. See Spencer Report, pp. 21-25. The following section of this report describes several types of experts frequently relied upon in capital cases and some observations of judges and lawyers with respect to their significance. This discussion is intended to illuminate both their function and their relationship to defense costs.

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[77] As indicated on page 31, supra, when this report refers to "experts," the term encompasses not just expert witnesses, but investigators and all "services other than counsel."

1. Guilt Phase Experts

To investigate, prepare, and present evidence of guilt, the government most often is able to rely on salaried employees of such agencies as the Federal Bureau of Investigation, the Drug Enforcement Agency, the Bureau of Alcohol, Tobacco, Firearms and Explosives, and others. Defense counsel, however, must retain, and courts therefore must authorize payment for, private individuals to carry out similar functions. Likewise, with respect to the many types of specialized forensic science expertise that may be relevant during the guilt phase (e.g., ballistics, DNA, serology, narcotics), the prosecution often can utilize salaried members of law enforcement agencies, while the defense generally must hire experts who charge an hourly rate for their services. Fact investigators and forensic science evaluators are common in both capital and non-capital cases.

2. Mental Health Experts

Mental health experts – psychologists, neuropsychologists, psychiatrists, and others – while not unique to death penalty cases, are relied upon to a much greater extent in capital than in non-capital matters. They may be retained to evaluate a defendant, review records, consult with counsel, testify, or all of the above. They may conduct complex neurological assessments, including MRI or PET scans. They may act as "teaching witnesses," to educate a judge or jury about such issues as traumatic brain injury, fetal alcohol syndrome, addiction, mental retardation, or other complex mental conditions. The services of a mental health expert or experts were obtained in virtually every case examined for this study; in a substantial number of those cases that proceeded to trial, such experts were called to testify.

With respect to controlling expenditures, lawyers and judges reported that it is sensible and cost-effective to have mental health evaluations and expert consultations proceed in stages,

rather than arranging for multiple experts and assessments at once. Evaluation ordinarily should move from the general to the more specific, since initial findings will indicate whether there is a need for certain types of specialized expertise. In addition, lawyers specializing in this area explained that expert evaluations typically should be undertaken only after the defense has completed substantial investigation, so that the expert inquiry can be properly focused, and the evaluation based on a reliable foundation of knowledge. A lawyer offered the following example: a life history investigation may reveal that a defendant failed in school beginning in the early grades. A neuropsychological evaluation might then be obtained, revealing that the defendant has a low IQ. This in turn may necessitate more specialized investigation and testing to assess for adaptive function and a possible diagnosis of mental retardation.

Mental health experts are retained by the prosecution as well as the defense. Lawyers and judges indicated that the hourly rates paid to these experts by both sides have risen significantly in the past decade. One judge recalled the trial testimony of a psychiatrist who was being paid between $650 and $800 an hour for his work for the prosecution. Several defense lawyers said that though their expert costs were high, defense experts' hourly rates were no higher than, and in many cases were lower than, those of the mental health experts employed by prosecutors.[78]

[78] The current rate sheet for a nationally prominent firm frequently employed by the prosecution in federal death penalty cases indicates hourly rates of up to $900 for some mental health experts. Expert Rates, Park Dietz & Associates, available upon request. In a recent non-capital federal case, a different prosecution expert testified that he was paid $500,000 by the U.S. Attorney's Office for his report, on which he spent approximately 1,000 hours. http://www.deseretnews.com/article/705349138/Expert-paid-500K-for-Mitchell-report.html

3. Mitigation Specialists

As the Spencer Report indicated, effective representation in a death penalty case requires a thorough investigation of the defendant's life history to develop information relevant to sentencing. Spencer Report at 24-25.[79] The investigation typically is undertaken with the assistance of a mitigation specialist who has a graduate level degree as well as extensive training and experience in the defense of capital cases. The mitigation specialist generally coordinates a multi-generational investigation of the defendant's family; identifies medical, psychological, and other issues requiring expert evaluation; and assists attorneys in locating experts and providing documentary materials for the experts to review. The mitigation specialist's hourly rate is less than counsel's and less than that of the expert witness(es) whose testimony may rely on the results of this investigation.

The Spencer Report found mitigation experts in short supply. Interviews with judges and defense counsel for this report established that the problem continues. Appreciation was expressed by lawyers for the annual mitigation training program sponsored by the Office of Defender Services of the Administrative Office of the U.S. Courts, and for the availability of some support for mentoring by senior mitigation specialists. One judge said that finding a good mitigation specialist was much harder than finding counsel, and defense lawyers agreed. The shortage of mitigation specialists is even more severe when specialized skills such as foreign language ability are required. As a result, counsel frequently must retain mitigation specialists from other geographic areas. Recommendation 7 (Experts) and the accompanying commentary support efforts to enhance the availability of mitigation specialists.

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[79] This responsibility is described in greater detail in the American Bar Association's *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913 (2003), and *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 Hofstra L. Rev 677 (2008).

4. Jury Consultants

Jury consultants provide a range of services in federal death penalty cases, from developing questionnaires to participating in voir dire. As the Spencer Report explained, jury selection is more complicated in a capital trial. Spencer Report at 16-17. The process of determining whether potential jurors should be disqualified because of their views about the death penalty is complex and time consuming. The involvement of jury consultants in federal death penalty cases has found broader acceptance since the time of the Spencer Report, and such experts are now authorized in a majority of cases that proceed to trial, but the opinions of judges and lawyers about their utility continue to differ. Lawyers interviewed for this study viewed jury consultants as essential. While some judges agreed (one said access to a jury consultant was "not only reasonable, but important to a fair trial"), many judges expressed uncertainty about their value but said they gave the benefit of the doubt to defense counsel's strong belief that the defense required the assistance. Some judges said they authorized jury consultants in capital cases but not in non-capital ones. Others said they authorized a jury consultant if the prosecution retained one.

5. Victim Liaisons

In a federal capital case, the victim's family has a role at every stage of the proceedings, from the capital authorization process, in which their views are considered in accordance with the Justice Department's protocol, through the sentencing phase, where they are afforded the opportunity to testify. U.S. Attorney's Offices have special staff to coordinate the contacts of victims and their families with prosecutors and the court. Defense counsel have an obligation to communicate with victims as they would any other witnesses, and many lawyers reported they

prefer to rely on specially trained victim liaisons to carry out this sensitive task.[80] The work that is performed by a victim liaison varies. It may include serving as a conduit for family members' questions of or about the defendant, the defense function, the facts of the offense, or the court proceedings and for conveying the responses of defense counsel back to the family. The liaison also may, if the family so requests, convey to defense counsel the family members' wishes and priorities in terms of the disposition of the case, and the liaison may address the family's desired role during pre-trial or trial proceedings. In some instances, a victim's family may wish to avoid a capital trial, a fact which can be very important to both prosecution and defense in reaching a plea agreement.

Victim liaisons have played a role in federal capital cases only for about 10 years. Very few judges interviewed for this report had heard of them, likely because the practice has become more prevalent in cases litigated after the period encompassed in this study.[81] The lawyers who had employed a victim liaison said that while family members are free to decline any interaction, those who did choose to communicate with the liaison seemed to find it helpful and said the liaison's work made a valuable contribution to their representation. These lawyers also said that the services of a liaison may have a positive impact on reducing costs, because it may facilitate a non-trial disposition. Even where that is not the case, they pointed out, the victim liaison fulfills an important function in establishing (or attempting to establish) contact with individuals to whom the defense must reach out based on their relationship to the victim and their required role

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[80] The use of specially trained victim liaisons is discussed in the *ABA Guidelines*, Commentary to ABA Guideline 10.9.1, 31 Hofstra L. Rev. at 1042, where it is suggested that "approaches to the victim's family should be undertaken with sensitivity" and that defense counsel " should consider seeking the assistance of . . . a defense-victim liaison . . . in the outreach effort."

[81] The one judge familiar with victim liaison work said he viewed it as important.

in the litigation, and does so at an hourly rate lower than counsel's. Defense-initiated victim contact is "simply essential to the effective delivery of defense services," said one attorney.

6. Future Dangerousness and Prison Conditions Experts

At the sentencing phase, a federal capital trial jury must decide between two options: a sentence of life in prison without the possibility of release and a sentence of death. Another type of expert unique to death penalty cases is an individual who can inform the jury about the conditions of life in prison. To provide information about whether a defendant will be dangerous to others if incarcerated for life, both prosecution and defense counsel rely on social scientists who study prisons or on corrections officials with experience administering high-security facilities. Such experts inform jurors about the nature of prison life, the extent to which federal prisons ensure (or cannot ensure) the safety of prisoners and corrections staff, and the rates of violence in prison. Testimony from such experts was very common in cases that went to trial. Judges and lawyers said that knowledge of the prison environment seemed extremely important to jurors and the testimony of these experts was highly valued.

7. Requests for Expert Services

Most judges reported that they found the majority of defense counsel's requests for expert services reasonable and approved them, and defense attorneys similarly reported that courts generally ruled favorably upon their applications. Judges said that they found the requests for expert services were made in good faith and reflected a genuine need. They also indicated that the life and death stakes and the nature of the resources marshaled by the prosecution disposed them toward granting all reasonable defense requests and toward giving the defense the benefit of the doubt where any existed. Prosecution resources were described by judges as "vast" and "limitless." The defense is always out-resourced, one judge explained, because

"defense counsel doesn't have the FBI to do its investigation. We do what we can to level the playing field." Prosecution spending was referred to by one judge as "an open spigot" and by another as "a blank check." Another judge asked why "no one ever talks about the government's costs. That's where the money is really spent," he said.

8. $7,500 Threshold for Circuit Approval of Expert Payments

As required by statute, once the cost of expert services in a capital case totals $7,500, the district court judge must obtain approval from the chief judge of the circuit, or his or her designee, in order to authorize further payments. 18 U.S.C. § 3599(g)(2). Although intended as a cost control measure, judges said the threshold would need to be substantially higher to serve as a meaningful control.[82] Almost all judges said they succeeded in gaining approval from their circuit chief, most without any difficulty. Many judges said they thought it was sensible to have some type of oversight of the expenditures they authorized. Nevertheless, several judges questioned whether circuit court judges are well situated to evaluate district judges' decisions about the reasonableness of trial costs. One judge expressed concern that decision-making was "arbitrary," while another pointed out that the prosecution did not have to seek court permission for its expenditures. A third judge, who had difficulty obtaining approval, described his circuit's review process as "terrible."

H. Case Management

Most judges said they took special steps to prepare for presiding over a federal death penalty case. They obtained materials from the Federal Judicial Center (FJC) and attended FJC training seminars, contacted the Administrative Office, spoke to experienced capital prosecutors

[82] The median cost of expert services in cases analyzed for this report was $42,000 for cases ending in a guilty plea and just over $100,000 for cases ending in a trial. Supra at p.32, Table 8. In interviews, judges referred to the $7,500 threshold as outdated, unreasonably low, and "wholly unrealistic."

and defense attorneys, and read the Spencer Report. Most reached out to other federal judges who had presided over death penalty trials, speaking with judges in their own and in other districts. Compared to other complex cases, said one judge, his federal death penalty preparation involved "a greater quantity of time and intensity of focus." It was "like getting ready for an extended journey." Another judge said his preparation included reading all of the U.S. Supreme Court's capital decisions. He compared it to studying for the bar exam, and said the materials he compiled on capital cases "took up a whole wall." "You can't work on anything else for weeks," he said. "It takes all your time."

Both lawyers and judges described capital litigation as exacting an enormous emotional toll, not only from the defendant and his counsel, but also from jurors, prosecutors, judges, and courtroom staff. One judge said that a colleague who presided over a death penalty trial called to warn him about the stress. The caller had suffered a heart attack shortly after his trial. This judge described having nightmares during his case and said that some of the jurors did as well. One of the lawyers involved in the trial was hospitalized with chest pains. That judge described the experience as "a year out of time," when everything but the capital trial receded. The lawyers and the judge essentially shut themselves off from any other work. Another judge said he had to let a lawyer withdraw from a case because he was unable to bear the financial cost of shutting down the rest of his practice indefinitely. Defending one of these cases requires "complete commitment," said another judge. They are enormous and long-term and it is "almost impossible to know when the commitment will end, making it hard to plan for the future."

Death penalty cases require "more stamina, time, and emotional effort," said one judge. To illustrate the emotional investment of the lawyers, one judge recalled the reaction of an attorney when a life verdict was returned. "He just started sobbing with relief," the judge said.

Another judge made a similar observation: "You can literally see the emotional and physical toll on the lawyers. It's visible." Speaking of his own stress level, one judge said, "You don't sleep at night. You wake up at 3 a.m. It totally consumes your life. You can just cancel everything else in your work and personal life."

Most judges described federal death penalty cases as extremely complex to manage, whether they involved a single defendant or multiple defendants. Some compared their capital trials to the most complex civil litigation they had presided over, while others said the capital trials were even more challenging than those matters, noting that the life and death stakes made them also much more stressful. In a published article, one judge said his single defendant capital trial involved 250 pretrial motions, some requiring many hours of hearings, and three interlocutory appeals. Presiding over the penalty phase was, he said, like "chuting the Colorado River on a tea tray."[83] Not every judge agreed, however. One said that while the pressure for lawyers was greater because of the stakes, it was not so for him as the judge. "Everyone overdoes it in death penalty cases," said another judge, who felt his experiences prior to joining the federal bench, as a defense lawyer and as a state court judge presiding over state death penalty trials, made him especially efficient. He suggested that judges inexperienced with capital cases "think everything is an important thing," and thus let cases run too long.

When discussing case management issues bearing on case cost, judges emphasized three things: streamlining the death penalty authorization process; the benefits of an early decision on severance; and the efficiencies that can be achieved through conscientious discovery practices. Another aspect of capital case management on which all judges commented was voir dire, because capital jury selection is generally very time consuming and different from selecting a

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[83] Ponsor, *Life, Death and Uncertainty*, Boston Globe, July 8, 2001, at D2.

non-capital jury. The authorization process is discussed separately, in Section II (p. 3) and in Section VI (I) (p. 82). The other three subjects are addressed below. In addition, many judges said their capital trials demonstrated the importance of conducting regular status hearings as well as periodic conferences to review the case budget with defense counsel. These and other cost-containment suggestions relating to case management are also discussed in Recommendation 9 (Case Budgeting, p.115) and Recommendation 10 (Case Management, p.119).

1. Severance

Defendants are severed much more frequently in capital than in non-capital cases, both for legal reasons (e.g., evidence is admissible against one defendant but not another) and for case management reasons, including cost efficiency. As the Spencer Report noted, multi-defendant cases generally cost more to defend, per defendant, than single defendant cases, and this effect "may be magnified in a case in which some defendants face the death penalty and other defendants face only non-capital charges." Spencer Report at 11. From the earliest pre-trial period through the end of a penalty trial, the defense of capital and non-capital defendants is likely to proceed very differently. In most cases in this study, courts found it efficient to sever non-capital defendants early in the proceedings. One judge described it as "virtually mandatory," not in a legal sense but in a practical one. Non-capital cases typically resolve, whether by plea or by trial, long before capital cases, and thus their representation costs cease. The majority of cases proceeding to trial have involved just one defendant for whom the government is seeking the death penalty, but severance practices with regard to capital defendants' trials have varied. In multi-defendant cases involving more than one authorized defendant, many judges have followed the practice of trying each capital defendant separately.

Some have conducted joint trials and some have severed the penalty phase trial for each defendant after a joint trial in the guilt phase.

2. Discovery

The amount of material produced for discovery in a federal death penalty case can be overwhelming, particularly when there are multiple defendants and when alleged conduct spans an extended period of time. A judge who has presided over several large multi-defendant death penalty cases, himself a former prosecutor, had numerous suggestions about containing the costs of discovery. "There's much the government can do to mitigate the cost of huge discovery so these costs aren't passed on to the CJA," he said. He suggested that either the judge or a court administrator work with counsel for both sides to identify methods of containing discovery costs, e.g., negotiating with vendors for discounts on large reproduction orders. The judge also suggested that the government be encouraged or required by the court to organize materials in a manner reasonably convenient for defense counsel to access, such as a readable electronic format. Along the same lines, the government could assist by providing any transcripts that have been prepared along with the recordings of wiretapped conversations it turns over in discovery. Such practices would not cost the prosecution much, but could save the defense, and thus the public, a great deal of expense by avoiding costly duplication of effort.

3. Jury Selection

The Spencer Report described the heightened significance and complexity that the death penalty adds to jury selection. Spencer Report at 16-17, 25. Not surprisingly, judges and lawyers described jury selection in capital cases as dramatically different from that in non-capital

trials.[84] Jury selection takes longer in federal death penalty cases, both because the total number of jurors questioned is larger, and because there is, necessarily, more extensive questioning of each individual prospective juror.[85] Many lawyers and judges said that in general, voir dire is the single most determinative factor in the outcome of a trial. In fact, judges declared it essential for a trial judge new to capital cases to become educated about voir dire in advance of trial.

In almost all cases, juror questionnaires that the lawyers participated in drafting were distributed and used to winnow the jury pool. This was typically followed by group voir dire and then by more extensive individual voir dire. One judge said he did not allow questionnaires because it "lets lawyers find ways to keep jurors off the jury." Instead, he said, he asks a series of questions and then lets the lawyers do the remaining voir dire. Most judges said they found it appropriate to give counsel a much larger role and greater latitude in the questioning than would be their practice in a non-capital case. While most judges said it was necessary to dedicate a great deal more time to selecting a capital jury, there were a few notable exceptions. The majority of judges and lawyers described a jury selection process that took weeks or even months, but a few described a shorter process. Two judges said their voir dire of prospective jurors lasted only one day, a fact that many other judges found disturbing. Those districts where voir dire was most brief were located in states with a large number of state court death penalty trials, although not all such states had abbreviated voir dire.

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[84] In a capital case, ordinarily the same jury will decide both the guilt and penalty phase verdicts, and so, among other things, the court must determine whether jurors should be disqualified because their views about the death penalty, for or against, would make them unable to follow the law governing penalty phase deliberations.

[85] A large pool is required because of the range of issues that may cause an individual to be excused, including the death qualification inquiry, pretrial publicity, or other factors related to the nature of the guilt or sentencing portion of the case.

I. The Capital Authorization Process

The Department of Justice seeks the death penalty against only a small percentage of the defendants charged with death-eligible offenses. The process by which the Attorney General determines whether to seek the death penalty and whether, in cases in which capital prosecution has been authorized, to permit a plea agreement involving a sentence other than death is described in Section II.B (pp. 5-8) of this report. A decision not to authorize capital prosecution has obvious and dramatic cost consequences, as it may reduce the number of defense counsel required, as well as their hourly rate, and will certainly narrow the scope of their responsibilities. The Spencer Report recommended that the authorization process be streamlined so that these cost savings could be maximized.[86] Spencer Report at 19-21, 49-50. Lawyers and judges interviewed for this report, however, still find the process inefficient and extremely costly.

Trial judges interviewed consistently expressed a high degree of dissatisfaction with authorization decision-making because the process generally takes too long. Judges were concerned because the delay in decision-making drives costs higher. While prolonged decision-making proceeds, two lawyers (paid at the higher capital rate) continue to treat a case as capital, preparing motions, investigating for mitigation, and hiring and utilizing experts. The money is spent even when the case is not ultimately authorized. Judges were troubled because this aspect of the authorization process places an unnecessary burden on CJA resources, the judiciary, and ultimately the taxpayer.

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[86] This study found that authorized cases cost about eight times as much as cases that are not authorized. See Table 3, page 26. The median defense cost of an authorized federal death penalty case between 1998 and 2004 was $353,185. By comparison, the median defense cost of a case that was eligible for capital prosecution but was not authorized was $44,809. Capital authorization thus increased the median defense cost of a case by $308,376.

Many judges said that in their cases it took the Justice Department "too long" to make a decision about whether or not the death penalty would be authorized. Judges had this concern with respect to cases ultimately authorized for prosecution as well as cases that were not, but their concerns were heightened with respect to the latter.[87] They emphasized that the process took months, even where cases could be identified as unlikely to be authorized based on what already was known about the defendant, the prosecution's case, or both. The Justice Department's process "has got to be faster," said one judge, who felt "the local prosecutors lost control" and the case "got lost in the bureaucracy."

Some judges said they tried to accelerate the authorization process by setting deadlines that would bind prosecutors to returning the Attorney General's decision by a certain date, while others indicated they were reluctant to do so for fear this might cause the government to provide notice of authorization simply as a placeholder. For example, one judge emphasized that as a cost management tool, it was critical to be aggressive in setting deadlines and requiring strict adherence from the government, with forfeiture of the right to seek the death penalty resulting from non-compliance. This judge pointed out that the death penalty is not sought in the overwhelming majority of capital-eligible cases, and that the prosecution should be able to identify most of those cases much more quickly. Another judge expressed reluctance to pressure the local prosecutors for fear it would precipitate a premature decision to seek death. (In that judge's case, the local prosecutors recommended against authorization but the Attorney General authorized the case.)

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[87] Judges noted that in cases where death penalty authorization does appear a realistic possibility, it is important to allow defense counsel sufficient opportunity to gather and present their best arguments to the local prosecutors and the Justice Department. From a cost standpoint, they said, investing in the effort to avoid a capital prosecution is the approach most likely to avoid greater future costs.

While judges were most concerned with the amount of time it took for a decision not to seek the death penalty, lawyers emphasized the way authorization decisions are re-visited later in the litigation. In a federal death penalty case, if the defense and U.S. Attorney reach a negotiated settlement, the Justice Department's protocol will not allow a plea to proceed unless it is approved by the Attorney General. Lawyers described cases in which costly trials went forward because the Justice Department refused to approve such a settlement. They viewed the subsequent expenditure of time, money, and other resources as wasteful when both sides had agreed to what each viewed as a fair resolution of the case. They pointed out that the sentences of life without the possibility of release that resulted from these trials could have been had at a much lower price had the Justice Department heeded the recommendation of the local U.S. Attorney.

J. Appellate and Post-Conviction Representation

Although research for this report focused primarily on trial representation, the interviews yielded information relevant to the quality and availability of appellate and post-conviction representation that warrants attention. The following section discusses those issues.

1. Quality and Availability of Appellate Counsel

Until recently, it was not uncommon for courts of appeals automatically to continue the appointment of a death-sentenced federal defendant's trial lawyers through the appeal.[88] Interviews with experienced capital appeals lawyers suggested that this practice had a negative impact on the quality of appellate representation. They noted that counsel who lacked capital appeals experience sometimes overlooked the importance of litigating and emphasizing appellate

[88] The reasons why this is not a preferred practice in capital (or in non-capital) representation are discussed more fully in the Commentary accompanying Recommendation 1(c) (Special Considerations in the Appointment of Counsel on Appeal).

issues pertaining to sentencing, and yet where error is found and relief granted in capital cases, it is more typically in the sentencing phase. For example, in one case the primary issue raised on appeal related to an arguably frivolous speedy trial claim, while a potentially meritorious death-sentencing claim was wholly ignored. The lawyers noted that while most federal death penalty appellate decisions have been affirmances, those in which relief was granted have all involved penalty phase errors. One capital appeals specialist expressed surprise that he saw briefing in federal court that was "beneath the standard of practice in state capital appeals."

It was also noted that lawyers without capital appellate experience have rarely, if ever, confronted other challenges unique to these appeals. These include a voluminous record that can extend to tens of thousands of pages (and which may have to be supplemented to bring all relevant issues before the appellate court) and that can give rise to a vast number of potential issues; the special need to select and present issues with a view toward future proceedings (e.g., post-conviction litigation and clemency); and special difficulties in managing clients who are on death row. Finally, capital appeals specialists noted that even trial counsel who do have strong appellate credentials may have difficulty viewing the case within the "four corners" of the record rather than through their extensive outside-the-record experiences at trial. As a result, legal issues missed at trial may be neglected on appeal as well. For this reason, they explain, it is important to bring a fresh perspective, as well as appellate expertise, to the examination of the record.

2. Quality and Availability of Post-Conviction Counsel

Concerns about appointment of counsel were greater with respect to post-conviction representation. Post-conviction specialists from various regions noted that, contrary to Spencer Report Recommendation 1(d), some courts had appointed attorneys who lacked capital post-

conviction experience. They said this lack of experience was especially consequential in light of the one year statute of limitations within which motions for relief pursuant to 28 U.S.C. § 2255 must be thoroughly investigated and filed. They said there is little time available for inexperienced counsel to "learn the ropes," and no safety net if they fail, as this is the one and only opportunity for post-conviction investigation and presentation of claims challenging the constitutionality of a federal conviction and death sentence.

Among the problems resulting from the appointment of inexperienced post-conviction counsel was a failure to fully investigate potential post-conviction claims, particularly those requiring investigation outside the trial record and relating to the penalty phase, such as ineffective assistance of counsel, juror misconduct, and government suppression of evidence favorable to the defense. One striking concern, they said, was the number of instances in which viable claims of mental retardation and other mental conditions were either overlooked or insufficiently developed, first at trial and then again in the post-conviction stage. The inadequacy of post-conviction mitigation investigation in general was a focal point of concern. The Commentary accompanying Recommendation 1(d) (Special Considerations in the Appointment of Counsel in Post-Conviction Proceedings, p. 90) identifies the prior experience counsel should bring to a federal capital post-conviction representation.

As explained earlier, interviews with trial judges found that in general they had confidence in the work that was done by the trial counsel they appointed. Although only a limited number of judges interviewed had presided over capital 2255 proceedings, their perceptions about the high quality of trial representation seemed to inform their views about the resources that would be required for post-conviction defense representation. According to experienced post-conviction lawyers, some judges are reluctant to grant the resources necessary

to fulfill post-conviction counsel's duty to conduct an independent outside-the-record investigation. They also pointed out that even highly experienced and dedicated trial counsel can miss, and have missed, important issues or areas of investigation. This point was confirmed by experienced trial counsel.

At least one judicial district has adopted a policy of transferring capital 2255 proceedings to a judge other than the one who presided over the trial, and a judge from that district spoke favorably about it. Under this policy, he said, there is "no question about impartiality," adding that it gives him more confidence in the process "to have another set of eyes on the case." Having the trial court preside over the post-conviction proceedings is "too much like having the trial court rule on the appeal of its decisions," he said.

VII. Conclusion

The 1998 Spencer Report concluded by offering 11 recommendations to encourage both high quality representation and cost containment in the defense of federal death penalty cases. Those recommendations were adopted by the Judicial Conference and remain Conference policy today. This report concludes by offering updated commentary to accompany those same recommendations, in order to reflect the judiciary's evolving experience with these highly complex and intensely demanding matters.

VIII. RECOMMENDATIONS AND COMMENTARY[89]

1. Qualifications for Appointment.

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

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

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

i. the attorney's experience in federal criminal appeals and capital appeals;

ii. the general qualifications identified in paragraph 1(a), above; and

iii. the attorney's willingness, unless relieved, to serve as counsel in any post-conviction proceedings that may follow the appeal.

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

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

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[89] Section VIII utilizes a numbering system that is different from the rest of this report in order to match the numbered recommendations in the original Spencer Report.

Commentary

As Recommendation 1(a) indicates, the first responsibility of the court in a federal death penalty case is to appoint experienced, well-trained, and dedicated defense counsel who will provide high quality legal representation. Federal law requires the appointment of two counsel to represent a defendant in a federal death penalty case, of whom at least one must be "learned in the law applicable to capital cases." 18 U.S.C. § 3005. Additional requirements relating to counsel's experience are codified at 18 U.S.C. § 3599. Legislatures, courts, bar associations, and other groups that have considered the qualifications necessary for effective representation in death penalty proceedings have consistently demanded a higher degree of training and experience than that required for other representations. As provided in the Defender Services Program Strategic Plan, counsel in federal death penalty cases are expected to comply with Guidelines 1.1 and 10.2 et seq. of the American Bar Association's *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913 (2003), and the *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 Hofstra L. Rev 677 (2008).[90]

Heightened standards are required to ensure that representation in federal death penalty cases is both cost-effective and commensurate with the complexity and high stakes of the litigation. Counsel in a federal death penalty case must not only be skilled in defending the charged offense, e.g., a homicide, but also must be thoroughly knowledgeable about a complex body of constitutional law and special procedures that do not apply in other criminal cases. They must be able to direct extensive and sophisticated investigations into guilt/innocence and

[90] Aimed at providing counsel services "consistent with the best practices of the legal profession," the Defender Services Program Strategic Plan was endorsed by the Defender Services Committee of the United States Judicial Conference. See Goal 2 (Quality of Representation), Strategy 16 (Capital Representations).

mitigation of sentence. They must have the counseling skills to advise a client deciding between pleading guilty in return for a life sentence and proceeding to trial where the sentencing options are death or life imprisonment without the possibility of release.[91] They must have communication skills to establish trust with clients, family members, witnesses, and others whose backgrounds may be culturally, racially, ethnically, linguistically, socioeconomically, and otherwise different from counsel's. They must be able to work effectively as part of a defense team and collaboratively with counsel for codefendants. And, for post-conviction cases, counsel also must be familiar with the unique jurisprudence and practices applicable in habeas corpus. Finally, counsel must be able, notwithstanding exceptional knowledge and skill, to commit sufficient time and resources, taking into account the extraordinary demands of a federal death penalty representation.

The standards listed in Recommendations 1(b) – (d) are designed to assist courts in identifying the specific types of expertise and distinguished prior experience which have been deemed most valuable to this demanding work in the experience of the federal courts thus far. They emphasize the importance of bringing to bear both death penalty expertise and experience in the practice of criminal defense in the federal courts. As described further in the commentary to Recommendation 2, the qualifications of counsel must be assessed with respect to the particular demands of the individual case, the stage of the litigation, and the defendant.

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[91] A guilty plea negotiated at any point in the proceedings brings substantial cost savings, and such a disposition is always available if the sides can find agreement, even after the death penalty has been authorized. The Federal Death Penalty Resource Counsel Project recently estimated that plea agreements have been reached in approximately 25 percent of *authorized* federal capital prosecutions since 1988. Appointed counsel's negotiating skills thus are very important.

The governing statute calls for capitally qualified counsel to be appointed "promptly," 18 U.S.C. § 3005. Recommendation 1(b) endorses appointment of specially qualified counsel "at the outset" of a case, which in some cases may mean prior to the formal filing of a charging document. Courts should not wait to see whether the government will seek capital prosecution before appointing appropriately qualified counsel and granting them the resources necessary for a preliminary investigation. The goals of efficiency and quality of representation are achieved by early appointment of learned counsel in cases where capital indictment may be sought. Virtually all aspects of the defense of a federal death penalty case, beginning with decisions made at the earliest stages of the litigation, are affected by the complexities of the penalty phase. Early appointment of "learned counsel" is also necessitated by the formal authorization process adopted by the Department of Justice to guide the Attorney General's decision-making regarding whether to seek imposition of a death sentence once a death-eligible offense has been indicted. Integral to the authorization process are presentations to the local United States Attorney's Office and Justice Department officials of the factors which would militate against a death sentence. See United States Attorney's Manual § 9-10.000. A mitigation investigation therefore must be undertaken at the commencement of the representation. Delay in appointment of learned counsel risks missing this important opportunity to avoid the high cost of a capital prosecution. Since an early decision not to seek death is the least costly way to resolve a potential capital charge, a prompt preliminary mitigation investigation leading to effective advocacy with the local U.S. Attorney and with the Justice Department is critical both to a defendant's interests and to sound fiscal management of public funds. And, since the local prosecutor's recommendation most often prevails with the Attorney General, the opportunity to persuade the U.S. Attorney not to request capital authorization is extremely important.

Recommendation 1(b)'s requirement of "distinguished prior experience" contemplates excellence, not simply prior experience, at the relevant stage of proceedings: trial, appeal, or post-conviction. It is expected that a lawyer appointed as "learned counsel" for trial previously will have tried a capital case through the penalty phase, whether in state or in federal court, and will have done so with distinction. Excellence in general criminal defense will not suffice because the preparation of a death penalty case requires knowledge, skills, and abilities which even the most seasoned lawyers will not possess if they lack capital experience. And not all capital trial experience will qualify as "distinguished." Consultation with federal defender organizations and Resource Counsel, as described in Recommendation 2 (Consultation with Federal Defender Organizations or the Administrative Office), can help ensure that appointed counsel meet this criterion.[92]

Courts should appoint counsel with "distinguished prior experience" in death penalty trials, appeals, or post-conviction representation, even if meeting the standard requires appointing counsel from outside the district in which a matter arises. Appointing such qualified defense counsel generally produces cost efficiencies, including a higher likelihood of a non-trial disposition. The costs of travel and other expenses associated with bringing counsel from

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[92] The term federal defender organization (FDO) is used here to refer to a Federal Public Defender Organization (FPDO) and a Community Defender Organization (CDO), two different organizational models that fulfill the same function of providing counsel for indigent criminal defendants in the federal courts pursuant to the Criminal Justice Act (CJA), 18 U.S.C. § 3006A. A Federal Public Defender Organization is a federal office, headed by a Federal Public Defender who is selected by the Circuit Court of Appeals. The attorneys and other staff are employees of the federal judiciary. A Community Defender Organization is a not-for-profit corporation governed by a board of directors and led by an executive director. Both types of organization are funded and administered by the federal judiciary. Among the 94 judicial districts, 90 are served by an FDO.

The term "Resource Counsel" refers to the death penalty experts who serve in the Federal Death Penalty Resource Counsel Project (trial level), the Federal Capital Appellate Resource Counsel Project (appellate level), and the Federal Capital Habeas Project (post-conviction level). These groups are referred to collectively as "Resource Counsel" or "the Resource Counsel Projects." The work of the three Resource Counsel Projects and the National Mitigation Coordinator is described in the commentary accompanying Recommendation 2 (Consultation with Federal Defender Organizations or the Administrative Office) and Recommendation 6 (Federal Death Penalty Resource Counsel).

another jurisdiction can be minimized with careful planning by counsel and the court. With appropriate forethought, investigations, client counseling, court appearances, and other obligations can be coordinated to maximize the efficient use of counsel's time and ensure cost-effectiveness. In the institutional defender context, when it is helpful and desirable, attorney resources can be shared between defender offices pursuant to an established protocol.

Recommendation 1(c) provides that counsel on appeal should include "at least one attorney who did not represent the appellant at trial." Like capital trial representation, capital appellate representation should be tailored to the individual requirements of the case, stage of proceedings, and client. There should be no presumption of continuity from trial to appeal in federal death penalty cases, and courts frequently relieve and replace both trial counsel. Capital appellate work is a specialty, and a lawyer is rarely a specialist in both trial and appellate representation.[93] Even if trial counsel does possess "distinguished prior experience" in appellate as well as trial representation, there is value in bringing fresh perspective to issues that have been litigated below. In addition, a new lawyer may, if appropriately experienced, be able to provide continued representation following the appeal in any post-conviction proceedings, which a trial lawyer could not, due to a conflict of interest.[94] This would afford continuity of representation at that stage and, presumably, cost savings. To address particular case-specific demands, such as an especially complex trial record or managing the needs of a defendant with significant mental health issues, some courts have found it helpful and cost-efficient to appoint one of the

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[93] See *Good Practices for Panel Attorney Programs in the U.S. Courts of Appeals*, Vera Institute of Justice (2006) (the Defender Services Committee endorsed the report's recommendation that circuits adopt a flexible approach rather than requiring CJA trial counsel to continue representing the defendant through the appeal, and encouraging deference to trial counsel regarding whether continued representation is in the client's best interests and consistent with counsel's professional skills and obligations). http://www.uscourts.gov/FederalCourts/AppointmentOfCounsel/Publications/VERASuggestedGoodPractices.aspx.

[94] Where a claim of ineffective assistance of counsel on appeal is possible, continued representation would not be appropriate.

defendant's trial attorneys as third counsel on appeal, to provide limited and/or temporary assistance as required.

Recommendation 1(d) highlights the need for specialized expertise in post-conviction representation. Like trial and appellate counsel, post-conviction lawyers for federal death penalty cases should be selected based on an individualized assessment of the requirements of the case, the stage of the litigation, and the defendant. Habeas corpus practice is a complex subspecialty of capital representation. A lawyer qualified to be learned counsel in a federal capital trial or on appeal will not necessarily have such expertise. Challenges include an accelerated timeline, a tangle of specialized procedural law applicable to capital proceedings pursuant to 28 U.S.C. § 2255, and an obligation that includes a full investigation of both phases of the trial to identify any possible constitutional infirmities. This underscores the importance of appointing counsel with the experience and dedication – as well as the time and resources – to devote to this intensely demanding work. The one-year statute of limitations makes it especially important that counsel be appointed promptly. Federal Capital Habeas Resource Counsel recommend that appointment take place prior to the denial of certiorari by the Supreme Court. As indicated in Recommendation 4 (Appointment of the Federal Defender Organization), a number of federal defender organizations have staff attorneys who specialize in post-conviction capital litigation. Where they possess the requisite expertise, appointment of federal defender organizations should be considered in capital 2255 cases. For capital habeas corpus cases brought pursuant to 28 U.S.C. § 2254, involving state death sentenced prisoners, representation

by an institutional defender organization has been endorsed by the Committee on Defender Services as offering cost and other efficiencies together with high quality representation.[95]

Recommendation 1(e) recognizes that appropriate rates of compensation are essential to maintaining the quality of representation required in a federal capital case. The time demands of these cases are such that a single federal death penalty representation is likely to become, for a substantial period of time, counsel's exclusive or nearly exclusive professional commitment. It is therefore necessary that the hourly rate of compensation be fair in relation to the costs associated with maintaining a criminal practice. The rate ($178 as of January 1, 2010) should be reviewed at least every three years to ensure that it remains sufficient in light of inflation and other factors. (See 18 U.S.C. § 3006A(d)(1) and 18 U.S.C. § 3599(g)(1).)

[95] Report on Death Penalty Representation, prepared by the Committee on Defender Services Subcommittee on Death Penalty Representation, approved by the Judicial Conference (JCUS-SEP 95, pp. 69, 78-81).

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

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

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

c. Consultation by Federal Defender Organizations and the Administrative Office in Recommending Counsel. In discharging their responsibility to recommend defense counsel, FDOs and the Administrative Office should consult with Federal Death Penalty Resource Counsel in order to identify attorneys who are well qualified, by virtue of their prior defense experience, training and commitment, to serve as lead and second counsel.

Commentary

Courts are required pursuant to 18 U.S.C. § 3005 to consider the recommendation of their federal defender organization or the Administrative Office regarding the appointment of both counsel in each federal death penalty case.[96] Most courts are aware of the statute and policy and do consult about their appointments, though a small number still do not. The Administrative Office should continue to ensure that all courts are aware of the importance and availability of consultation for all federal capital appointments, and should make specific outreach to courts that for any reason have not consulted with federal defenders or Resource Counsel.

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[96] The specific language of the statute requires the court to "consider the recommendation of the *Federal Public Defender* organization, or, if no such organization exists in the district, of the Administrative Office…." 18 U.S.C. § 3005. Emphasis added. There is no indication in the legislative history that this reference was intended to exclude Community Defender Organizations, and the most reasonable interpretation is that this was inadvertent and that Congress's intention was to include all federal defender organizations. As a matter of policy, the Judicial Conference recommends that consultation be made with the district's FDO, regardless of whether it is organized as an FPD or a CDO. See Recommendation 1, Footnote 94.

Recommendation 2(b) emphasizes that consultation should be made for "*each case* involving an offense punishable by death." It is not satisfied where a court selects counsel from a pre-existing list, because recommendations concerning appointment of counsel are best obtained on an individualized, case-by-case basis. The relative infrequency of federal death penalty appointments, and the typically swift response which any court requesting a recommendation can expect, makes lists or "panels" of "capitally-qualified" attorneys both unnecessary and, in some respects, impractical.[97] Currently, within a short time after receipt of a request, the federal defender or Administrative Office (through Resource Counsel, as described below and in Recommendation 6) provides the court with the names of attorneys who not only are qualified to serve as counsel but who also have been contacted and indicated their willingness to serve in the particular case.[98] These individualized recommendations help to ensure that counsel are well-suited to the demands of a particular case and compatible with one another and the defendant. Whether at trial, on appeal, or in post-conviction, the federal defender and Resource Counsel are likely to have access to information that the court lacks. That information includes factors relating to the defendant or to counsel who are candidates for appointment. Consideration of these factors is essential to establishing a defense team that functions effectively. Case-specific consultation is also required by Judicial Conference policy (see Guide, §§ 620.30(a) and (b), explaining the 18 U.S.C. § 3005 consultation requirement and

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

[98] In some instances, in fact, it is the federal defender or Resource Counsel who first alerts the court to the need for an appointment. For example, prior to an indictment issuing, the U.S. Attorney's Office may inform the defender or Resource Counsel of an imminent capital prosecution in which a defendant will need capitally qualified counsel, or the defender or Resource Counsel may become aware of an investigation and the need for counsel through other means.

suggesting that in developing a recommendation, consideration be given to "the facts and circumstances of the case.")

Recommendation 2(c) recognizes the role of Resource Counsel in the consultation process. When this Recommendation was first made, there was a single Federal Death Penalty Resource Counsel Project charged with responsibility for assisting in federal death penalty proceedings at all stages of litigation: trial, appeal, and post-conviction. Those functions have now been distributed among three projects, each of which addresses a different stage of litigation: the Federal Death Penalty Resource Counsel Project (trial), the Federal Capital Appellate Resource Counsel Project, and the Federal Capital Habeas Project.[99] Referred to collectively here as "Resource Counsel" or "the Resource Counsel Projects," these lawyers are death penalty experts. They are knowledgeable about and maintain effective communication with defense counsel nationwide, and their ability to promptly match attorneys with cases is of great value to the judiciary.

The appropriate Resource Counsel Project should be consulted about appointment of counsel in every trial, appellate, and post-conviction case, whether by the court, the federal defender, or both. In addition, prior to recommending counsel for appointment in a federal capital case, federal defenders should advise potential counsel that any attorney appointed is expected to consult regularly with Resource Counsel.[100] Federal defenders and Resource Counsel should also ensure, prior to making a recommendation to a court, that prospective defense counsel are able to dedicate the time required to the new capital case.

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[99] The National Mitigation Coordinator also provides assistance in federal death penalty cases, as described in Recommendation 6 (Federal Death Penalty Resource Counsel).

[100] See Defender Services Strategic Plan, Goal 2 (Quality of Representation), Strategy 17 (Capital Representations).

Together, Resource Counsel and federal defenders have been instrumental in providing high quality representation to federal defendants from trial through post-conviction proceedings. Recommendation 2(c) recognizes the value of Resource Counsel and urges federal defenders and the Administrative Office to continue to work closely with them.

3. Appointment of More Than Two Lawyers.

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

Commentary

The norm in federal death penalty cases is the appointment of two counsel per defendant. Courts contemplating the appointment of a third counsel for trial, appeal or post-conviction representation might consider contacting the Administrative Office, the federal defender organization or the appropriate Resource Counsel Project (see Recommendation 6) for information and advice about whether circumstances warrant such appointment. Notwithstanding this suggested limit on the number of attorneys charged with responsibility for the defense in its entirety, courts are encouraged to permit appointed counsel to employ additional attorneys to perform more limited services where to do so would be cost-effective or otherwise enhance the effective use of resources. For example, in many federal death penalty cases, the prosecution provides to defense counsel an extensive amount of discovery material which must be reviewed for relevance and organized for use by the defense. Allowing appointed counsel to obtain legal assistance from an associate at his or her firm or from another appropriately qualified lawyer may prove economical because the work is performed at a lower hourly rate, or this assistance may be a necessity in light of the volume and nature of the work or court deadlines. See Guide, §§ 620.10.10 and 230.23.10(f).

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

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

> i. the FDO has one or more lawyers with experience in the trial and/or appeal of capital cases who are qualified to serve as "learned counsel"; and
>
> ii. the FDO has sufficient resources so that workload can be adjusted without unduly disrupting the operation of the office, and the lawyer(s) assigned to the death penalty case can devote adequate time to its defense, recognizing that the case may require all of their available time; and
>
> iii. the FDO has or is likely to obtain sufficient funds to provide for the expert, investigative and other services reasonably believed to be necessary for the defense of the death penalty case.

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

> i. the FDO has sufficient resources so that workload can be adjusted without unduly disrupting the operation of the office, and the lawyer(s) assigned to the death penalty case can devote adequate time to its defense, recognizing that the case may require all of their available time; and
>
> ii. the FDO has or is likely to obtain sufficient funds to provide for the expert, investigative and other services reasonably believed to be necessary for the defense of the death penalty case.

Commentary

Effective capital representation requires a team of many players, and the institutional strength of a federal defender organization lends itself to good teamwork. On the other hand, a defender organization can meet the demands of a capital case only if the assigned personnel possess the requisite qualifications and have available to them the time and other resources the case requires. Thus, courts are encouraged to appoint an FDO as either lead or second counsel in a capital case, but only after consideration of the factors identified in this Recommendation and consultation with the federal defender.

Recommendations 4(a) and (b) acknowledge that capital cases inevitably and seriously disrupt the normal functioning of an office. To undertake too much death penalty litigation would seriously threaten the effective performance of a defender organization's responsibility to provide representation to a substantial number of financially eligible criminal defendants in its district each year. Therefore, a federal defender organization should not be required to accept more than one federal death penalty trial representation at a time unless the head of the organization believes such an arrangement is appropriate. In addition, the head of an FDO accepting a capital appointment must be prepared to seek additional resources as necessary and to shift responsibilities among staff so that those entrusted with capital cases have sufficient time for that work and other demands upon them are limited.[101] Regardless of what level of capital experience the federal defender has, all FDOs with federal capital cases should maintain close contact and collaborate with the appropriate Resource Counsel Project.[102]

In addition to serving as counsel, many federal defender organizations play a valuable administrative and leadership role with respect to death penalty representation in their districts, for example, by sponsoring training, facilitating relationships with Resource Counsel, and disseminating information to panel attorneys. This important work should continue to be supported and encouraged by the Administrative Office. Also, federal defender organizations should identify and share best practices they have developed in providing capital representation and in supporting the work of other capital lawyers.

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[101] These warnings about avoiding over-commitment should be understood to extend to panel attorneys accepting appointment in capital cases as well. As noted in the commentary accompanying Recommendation 2 (Consultation with Federal Defender Organizations or the Administrative Office), in making recommendations and appointments, courts, federal defenders and Resource Counsel should ensure that prospective defense counsel are sufficiently free of other obligations to dedicate the time required to the new capital case.

[102] See Defender Services Strategic Plan, Goal 2 (Quality of Representation), Strategy 16 (Capital Representations).

Courts are encouraged to consider appointing federal defender organizations with the requisite expertise to represent federal death-sentenced prisoners in appellate and post-conviction proceedings, as well as at trial. There are particular benefits to the appointment of well-resourced offices in capital 2255 proceedings, which require digesting and briefing large amounts of legal and factual material and conducting a thorough investigation within a very compressed timetable. Post-conviction representation makes demands that can be efficiently met by institutional representation.[103] In addition, it has proved much harder to find qualified, available attorneys for 2255 matters than for capital trial cases.

Over the past several years, a number of federal defender organizations have accepted capital appeals and 2255 representations, most of them having acquired the necessary expertise through their representation of state death-sentenced prisoners pursuant to 28 U.S.C. § 2254. The Administrative Office should evaluate the need for counsel in capital 2255 proceedings, continue to support federal defender organizations in meeting the need, and consider whether to establish additional capacity for institutional representation in capital cases in the defender program.

[103] Report on Death Penalty Representation, prepared by the Committee on Defender Services Subcommittee on Death Penalty Representation, approved by the Judicial Conference (JCUS-SEP 95).

5. The Death Penalty Authorization Process.

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

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

Commentary

A decision not to seek the death penalty against a defendant has large and immediate cost-saving consequences. The sooner that decision is made, the larger the savings. Since the death penalty ultimately is sought against only a small number of the defendants charged with death-eligible offenses, the process for identifying those defendants should be expeditious in order to preserve funding and minimize the unnecessary expenditure of resources. The current process, however, is not expeditious; rather, even in cases in which authorization for capital prosecution is viewed as unlikely by both the prosecution and the defense, the process is lengthy and seemingly inefficient, involving multiple levels of review, and results in unnecessary costs being incurred. The process also limits the availability of lawyers qualified to serve as "learned counsel" for other capital appointments. Recommendations 5(a) and (b) call upon the Department of Justice and the judiciary to maximize cost-savings by increasing the efficiency of the authorization process. The Department of Justice can do this by evaluating and streamlining its procedures. Judges can do this by establishing reasonable deadlines and maintaining oversight during the pre-authorization stage of the litigation.[104] Courts should ensure, however, that whatever decision-making timetables are imposed are sufficient to allow for meaningful pre-authorization advocacy by counsel for the defendant. Where authorization to seek the death

[104] Section 670 of the Guide sets forth Judicial Conference policy on "scheduling of federal death penalty case authorization to control costs."

penalty is significantly likely, the prosecution and defense should be given every opportunity to explore the reasons for not authorizing or for negotiating an early disposition of the case.

In addition to acting in their individual capacities to pursue efficiency goals, the Department of Justice and the judiciary should seek opportunities to communicate with one another about the impact of federal death penalty policies on the efficient administration of justice. Given the enormous resource demands and cost implications, it would be wise for the judiciary, the Department of Justice, and the Administrative Office to communicate and work together at the highest levels.

6. Federal Death Penalty Resource Counsel

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

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

Commentary

When Recommendation 6 was issued in 1998, there was only one Federal Death Penalty Resource Counsel Project, and it offered support for all cases, whether at trial, on appeal, or in post-conviction. As Recommendation 2 (Consultation with Federal Defender Organizations or the Administrative Office) describes, there is now a separate Resource Counsel Project dedicated to each stage of litigation. The trial-level Federal Death Penalty Resource Counsel Project has been joined by the Federal Capital Appellate Resource Counsel Project and the Federal Capital Habeas Project. There is also a National Mitigation Coordinator who collaborates with Resource Counsel and supports work in all death penalty matters that arise in the federal courts.[105] Recommendation 6 and other references to Resource Counsel in these Recommendations and Commentary apply to each of the Resource Counsel Projects.

The Resource Counsel Projects serve CJA counsel, federal defenders, and the courts by recommending counsel for every case at trial, on appeal, and in post-conviction, and by providing numerous other services, including case consultation, training, and assistance with case budgeting. Trial-level Resource Counsel are assigned to each defense team at the outset of

[105] The National Mitigation Coordinator also works with the Habeas Assistance and Training Counsel Project (HAT) in connection with capital post-conviction representation in the federal courts pursuant to 28 U.S.C. §2254.

every death-eligible case, and continue to support the efforts of appointed counsel through the conclusion of trial. Appellate and post-conviction Resource Counsel assume responsibility at the appropriate procedural junctures, and offer consultation and assistance throughout those stages of the case. The National Mitigation Coordinator provides information, referrals, and case-specific consultation, and is extensively involved in the planning and delivery of training. The four Projects work together on issues of common concern, and support one another in conducting training and disseminating information to counsel. They also provide consultation and advice to the Administrative Office and to courts.

Recommendation 6(a) urges both the judiciary and counsel to maximize the benefits of Resource Counsel's services. Together, the Resource Counsel Projects are essential to the delivery of high quality, cost-effective representation. Their work should continue to be facilitated by the Administrative Office, and counsel in all federal death penalty cases are encouraged to maintain regular contact with Resource Counsel. See Defender Services Strategic Plan, Goal 2 (Quality of Counsel), Strategy 16 (Capital Representations). In addition, federal defender organizations should advise potential appointed counsel that they are expected to consult with Resource Counsel if they accept a capital representation. *Id*., Strategy 17 (Capital Representations). The Department of Justice provides centralized support to prosecutors nationwide at all stages of federal death penalty proceedings. Although the Resource Counsel Projects cannot match that capacity, the judiciary should allocate resources sufficient to permit the full value of their services to be provided in every case.

Recommendation 6(b) recognizes the critical role of technology in sharing information. The website maintained by Resource Counsel (www.capdefnet.org) recently has been upgraded. It is a valuable resource, enhancing quality of representation in a cost-efficient manner, and it is

relied upon extensively by appointed counsel nationwide. The Administrative Office should support the ongoing development of this cost-effective means of assisting appointed counsel in federal death penalty cases. The database of case related information maintained by Resource Counsel is also an essential resource and, similarly, should receive ongoing support as indicated in the Commentary to Recommendation 11 (Availability of Cost Data).

7. Experts

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

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

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

Commentary

Penalty phase investigators or "mitigation specialists" are individuals trained and experienced in the development and presentation of evidence for the penalty phase of a capital case. As indicated in the 2003 ABA Guidelines,[106] this function is an essential component of effective capital defense representation; however, mitigation specialists are in short supply and in many cases they are not available locally. Recommendation 7(a) suggests ameliorating this problem by employing and training persons for this work in federal defender organizations. In 2004 the Defender Services Committee authorized a position for a National Mitigation Coordinator in a federal defender office to assist in expanding the availability and quality of mitigation work in death penalty cases in the federal courts. In addition to leveraging his own significant knowledge and skills through case consultations, the National Mitigation Coordinator has enhanced defense representation and contributed to cost containment efforts by recruiting more mitigation specialists to work on federal capital cases, matching mitigation specialists with

[106] American Bar Association, *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913 (2003). See also Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases, 36 Hofstra L. Rev. 677 (2008) for an elaboration on the mitigation function, including the role of mitigation specialists.

counsel, and providing expanded training opportunities both for defender staff and for private mitigation specialists who are authorized to work on federal cases. This training enhances the skills and availability of such professionals.

In addition, because of the cost containment potential, Recommendation 7(a) suggests that salaried federal defender employees might work not only on cases in which their office is appointed, but also, in appropriate instances, on other cases. Procedures that will facilitate lending such non-attorney staff members between defender offices have been developed by the Administrative Office.

Recommendation 7(b) encourages counsel to negotiate a reduced hourly rate for expert services whenever possible. Private experts must be employed in death penalty cases, but the cost of their services can and should be contained. When asked to provide services for the defense of a CJA-eligible criminal defendant, many experts are willing to accept fees lower than their customary hourly rates for private clients. The types of experts employed in capital cases can be highly specialized, however, and sometimes a particular expert is required and it is not possible to negotiate a reduced rate. It should be noted that the government, too, employs private experts, often at high hourly rates, a factor the courts could consider in assessing the reasonableness of proposed defense expenditures.

With respect to Recommendation 7(c), it should be noted that while maintaining formal lists of experts has proved to be problematic, substantial progress has been made in collecting and sharing appropriate information of this nature with defense counsel and courts, particularly since 2004 when the National Mitigation Coordinator position was established. Resource Counsel, federal defenders, and the National Mitigation Coordinator have knowledge of a wide range of expert service providers throughout the country and they are available to assist in

matching cases with experts and evaluating costs during the case-budgeting process and at any other stage of litigation.

8. Training.

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

Specialized death penalty training programs are relied upon by even the most highly experienced counsel to update and refine their skills and knowledge. Death penalty law is not only complex but also is rapidly evolving, and counsel are obligated to keep pace with developments throughout the federal courts. Continuing education in the latest forensic science developments is another responsibility of capital lawyers. Resource Counsel, the National Mitigation Coordinator, and federal defenders, with the support of the Administrative Office, have substantially increased training opportunities over the past several years. Counsel appointed in federal capital cases may attend a variety of specialized trial, appellate, and post-conviction programs organized or supported by each of the Resource Counsel Projects. Defender offices sponsor local and regional training as well. Programs focusing on forensic science, mitigation investigation, and victim contact offer further opportunities for skill-building and information sharing. Financial assistance to facilitate attendance at training programs and other logistical support are made available through the Training Branch of the Administrative Office's Office of Defender Services. These opportunities for counsel to benefit from the research and experience of others and share information and ideas are important and cost-effective. Their quality and utility has been universally praised by defense counsel. The Administrative Office should ensure that training opportunities continue to expand to meet the needs of capital defense teams.

9. Case Budgeting.

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

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

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

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

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

f. Modification of Approved Budget. An approved budget should guide counsel's use of time and resources by indicating the services for which compensation is authorized. Case budgets should be re-evaluated when justified by changed or unexpected circumstances, and should be modified by the court where good cause is shown.

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

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

i. Death Penalty Not Authorized. As soon as practicable after DOJ declines to authorize the death penalty, the court should review the number of appointed counsel and the hourly rate of compensation needed for the duration of the proceeding pursuant to the Guide, § 630.30.

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

k. Judicial Training for Death Penalty Cases. The Federal Judicial Center should work in cooperation with the Administrative Office to provide training for judges in the management of

federal death penalty cases and, in particular, in the review of case budgets.

Commentary

When Recommendation 9 was issued in 1998, case budgeting was new to the courts. It is now well established, representing the norm in federal death penalty cases. Judicial Conference policy with respect to capital case budgeting is set forth in Section 640 of the Guide, and district and appellate courts in various parts of the country are experimenting with different approaches to case budgeting. Reports on their methods and progress will be forthcoming as those initiatives are evaluated. In the meantime, certain things are clear. Drafting a case budget requires the lawyer to incorporate cost considerations into litigation planning and encourages the use of less expensive means to achieve the desired end. Submission and review of a budget assists the court in monitoring the overall cost of representation in the case, and determining the reasonableness of costs. Both judges and counsel consistently describe the budgeting process as valuable. They also emphasize the importance of a focus on the "big picture" rather than "nickels and dimes," and of an understanding that case budgeting is about ensuring planned, thoughtful, and responsible spending as opposed to simply cutting costs. Resource Counsel are available to assist courts and counsel with drafting and evaluating case budgets.

Because of the unpredictability of pretrial litigation, it is impractical to require counsel to budget for an entire case from start to finish. At a minimum, the budgeting process should occur in two stages, as suggested in Recommendations 9(b) and (c). The first stage begins when the lawyer is sufficiently familiar with the case to be able to present a budget reasonably related to the anticipated factual and legal issues in the case and continues until the Department of Justice makes its decision as to whether it will seek the death penalty. Prior to this first-stage budget, in some districts the court orders a "starter budget" approving funds for an initial allotment of

counsel's time as well as service providers such as an investigator, paralegal, mitigation specialist, and associate counsel. This allows counsel to begin work without delay, and a formal first-stage budget is submitted after counsel has had an opportunity to assess the needs of the case more thoroughly. As indicated in the Commentary to Recommendation 1(b) (Qualifications of Counsel), courts should not defer appointing "learned counsel" and authorizing an appropriate investigation at this stage. As recognized in Section 640.40 of the Guide, it will be necessary for counsel to begin work immediately, so courts should be prepared to authorize funds for this purpose, even if a case budget has not yet been submitted or approved.

If a death penalty notice is filed, a further budget should be prepared. The court may require a single budget from authorization through trial, though it may be more practical to develop a series of budgets covering shorter increments of time. If the prosecution will not seek the death penalty, Recommendation 9(i) calls for the court to review the case in accordance with the Guide, § 630.30, to determine whether the number or compensation of counsel should be reduced.

Consistent with the Criminal Justice Act, 18 U.S.C. § 3006A, Recommendation 9(e) calls for case budgets to be submitted ex parte and maintained under seal. Guide, § 640.20(b). A case budget requires defense counsel to develop an overall litigation plan for the case. Consequently, it contains privileged information and is an extremely sensitive document.

Recommendation 9(g) encourages prompt and efficient consideration and payment of interim vouchers in capital cases. Delay in approving payments to experts or counsel may prevent the defense from moving forward to develop its case, negatively affect the quality of representation, and/or delay expeditious and cost-effective disposition of the matter.

Case budgeting in post-conviction cases should proceed in much the same way as trial case budgeting. Costs can be significant because counsel is obligated to thoroughly and independently investigate both phases of the trial to determine whether there are any potential constitutional infirmities. Guideline 10.7 (Investigation), American Bar Association, *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913, 1015 (2003). A capital post-conviction budget should include the costs of counsel, investigators, and experts. The budgeting process should be completed quickly in light of the one-year statute of limitations for filing a motion pursuant to 28 U.S.C. § 2255.

10. Case Management.

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

b. Multi-defendant Cases.

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

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

iii. "Coordinating Counsel." In a multi-defendant case (in particular a multi-defendant case in which more than one individual is eligible for the death penalty), and with the consent of co-counsel, courts should consider designating counsel for one defendant as "coordinating counsel."

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

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

Commentary

Recommendation 10(a) recognizes that the large volume of discovery materials and pleadings associated with a federal death penalty case may make it cost-effective for courts to authorize (and appointed counsel to employ) the services of law clerks, paralegals, secretaries, or others to perform organizational work which would otherwise have to be performed by counsel at a higher hourly rate. (See also Commentary accompanying Recommendation 3 (Appointment of More Than Two Lawyers), endorsing the practice of authorizing counsel to obtain the services of additional attorneys under appropriate circumstances.) Judicial Conference policy provides that, in general, appointed counsel may not be reimbursed for expenses deemed part of their office overhead (Guide, § 230.66.10); however, unusual expenses of this nature may be

compensated (Guide, § 320.70.30). The Guidelines suggest that in determining whether an expense is unusual or extraordinary, "consideration should be given to whether the circumstances from which the need arose would normally result in an additional charge to a fee paying client over and above that charged for overhead expenses." (Guide, § 320.70.30).

Recommendations 10(b)(i) – (iv) address some of the particular management burdens associated with multi-defendant federal death penalty cases. Special efforts are required to ensure the orderly administration of justice in these matters, which tend to become costly and cumbersome for courts and counsel. Courts should also consider encouraging prosecutors to provide discovery in a way that will make information much more accessible and therefore less costly for the defense to assimilate. For example, the way in which the government organizes the material it turns over to defense counsel and the way it formats it can have significant cost consequences. Where there is extensive wiretap evidence, the government might be asked to provide defense counsel not just with recordings, but with any transcripts of those recordings. Such time and cost savings possibilities should be urged wherever possible. The court might initiate discussion about how best to contain discovery costs by soliciting a list of ideas from the parties.

Recommendation 10(b)(i) suggests that courts make early decisions concerning severance of non-capital from capital codefendants. In general, capital cases remain pending longer than non-capital cases and involve far greater amounts of pre-trial litigation. Separating the cases of non-capital codefendants, where appropriate, may lead to swifter and less costly dispositions in those cases. The earlier such a decision is implemented, the greater will be the cost savings.

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

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

11. Availability of Cost Data

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

Commentary

The cost data for this report were assembled by painstaking manual collection, necessitated by the limitations of the only available information source, the CJA payment system.[107] Given the significance of capital case costs to the federal defender program, the Administrative Office has given priority to developing an electronic CJA voucher processing system that will provide accurate and reliable case data that are accessible for analysis. Enhancing the ability of the Defender Services program to analyze and make use of cost and other quantitative data relating to federal death penalty cases would assist in making resource allocation decisions and in establishing policy. In addition, the judiciary should give further consideration to geographic disparities in defense resources and the relationship between low cost defense representation and sentencing outcome in capital cases. The Administrative Office should work with the Department of Justice to obtain useful data about prosecution costs in federal capital cases.

This report could not have been completed without extensive assistance from the federal capital trial, appellate, and post-conviction Resource Counsel Projects, including access to information from their databases. These data are vitally important to the Defender Services program and their collection and analysis should remain a priority and be supported by the Administrative Office.

[107] The CJA Panel Attorney Payment System is a judiciary-wide application in which all attorney and expert service provider vouchers for representation-related work performed are recorded, processed and paid.

APPENDIX A: DATA EXAMINED

Defendant name
District
Case proceeds to conclusion as death authorized
If tried, defendant guilty of the capital count
Number of defense counsel
Number of defendants
Category of offense
Date defense counsel appointed
Attorney General who authorized
Date case ends (sentencing or acquittal)
Number of days from opening to authorization
Number of days from opening to closing of case
Categories of experts used
Expenses for each category of expert used
Total cost for experts and defense counsel
First and last dates of counsel payments
Victim's connection to criminal activity
Gender of Victim
Circuit
Type of Counsel
Case resolved by trial or plea
Sentence
Number of prosecutors
Number of indicted offenses
Exceptional offenses
Date of authorization by DOJ
Number of victims
Total hours by defense counsel
In-court hours by defense counsel
Out-of-court hours by defense counsel
Total cost for defense counsel
Total cost for experts
Cost of transcripts
Race of Victim
Race of Defendant
Gender of Defendant
Government alleges future dangerousness against defendant
Whether state had the death penalty at the time of indictment
Number of years post-*Furman* that the state (re-)instituted the death penalty
Number of years post-*Gregg* that state executed its first prisoner
Number of prisoners executed by the state post-*Gregg* on a per capita basis
State's current death row population on a per capita basis
State's current murder rate

In addition, a request was made to the U.S. Department of Justice for comparative data on the hours spent and expert costs expended in prosecuting federal capital cases. However, those data were not usable for purposes of comparison in the form provided.

APPENDIX B: SUPPLEMENTAL DATA

Figure B.1

Number of Federal Capital Defendants Going to Trial/Trials Commencing, by Calendar Year

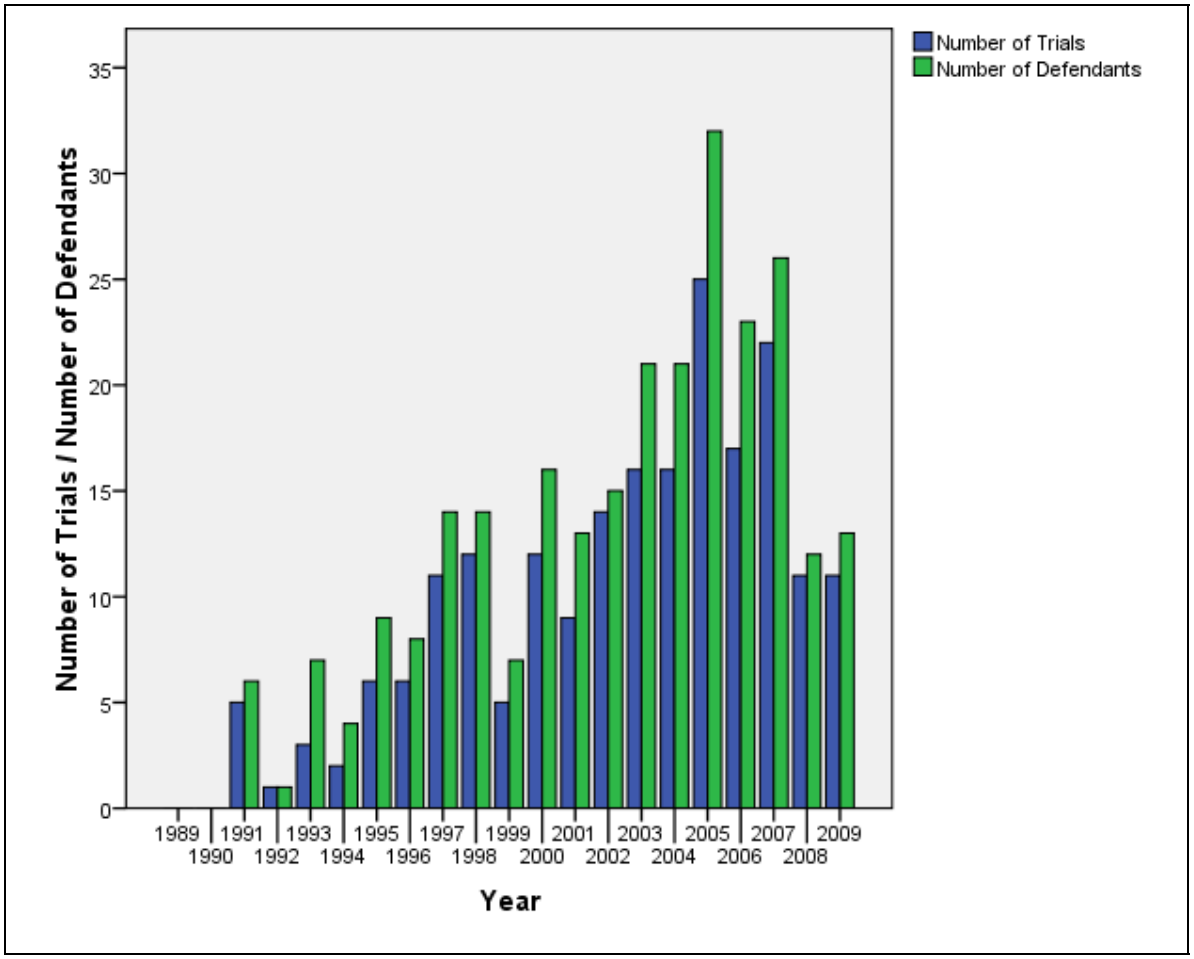
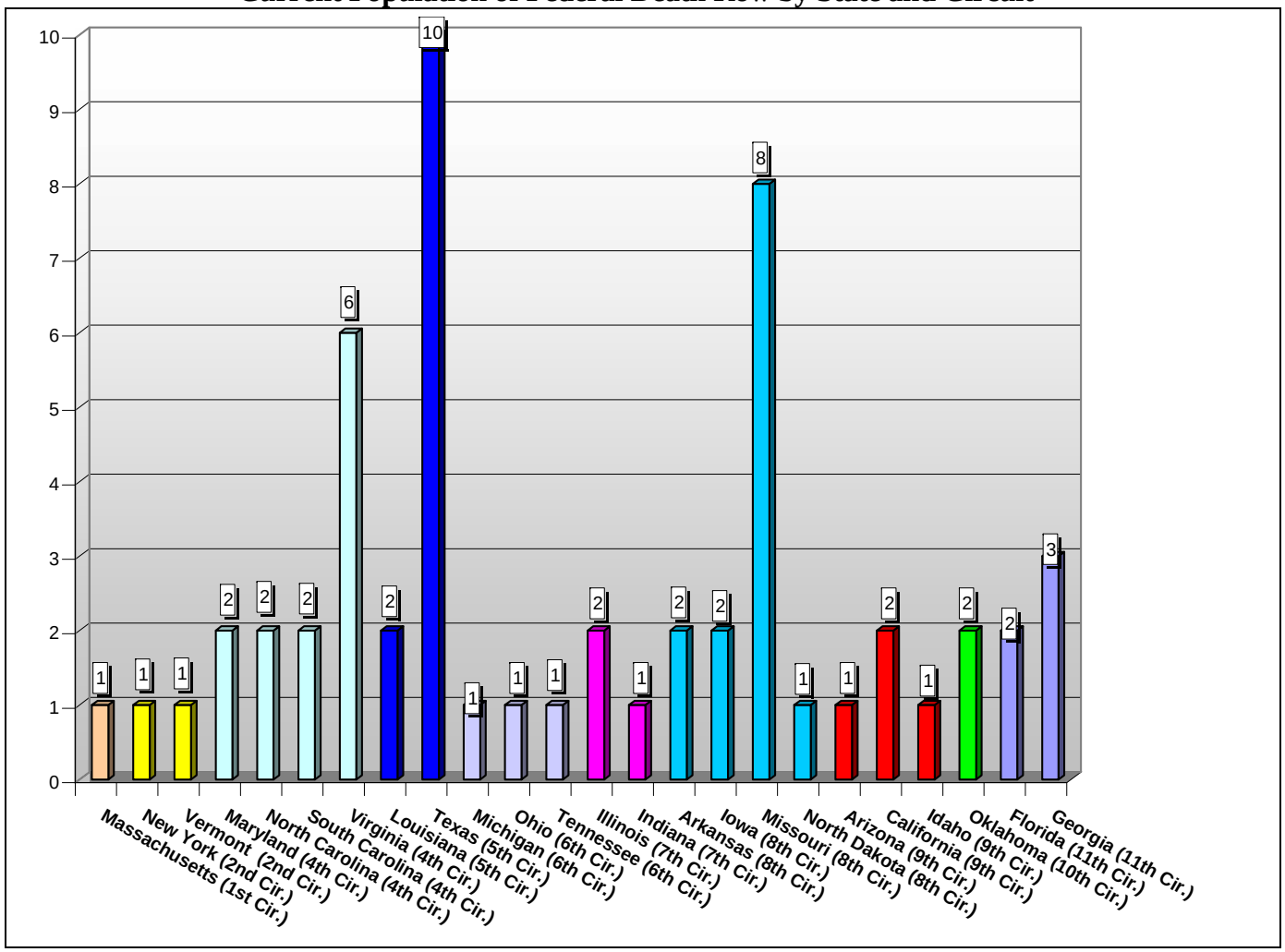


Table B.1
Number of Federal Capital Defendants Going to Trial/Trials Commencing, by Calendar Year

Year	Number of Trials	Number of Defendants
1989	0	0
1990	0	0
1991	5	6
1992	1	1
1993	3	7
1994	2	4
1995	6	9
1996	6	8
1997	11	14
1998	12	14
1999	5	7
2000	12	16
2001	9	13
2002	14	15
2003	16	21
2004	16	21
2005	25	32
2006	17	23
2007	22	26
2008	11	12
2009	11	13
TOTAL	**204**	**262**

Figure B.2
Current Population of Federal Death Row by State and Circuit*



*Total federal death row population was 57, as of March 16, 2010.

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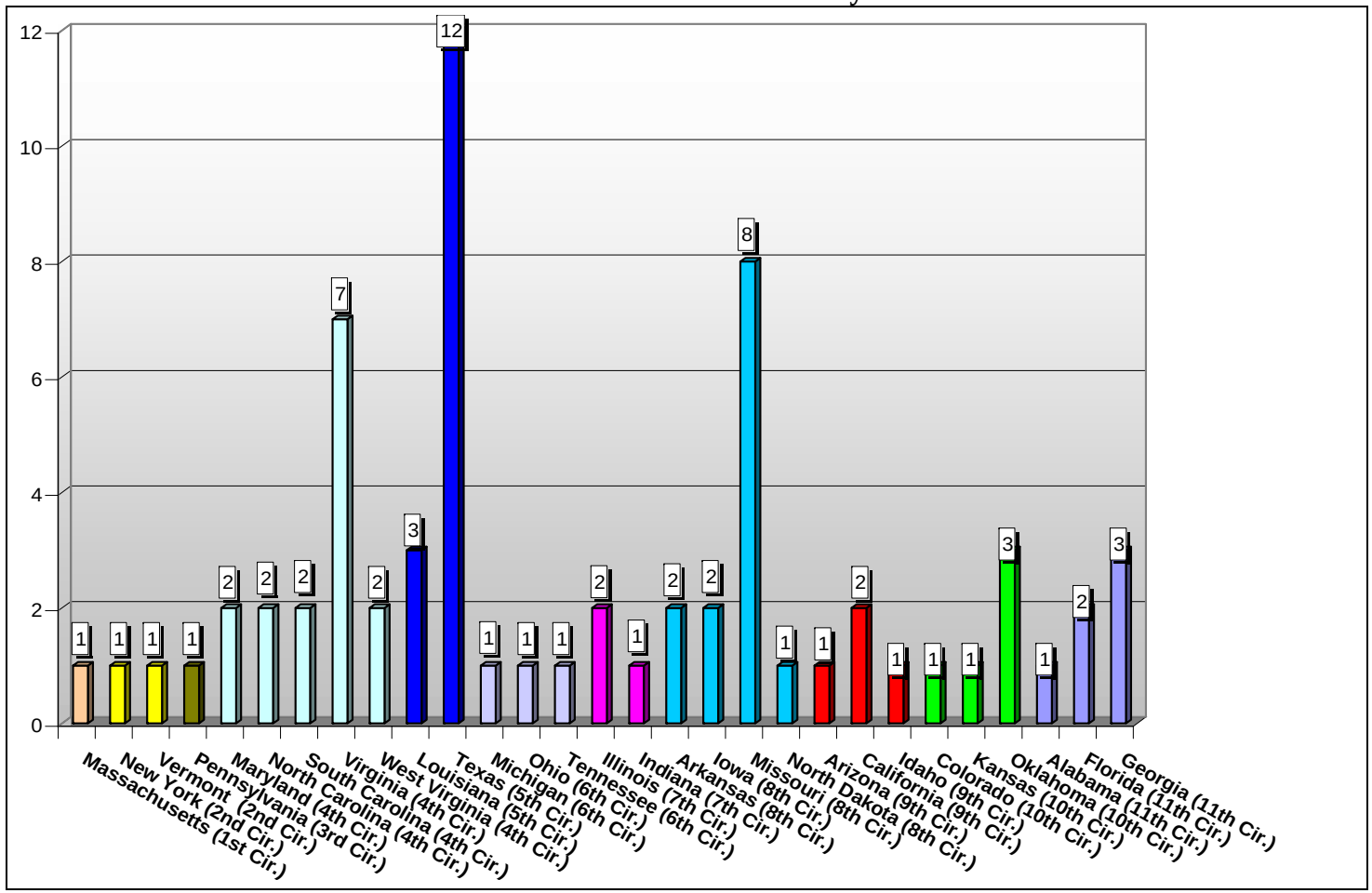
Figure B.3
Federal Death Sentences in the Modern Era by State and Circuit*



*Total number of Federal Death Sentences in the modern era was 68, as of March 16, 2010.

APPENDIX C: AUTHORIZED VERSUS UNAUTHORIZED CASE COSTS

Table C.1
Median Costs for Defense Representation in Federal Capital Cases, 1998-2004[108]

Type of Case	Total Cost	Attorney Cost	Attorney Total Hours	Attorney In-Court Hours	Attorney Out-Court Hours	Expert Cost	Transcript Cost
Not Authorized	$44,809	$42,148	436	34	350	$5,275	$210
Authorized	$353,185	$273,901	2,014	306	1,645	$83,029	$5,223
Trials	$465,602	$352,530	2,746	353	2,373	$101,592	$10,269
Pleas	$200,933	$122,772	1,028	42	992	$42,049	$82

Authorized representations are almost eight times more expensive to defend than are capital-eligible cases that the Department of Justice decides not to authorize.

[108] Because these figures are medians, the subparts (e.g., attorney in-court and out-court hours) do not sum to the whole (e.g., attorney total hours).

APPENDIX D: COST ESTIMATES IN 2010 DOLLARS

Table D.1 below adjusts the total defense cost figures presented in this report to estimated 2010 values. The amounts were adjusted to account for inflation based on the consumer price index (CPI). The adjustment was made for the period from 2001, the mid-point of the time period under review, to 2010, using the inflation calculator produced by the Bureau of Labor Statistics of the U.S. Department of Labor.

It should be noted that during the period studied, 1998-2004, the maximum hourly rate for counsel in federal capital cases was $125/hour; it has risen incrementally since then to the present level of $178/hour. This increased hourly rate is not reflected in the estimate below. Because of differences in recordkeeping, it was not possible to adjust attorney fees to 2010 levels using these rates, and, instead, the CPI was employed to account for increased costs. Expert costs do not present this phenomenon. Because the CPI likely represents a smaller increase in attorney costs than their actual amounts, the figures in the table below *underestimate* the value of defense costs in 2010 dollars.

Table D.1

Estimated Median Costs in 2010

Type of Case	Median Cost 2010 (*Estimated*)	Median Cost 1998-2004
Not Authorized	$54,667	$44,809
Authorized	$430,886	$353,185
Trials	$568,034	$465,602
Pleas	$245,138	$200,933