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# CAPITAL PUNISHMENT OR LIFE IMPRISONMENT? SOME COST CONSIDERATIONS

*Robert L. Spangenberg\* and Elizabeth R. Walsh\*\**

## I. INTRODUCTION

It is not more economical, necessarily, to execute a criminal than to keep him in confinement for life. The cost to the state of a capital offense trial and of all the subsequent appeals is exorbitant, as is the added cost of maintaining a prisoner on death row for what might be many years of appeal. Summary execution would of course reduce that cost and add something to the possibility of the penalty acting as a deterrent, but is unacceptable under our present concept of justice and due process. For those unwilling to accept that anyone in authority would consider mere economics in an issue of such gravity, I cite the recent case where the warden of a state penitentiary asked for legalization of lethal injection as a means of execution because it would cost only one dollar per head! Against that kind of thinking there is no refutation.<sup>1</sup>

In addition to the more traditional societal-cost arguments, the "mere economics" of the death penalty in America has become a major concern in recent years. This Article does not consider the societal-cost arguments in favor of capital punishment, such as deterrence, retribution, incapacitation or affect on crime rate, nor does it consider the fairness or unfairness in application or administration of the death penalty.

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1. Turnbull, *Death by Decree: An Anthropological Approach to Capital Punishment*, 87 NAT. HIST. 51, 56 (1978).

The narrow focus of this Article is the cost, in dollars and cents, of capital punishment as compared to the cost of the most widely-suggested alternative, life imprisonment. Despite this focus, the issue of capital punishment is not simply reduced to fiscal considerations; rather, the assertion is that the costs of capital punishment are a growing concern in a number of states, both with and without the death penalty.

Part II of this Article will explain the capital process: what the process entails, why the capital process at all stages is more complicated than its non-capital counterpart and, therefore, why it is more lengthy and more costly. Further, Part II will note the projected costs for the capital versus the non-capital processes. The projections are based upon information that The Spangenberg Group<sup>2</sup> has gathered from studies conducted on capital representation as well as information obtained from individual states in which the cost of capital punishment has been examined.

Part III of this Article will discuss the research collected in this area of costs to date. As yet, no nationwide study has been completed that compares costs of the entire capital process with costs of the non-capital process. A nationwide study should be conducted within three years by the United States Government Accounting Office in connection with the federal death penalty enacted in 1988.<sup>3</sup> To date, research has either been limited to data in a single state, or data on one or more, but not all, of the

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2. The Spangenberg Group is a nationally recognized research consulting firm specializing in law and justice issues. Formed in September 1985, and located in West Newton, Massachusetts, members of The Spangenberg Group have conducted research and provided technical assistance to organizations and agencies both within and outside the court system in virtually every state in the nation for over a decade.

The research conducted by The Spangenberg Group has been sponsored by the Federal Government, state and local governments, courts, the American Bar Association, state bar foundations, private foundations, and other private sources. The Group has conducted research in the several areas of indigent defense, such as compiling national baseline data, performing statewide assessments, and analyzing and evaluating local programs.

3. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7001, 102 Stat. 4387 (1988) (codified at 21 U.S.C.A. § 848 (West Supp. 1989)). The Act provides a federal death penalty for drug-related murders. Section 7001(q)(4)(A) provides for appointment of counsel for indigents at the federal habeas corpus stage of any capital case. *Id.* § 7001(q)(4)(A), 102 Stat. at 4393 (codified at 21 U.S.C.A. § 848 (West Supp. 1989)).

In addition, the Act provides for a study of the costs incurred by the federal government for executions. Specifically, Section 7002 requires the Government Accounting Office to study the cost of executions. It states:

(a) **STUDY.**-No later than three years after the date of the enactment of this Act, the Comptroller General shall carry out a study to review the cost of implementing the procedures for imposing and carrying out a death sentence prescribed by this title.

(b) **SPECIFIC REQUIREMENT.**-Such study shall consider, but not be limited to, information concerning impact on workload of the Federal prosecutors and

stages in the capital process. We conclude, however, based upon our analysis, that the death penalty is not now, nor has it ever been, a more economical alternative to life imprisonment.

## II. CAPITAL VERSUS NON-CAPITAL PROCESS

The United States Supreme Court has recognized that "death is different," unique both in severity and irrevocability.<sup>4</sup> As such, capital cases require that a heightened level of due process, or "super due process," be afforded the capital defendant.<sup>5</sup> The capital process closely parallels other criminal proceedings, with some important exceptions.

Both non-capital and capital cases can be divided into pretrial, trial and post-trial levels. However, because "death is different," the steps within each of these levels differ, demanding more time and expense in a capital case. This section will explain, in general, the steps involved in a death penalty case, recognizing that jurisdictional and regional differences exist and that the steps set forth here are not universal. What should be kept in mind is that in both capital and non-capital cases, expenses accrue to the state or county from a number of sources. Law enforcement, prosecution, courts, judges, corrections<sup>6</sup> and, in the case of indigent defendants, public defenders (or some other form of appointed counsel) incur costs, each of which will be greater in capital than in non-capital cases.

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judiciary and law enforcement necessary to obtain capital sentences and executions under this Act.

(c) SUBMISSION OF REPORT.-Not later than four years after date of the enactment of this Act, the Comptroller General shall submit to Congress a report describing the results of the study.

*Id.* § 7002, 102 Stat. at 4395 (codified at 21 U.S.C.A. § 848 (West Supp. 1989)).

4. See *Gardner v. Florida*, 420 U.S. 349, 357 (1977), where the Court stated:

[F]ive Members of the Court have now expressly recognized that death is a different kind of punishment from any other which may be imposed in this country. From the point of view of the defendant, it is different both in its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.

*Id.* at 357-58 (citations omitted). See also *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Gregg v. Georgia*, 428 U.S. 153, 181-88; *Furman v. Georgia*, 408 U.S. 238 (per curiam), 286-91 (Brennan, J., concurring), 306-10 (Stewart, J., concurring), 314-71 (Marshall, J., concurring).

5. Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143 (1980).

6. See *infra* notes 79-90 and accompanying text for a discussion of corrections costs.

### A. Pretrial

The pretrial level is usually thought of as beginning with arrest or indictment of the defendant. We refer to the pretrial stage as all steps prior to trial, from investigation through arraignment, since costs may be incurred by both the prosecution and the defense well before an arrest is made.

The first pretrial level of a homicide case is the investigation stage. Knowing that the case is potentially a capital case and that all evidence will be highly scrutinized by defense counsel, law enforcement is forced to take steps to ensure their investigation is done correctly. For example, highly qualified forensic experts will be required to examine crime scene evidence due to the heightened standard of due process and the state's concomitant burden of proof.<sup>7</sup> To date, no estimates have been made of the costs incurred by the state during this phase of a capital case as compared to a non-capital case.

After a warrant is issued and an arrest is made, the arrested person is detained for a bond hearing.<sup>8</sup> Security is tighter for the capital detainee than that for a non-capital detainee from this stage of incarceration throughout the remainder of the capital process.<sup>9</sup> At this point, law enforcement may have to extradite the arrestee, in which case the process will likely become more complex and involve substantial resources of prosecution, defense, and the courts in both states.<sup>10</sup>

If extradition is successful, a bond hearing is held and the prosecution decides whether to seek the death penalty. At this stage, a capital indictment for murder may be sought by the state.<sup>11</sup> If the indictment is returned, and the state's decision to seek the death penalty remains firm, the defendant is arraigned on a capital charge.<sup>12</sup>

The seriousness of each capital indictment warrants its treatment as a true capital case requiring a great expenditure of time, energy and resources. However, not all indictments proceed to the trial stage. For

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7. NEW YORK STATE DEFENDERS ASS'N, INC., CAPITAL LOSSES: THE PRICE OF THE DEATH PENALTY FOR NEW YORK STATE 13 (1982) [hereinafter CAPITAL LOSSES].

8. *Gerstein v. Pugh*, 420 U.S. 103, 116-19 (1975) (right to hearing whereby post-arrest probable cause is determined and right to bail is addressed).

9. The remainder of the process refers to the period of time after the arrest is made and until the detainee is either released and the status of the case changes from capital to non-capital, or until execution is carried out.

10. See *Puerto Rico v. Branstad*, 483 U.S. 219, 222, 226-29 (1987); and *Michigan v. Doran*, 439 U.S. 282, 286-90 (1978) for a discussion of extradition procedures.

11. Tabak, *The Death of Fairness: The Arbitrary and Capricious Imposition of the Death Penalty in the 1980s*, 14 N.Y.U. REV. L. & SOC. CHANGE 797, 799 (1986).

12. *Id.*

example, in Ohio there are approximately 125 indictments per year for capital cases, although only about twenty percent will ultimately proceed to trial.<sup>13</sup> Thus, the overall costs of capital indictments may be enormous, even though in some jurisdictions only a few will actually proceed to trial.<sup>14</sup>

Investigation conducted by the state does not halt upon indictment or arraignment, but continues throughout the pretrial level and throughout the criminal process. Additionally, investigation by the defense will be necessary in preparation for trial. Investigation is estimated to take approximately three to five times longer in capital cases than in non-capital cases because the defense and the state must prepare not only for the guilt phase, but for the separate penalty phase as well.<sup>15</sup> In one survey, investigators' fees were estimated to range from \$500-\$1500 per day or between \$75-\$200 per hour for experienced investigators.<sup>16</sup>

In a capital case, motions are commonly filed asserting the defendant's incompetency to stand trial.<sup>17</sup> Defense counsel also consider using a diminished capacity or insanity defense.<sup>18</sup> Thus, in addition to investigators, both sides require the services of psychiatrists as well as other experts. Equally common is the state's use of testimony by similar experts to refute the claims asserted by the defense. The court may also hire its own experts to perform evaluations on its behalf.<sup>19</sup> Each of these experts will perform examinations and formulate evaluations prior to trial. This expense is separate from the cost of in-court expert testimony during trial.<sup>20</sup>

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13. Interview with Randall Dana, State Public Defender, Ohio State Public Defender Commission, in Columbus, Ohio (June 19, 1989) (discussing average annual indictments in Ohio in recent years).

14. The Kansas Legislative Research Department has estimated the first-year cost to reinstate the death penalty at more than \$11 million. KANSAS LEGISLATIVE RESEARCH DEP'T, COSTS OF IMPLEMENTING THE DEATH PENALTY, HOUSE BILL 2062 (as amended by the House Committee of the Whole) (1987) [hereinafter KANSAS LEGISLATIVE RESEARCH DEP'T].

15. Comment, *The Cost of Taking a Life: Dollars and Sense of the Death Penalty*, 18 U.C. DAVIS L. REV. 1221, 1251 (1985).

A capital case is qualitatively different from non-capital trials; and an effective attorney must prepare to introduce mitigating circumstances during the penalty phase of the trial and therefore must extensively investigate the defendant's background. . . .

An investigation for capital trials is generally three to five times longer than that for non-capital trials, and may take as long as two years.

*Id.*

16. See CAPITAL LOSSES, *supra* note 7, at 13.

17. SOUTHERN POVERTY LAW CENTER, MOTIONS FOR CAPITAL CASES 2 (1981).

18. *Id.*

19. See Comment, *supra* note 15, at 1252.

20. See *infra* notes 21-26 and accompanying text.

Estimated costs for psychiatric experts range from \$500-\$1,000 per day, or \$100-\$150 per hour.<sup>21</sup> The services of other experts at the pre-trial level are required as well.

A typical cost breakdown for use of experts includes the following: A medical examiner costs approximately \$700-\$1,000 per day; a polygraph expert costs approximately \$200-\$300 per day for courtroom testimony and \$150-\$250 for the polygraph examination; an expert witness concerning eyewitness identification costs approximately \$500 per day for courtroom testimony and \$100 per hour for consultation . . . .<sup>22</sup>

In one state, for example, the additional costs of expert witnesses and investigators were estimated to be \$3,000 and \$2,000 respectively.<sup>23</sup> Additionally, it was assumed that the prosecution would also utilize its own experts, thereby nearly doubling the total cost.<sup>24</sup> In California during the fiscal year 1984-1985, the average per case allotment for defense experts' preparation for trial was \$12,000.<sup>25</sup> The average amount expended for support costs in Maryland capital cases is \$9,822 per case.<sup>26</sup>

Numerous pretrial motions are filed in capital cases both by the defense and the prosecution. Although typical of motions filed in all criminal cases, those filed in capital cases tend to be longer, more complex, and raise evidentiary issues unique to the capital process. These motions raise issues that are part of the defense attorney's strategy—preventing imposition of the death penalty.<sup>27</sup> The number of pretrial motions filed in a capital case are estimated to range from two to six times the number filed in non-capital cases; this increase accordingly raises costs two to six times.<sup>28</sup> As in other phases of criminal practice, the expense involves not only the cost of defense counsel, but also prosecution and court costs.

Plea bargaining is used extensively to reduce the criminal caseload in the courts.<sup>29</sup> However, it is not used nearly as frequently in death

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21. See CAPITAL LOSSES, *supra* note 7, at 15.

22. See Comment, *supra* note 15, at 1253-54.

23. KANSAS LEGISLATIVE RESEARCH DEP'T, *supra* note 14, at 5.

24. *Id.*

25. See Comment, *supra* note 15, at 1260.

26. COMMITTEE TO STUDY THE DEATH PENALTY IN MARYLAND, FINAL REPORT: THE COST AND HOURS ASSOCIATED WITH PROCESSING A SAMPLE OF FIRST DEGREE MURDER CASES FOR WHICH THE DEATH PENALTY WAS SOUGHT IN MARYLAND BETWEEN JULY 1979 AND MARCH 1984, 18 (1985) [hereinafter FINAL REPORT].

27. See Comment, *supra* note 15, at 1248.

28. *Id.* at 1247-48; see also CAPITAL LOSSES, *supra* note 7, at 12.

29. Nakell, *The Cost of the Death Penalty*, 14 CRIM. L. BULL. 69, 71 (1978).

penalty cases as in non-capital cases.<sup>30</sup> As of 1978, between eighty-five to ninety percent of the non-capital murder cases that reach the arraignment stage result in guilty pleas.<sup>31</sup> In death penalty cases, the prosecution is dissuaded from plea bargaining since reducing the charge or promising a lighter sentence would render the case non-capital.<sup>32</sup> Accordingly, capital cases may result in jury trials ten times more often than in non-capital cases.<sup>33</sup>

Certain other expenses at the pretrial level are difficult to ascertain and have not been fully estimated for either the prosecution, the defense, or the courts.

### B. *The Trial Level*

The trial level discussed here includes the guilt phase, the penalty phase, and the appeal, since appeals in capital cases are automatic upon imposition of the death sentence.<sup>34</sup> The guilt phase begins with the voir dire process, which is designed to ensure a fair and impartial jury.<sup>35</sup> Voir dire in capital trials is more lengthy, since the background of each juror is explored on an individual basis and sometimes in a sequestered setting.<sup>36</sup> Jurors' views on the death penalty are explored, which do not necessarily establish removal for cause.<sup>37</sup> Further, the effect of publicity on each juror is explored, which is more likely to establish a basis for removal for cause.<sup>38</sup>

In some states, during voir dire in a capital case each side is allotted

30. *Id.* Few defendants will plead guilty to a capital charge, and those who do will still have a jury determine the penalty. *Id.*

31. *Id.*

32. See Comment, *supra* note 15, at 1247 n.112.

33. See Nakell, *supra* note 29, at 71.

34. *Id.* at 73-74.

35. See *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981) (plurality opinion); *Dennis v. United States*, 339 U.S. 162, 171-72 (1980) (voir dire is designed to ensure a fair and impartial jury).

36. Virtually every capital trial voir dire includes a process called "death qualification." In the process, a series of questions are posed to prospective jurors. These questions are designed to identify and exclude for cause those jurors whose beliefs are considered incompatible with their role as capital jurors. This method, used to exclude those jurors, is a challenge for cause by the prosecutor after the juror has stated some form or degree of opposition to the death penalty. E. KRAUSS & B. BONORA, *THE NATIONAL JURY PROJECT, INC., JURYWORK: SYSTEMATIC TECHNIQUES* § 10.03[8] (2d ed. 1988). See also, Dayan, Mahler & Widenhouse, *Searching for an Impartial Sentencer Through Jury Selection in Capital Trials*, 23 *LOY. L.A.L. REV.* 153, 164-66 (1989).

37. *Witherspoon v. Illinois*, 391 U.S. 510 (1968). Exclusion of prospective jurors for "cause" if they harbor conscientious beliefs against imposing the death penalty denies a capital defendant an impartial jury. *Id.* at 517.

38. *Id.*



a larger number of peremptory challenges,<sup>39</sup> requiring a larger panel from which to select the jury. In addition, because capital trials are often bifurcated proceedings,<sup>40</sup> some states require the selection of two juries: one jury for the guilt phase and another for the penalty phase.<sup>41</sup> The selection of juries for these phases requires more time than non-capital jury selection. Voir dire alone is estimated to take 5.3 times longer in a capital case than in a non-capital case, and can take up to two months.<sup>42</sup>

Virtually all states with capital punishment statutes require a bifurcated trial proceeding with the guilt phase separate from the penalty phase.<sup>43</sup> Both these proceedings allow for the introduction of evidence and the testimony of witnesses. Satisfaction of the requirements of due process must be met in each phase.<sup>44</sup> All expenses incurred by each side during the guilt phase could be duplicated during the penalty phase.<sup>45</sup> These expenses include attorney hours, expert assistance at the hourly or daily in-court rate,<sup>46</sup> investigation costs,<sup>47</sup> and court costs. Again, the costs are incurred by both the defense and the prosecution.

Upon imposition of a death sentence, the condemned person is entitled to an automatic appeal to the state's highest court.<sup>48</sup> Possibility for error in the lower courts, coupled with the finality of the punishment, require review of the sentence.<sup>49</sup> Mandatory supreme court review is not required in most states in non-capital cases.<sup>50</sup> On average, capital appeals take 500-1,000 hours of defense attorney time.<sup>51</sup> The estimates

39. See Uelmen, *The Death Penalty Costs Too Much: Life Imprisonment Without Parole is Only One-Third the Price*, L.A. Times, July 27, 1983, § II, at 5, col. 3. Uelmen observed that California allows 26 peremptory challenges in capital cases in contrast to the 10 allowed in non-capital cases. *Id.* See also Dayan, Mahler & Widenhouse, *supra* note 36, at 187.

40. All states that provide for capital punishment have now adopted a bifurcated trial procedure. Note, *The Presumption of Life: A Starting Point for a Due Process Analysis of Capital Sentencing*, 94 YALE L.J. 351, 366 (1984). See also Gregg v. Georgia, 428 U.S. 153 (1976); Crampton v. Ohio, 402 U.S. 183 (1971).

41. See KANSAS LEGISLATIVE RESEARCH DEP'T, *supra* note 14, at 2 (House Bill as proposed would have required two juries in capital trials). *Id.*

42. See CAPITAL LOSSES, *supra* note 7, at 16; Nakell, *supra* note 29, at 72; Comment, *supra* note 15, at 1255-57 n.173. See also KANSAS LEGISLATIVE RESEARCH DEP'T, *supra* note 14, at 3 (estimated increase of 7.5 days in jury selection process in capital cases in Kansas, if death penalty adopted).

43. See Marshall v. Lonberger, 459 U.S. 422, 456 n.8 (1982).

44. Gardner v. Florida, 430 U.S. 349, 358 (1976).

45. See CAPITAL LOSSES, *supra* note 7, at 11-19.

46. See *supra* notes 17-26 and accompanying text.

47. See *supra* notes 15-16 and accompanying text.

48. Gregg v. Georgia, 428 U.S. 153, 204 (1976).

49. *Id.* at 206-07.

50. See, Nakell, *supra* note 29, at 73-74.

51. See KANSAS LEGISLATIVE RESEARCH DEP'T, *supra* note 14, at 4 (estimating 800 hours of attorney time required for one death penalty trial); CAPITAL LOSSES, *supra* note 7, at

here are for defense attorney hours only, and are exclusive of attorney expenses such as travel, photocopying, investigation, and court costs, as well as prosecution costs. Additionally, if the appellant wins at this stage, the costs incurred at the original trial may be replicated at the retrial or resentencing.

It has been estimated that capital trials may take up to three and one-half times longer than non-capital trials.<sup>52</sup> The average capital trial lasts approximately thirty days,<sup>53</sup> and consumes an average of 850-1,000 hours of attorney time.<sup>54</sup>

The estimates of costs at the guilt and sentencing phases vary greatly from state to state. New York has estimated that if the death penalty were to be reinstated there, trial costs including attorneys fees, investigators, and experts would be \$176,350,<sup>55</sup> and the costs for the prosecution would be \$845,400.<sup>56</sup> Further, New York also estimated court costs at \$300,000, exclusive of corrections costs.<sup>57</sup> Appeals have been calculated to cost another \$320,000.<sup>58</sup> The total process would cost the State of New York approximately \$1.7 million.<sup>59</sup>

The following are other examples of trial expenses: additional courtroom costs of \$65,580 in California;<sup>60</sup> \$16 million per year to prosecute all capital cases in New Jersey;<sup>61</sup> \$1.5 million annually to the public defender for capital cases in Ohio;<sup>62</sup> and between \$50,000 and \$75,000 for one capital case trial in Maryland.<sup>63</sup> Kansas estimated that total trial

20 (estimating one appeal to take between 800-900 billable hours); Comment, *supra* note 15, at 1263. See also generally FINAL REPORT, *supra* note 26.

52. See KANSAS LEGISLATIVE RESEARCH DEP'T, *supra* note 14, at 3.

53. See *id.*; CAPITAL LOSSES, *supra* note 7, at 11-19; Comment, *supra* note 15, at 1258 nn.175-76; see generally Nakell, *supra* note 29, at 71-73; Von Drehle, *Bottom Line: Life in Prison One-Sixth as Expensive*, Miami Herald, July 10, 1988, at 12A, col. 1.

54. Spangenberg, *Gideon Undone: Criminal Justice and Indigent Defense in Crisis*, Remarks made at the Symposium sponsored by Florida State University College of Law 10 (April 26, 1989) [hereinafter *Gideon Undone*]; see also FINAL REPORT, *supra* note 26, at 20. The figures in this study show a mean of 722 hours worked for the state attorney and a mean of 645 hours worked for the public defender during the trial level of a capital case. *Id.* Whereas in non-capital cases, the study indicates the state and defense attorneys' mean hours worked were 551 and 366 respectively. *Id.* These figures are comprised of in-court time only. *Id.*

55. See CAPITAL LOSSES, *supra* note 7, at 18.

56. *Id.*

57. *Id.*

58. *Id.* at 20-21.

59. *Id.* at 18-22.

60. See Comment, *supra* note 15, at 1259-61.

61. *Id.*

62. *Id.*

63. *Id.* at 1258-61.

costs would equal \$9,269,750 annually,<sup>64</sup> and total costs on appeal would cost the state another \$2 million annually.<sup>65</sup> Alaska estimated, using figures obtained from the John Kenneth Peel trial<sup>66</sup> (a non-capital but complex Alaskan murder prosecution that required two grand jury proceedings and two trials), that the average prosecution cost of prosecuting a bifurcated capital felony case would be \$597,000.<sup>67</sup>

Due to the complexity of the issues and the finality of the penalty involved, several states and the federal government provide for appointment of one or more attorneys in a capital case.<sup>68</sup> The provision of more than one attorney will most likely increase the total attorney cost. Thus, factors such as bifurcated proceedings, increased use of experts in both phases, large number of witnesses in general,<sup>69</sup> use of two attorneys in each phase, and the complexity of the litigation each add to the time and expense required in the capital trial.

### C. *Post-conviction*

The post-conviction process is the last level in the death penalty odyssey. First, the state post-conviction stage involves at least three steps. After exhaustion of state remedies, the federal post-conviction stage involves at least three more steps. At the state post-conviction level, states are not required to provide counsel for the petitioner.<sup>70</sup> However, slightly more than half of the current death penalty states statutorily mandate provision of counsel upon request, and most other states provide some form of counsel at the court's or public defender's discretion.<sup>71</sup>

No uniform rate exists for compensation of attorneys among the states, so the attorney costs are difficult to determine. The compensation provided for attendant costs of representation is also difficult to estimate, because compensation provisions by individual states vary widely. However, these costs are incurred regardless of whether or not the attorney is compensated. If the attorney is not compensated by the state, the attorney must absorb the costs.<sup>72</sup>

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64. KANSAS LEGISLATIVE RESEARCH DEP'T, *supra* note 14, at 6.

65. *Id.*

66. *Peel v. State*, 751 P.2d 1366 (Alaska 1988).

67. STATE OF ALASKA, DEP'T OF LAW, REPORT ON FISCAL NOTE ANALYSIS 6 (1989) [hereinafter ANALYSIS].

68. *See* CAPITAL LOSSES, *supra* note 7, at 12 n.35.

69. *See* Comment, *supra* note 15, at 1252 n.140 (one capital case involved 240 potential witnesses over half of which later testified at trial).

70. *Murray v. Giarratano*, 109 S. Ct. 2765 (1989).

71. *Id.* at 2781-82.

72. *See* Wilson & Spangenberg, *State Post-conviction Representation of Defendants Sen-*

The estimated number of hours of attorney time at both the state and federal post-conviction levels is between 1,400 and 1,700.<sup>73</sup> In Florida, the number of attorney hours required for the state post-conviction process was estimated to be 800; the number of hours required for Florida cases at the federal post-conviction level was 900.<sup>74</sup> Even using conservative estimates of hourly rates, the expense incurred either to the state or to the individual attorney is extremely high.

Significantly, in 1988, the United States Congress passed the Anti-Drug Abuse Act<sup>75</sup> providing a federal death penalty for drug-related killings.<sup>76</sup> A provision contained therein provides for counsel in every death penalty case at the federal post-conviction level, and requires the payment of "reasonable compensation" and reimbursement to the attorney for "reasonably-incurred" expenses.<sup>77</sup> Five hundred cases were projected to reach the federal habeas corpus level as of September, 1988. The number of cases projected to reach this level as of September, 1989 is 350, and for the same period in 1990, 400-450 cases.<sup>78</sup> The costs associated with these numbers of cases is staggering, using Florida's figure of 900 hours per case, if attorneys are compensated at a truly "reasonable" rate.

#### *D. Corrections Costs*

Corrections costs are those costs incurred by the state in capital cases for maintenance and staff of correctional facilities. The costs incurred in the corrections process begin upon arrest. The prisoner is maintained in a maximum security correctional setting throughout the process, until a death sentence is imposed. At that point, the condemned is moved to death row.

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*tenced to Death*, 72 JUDICATURE 331, 331-35 (1989); The Spangenberg Group, State Survey of Capital Post-Conviction: The Right of Counsel and Compensation 49 (1988).

73. See *Gideon*, Undone, *supra* note 54, at 10.

74. THE SPANGENBERG GROUP, CASELOAD AND COST PROJECTIONS FOR FEDERAL HABEAS CORPUS DEATH PENALTY CASES IN FY 1988 AND FY 1989 (prepared for the Administrative Office of State Courts) 49 (1989) [hereinafter CASELOAD].

75. See *supra* note 3, § 7001, 102 Stat. at 4387 (codified at 21 U.S.C.A. § 848 (West Supp. 1989)).

76. See *supra* note 3, § 7001(e)(1), 102 Stat. at 4387 (codified at 21 U.S.C.A. § 848 (West Supp. 1989)).

77. See *supra* note 3, § 7001(q)(10), 102 Stat. at 4394 (codified at 21 U.S.C.A. § 848 (West Supp. 1989)).

78. THE SPANGENBERG GROUP, CASELOAD AND COST PROJECTIONS FOR FEDERAL HABEAS CORPUS DEATH PENALTY CASES THROUGH FY 1990, 4 (1988) (updating CASELOAD, *supra* note 74, prepared for the Administrative Office of the Courts under contract with the Bar Information Program).

The average time a prisoner spends on death row is eight years.<sup>79</sup> During this time, the prisoner must be maintained in a special maximum security facility for death row inmates. These facilities require much greater time-and-effort expenditures on the part of corrections officers.<sup>80</sup> Furthermore, the condemned prisoner, unlike non-condemned inmates, is not permitted to work in the prison to repay the state for costs of his or her confinement.<sup>81</sup> These corrections costs are exacerbated by the special procedures that are required in some states when a death warrant is signed.

For example, in Florida a condemned prisoner is moved to a special cell and watched twenty-four hours per day for thirty days prior to execution.<sup>82</sup> Since 1973, 199 warrants have been signed in Florida.<sup>83</sup> When this fact is considered in conjunction with the actions of former Governor Graham and current Governor Martinez to deny clemency in almost all cases involving capital crimes,<sup>84</sup> one can understand the magnitude of the cost problem that exists in Florida and other states as well.

Additionally, the costs of carrying out an execution must be included. These costs consist of the maintenance of an electric chair or other device used for executions and associated costs related to the execution and burial of the persons executed.

On the other hand, the cost of confining a prisoner for life is significantly less compared to the cost of the execution process. For example, in 1978 the estimated annual cost of housing a prisoner in New York was \$15,050.<sup>85</sup> The cost of maintaining that same prisoner for forty years would be \$602,000.<sup>86</sup> Similarly, the expense of death row and execution in Florida is estimated to be six times as costly as housing a prisoner until he or she dies of natural causes.<sup>87</sup> In California, the cost of execution, \$600,000,<sup>88</sup> far surpasses the cost of housing a prisoner, \$14,254 per year.<sup>89</sup> The cost of maintaining a death row in Kansas was estimated to

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79. Powell, *Capital Punishment*, 102 HARV. L. REV. 1035, 1038 n.26 (1989).

80. See Nakell, *supra* note 29, at 76.

81. Sellin, *Capital Punishment*, 25 FED. PROBATION 3 (1961).

82. Von Drehle, *Political Pressure Thwarts Clemency*, Miami Herald, July 12, 1988 at 1A, col. 1.

83. *Id.*

84. See Von Drehle, *supra* note 82, at 10A, col. 1 (4.1% of all capital cases between 1978-1986 were granted clemency under Governor Graham and none under Governor Martinez from 1986 to date of publication).

85. See CAPITAL LOSSES, *supra* note 7, at 23.

86. *Id.*

87. See Von Drehle, *supra* note 82, at 12A, col. 1.

88. See Comment, *supra* note 15, at 1268-69.

89. *Id.* at 1268 n.245.

be \$922,682 annually.<sup>90</sup> At today's corrections costs, the difference in cost would be even greater.

### III. THE CURRENT RESEARCH

Some noteworthy research has been completed that compares costs in capital cases to costs in non-capital cases.<sup>91</sup> In addition, some states have conducted unofficial research projects on the cost of capital punishment. These studies are less thorough since the information was gathered from either state public defender offices or corrections departments regarding capital punishment costs.<sup>92</sup>

Unfortunately, research available to date does not include a nationwide study that compares costs of capital versus non-capital cases at all levels from the investigation stage through the entire criminal justice process to execution. Furthermore, the studies conducted thus far, while adding to the research, have focused only on portions of the capital process such as the cost of the capital trial and this simply does not tell the entire story.

Additionally, capital cases might not complete the entire judicial process. Accordingly, measures must be taken to ensure that the costs of these cases are included in current research so that comparisons are not erroneously made only to those capital cases that actually go to trial. Furthermore, in some studies, the information is incomplete because the studies fail to include all phases of all cost components of the capital process or the comparisons made are not internally consistent. For example, the studies may fail to consider the cost of a capital trial compared with the costs of non-capital incarceration.<sup>93</sup> The first major opportunity for such a study is about to be undertaken by the United States Government Accounting Office.<sup>94</sup>

Efforts should be taken to calculate not only the costs to the state in terms of attorney hours paid, but also attorneys' fees and costs incurred for investigation, expert witnesses, travel, and photocopying costs. Another consideration is the cost to the state and its counties for the prosecution of capital cases, and the cost of the court's time. When the total

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90. See KANSAS LEGISLATIVE RESEARCH DEP'T, *supra* note 14, at 7.

91. See, e.g., CAPITAL LOSSES, *supra* note 7 (New York Public Defenders' study); KANSAS LEGISLATIVE RESEARCH DEP'T, *supra* note 14 (a Kansas study which played a role in the Kansas legislature's decision not to reinstate the death penalty); FINAL REPORT, *supra* note 26 (Maryland's study); Comment, *supra* note 15 (study by the University of California at Davis).

92. See, e.g., ANALYSIS, *supra* note 67, at 1258-61.

93. See, e.g., CAPITAL LOSSES, *supra* note 7; KANSAS LEGISLATIVE RESEARCH DEP'T, *supra* note 14; Von Drehle, *supra* note 82.

94. See *supra* note 3 and accompanying text.

costs are ascertained for each level and the entire process, then the comparison can be drawn precisely between capital and non-capital cases. In the meantime, estimates indicate that the dollars are adding up, from which tentative conclusions may be articulated.

#### IV. CONCLUSION

The information presented here is a myriad of cost figures derived from various states and studies intended to summarize the research performed thus far in the area of costs of the death penalty as compared to costs of life imprisonment. Obviously, more research needs to be undertaken in order to complete the cost picture. While this information remains limited, what we do know appears to be more important than what we do not know.

What we do know is this: the death penalty is costly. We know enough about the number of hours attorneys spend at each level of a criminal proceeding to know that attorney costs are substantially higher in capital cases than in non-capital cases. We know that the expenses incurred for investigators and experts are higher in capital cases than in non-capital cases as well. We also know that security is tighter in capital cases than in non-capital cases, causing corrections costs in capital cases to exceed those in non-capital cases.

While not empirically based, studies to date have estimated total costs for capital cases in the millions of dollars. A New York study compares a \$1.4 million cost figure for each death penalty trial with \$602,000 for the cost of life imprisonment for forty years in non-capital cases.<sup>95</sup> Florida has estimated that the true cost of each execution is approximately \$3.2 million, or approximately six times what it would cost to keep that person in prison for all of his or her natural life.<sup>96</sup> Based upon our research and data currently available, these appear to be reasonable estimates of the overall costs incurred in capital and non-capital cases.

Regardless of whether we can attach specific dollar amounts to each level for each category of expense, we do know that at every step in the process, the defendant receives greater constitutional guarantees in a capital case than in a non-capital case. The only conclusion that can be drawn is that, in dollars and cents, capital punishment is simply more expensive than life imprisonment.

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95. See CAPITAL LOSSES, *supra* note 7, at 23.

96. See Von Drehle, *supra* note 53, at 12A, col. 1.