

THE COSTS OF PROCESSING MURDER CASES
IN
NORTH CAROLINA

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May 1993

Funded by a grant from the State Justice Institute
to the North Carolina Administrative Office of the Courts

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This report was developed under a grant from the State Justice Institute. The points of view expressed are those of the authors, and do not necessarily represent the official position or policies of the State Justice institute or the North Carolina Administrative Office of the Courts.

Philip J. Cook and Donna B. Slawson, 1993

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PREFACE

The motivation and background for the research reported here are explained in a proposal prepared by the National Center for State Courts in conjunction with the American Bar Association's Ad Hoc Committee to Assess the Cost and Impact of the Death Penalty on the Criminal Justice System. That document¹ noted that the "super due process" accorded in potential death cases has the effect of making the typical capital case more expensive at every stage of adjudication than the typical noncapital murder case, and proposed that these costs be documented by a systematic study conducted in North Carolina. The State Justice Institute agreed to fund a limited version of this proposed study, and awarded a grant to the North Carolina Administrative Office of the Courts (AOC) in 1991. The AOC in turn contracted with Duke University to perform the research and prepare a report.

Our work commenced in September 1991. Philip Cook has served as the principal investigator, and Donna Slawson as project director. In September, 1992 Lori Gries joined the project, and has been responsible for much of the coding, data entry, and programming for data analysis.

During the course of our work we have been assisted by a number of students -undergraduate, graduate, and professional -- who have provided crucial assistance for minimal remuneration. We especially thank Seth Blum, Ken Pettit, Rosalie Pacula, Adam Spilker, Nick Djuric, Melissa Bowden, and Siegmund Shyu. Elaine Lamb provided able clerical assistance in the first year of the project.

The data collection effort for this report required the cooperation and time of a number of public officials. We are very grateful to all those officials who answered our questions, filled out our questionnaires, provided us with data from their files, and generally made this project possible. The list is long, and includes a number of Clerks of Superior Court and individuals in the Judicial Department, the Office of the Attorney General, and the Department of Correction. We also acknowledge with gratitude all those members of the private bar who responded to our requests.

Several colleagues have provided us with useful suggestions and comments on earlier drafts of this report. We especially thank Jack Boger, Stevens Clarke, Jim Coleman, Harry C. Martin, Ann Petersen, and Elizabeth Rapaport. An advisory committee appointed by the AOC provided suggestions during a meeting at the beginning of the project, and has been provided with drafts of this report.

Finally, we greatly appreciate Kathy Kunst's help in managing the contract and providing us with much-needed office space and PCs.

PJC & DBS, April 1993

1. National Center for State Courts, "A Proposal to Determine the Additional Costs, if any, Imposed on the North Carolina Criminal Justice System by the Death Penalty" (Arlington, VA, July 1987).

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1. EXECUTIVE SUMMARY

In this report we compare the resource costs of adjudicating murder cases capitally and noncapitally in North Carolina. Our analysis is based on an extensive data collection effort by which we were able to develop estimates for costs stemming from murder trials, appeals, and imprisonment. One conclusion is that the extra costs to the North Carolina public of adjudicating a case capitally through to execution, as compared with a noncapital adjudication that results in conviction for first degree murder and a 20-year prison term, is about \$329 thousand, substantially more than the savings in prison costs, which we estimate to be \$166 thousand. We note that a complete account must also include the extra costs of cases that were adjudicated capitally but did not result in the execution of the defendant. All told, the extra cost *per death penalty imposed* is over a quarter million dollars, and *per execution* exceeds \$2 million. This last estimate is quite sensitive to our assumption that ten percent of death-sentenced defendants are ultimately executed. These and other assumptions and qualifications are included throughout the report.

A section-by-section summary follows.

2. *Objectives.* Our objective is to provide estimates of the cost of capital adjudication that will be useful to legislators and criminal justice officials. The law and practice of capital punishment change from year to year as a result of new case law, amendments to existing statutes, and revisions in standard operating procedures by district attorneys and other officials. Our estimates are intended to help inform these decisions and predict their consequences for the utilization of resources in the criminal justice system. There have been a handful of other studies that have attempted to cost out the death penalty, but ours is the most complete and the first to utilize direct observation of a number of cases at each stage of the process.

3. *Constitutional and Statutory Framework* The legal doctrine that as a punishment "death is different" is reflected in the fact that capital cases tend to be litigated more thoroughly than other serious murder cases. For example, in capital trials indigent defendants are entitled to two court-appointed attorneys, the jury must be "death qualified," and in most states the jury rather than the judge is responsible for making the decision whether to sentence the defendant to life imprisonment or death. These and other protections stem from constitutional and statutory provisions at both the state and federal level, as well as the especially diligent effort ordinarily expected of practitioners in these cases.

4. *Accounting Rules.* "Cost" in this report is defined as the *opportunity -cost* of the extra resources required to adjudicate capital cases, and more specifically as the value *of* the additional resources consumed by these cases. Our study is limited to the costs borne by the state and county government agencies, omitting consideration *of* private costs and costs to the federal government. It should be emphasized that this report is not an evaluation of the death penalty, since our focus is almost exclusively on the cost side; the only benefit we measure is the savings in imprisonment cost. (We also consider the possibility that the death penalty serves to encourage some murder defendants to plead guilty and thus saves the state the cost *of* the trial. This is a real possibility, but it is somewhat unusual in North Carolina for a district attorney to accept a guilty plea after prosecuting a case capitally, in part because of the ban on sentence bargaining in first degree murder cases.)

5. *Unit Costs.* We use standard accounting procedures to estimate the unit costs of key resources, including the time of attorneys in the offices *of* the district attorneys, public defenders, the Appellate Defender, and the Attorney General. The value *of* an hour of an attorney's time includes the prorated

position cost, together with the appropriate "load" from support staff and general administration. We also estimate the unit cost for a day in Superior Court, and for the time of the justices and law clerks of the Supreme Court of North Carolina.

6. *Trial Court Costs.* To estimate the costs of murder trials, we collected data on a large sample of such cases in six prosecutorial districts, supplemented with data on specific cases in other districts. We found that the average cost of a bifurcated capital trial is \$84 thousand, and of a capital trial that ends with the guilt phase, \$57 thousand. The average for noncapital murder trials is just \$17 thousand.. Using regression analysis to adjust for other differences among these cases, we conclude that a bifurcated trial costs about \$55 thousand more than a noncapital murder trial. We then go on to estimate the extra costs in the trial courts *per death penalty imposed*, which works out to \$194 thousand. This figure includes the extra costs of capital prosecutions that do not result in the imposition of the death penalty, as well as the extra costs resulting from the fact that capital cases are more likely than other murder cases to be remanded to the trial courts for resentencing or retrial.

7. *Appellate and Postconviction Costs.* At our request, the justices and law clerks of the Supreme Court of North Carolina kept records for 12 months on the amount of time they devoted to direct appeals of murder cases. Based on these data, and interviews with attorneys in the offices of the Appellate Defender and Attorney General, we conclude that a direct appeal in a death case is about \$7 thousand more costly than in a life case. For postconviction proceedings, we focused on two capital cases, *Gardner* and *Maynard*, both of which concluded in 1992 after being fully litigated. The average postconviction cost to the state of these two cases was \$255 thousand.

8. *Prison Costs.* The operating cost of a year in prison ranges from \$16 thousand per inmate for minimum security to \$23 thousand per inmate for close security. Facility costs are about \$750 per inmate annually. An inmate who serves ten years on death row and is then executed costs the Department of Corrections \$166 thousand less (in present value terms) than an inmate who serves a "life" term and is paroled after 20 years.

9. *Summing Up.* "The" cost of the death penalty depends on the definition. Comparing two hypothetical cases, one of which concludes with the defendant's execution after ten years on death row, and the other with the defendant serving 20 years in prison, yields an answer of \$163 thousand as the extra cost for the capital case. Of greater relevance to policy is an estimate that includes the costs of cases that are adjudicated capitally but the defendant is not executed. This more complete measure of cost can be reported either as a ratio to the number of death sentences imposed, or as a ratio to the number of executions. The latter is perhaps the most meaningful, and also the most uncertain, given our uncertainty concerning the fraction of death sentences that will ultimately be carried out.

It is possible to use our data to make a rough estimate of the statewide costs incurred over a particular time period. Over the two-year period 1991 and 1992 there were a total of 94 defendants tried capitally (excluding retrials and resentencing hearings). Of these, 29 were sentenced to death. These capital trials would have cost the state and counties about \$4.3 million less if they had proceeded noncapitally. If the death-sentenced cases follow a postconviction track similar to that of cases from previous years, the cost to the state will total about \$2.8 million for appeals and postconviction proceedings, and \$1.4 million for retrials and resentencing proceedings ordered by the appellate courts. Recent history suggests that approximately 10 percent of the death-sentenced defendants will be executed, at a savings in imprisonment costs of \$0.5 million.. Combining all these figures gives an overall extra cost on the order of \$8 million, or an average of \$4 million per year.

The extra costs of adjudicating murder cases capitally outweigh the savings in imprisonment costs. As it is currently implemented, the death penalty cannot be justified solely on the grounds of economy. The death penalty is usually justified on the basis that it offers public benefits in the form of greater deterrent and retributive value than life imprisonment; these benefits, if they exist, are not free, but rather come at a substantial cost to the public.

2. OBJECTIVES

Our objective in this report is to provide useful estimates of the costs of adjudicating capital cases in North Carolina. The "super due process" protections accorded the defendant in capital cases ensure that the typical capital case in North Carolina, as in other states, is more expensive at every stage of adjudication than it would have been if the State had not sought the death penalty. While this assertion is not in dispute, there is considerable uncertainty about the *magnitude* of the cost premium in capital cases. Several estimates from other states have been disseminated, but these estimates are for various reasons of limited use.

It should be noted that this report is not a comprehensive evaluation of the death penalty. Our focus is on the costs to state and county government. We do not consider the costs of adjudication borne by the federal government, or by private individuals. Nor do we consider the possible benefits of the death penalty, with one exception -- the savings in the cost of incarceration. Our intent, then, is simply to put a price on the death penalty that is relevant to the state's taxpayers and their elected officials. The *value* of what they are buying at this price is left for others to determine.

A. Potential Uses for Cost Estimates

There are a number of circumstances in which our cost estimates may be relevant, including the following three:

* *Budgeting for the death penalty*: As background for projecting budgetary needs, the Administrative Office of the Courts issues reports from time to time concerning the costs of certain aspects of capital proceedings.

* *Legislating change in the domain of the death penalty*: Proposed changes in the domain of the death penalty will have cost implications that may be considered relevant by state legislators. For example, additions to the list of aggravating circumstances that may be presented to the jury during the sentencing phase of a capital trial would presumably result in additional capital trials and death sentences each year.² Alternatively, the number of capital cases would be reduced if murder defendants under age 18, or of low intelligence, were exempted from the death penalty.

* *Legislating change in the rules governing capital trials and appeals*: The costs of the death penalty are influenced by statutory rules governing capital trials and appeals.

Cost implications may be secondary to other concerns, but are still relevant to defining the public interest in these matters.

B. Defining the Question

What exactly is the question to which a cost estimate is supposed to be the answer? We take some pains in this report to clarify this fundamental matter. The result is not a definitive set of estimates, but, we hope, a clearer understanding of the issues and a better estimate of some of the relevant magnitudes than has been available previously. In fact, there is not just one "price" for the death penalty but several, depending on how we define the question.

Probably the first definition of "the cost of the death penalty" that comes to mind is the *increase in the total public expenditures on criminal justice activities in the state (if any)* resulting from capital cases. We do not attempt to apply this definition. Even though capital cases tend to be more expensive than noncapital murder cases, it is not clear that the total budget for the system is increased as a result; it could be that capital cases are pursued at the expense of other types of criminal cases, rather than at direct cost to the taxpayer. Implementing this definition, then, would require a comparison of the actual criminal justice system budget with the hypothetical system budget that would be authorized if there were no death penalty.

Estimating this hypothetical amount requires a judgment about the workings of the political process that we are not prepared to make.

The two definitions that do guide our work can be made operational in a straightforward manner and provide results that we believe are of interest to policymakers. These two definitions are fundamentally different in perspective, but both seem meaningful.

Definition I: *The "single case" perspective*

The cost of the death penalty may be defined as the difference in the costs of adjudicating an aggravated murder case as a capital case and as a noncapital case. Two scenarios are specified. In the first scenario the defendant is tried capitally, sentenced to death, and ultimately executed after the sentence is affirmed on appeal and upheld on collateral review. In the second scenario the defendant is given a noncapital trial, sentenced to life, and serves out the normal term. We estimate the difference in the costs of these two scenarios, including separate estimates of the cost of the trials, the direct appeals, postconviction proceedings, and incarceration.

Definition II: *The "cohort" perspective*

In practice, most defendants who are prosecuted capitally are not sentenced to death, and most who are sentenced to death are never executed. It is useful to produce cost estimates that take account of cases that are prosecuted capitally but for one reason or another the defendant is never executed. For example, suppose that there is ultimately one execution for every 20 cases that are prosecuted capitally. The total additional cost of accomplishing that execution includes the additional cost associated with adjudicating all 20 cases capitally, not just the one where the defendant was actually executed. One difficulty in generating such an estimate is to assign reasonable probabilities to the myriad paths that capital cases can take through trial and postconviction proceedings. We provide a framework for such an estimate. Given the uncertainty concerning the probability that future death sentences will eventually result in execution, we cannot provide a definitive estimate. The problem here is that past experience (since *Furman v. Georgia*³) is sparse, and may not in any event be a reliable guide to the future in this area, given the rapid changes in postconviction rules and practice.

The second definition necessarily implies a far higher cost of imposing the death penalty than the first. Further, when combined with data on the number of capital cases initiated in a given period of time, it serves as a basis for estimating the total extra cost incurred statewide for that period. We provide such an estimate for 1991 and 1992.

C. Other Estimates

A recent study by the U.S. General Accounting Office concluded that "[e]ven though many experts believe that it costs more to finance a system in which the death penalty is an option, little empirical data exist that actually compare the cost of a death sentence case with a nondeath sentence case."⁴ We concur with this conclusion.⁵

The only previous study that is based on a direct measurement of costs for a sample of cases was conducted at the request of the Maryland House Appropriations Committee to provide information on the fiscal impact of processing death penalty cases in the state.⁶ The committee appointed to perform this research was able to obtain adequate information on 32 murder cases (out of a statewide total of 80) that were capitally prosecuted between July 1979 and March 1984. The average sum of costs to the state for prosecution and defense attorneys, court time, and expenses was \$48,200 for the 23 cases that were tried,

and \$14,300 for the 9 cases that resulted in a guilty_plea. There is no information in this study on the average cost of a noncapital murder case, and nothing on postconviction costs.

Another widely cited study, by Margot Garey, appeared in a symposium on the death penalty published in the *University of California at Davis Law Review* in 1985. Her estimate for the cost of a capital trial in California was far higher than the Maryland estimate; the author concluded that a capital murder trial cost \$201,510 more than a noncapital murder trial on the average.⁷ Garey did not analyze a sample of specific cases, but rather pieced together information from interviews with attorneys and from published information on the various components of total cost. While the assumptions behind some of her numbers are not always clear, it appears that she assumed that voir dire would take 40 days longer in a capital case than a noncapital case, and that the trial would last 30 days longer. Garey went on to offer estimates of the cost of the appeal (\$100,000) and of postconviction proceedings (\$212,202) in capital cases.

A similar though less thorough effort was undertaken by the New York State Defenders Association in 1982.⁸ It assumed that a capital case would require a four week trial, and estimated the defense costs for such a trial. Prosecution costs were then stipulated to be double that of defense costs. The total cost to the state of a capital trial was estimated to be \$1.6 million. Estimates of the costs of subsequent stages were also provided: \$160,000 for the direct appeal following a sentence of death and \$170,000 for, the petition to the United States Supreme Court after the sentence is affirmed at the state level.

In sum, these three studies use the same basic definition of "cost" (the "single case" definition offered above)⁹ but come to rather different conclusions concerning the costs to the state of a capital trial:

Maryland, early 1980s: \$48,200 (total)

California, 1984 or so: \$201,510 (over noncapital costs)

New York, 1981 or so: \$1,568,100 (total)

As noted, only the Maryland study is based on systematic study of a sample of cases.

The rather sparse and inconsistent results from the literature suggest the need for a more thorough and systematic study. The case for such a study was made in considerable detail by the National Center for State Courts in 1986.¹⁰ That report was a progenitor for this one.

The costs of the death penalty originate with the legal doctrine that as a punishment "death is different." The ways in which it is different are reviewed in the next chapter.

NOTES

1. For a general account of legislative activity on the death penalty nationwide *see* Leigh Dingerson, *Reclaiming the Gavel. Making Sense Out of the Death Penalty Debate in State Legislatures*, 18 N.Y.U. REV. L. SOC. CHANGE 873 (1990/91).
2. Examples from the 1989 session of the North Carolina General Assembly include SB 1581 (1990 Omnibus Drug Act) and HB 1300 (Drug Murder/Require Death Penalty), both of which would have broadened the domain of the death penalty to include murders connected to drug dealing.
3. *Furman v. Georgia*, 408 U.S. 238 (1972).
4. U.S. GENERAL ACCOUNTING OFFICE, REPORT TO THE CHAIRMAN, SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS, COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, LIMITED DATA AVAILABLE ON COSTS OF DEATH SENTENCES 4, GAO/GGD-89-122 (September 1989).
5. In the review presented here we do not include investigative reports by newspaper reporters.
6. 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 (1985).
7. Margot Garey, Comment, *The Cost of Taking a Life. Dollars and Sense of the Death Penalty*, 18 U.C. DAVIS L REV. 1221, 1269 (1985). The numbers presented here are from footnote 245, on page 1269, which in turn references the discussion throughout the text.
8. NEW YORK STATE DEFENDER'S ASSOCIATION, CAPITAL LOSSES: THE PRICE OF THE DEATH PENALTY FOR NEW YORK STATE (1982).
9. The Kansas Legislative Research Department undertook a study with a somewhat different perspective in 1987. At that point the Kansas legislature was considering a death penalty bill, and requested an estimate of the total additional cost if it should be adopted. The report assumed that there would be 70 cases prosecuted capitally each year, of which 35 would result in a conviction of first degree murder and include a penalty phase. The total extra costs associated with these capital cases was estimated to be \$9.3 million, or about \$133,000 per case. KANSAS LEGISLATIVE RESEARCH DEPARTMENT, MEMO: COSTS OF IMPLEMENTING THE DEATH PENALTY - H.B. 2062 (February 11, 1987).
10. NATIONAL CENTER FOR STATE COURTS, FINAL REPORT: DOES THE DEATH PENALTY IMPOSE ADDITIONAL COSTS ON THE CRIMINAL JUSTICE SYSTEM?: A RESEARCH DESIGN (1986).

3. CONSTITUTIONAL AND STATUTORY FRAMEWORK

A. Charging and Plea Bargaining in Murder Cases in North Carolina

Generally, North Carolina prosecutors have discretion to decide what level of charge to bring against any given defendant.¹ In deciding the charge or charges with which to prosecute a defendant the district attorney may weigh "many factors such as 'the likelihood of successful prosecution, the social value of obtaining a conviction as against the time and expense to the State, and his own sense of justice in the particular case."² The discretion to prosecute a defendant for murder in the first or second degree or for a lesser charge is broad, limited only by a constitutional prohibition against basing such discretionary decisions on race, religion, or other constitutionally impermissible classifications.³ If a prosecutor does decide to proceed with a murder charge in any given homicide case, however, he or she must submit a bill of indictment to the grand jury for its consideration.⁴ If the grand jury then returns a true bill of indictment for murder the prosecutor has the choice of accepting a plea of guilty, or taking a defendant to trial for either murder in the first degree or murder in the second degree. While guilty pleas are widely acknowledged as a generally accepted way of managing caseloads⁶, some limitations apply to the availability of plea and sentence negotiation in the context of capital cases.

Under North Carolina law a homicide may be prosecuted capitally, that is, with the death penalty being a possible sentence, if, in addition to the presence of evidence arguably sufficient to prove each of the elements of murder in the first degree, the State also has evidence that would support a finding of one or more aggravating circumstances.⁷ If a district attorney has decided to prosecute a defendant for murder in the first degree, the Supreme Court of North Carolina has held that the case must be litigated capitally:

The decision as to whether a case of murder in the first degree should be tried as a capital case is not within the district attorney's discretion. *State v. Britt*, 320 N.C. 705, 360 S.E.2d 660 (1987). This is so in order to prevent capital sentencing from being irregular, inconsistent and arbitrary. If our law permitted the district attorney to exercise discretion as to when an aggravating circumstance would or would not be submitted, our death penalty scheme would be arbitrary, and therefore, unconstitutional.⁸

As in many, but not all jurisdictions, North Carolina statutorily requires that in a capital case a jury must determine the sentence to be imposed upon the defendant.⁹ Thus, the district attorney is prohibited from "sentence bargaining" in a capital case, e.g., by agreeing to accept a Plea of guilty to murder in the first degree in exchange for a life sentence without the involvement of a sentencing jury.¹⁰ The Supreme Court of North Carolina has held that to allow sentence bargaining in this context would violate North Carolina General Statute section 15A-2001 and would also render the North Carolina capital sentencing scheme unconstitutional." Thus, if a defendant were to plead guilty to murder in the first degree in a capital case, a jury still must be impaneled for the purpose of determining the sentence.¹² As a result, the costs of a trial, if only for sentencing purposes, will be an inevitable expense of every capital case in which the defendant is determined guilty, even in the unusual case where a defendant elects to enter a guilty plea.

A murder case in which the State has no evidence of an aggravating circumstance is prosecuted noncapitally.¹³ In this event the trial judge may impose a sentence without impaneling a sentencing jury.¹⁴ The prosecutor's announcement that there is not sufficient evidence to support a finding of any aggravating circumstance may be made at any stage of the prosecution.¹⁵ The defense may also move before trial for a determination by the trial court that no aggravating circumstances exist.¹⁶ Further, as stated earlier, in any murder prosecution the prosecutor has discretion to accept a plea of guilty to second degree murder, presumably even if there is evidence of aggravating circumstances.¹⁷

B. Selected Federal Constitutional Issues Affecting the Litigation of Capital Murder Cases

The modern era of death penalty procedures began in 1972 with the United States Supreme Court's decision in the landmark case of *Furman v. Georgia*.¹⁸ In *Furman* the Court had granted certiorari in four cases to determine if imposition of the death penalty under statutory procedures in the states of Georgia, Texas, and California violated the Eighth and Fourteenth Amendments to the United States Constitution.¹⁹ Broadly speaking, the statutes in question were such that after a defendant was found guilty of a capital crime (murder, rape, and armed robbery were such crimes) the jury was required to decide, without any guidelines, if the death penalty should be imposed. Except in California, which had a bifurcated trial in capital cases, the jury's decision to impose the death penalty in these cases had been made simultaneously with the decision of the defendant's guilt.

Upon reviewing the constitutionality of such procedures, the Court was unable to reach a unanimous decision. Among the nine separate opinions filed, five justices concluded that the death penalty had been unconstitutionally applied in the cases being reviewed.²⁰ Justices Brennan and Marshall found the death penalty to be unconstitutional per se. Justices Douglas, Stewart, and White, however, provided what would prove to be key opinions in the jurisprudence of capital sentencing. The one theme uniting this group would be *Furman's* legacy-: that under the United States Constitution, the death penalty is a cruel and unusual punishment if imposed arbitrarily and capriciously,²¹ for example as a result of the unguided jury discretion present in the cases consolidated for review by the Court.

The immediate effect of the *Furman* holding was to render unconstitutional every existing state death penalty statute, as all states followed similar procedures. In response, some thirty-five states revised their capital sentencing legislation to limit jury discretion in the imposition of the death penalty. These amended statutes fell roughly into two categories. One group of states, including North Carolina, made the death penalty mandatory for certain specified offenses.²² Other states adopted statutes that established a bifurcated procedure requiring the jury to determine the guilt or innocence during the first phase of the proceeding and then, during a sentencing phase, to decide the punishment.

In 1976 the United States Supreme Court reviewed five cases²³ in which the constitutionality of legislation that had been revised in light of *Furman* was challenged. In opinions filed in these cases Justices Marshall and Brennan adhered to their position that the death penalty is unconstitutional per se. Justice White opined that the guidance provided by both types of the revised legislation corrected the arbitrariness found in the *pre-Furman sentencing* schemes, and thus voted that all of the statutes under review were constitutional. Justices Stewart, Powell, and Stevens, however, provided the deciding votes by declaring the mandatory capital sentencing statutes in North Carolina and Louisiana unconstitutional, while upholding statutes in Texas, Georgia, and Florida that attempted to channel the Jury's discretion.

In summary, in the 1976 cases a 5-4 majority found legislation requiring -a mandatory death sentence for certain specified offenses to be unconstitutional. Such statutes treated the defendant as merely

part of a "faceless, undifferentiated mass"²⁴ and did not consider individualized aspects of either the defendant or the offense. At the same time, however, a 7-2 majority upheld the constitutionality of the statutes that provided a structured procedure to guide the jury in its examination of evidence and recommendation of sentence during the penalty phase. Of these, the statutory scheme examined in *Gregg v. Georgia* supplied what would become the framework for contemporary capital sentencing procedures.²⁵

The Georgia statutes in *Gregg* provided not only guided jury discretion by requiring the jury to determine whether specified aggravating and mitigating circumstances existed in any given case, but also required a bifurcated proceeding and an automatic direct appeal to the state Supreme Court to consider whether a death penalty imposed in any given case was arbitrary or disproportionate to other serious murder cases. In *Gregg*, the United States Supreme Court also enunciated the obvious but important statement that, as a punishment death is unique both "in its severity and irrevocability."²⁶ As a consequence subsequent cases began to elaborate enhanced procedural protections²⁷ for capital defendants in order to ensure that a sentence of death is appropriately imposed only for the most egregious crimes. Cases handed down after 1976 have continued to refine the attributes that a constitutional capital sentencing scheme must have. For example, in *Lockett v. Ohio*,²⁸ the Court held that a statute cannot constitutionally limit the scope of mitigating evidence that the defendant is permitted to offer at the sentencing portion of the penalty trial. Here, the principle of individualized consideration of the defendant was deemed necessary to maintain the constitutionality of a capital sentence.²⁹ This principle was applied in *McKoy v. North Carolina* in an opinion holding that the sentencing jury in a capital case cannot be required to agree unanimously on the existence of individual mitigating circumstances.³⁰

Another case, *Godfrey v. Georgia*³¹, provided the Court with the opportunity to rule that the statutorily specified aggravating circumstances relied upon by the jury to find the defendant eligible for the death penalty must be sufficiently clear to direct jury discretion and thereby minimize the risk of arbitrary and capricious imposition of a capital sentence. Further, a constitutional sentencing scheme cannot permit the imposition of the death penalty on one for whom there is no proof that the defendant killed, or intended to kill unless the defendant both had a major personal involvement in the felony that resulted in homicide and showed a reckless indifference to human life.³² The *Gregg* framework was further modified in *Pulley v. Harris*, where the Court held that proportionality review by a state's highest appellate court is not a constitutional requirement, provided that the state's statutory scheme affords other adequate protection against arbitrary capital sentences.

As the Court stated recently,

In sum, our decisions since *Furman* have identified a constitutionally permissible range of discretion in imposing the death penalty. First, there is a required threshold below which the death penalty cannot be imposed. In this context, the State must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold. Moreover, a societal consensus that the death penalty is disproportionate to a particular offense prevents a State from imposing the death penalty for that offense. Second, States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty. In this respect, the State cannot channel the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant.³⁴

The enhanced constitutional and statutory protections extended to the accused in capital litigation impose costs on the criminal justice system. These costs are discussed below, beginning with costs that begin to be incurred prior to trial.

C. The Costs of Enhanced Protection: The Trial and Trial-Preparation Phase Statutory Right to Two Defense Attorneys.

In North Carolina, an indigent defendant who is being tried for a capital crime has a statutory right to the appointed attorney.

Additional Investigation Costs. The opportunity to present any relevant aspect of the defendant's life at the penalty phase also imposes additional costs before trial begins. To prepare for the sentencing phase the defense team might begin with collection of the defendant's birth certificate, medical records, jail records, employment records, school records, military records, and social service agency records.³⁶ In order to adequately explore a defendant's past, the defense attorneys may also seek to develop an effective rapport with the client that will yield the cooperation and trust required to obtain details about the individual's past, such as childhood mistreatment by adults and other traumatic experiences.³⁷ Once relevant details have been obtained from the client, the search for available witnesses usually begins immediately, not only because there may not be enough time after the guilt phase of the trial to locate people who may have dispersed over the years, but also because the defense may intend to have them testify during the guilt phase.³⁸ Because of the thoroughness required, investigation for capital trials may take much longer than investigation for a noncapital case.

Investigations by law enforcement officials can also be more lengthy and costly in capital litigation. Because of the vigor with which capital cases are litigated, extreme care must be taken to discover, preserve, and analyze evidence favorable to the State.³⁹

Expert Witness Fees. Once details regarding the defendant become available, a variety of experts are often recruited to provide assessments of the lasting effects of childhood problems on the defendant's adult behavior. Experts may also be employed to assess whether a defendant can raise a successful insanity defense at trial. Professionals who may be used during capital litigation include medical examiners, criminologists, polygraph experts, forensic scientists, juristic psychologists⁴⁰ and psychiatrists.⁴¹ Furthermore, because a capital case defense often includes general constitutional challenges to the death penalty⁴² other individuals such as theologians, former death row inmates, and witnesses to prior executions may be sought to testify to establish the cruelty of the sentence.⁴³ Experts on studies regarding racial bias in the imposition of the death penalty and the efficacy of the sanction as a deterrent are also among those who have been used in challenging the appropriateness of this punishment.⁴⁴ Adding to the costs is the fact that in some cases both the defense and prosecution will be employing experts at state expense.⁴⁵

Motions Practice. Another factor in the pretrial process adding to the costs of litigating capital cases is the extensive motions practice employed. As vehicles for the assertion of constitutional and statutory rights, motions play a crucial role in every death penalty case.⁴⁶

A few motions are unique to capital cases. These include motions alleging the unconstitutionality of particular capital statutes or procedures implemented within the statutory framework motions seeking to declare a case noncapital given its facts, and motions pertinent to certain questions posed during jury voir dire. The vast majority of motions filed, however, will be standard motions that may be filed in any criminal case. More of these standard motions tend to be filed in capitally prosecuted cases, however. In most capital cases motions are filed for:

- (1) formal discovery; (2) [obtaining] evidence potentially favorable to the defense; (3) suppression of statements made by the accused; (4) suppression of physical evidence and/or suggestive

identification procedures; (5) dismissal of the indictment due to the unconstitutional composition of the grand/or petit jury; (6) change of venue; (7) individual, sequestered voir dire; (8) dismissal of the indictment based on the facial and/or as applied unconstitutionality of the pertinent death-penalty statute(s) [sic]; (9) funds for expert witnesses; and (10) allowance of the defendant to participate in the trial.⁴⁷

Additionally, these motions are often more complex and raise a greater number of evidentiary issues than those in a noncapitally litigated homicide prosecution.⁴⁸ Briefing and argument during motion hearings further adds to the costs of capital litigation. It should be noted that the present study does not attempt to explain why capital cases are litigated more vigorously than other kinds of serious murder cases. Common remarks from defense attorneys, however, lead to the conclusion that moral opposition to the death penalty, evolving legal standards regarding effective assistance of counsel in capital litigation, and a heightened professional commitment to litigate the case zealously are prime reasons. It seems unlikely that an attorney would litigate a capital case more thoroughly than another kind of case merely out of an expectation of receiving higher payment, since defense attorneys commonly complain that the fees they are paid by the state for representation of capitally tried defendants are not adequate to compensate them at a reasonable hourly rate for the amount of time they spent representing the defendant.⁴⁹

Pre-Trial Incarceration. Under North Carolina law, while defendants charged with noncapital offenses must have conditions of pretrial release determined, the decision to permit a defendant charged with a capital offense to be released is discretionary with the presiding judge.⁵⁰ Defendants being prosecuted for murder in the first degree tend to be released less frequently than those prosecuted for less serious offenses. If the defendant is detained, the costs of pretrial incarceration also add to the ledger.⁵¹ However, this cost is less than it may appear, since if the defendant is convicted, jail time is usually credited against a sentence to imprisonment. (Of course this comment does not apply if the defendant is actually executed.)

Jury Selection. Because many serious murder cases receive extensive publicity in the area where the crime was committed, the defense may file motions to change the venue of the trial in order to obtain a fair and impartial jury.⁵² (This is true whether or not the case is prosecuted capitally.) The investigation required to provide grounds for such motions will include gathering detailed information including reports of all the media coverage of the case and the defendant, surveying residents of the county, obtaining testimony of lawyers, and then preparing a brief in support -of the motion.⁵³ "There is no question but that supporting such a motion properly takes a great deal of time" ⁵⁴ Even if a motion for change of venue is not granted, however, other issues tend to make jury selection more lengthy in capitally tried cases.

For example, another defense motion commonly made in capital cases is for individualized sequestered voir dire during jury selection.⁵⁵ While in some jurisdictions collective questioning on certain issues may be routine in noncapital cases, such a practice in capital litigation may lead to problems such as exposing other jurors to prejudicial or incompetent material and the exclusion of ambivalent potential jurors because those wishing to be excused will learn what responses lead to disqualification.⁵⁶ Of even more concern is the realization that collective voir dire might prevent the candor on the part of potential jurors that is necessary for counsel to effectively use statutory peremptory challenges.⁵⁷ Employing such individualized questioning also consumes more time in the effort to provide attorneys with sufficient information about each juror.⁵⁸ Because the granting of a motion for individual sequestered voir dire is discretionary,⁵⁹ defense counsel must tailor their motions and argument carefully to the facts of each particular case, e.g., to demonstrate that individualized sequestered voir dire is important to limit the effect of adverse publicity.⁶⁰

Similarly, detailed investigation may be necessary in cases where the race of the defendant and victim differ to support defense motions to prohibit the prosecution from peremptorily excusing certain potential jurors because of their race.⁶¹ To establish the history of a prosecutor's use of peremptory strikes may help in showing that the prosecutor's peremptory excusals in any given case are discriminatory. In order to adequately establish this history the defense may examine closed cases and may also engage an expert statistician.⁶² This process may be lengthened in states such as North Carolina that allow a greater number of peremptory challenges by statute during capital adjudication.⁶³

Additional time will also be required during jury voir dire as a consequence of Supreme Court rulings concerning the circumstances under which potential jurors who express opposition to capital punishment can be excused from serving in a capital case. In *Witherspoon v. Illinois*, 391 U.S. 510, 522 (1968) the Court held that prospective jurors may not be excused for cause, simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." Under this reasoning a juror could be removed under a challenge for cause only if the juror made it unmistakably clear that he or she would automatically vote against the death penalty or could not make an impartial decision. The Court modified this standard to some degree in *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) by permitting a challenge for cause if the prospective juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."

As one North Carolina defense attorney has explained:

If a prospective juror is challenged for cause by the prosecutor on Witherspoon-Witt grounds, the defendant is entitled, before the court rules on the challenge, to question the juror in detail about how the juror's views might interfere with the juror's duties. Witt, supra In exercising this right, of course, defense counsel will be undertaking to rehabilitate the juror; that is to establish that the juror's views in fact would not impair his or her ability to carry out the duties of a juror. Counsel's goal is to have the juror say that, despite personal beliefs, he or she would follow the court's instructions and apply the law. And the law requires only that the juror "be willing to consider all the penalties provided by State law." Witherspoon, supra at 522 n. 21.⁶⁴

This commentator adds that further questioning also results from case law mandating the exclusion of jurors whose views favoring the death penalty prevent their considering life imprisonment as a possible punishment.⁶⁵

Sentencing Phase. The sentencing phase which is part of the bifurcated proceeding approved in Gregg imposes costs not found in most noncapital murder cases. Measures unique to capital sentencing add to the length of the proceeding.⁶⁶ Additionally, the North Carolina requirement that a jury decide upon the sentence results in costs represented by daffy fees paid to⁶⁷ jurors, court employees and appointed counsel. The experts appointed to testify on behalf of an indigent defendant's attempt to establish the existence of mitigating circumstances also must be paid, as must any experts hired to rebut their testimony.

D. The Costs of Enhanced Protection: Postconviction Proceedings

It is in postconviction proceedings that the greatest difference in costs may exist between capital and noncapital cases.⁶⁸ In North Carolina the postconviction. process can include the following stages:

Step 1: Direct appeal to the Supreme Court of North Carolina.

Step 2: Petition for writ of certiorari in the United States Supreme Court to review decision of the Supreme Court of North Carolina.

Step 3: Motion for appropriate relief filed in Superior Court; hearing on this motion.

Step 4: Petition for certiorari filed in Supreme Court of North Carolina to review denial of motion by Superior Court.

Step 5: Petition for writ of certiorari filed in United States Supreme Court to review denial of certiorari by Supreme Court of North Carolina.

Step 6: Petition for writ of habeas corpus filed in United States District Court; hearing, in some cases, on this motion.⁶⁹

Step 7: Appeal of decision of United States District Court to Fourth Circuit Court of Appeals.

Step 8: Petition for writ of certiorari filed in United States Supreme Court.

Step 9: Briefing and argument in United States Supreme Court.

A number of these steps may be repeated depending on the disposition by a given court at any given stage.⁷⁰ A stay of the execution date is not automatically granted when a petition for review is pending.⁷¹ Therefore motions for stays and responses to these motions are also an inevitable part of the postconviction process. Further, the defense may file a request for commutation of the sentence at any time with the Governor of North Carolina.⁷² During virtually all of these stages indigent defendants are appointed counsel⁷³ (although the counsel appointed for representation of the defendant in federal proceedings are paid with federal funds). The prosecuting attorneys are paid with state funds for all of these proceedings.

Each of these stages can take considerable time to complete. The automatic appeal to the state supreme court, which is intended to ensure that the death sentence is neither random nor arbitrary,⁷⁴ involves review of the verdict and sentence and, in some cases, further increased time spent by appellate counsel and court personnel collecting and analyzing data for⁷⁵ proportionality review when it is required. Postconviction proceedings in both state and federal courts are also time consuming,⁷⁶ as are appeals to the federal circuit courts of appeal.⁷⁷ Petitions for writs of certiorari filed in the United States Supreme Court require many hours to prepare.⁷⁸

In capital cases there is also a special incentive for convicted defendants to bring as many⁷⁹ postconviction proceedings as are legally permissible. Unlike noncapital defendants, for whom collateral review can only provide a small hope that their sentence will be reduced, death row inmates may literally have their lives extended by the period of time required to litigate these petitions. Further, at least in the past, a significant percentage of these petitions have been effective in many federal jurisdictions in obtaining some relief in the form of either a new trial or a new penalty trial. As one commentator recently stated:

The post-conviction process is of paramount importance to the condemned. The figures on success rates in the State post-conviction system are incomplete, but the success figures in federal habeas

corpus proceedings are dramatic. The success rate of non-capital habeas petitions is low, with estimates ranging from 0.25% to 3.2% to 7%. The success rate in capital habeas is much higher, however: 60-75% as of 1982, 70% as of 1983, and 60% as of 1986. Between 1976 and 1983 Federal Appellate Courts ruled in favor of the condemned inmate in 73.2% of the capital habeas appeals heard compared to only 6.5% of the decisions in non-capital habeas cases.⁸⁰ Such results follow from the fact that capital proceedings are more complex and the courts are especially careful in review to ensure that the proper procedures were meticulously observed.⁸¹

Postconviction relief has long been possible under North Carolina and federal statutes.⁸² However, recent rulings by the United States Supreme Court restricting the availability of habeas in corpus relief in federal courts may heighten the role of state postconviction proceedings.⁸³ In practical terms, it may be the case that the postconviction motion for appropriate relief available under North Carolina General Statute section 15A-1420 will receive more attention. A number of North Carolina attorneys have opined that as a result of recent United States Supreme Court decisions, state court proceedings on these motions will become more lengthy as issues for which habeas corpus relief in federal courts are no longer available are litigated more thoroughly in the state system.⁸⁴ If this turns out to be true, state government may eventually shoulder more and more of the postconviction costs associated with capital litigation.

E. Conclusion

The enhanced constitutional and legislative provisions unique to capital litigation do make the adjudicatory process more expensive to state tax-payers than noncapital litigation. Zealous advocacy is also undoubtedly a source of increased length and thus cost of these proceedings. Table 3.1 summarizes the principal areas in which capital proceedings are likely to be more costly than noncapital. proceedings.

TABLE 3.1
 POTENTIAL SOURCES OF COST FOR
 CAPITALLY TRIED CASES IN NORTH CAROLINA

	Capital Trial VS. Noncapital Murder Trial		
Investigation			
a. More by law enforcement officials			P
b. More by defense-character and background of defendant	(C)		P
Pre-Trial Motions and Trial Preparation			
a. Constitutionality of death penalty procedures	C	c	P
b. Change of venue motion			P
c. More evidentiary motions	C,	c	P
d. Motion for second attorney		s	P
Jury Voir Dire			
a. Extra peremptory challenges		s	P
b. <i>Witherspoon</i> et. al questioning	C	c	P
c. Individualized, sequestered voir dire			P
d. Two defense attorneys		s	
Guilt Phase			
a. Greater length and complexity	(C)		P
b. Two defense attorneys		s	
Sentencing Phase			
a. Second (penalty) trial before jury		s	
b. Two defense attorneys			P
Direct Appeal			
a. More thorough review	(C)		P
b. Proportionality review		s	P
c. Two defense attorneys			P

	Capital Trial VS. Noncapital Murder Trial		
State Postconviction and Review			
a. Longer proceedings			(C) c P
b. More motions filed			(C) P
Federal Habeas Corpus Petition			
a. More likely to have counsel appointed			S P
b. More likely that defense win file more than one petition			P
Federal Appeal/Review			

a. More likely to have MI briefing and argument	(C) S P
State Clemency/Commutation Petition	
a. More preparation	P
b. Longer proceeding	P

C = Specific provisions of the Constitution of the United States as interpreted by the United States Supreme Court.

(C) = Arguments that certain procedures are or are not constitutionally required may lengthen proceedings, although some of the issues raised have not been definitively addressed by the United States Supreme Court. Note--only recently have attorneys in North Carolina begun to raise many issues under the Constitution of North Carolina.

c= Specific provisions of the Constitution of the State of North Carolina, some of which have been interpreted by the Supreme Court of North Carolina.

S= Federal Statute(s).

s= North Carolina Statute(s).

P= Common practice in this sort of case.

Note: The comparison here is among cases that go to trial. The effects on costs of plea-bargaining and sentence-bargaining are not considered. Also intentionally omitted is any attention to differences in cost at the corrections level.

NOTES

1. See, e.g., *State v. Spicer*, 299 N.C. 309, 261 S.E.2d 893 (1980).
2. *State v. Spicer*, 299 N.C. 309, 311, 261 S.E.2d 893, 895 (citing Comment, *The Right to Nondiscriminatory Enforcement of State Penal Laws*, 61 COLUM. L. REV. 1103, 1119 (1961)). See also *State v. Wilson*, 311 N.C. 117, 124, 316 S.E.2d 46, 50-51 (1984).
3. *State v. Lawson*, 310 N.C. 632, 644, 314 S.E.2d 493, 501 (1994), *cert. denied*, 471 U.S. 1120 (1985) (The United States Supreme Court says the federal constitution does not prohibit the use of absolute prosecutorial discretion in determining which cases to prosecute for first degree murder so long as discretionary decisions are not based on race, religion, or some other impermissible classification. We are not inclined to interpret our State constitution to require more.) (footnote omitted). In fact, in a footnote to *Gregg v. Georgia*, 428 U.S. 153, 199 n.50 (1976) the United States Supreme Court suggested that a criminal justice system disallowing prosecutorial discretion in the charging of capital crimes might "in many respects ... have the vices of the mandatory death penalty statutes we hold unconstitutional today in *Woodson v. North Carolina* [428 U.S. 280 (1976)] and *Roberts v. Louisiana* [428 U.S. 325 (1976)]." But cf. *DeGarmo v. Texas*, 474 U.S. 973, 975 (1985) (Brennan, J, dissenting from denial of certiorari) ("The prosecutor's choices [whether to prosecute, what offense to prosecute, whether to plea bargain or not to negotiate at all] are subject to no standards, no supervision, no controls whatever. There are, of course, benefits associated with granting prosecutors so much discretion, but there are also costs. Some of these costs are simply accepted as part of our criminal justice system. But if the price of prosecutorial independence is the freedom to impose death in an arbitrary, freakish, or discriminatory manner, it is a price the Eighth Amendment will not tolerate.")
4. U.S. CONST. amend V; N.C. CONST. art. 1, § 22; N.C. GEN. STAT. § 15-144 (1983). See N.C. GEN. STAT. § 15A-642(b) (1988) (indictment may not be waived in a capital case). The grand jury thus serves as a check on discretion in the early stages of a murder prosecution. If the grand jury returns a true bill of indictment for murder, the bill is sufficient to authorize a prosecution for either murder in the first degree or murder in the second degree. E.g., *State v. King*, 311 N.C. 603, 320 S.E.2d 1 (1984). See N.C. GEN. STAT. § 14-17 (Supp. 1992) (defining murder in the first and second degrees).
5. See generally N.C. GEN. STAT. §§ 15A-1011 through 15A-1027 (1988).
6. In those jurisdictions where plea bargaining is permitted ordinarily 85% disposed of by guilty pleas. See, e.g., H REYNOLDS, *COPS AND DOLLARS - THE ECONOMICS OF LAW AND JUSTICE* 205 (1981); Francis I Carney and Ann L. Fuller, *A Study of Plea Bargaining in Murder Cases in Massachusetts*, 3 SUFFOLK U. L. REV. 292 (1969).
7. See N.C. GEN. STAT. § 15A-2000 (1988).
8. *State v. Case*, 330 N.C. 161, 163, 410 S.E.2d 57, 58 (1991). Accord, e.g., *State v. Hill*, 331 N.C. 387, 402, 417 S.E.2d 765, 771 (1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1293 (1993), in which the Supreme Court of North Carolina stated:

In his first assignment of error, the defendant contends that the death penalty as provided for by N.C.G.S. § 15A-2000 is unconstitutional because the district attorney has the discretion to decide whether to seek the death penalty. "[T]he question of trying a first degree murder case as capital or non-capital is not within the district attorney's discretion." *State v. Britt*, 320 N.C. 705, 709, 360 S.E.2d 660, 662 (1987). The defendant's argument is without merit.

However, as mentioned in endnote 3, *supra*, it has been held that under the Fourteenth Amendment, a district attorney has wide discretion to decide whether to prosecute any given homicide as a first or second degree case. *State v. Lawson*, 310 N.C. 632, 643-44, 314 S.E.2d 493, 501 (1984), *cert. denied*, 471 U.S. 1120 (1985). *Accord, eg.*, *State v. Wilson*, 311 N.C. 117, 316 S.E.2d 46 (1984); *State v. Spicer*, 299 N.C. 309, 261 S.E.2d 893 (1980). *See generally* Peter K Daniel, Note, *State v. Wilson, The Improper Use of Prosecutorial Discretion in Capital Punishment Cases*, 63 N.C.L REV. 1136 (1985).

9. N.C. GEN. STAT. §§ 15A-2000 through 15A-2002 (1988). The United States Supreme Court has held that the Sixth Amendment to the Federal constitution (which is binding on the states through the Fourteenth Amendment) does not require a jury trial at the sentencing phase of a capital trial. *E.g.*, *Spaziano v. Florida*, 468 U.S. 447 (1984); *accord e.g.*, *Morgan v. Illinois*, _ U.S. __, 112 S.Ct. = (1992). The sentences which may be imposed for a capital conviction are life imprisonment or death. N.C. GEN. STAT. § 15A-2001 (1988).

10. *State v. Johnson*, 298 N.C. 47, 78, 257 S.E.2d 597, 619 (1979) ("The question raised is whether a defendant may plead guilty to first degree murder and by prearrangement with the State be sentenced to life imprisonment without the intervention of a jury. The answer is no."). Further, if the State does present evidence at trial that would support a jury's finding of an aggravating circumstance during the sentencing phase, the State is required to submit the relevant aggravating circumstance to the jury. *State v. Case*, 330 N.C. 161, 163, 410 S.E.2d 57, 58 (1991) ("It was error for the State to agree not to submit aggravating circumstances which could be supported by the evidence. The decision as to whether a case of murder in the first degree should be tried as a capital case is not within the district attorney's discretion.") (citations omitted). *See also* *State v. Jones*, 299 N.C. 298, 308, 261 S.E.2d 860, 866-67 (1980). In fact, the present authors observed few pleas of guilty to murder in the first degree among the cases sampled.

11. *State v. Johnson*, 298 N.C. 47, 79, 257 S.E.2d 597, 620 (1974) (citing *United States v. Jackson*, *390 U.S. 570 (1968)). In *Jackson* the Supreme Court reasoned that a capital sentencing scheme which encouraged guilty pleas because of the availability of a lesser maximum penalty for pled cases was unconstitutional because it impermissibly burdened the defendant's right to plead not guilty and be tried by a jury with the same lesser penalty as a possible outcome. One treatise remarks that the "[reasoning in] *Jackson* should, at a minimum, apply whenever a defendant faces the possibility of the death penalty if he is convicted at a trial, but a lesser maximum penalty if he pleads guilty or nolo contendere." DAVID S. RUDSTEIN, C. PETER ERLINDER, AND DAVID C. THOMAS, *CRIMINAL CONSTITUTIONAL LAW*, If 12.07, at 12-166 (Matthew Bender, 1991).

12. While the jury technically "recommends" a sentence under North Carolina capital sentencing statutes, the recommendation cannot be rejected by the trial judge. N.C. GEN. STAT. § 15A-2002 (1988); *State v. Jones*, 299 N.C. 298, 308, 261 S.E.2d 860, 866 (1980).

13. *See State v. Johnson*, 298 N.C. 47, 80, 257 S.E.2d 597, 620 (1979) (when the State communicates the lack of evidence that would support any aggravating circumstance, "[s]uch an announcement must be based on a genuine lack of evidence to support the submission to the jury of any of the aggravating circumstances

listed in G.S. 15A-2000(e)."). A murder case that is not prosecuted capitally may be prosecuted as either murder in the first degree or murder in the second degree. *See* note 4, *supra*.

14. *Id.*

15. *State v. Britt*, 320 N.C. 705, 711, 360 S.E.2d 660, 663 (1987) ("[A]ny such announcement [that the State has no evidence of an aggravating circumstance] must be based upon a genuine lack of evidence to support the submission of any aggravating factors ... [and] there is nothing to prevent the State from making the announcement at the beginning of the trial, *see State v. Meisenheimer*, 304 N.C. 108, 111 n.1, 282 S.E. 2d 791, 794, n.1, (1981), or at any other time.").

16. *State v. Watson*, 310 N.C. 384, 312 S.E.2d 448 (1984).

17. Eighth Amendment jurisprudence would support an argument that if the State has evidence strong enough to prosecute a case capitally then it would be arbitrary and capricious to allow a prosecutor to have the discretion to prosecute the case as anything less than a capital homicide. *See, e.g., DeGarmo v. Texas*, 474 U.S. 973, 975 (1985) (Brennan J., dissenting). But cf. *Gregg v. Georgia*, 428 U.S. 151, 199 n. 50 (1976); *State v. Jones*, 327 N.C. 439, 451, 396 S.E.2d 309, 315-16 (1990) ("It is not necessarily arbitrary and capricious under the federal constitution for a prosecutor to ask the jury for the death penalty in one case and not in another despite evidence of an aggravating circumstance in both.').

18. *Furman v. Georgia*, 408 U.S. 238 (1972).

19. Prior to the Court's decision in *Furman*, the California Supreme Court held the California death penalty unconstitutional under the state's constitution. *People v. Anderson*, 493 P.2d 880 (Cal. 1972). Following the California Supreme Court's decision, the United States Supreme Court dismissed the writ in the California case.

20. Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist dissented, arguing, among other things, that it was inappropriate for the Supreme Court to prohibit use of the death penalty, that capital punishment was practiced when the Constitution and Bill of Rights were adopted, and that the increasing infrequency of executions indicated capital punishment was being imposed in only the most extreme cases, not that it had become unacceptable to society.

21. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. The Eighth Amendment was incorporated into the Fourteenth Amendment and made applicable to the States in *Robinson v. California*, 370 U.S. 660 (1962). The North Carolina Constitution has a similar provision. N.C. CONST. art. I § 27. ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.*) At least one jurist has commented that the disjunctive "or" present in the state constitutional provision may indicate that defendants have greater protection under the North Carolina Constitution. *Medley v. N.C. Department of Correction*, 330 N.C. 837, 845-46, 412 S.E.2d 654, 660 (1992) (Martin, J., concurring).

22. 1973 N.C. Sess. Laws ch. 1201.

23. *Gregg v. Georgia*, 428 U.S. 153.(1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

24. *Woodson v. North Carolina*, 428 U.S. at 304.

25. After the United States Supreme Court invalidated North Carolina's mandatory death penalty statutes in *Woodson v. North Carolina*, the North Carolina General Assembly enacted the current death penalty statutes, §§ 15A-2000 through 15A-2003, which apply to all capital murders committed on or after June 1, 1977.

26. *Gregg v. Georgia*, 428 U.S. at 187 (citing *Furman v. Georgia*, 408 U.S. at 286-91 (Brennan, J., concurring) and *Furman v. Georgia*, 408 U.S. at 306 (Stewart, J., concurring)). See also, e.g., *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) ("Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.") (footnote omitted).

27. The proposition that "super due process" is required during the sentencing process in capital cases was discussed in Margaret Jane Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143 (1980). But cf. Beth S. Brinkmann, Note, *The Presumption of Life. A Starting point for a Due Process Analysis of Capital Sentencing*, 94 YALE L.J. 351, 354 (1984) ("Most of the Court's opinions concerning capital sentencing that mention the Fourteenth Amendment have not referred specifically to the due process clause, citing the Fourteenth Amendment only as the provision through which the Eighth Amendment applies to the states.") (footnote omitted).

28. *Lockett v. Ohio*, 438 U.S. 586 (1978).

29. *Id.* at 605-08. See also *McKoy v. North Carolina*, 494 U.S. 433 (1990) (holding that North Carolina's requirement that the jury unanimously agree on the existence of each proffered mitigating circumstance violates the principle that a sentencer may not be precluded from giving effect to all mitigating evidence); *Mills v. Maryland*, 486 U.S. 367 (1988).

30. *McKoy v. North Carolina*, 494 U.S. 433 (1990).

31. *Godfrey v. Georgia*, 446 U.S. 420 (1980).

31 *Tison v. Arizona*, 481 U.S. 137 (1987) (death penalty not unconstitutional for felony murder where defendant neither killed nor intended to kill victims, but had major personal involvement in felony and showed indifference to human life). See also *Enmund v. Florida*, 458 U.S. 782 (1982). In *Coker v. Georgia*, 433 U.S. 584 (1977) the Supreme Court of the United States held that the death penalty for rape was an unconstitutionally excessive punishment. Since then states have generally restricted application of capital punishment prosecutions to homicides even though state constitutional and statutory provisions have not always been changed to conform with *Coker*, cf. e.g., N.C. CONST. art. XI, § 2 (providing that the death penalty is available for murder, arson, burglary, and rape).

33. *Pulley v. Harris*, 465 U.S. 37 (1984).

34. *McCleskey v. Kemp*, 481 U.S. 279, 305-06 (1987). But cf. *Walton v. Arizona*, 497 U.S. 639, 656-674 (1990) (Scalia, J. concurring in part) (advocating a retreat from one of the two principal branches of Eighth Amendment jurisprudence developed since 1976).

35. *See* N.C. GEN. STAT. § 7A-450(bl) (1989); *State v. Hucks*, 323 N.C. 574,374 S.E.2d 240 (1988). "Me second chair" attorney may be appointed simultaneously with the first attorney appointed, or at any later date. The timing of the appointment varies from one judicial district to another. A proposed rule requiring a pre-trial conference at which the necessity for a second attorney would be determined has been suggested by the North Carolina Bar Association All-Bar Death Penalty Representation Conference. *See* SHORT-TERM APPROACHES FOR IMPROVING REPRESENTATION OF INDIGENTS IN CAPITAL CASES, REPORT AND RECOMMENDATIONS OF THE NORTH CAROLINA BAR ASSOCIATION ALLBAR DEATH PENALTY REPRESENTATION CONFERENCE (March 25, 1992).

Either or both of these appointed attorneys may be employees of the Public Defender's office in those jurisdictions having Public Defenders. *See* N.C. GEN. STAT. § 7A-450(bl) (1989); N.C. GEN. STAT. § 7A-452(a) (1989). In counties without a Public Defender and in jurisdictions in which the Public Defender assigns a member of the private bar to represent the indigent defendant the attorneys' fees are fixed by the Superior Court. N.C. GEN. STAT. § 7A-458 (1989). An indigent defendant who is convicted and who was assigned counsel is responsible for repayment of attorney fees paid by the State to the attorneys who represented him. N.C. GEN. STAT. § 7A-455 (1989). However, the North Carolina Administrative Office of the Courts estimates that as a practical matter only a minimal percentage of the attorney's fees judgments which are entered against indigent defendants in capital cases are in fact repaid. Telephone conversation between Dr. LeAnn Wallace, Co-Director of Research and Planning, the North Carolina Administrative Office of the Courts, and Donna Slawson, on October 30, 1992.

36. William S. Geimer *Law and Reality in the Capital Penalty Dial*, 1990-91 N.Y.U. REV. L. & SOC. CHANGE 273, 290 (1991).

37. Gary Goodpaster, *The Trial for Life Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 321-25 (1983).

38. *Id.* at 324.

39. *See generally* Robert L Spangenberg and Elizabeth R. Walsh, *Capital Punishment or Life Imprisonment? Some Cost Considerations*, 23 LOYOLA LA_ L. REV. 45, 48 (1989) (noting that in capital cases "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") (footnote omitted).

40. NEW YORK STATE DEFENDERS ASSOCIATION, INC, CAPITAL LOSSES: THE PRICE OF THE DEATH PENALTY FOR NEW YORK STATE 15 (1982) [hereinafter: CAPITAL LOSSES].

41. *E.g.*, Margot Garey, Comment, *The Cost of Taking a Life: Dollars and Sense of the Death Penalty*, 18 U.C. DAVIS L REV. 1221, 1253 (1985). *See generally* *Ake v. Oklahoma*, 470 U.S. 68 (1985).

42. Garey, *supra* note 41, at 1248.

43. CAPITAL LOSSES, *supra* note 40, at 17. *See, e.g.*, *Fierro v. Gomez*, 790 F. Supp. 966 (N.D. Cal. 1992) (subsequent case history omitted).

44. Garey, *supra* note 41, at 1253.

45. For example, in the North Carolina capital trial of John Dennis Daniels, 90 CRS 004580, Administrative Office of the Courts records show that payments of \$5,950 were made to experts appointed on motion of the defense and \$4,662.48 for experts appointed on motion of the prosecution.

46. CAPITAL LOSSES, *supra* note 40, at 12. See N.C. GEN. STAT. § 15A-952 (1988).

47. SOUTHERN POVERTY LAW CENTER, MOTIONS FOR CAPITAL CASES 3 (1981) (footnotes omitted). See generally N.C.GEN. STAT. § 15A-952 (1988) (defining motions that are required to be made before trial). Motions that have been made recently in capital litigation in North Carolina include:

- Motion to have the defendant examined for competency.
- Motion to obtain a private psychiatrist in order to develop insanity defense.
- Motion by the State to have the defendant examined after the defendant has served notice of an intention to raise the insanity defense.
- Motion by the defendant to have a prosecuting witness examined for possible mental problems.
- Motion for appointment of non-psychiatric experts.
- Motion to compel witnesses to speak to the defense.
- Motion for discovery of the aggravating circumstances upon which the State intends to rely.
- Motion to provide pretrial witness lists and witness statements.
- Motion to provide the criminal records of the State's witnesses.
- Motion to require the State to turn over any evidence of possible mitigation or exculpation.
- Motion to require law enforcement officials to keep rough notes made at the scene of the crime or during an investigation.
- Motion to inspect the premises or crime scene.
- Motion for individual voir dire and sequestration of the jury.
- Motion to prohibit death qualification of the jury.
- Motion for pre-voir dire jury instructions by the court which explain the sentencing process to the jury.
- Motion to prohibit the State from peremptorily excusing people who express reservations about the death penalty.
- Motion to increase the number of defendant's peremptory challenges.
- Motion to divulge any prior relationship between the district attorney's office and any juror.
- Motion to have the court reporter note the race of potential jurors.
- Motion to prohibit the prosecutor from removing African-American jurors peremptorily.
- Motion to provide for a jury questionnaire.
- Motion for a right to rehabilitate jurors prior to excusal for cause.
- Motion to be permitted to question jurors about their understanding of parole.
- Motion to inform jurors of race of victim in an inter-racial killing and to question the juror about how their attitudes on race might affect them.
- Motion to quash a short form indictment.
- Motion to require the State to elect prior to trial which theory of murder it intends to prosecute defendant for.
- Motion to quash the indictment for failure to assert which aggravating factors are present in the case.
- Motion to have a pretrial hearing on the existence of aggravating circumstances.
- Motion to declare the death penalty unconstitutional due to prosecutors' unbridled discretion.
- Motion to declare the death penalty unconstitutional due to impermissible subjective discretion.
- Motion to declare the death penalty unconstitutional due to its alleged violation of the right to privacy.
- Motion to declare the death penalty unconstitutionally vague.
- Motion to preclude death penalty for being imposed on mentally disabled individuals.

- Motions to declare various aggravating circumstances unconstitutional because of vagueness.

Other procedural motions that have been lodged during the penalty phase include the following:

- Motion to prohibit the "duty" instructions.
- Motion to require State to disprove the presence of mitigating factors.
- Motion to prohibit unanimity instruction for mitigation.
- Motion to prevent the State from proving prior convictions of felonies other than by certified records.
- Motion to prevent the use of a conviction if it has not been affirmed on appeal.
- Motion in limine to prevent the prosecutor from arguing the deterrent effect of the death penalty.
- Motion in limine to prevent the prosecutor from arguing specific deterrence.
- Motion in limine to prevent the prosecutor from arguing that the Bible does not forbid the infliction of the death penalty.
- Motion in limine to prevent the prosecutor from arguing the impact of the crime on the victim's family.
- Motion in limine to prohibit the prosecutor from arguing what message the jury would send to the community.
- Motion in limine to prevent the prosecutor from arguing about parole eligibility.

In addition to the above either side may Me even more standard criminal practice motions such as: motion to limit the number of photographs allowed into evidence, motion for complete recodation of all proceedings, motion for reciprocal discovery of defense experts' reports before trial, motion in limine to prohibit the defense from arguing the result of the jury's failure to agree, motion in limine to prohibit the defense from arguing or stating in jury voir dire that a life sentence means the defendant will be imprisoned for the rest of his or her natural life, motion in limine to prohibit the defense from arguing about what juries have done in other cases, etc. *See also* Mary Ann Tally, *Motions Practice, in NORTH CAROLINA ACADEMY OF TRIAL LAWYERS, DEATH PENALTY: DEFENSE FOR THE 90's* (1990).

48. *See* Garey, *supra* note 41, at 1248.

49. *Cf generally, e.g.,* Albert L. Vreeland, II, Note, *Vie Breath of the Unfeed Lawyer. Statutory Fee Limitations and Ineffective Assistance of Counsel in Capital Litigation*, 90 MICH. L. REV. 626 (1991).

50. N.C. GEN. STAT. § 15A-533 (1988). *See* N.C. GEN. STAT. § 14-17 (Supp. 1992).

51. Defendants are usually incarcerated in county jails prior to trial. N.C. GEN. STAT. § 15-126 (1983).

52. The Sixth Amendment to the United States Constitution guarantees that "[i]n all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury" U.S. CONST. amend. VI. *See generally* Lockhart v. McCree, 476 U.S. 162, (1986). The Fourteenth Amendment guarantees the right to a jury trial in all State criminal cases which, were they tried in a federal court, would come within the Sixth Amendment guarantee of trial by jury. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). *See also* N.C. CONST. art. I, § 24; N.C. GEN. STAT. § 15A-957 (1988).

53. Tally, *supra* note 47, at 12.

54. *Id.* at 13.

55. "[T]he rationale for voir dire in most jurisdictions is two-fold: first and foremost, to obtain a pet ' it jury

which is impartial, able* to apply the law fairly and to consider the evidence before it objectively and, second, to allow the parties to exercise their peremptory challenges intelligently." Marshall Dayan, Robert Steven Mahler, and M. Gordon Widenhouse, *Searching for an Impartial Sentencer Through Jury Selection in Capital Trials*, 23 LOYOLA L.A. L. REV. 151, 152-53 (1989) (footnote omitted). See *Rosales-Lopez v. United States*, 451 U.S. 182 (1981).

56. Goodpaster, *supra* note 37, at 327.

57. *Id.* at 327-28 (citing Dennis N. Balske, *New Strategies for the Defense of Capital Cases*, 13 AKRON L. REV. 331, 341-42 (1979)). In capital cases both the prosecution and the defense are allowed fourteen peremptory challenges. N.C. GEN. STAT. § 15A-1217(a) (1988).

58. Garey, *supra* note 41, at 1256.

59. See N.C. GEN. STAT. § 15A-12140 (1988); *State v. Black*, 328 N.C. 191, 400 S.E.2d 398 (1991).

60. See Kenneth J. Rose, *Investigation in Capital Cases*, in NORTH CAROLINA ACADEMY OF TRIAL LAWYERS, DEATH PENALTY: DEFENSE FOR THE 90'S at 7 (1990).

61. See *Batson v. Kentucky*, 476 U.S. 79 (1986) (defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury based solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial); see also *Powers v. Ohio*, 499 U.S. ___, 111 S.Ct. 1364 (1991) (in trial of a white criminal defendant, a prosecutor is prohibited from excluding African-American jurors on the basis of race); *Georgia v. McCollum*, ___ U.S. ___, 112 S.Ct. 2348 (1992) (federal constitution prohibits a criminal defendant from engaging in purposeful discrimination on the ground of race in the exercise of peremptory challenges). See generally, Rose, *supra* note 60, at 7.

62. See Rose *supra* note 60, at &

63. N.C. GEN. STAT. § 15A-1217(a) (1988).

64. Roger W. Smith, *Jury Selection: Techniques and Legal Principles For Selecting a Fair and Impartial Jury in a Capital Case*, in NORTH CAROLINA ACADEMY OF TRIAL LAWYERS, DEATH PENALTY: DEFENSE FOR THE 90's at 9 (1990).

65. *Id.* at 13. See *Morgan v. Illinois* ___ U.S. ___, 112 S.Ct. = (1992) (under the Fourteenth Amendment a trial court must, at a capital defendant's request, inquire into the prospective juror's views on capital punishment; the defendant may challenge for cause any prospective juror who would automatically vote for the death penalty). See also *Ross v. Oklahoma*, 487 U.S. 81 (1988); *Adams v. Texas*, 448 U.S. 38 (1980).

66. See N.C. GEN. STAT. § 15A-2000 (1988); *Gardner v. Florida*, 430 U.S. 349 (1977) (due process is required during capital sentencing phase). As one commentator remarked, "[t]he 'growth industry' in procedural doctrine has imposed on the penalty trial the constitutional due process model of the guilt trial." Robert Weisberg, *Deregulating Death*, 1983 SUPREME COURT REVIEW 305, 338 (1984) (mentioning that between the time *Furman v. Georgia* was handed down and 1982, "the capital defendant [had] gained, among other things, a confrontation right to rebut State evidence, a compulsory process right to introduce favorable penalty phase testimony regardless of the constraints of State evidence law, application of the

privilege against self-incrimination to evidence used only in the penalty trial, and a right to preclude double jeopardy where the defendant has won a 'life sentence verdict.') (footnotes omitted).

67. The United States Supreme Court has held that the United States Constitution does not require a jury to impose the sentence of death or to make the specific findings authorizing the imposition of a sentence of death. E.g., *Spaziano v. Florida*, 468 U.S. 447 (1984); *accord. e.g.*, *Walton v. Arizona*, 497 U.S. 639 (1990). However, in North Carolina, this is required by statute. N.C. GEN. STAT. § 15A- (1988). See endnote 12, *supra*. See also N.C. GEN. STAT. § 7A-312 (1989) (regarding juror fees), 7A-314 through 7A-316 (1989) (payment to witnesses in criminal actions).

68. See generally *The Spangenberg Group, Time and Expense Analysis In Post-Conviction Death Penalty Cases*, (1987); John Kaplan, *The Problem of Capital Punishment*, 1983 U. ILL L. REV. 555, 573 (1983).

69. See 28 U.S.C. § 2254 (1977). Counsel may be appointed to aid an indigent State prisoner seeking habeas corpus relief in federal courts "at any stage of the case if the interest of justice so requires." Rules Governing § 2254 Cases in the United States District Courts, 28 U.S.C. foll. § 2254, Rule 8(c) (1988). See *Townsend v. Sain*, 372 US. 293, 312 (1963) (where an applicant for a writ of habeas corpus alleges facts which, if proved, would entitle him to relief, the federal court to which the application is made has the power to receive evidence and try the facts anew.").

70. *Eg.*, the opinion in *McKoy v. North Carolina*, 494 U.S. 433 (1990) has resulted in new sentencing hearings in a number of death cases. All of these new sentencing hearings will be capital proceedings. See *State v. Britt*, 320 N.C. 705, 710, 360 S.E.2d 660, 662-63 (1987); see generally, RICHARD KANE, NORTH CAROLINA ADMINISTRATIVE OFFICE OF THE COURTS, ESTIMATES OF JUDICIAL DEPARTMENT COSTS FOR RESENTENCING TRIALS IN CAPITAL CASES FOLLOWING *McKoy v. North Carolina*, (June 1, 1990) at pp. 7-8.

71. See, e.g., *Barefoot v. Estelle*, 463 U.S. 880 (1983) (when a capital petitioner presents a non-frivolous federal claim in appealing a district court denial of habeas corpus, the circuit court need not grant a stay of execution in order to decide the appeal according to its full briefing and argument procedures).

72. N.C. CONST. art. 111, § 5(6); N.C. GEN. STAT. § 147-21 (1985).

73. Indigents sentenced to life or death are also entitled to an appointed attorney during the appeal to the Supreme Court of North Carolina required under North Carolina General Statute 15A-2000. *Douglas v. California*, 372 U.S. 353 (1963); N.C. GEN. STAT. § 7A486.3(l) (1989). In addition, while there is no federal or state constitutional right to the appointment of counsel during post-conviction proceedings in either capital or noncapital cases, in North Carolina such representation is available statutorily for state post-conviction proceedings. *Murray v. Giarratano*, 492 U.S. 1 (1989) (holding that neither the Eighth Amendment nor the due process clause of the federal Constitution require states to provide counsel at the state post-conviction stage). Cf also *Pennsylvania v. Finley*, 481 U.S. 551 (1987) (neither the due process clause nor the equal protection clause requires appointment of counsel in state post-conviction proceedings in noncapital cases); see generally *Strickland v. Washington*, 466 U.S. 668 (1984) (discussing the constitutional right to effective assistance of counsel); N.C. GEN. STAT. §§ 7A-451(a)(1),(2), and (3) (1989). However, the fees billable by defense counsel for representation of indigent defendants during commutation proceedings are not payable with state funds.

Appointed counsel is also available for certain postconviction proceedings in federal courts; attorneys fees for defense attorneys representing defendants in federal court are paid from federal funds. 18

U.S.C. § 3006A (Supp. 1992) and 28 U.S.C. § 2254 (1977) (under the criminal justice act defendants incarcerated in state correctional facilities are entitled to the appointment of counsel "at any stage of the case if the interest of justice so requires" when petitioning for writs of habeas corpus in United States courts).

74. *Gregg v. Georgia*, 428 U.S. 153, 206 (1976).

75. Proportionality review is required statutorily in North Carolina. N.C. GEN. STAT. § 15A-2000(d)(2) (1988). *See generally*, James G. Exum, Jr., *The Death Pena) in North Carolina*, 8 CAMP. L REV. 1, 8-10 (1985) (describing proportionality review in two cases); cf. *Pulley v. Harris*, 465 U.S. 37 (1984) (proportionality review not required under the Eighth Amendment to the federal Constitution). Again, a criminal indigent defendant has a federal constitutional right to counsel during this mandatory first appeal. *Douglas v. California*, 372 U.S. 353 (1963).

76. *See generally* AMERICAN BAR ASSOCIATION, POST-CONVICITION DEATH PENALTY REPRESENTATION PROJECT, MANUAL FOR ATTORNEYS REPRESENTING DEATH-SENTENCED PRISONERS IN POSTCONVICIION PROCEEDINGS at 120 (1987) (noting that, "[I]N many postconviction cases, . . . one of the issues to be presented will be the ineffective assistance of counsel at the penalty stage of the trial. In order to present the issue, postconviction counsel must, essentially, put on the [sentencing] hearing that should have been put on at trial"); Michael Mello, *Facing Death Alone. The Post-Conviction Attorney Crisis on Death Row*, 37 AM. U. L REV. 513, 554-563 (1988) (noting that post-conviction capital litigation "is among the most difficult and time consuming [kind of litigation]"); 'Me Spangenberg Group, *Tune and Expense Analysis in Post-Conviction Death Penalty Cases in North Carolina* (1988). *See also* discussion in Chapter 7 of this report

77. "In one respect capital appeals are different from other appeals: in an ordinary appeal, whether civil or criminal, you weed out the weak issues and go only with your strong issues. Although most appellate judges might disagree, you cannot drop any issue on appeal of a federal habeas petition unless the issue is patently frivolous. You must raise every issue that has any arguable merit, even if you only do so briefly. That is because the law changes so often . . ." AMERICAN BAR ASSOCIATION, POSTCONVICITION DEATH PENALTY REPRESENTATION PROJECT, MANUAL FOR ATTORNEYS REPRESENTING DEATH-SENTENCED PRISONERS IN POSTCONVICITION PROCEEDINGS at 128 (1987).

78. Garey, *supra* note 41, at 1264, n.25. One North Carolina defense attorney who has filed a number of petitions to the United States Supreme Court directly following appeal to the Supreme Court of North Carolina estimates that on average a petition in a death case takes about seventy hours to prepare, whereas a petition in a life case takes forty-five hours. Telephone conversation between Ann Petersen and Donna Slawson on March 22, 1993. Further, when a writ of certiorari is granted and the United States Supreme Court rules favorably for a particular defendant many other cases may be affected. For example, the ruling in *McKoy v. North Carolina*, 494 U.S. 433 (1990) that jury instructions systematically given in the sentencing phase of capital cases were unconstitutional affected many pending cases in which these instructions had been given. As a result of the ruling, resentencing has had to be ordered in many of these cases, at considerable state expense. In response, the General Assembly of North Carolina passed legislation appropriating special funds to pay for the costs generated by this wave of new sentencing hearings. 1989 N.C. Sess. Laws, ch. 1066 (1990) and 1991 N.C. Sess. Laws, ch. 742 (1992).

79. In North Carolina a common motion filed is the motion for appropriate relief under article 89 of chapter 15A of the General Statutes. Relief is also technically available under chapter 17 of the General Statutes. An indigent defendant is entitled to appointed counsel for a hearing on a petition for writ of habeas corpus and for a motion for appropriate relief filed in North Carolina state courts. N.C. GEN. STAT. § 7A-451(2), (3) (1989).

80. Mello, *supra* note 76 at 520-21. According to officials in the North Carolina Attorney General's office and the Office of the Appellate Defender the "success rate" for defendants whose convictions were obtained in the state courts of North Carolina are not nearly as high. In the past several years very few death sentences have been vacated with finality by a federal court. *E.g.*, *McDowell v. Dixon*, 858 F.2d 945 (4th Cir. 1988), *cert. denied*, 489 U.S. 1033 (1989).

81. Kaplan, *supra* note 68 at 573 (citing Margaret Jane Radin, *Cruel Punishment and Respect for Persons*. *Super Due Process for Death*, 53 S. CAL L REV. 1143 (1980)).

82. *See* N.C. CONST. art. I §§ 18, 21; N.C. GEN. STAT. chapters 17, 15A 28 U.S.C. § 2254 (1977).

83. *See, e.g.*, *Keeney v. Tamayo-Reyes*, _ U.S. ___, 112 S. Ct. 1715 (1992); *McCleskey v. Zant*, _ U.S. 111 S.Ct. 1454 (1991). *Cf generally* Franklin E. Zimring, *Inheriting the Wind: The Supreme Court and Capital Punishment in the 1990s*, 20 FLA. ST. U. L. REV. 7 (1992).

84. Conversations with attorneys in the Appellate Defender's office during interview on September 3, 1992, and interviews with attorneys in the North Carolina Attorney General's office on September 16, 1992.

4. ACCOUNTING RULES

To develop a working definition of the "cost" of the death penalty, we begin with a general discussion of cost and then explain how the accounting rules adopted for this study relate to the underlying concept. In Chapter 2 we defined two approaches to defining the cost: "Single Case" and "Cohort." The accounting rules developed below are applicable to both approaches.

A. Opportunity Cost

The "cost" of a particular action or choice, as this concept is understood in economics, is defined by the value of opportunities foregone. For example, the decision to spend two hours watching a movie comes at the cost of reading, going for a walk, or whatever else is the most valued alternative use of the time, and the \$5 price of admission also has other valued uses. Similarly, extra resources allocated to adjudicating a capital case are not available for other uses, and it is the value of these other uses that defines the cost of the death penalty. For the district attorney's office, the opportunity costs include the value of the additional time required on the part of the DA, one or more assistant DAs, and other staff people. This is time that could have been devoted to other cases. The decision to go forward with a capital trial thus comes at the cost of reduced resources available for prosecuting the rest of the district attorney's caseload, and ultimately perhaps at the cost of less successful prosecutions in one or more cases. Of course the extra costs of trying the case capitally are not limited to the DA's office, but also include the additional resources required for indigent defense, pretrial investigation, and the trial itself.

While for any one case it appears that the opportunity costs of a capital trial come in the form of reduced capacity to deal effectively with other criminal cases, that is not necessarily true in the aggregate. The legislature may increase the appropriation to the Judicial Department to accommodate the extra burden created by capital cases.¹ If so, then over the long run the trialcourt cost of the death penalty does not take the form of reduced capacity to try other cases. Rather, the opportunity cost is borne by other state agencies (which receive a smaller appropriation than they otherwise would) or perhaps by taxpayers, if the overall state budget is increased in order to increase the capacity of the Judicial Department.

Our approach is to interpret the cost of capital cases as the cost of the additional resources that must be added to the system in order to preserve its capacity to deal with the remainder of its caseload in the face of the extra demands created by capital cases. This could be labelled the "input cost" approach. We make no claim that the Judicial Department does in fact have a larger budget than it would if there were no death penalty. But an estimate of the additional resources needed is still meaningful and useful, whether or not those resources are actually provided.

The other valid approach to estimating costs would focus on outputs rather than inputs. The task is to estimate the value of what is lost when some of the attorneys' time and other resources purchased with a given budget are allocated to capital cases. Presumably some other cases are then dealt with less effectively. The opportunity cost of the death penalty would then be measured in terms of a reduction in the quality of justice in the remainder of the caseload. This approach, while valid in principle, is very difficult to implement in practice. Hence we focus on the cost of additional inputs. Fortunately, while it is not necessarily so, there is some expectation that the magnitudes of the "input cost" and the "output cost" will be similar, in which case it does not make much difference which approach is chosen.²

Our "input cost" approach runs into some difficulty in dealing with the costs associated with the Supreme Court of North Carolina. The Court spends a considerable portion of its caseprocessing

"capacity" on appeals involving capital cases. We can and do estimate the price of the inputs needed to deal with these cases, including the time of law clerks and justices. The problem is that while the number of clerks and most other Court resources can be increased in response to a larger workload, the number of justices is fixed.³ To an extent, however, the "productivity" of these justices can be increased by providing them with additional assistance. Therefore our task is to estimate the cost of adding sufficient support to increase productivity to the level needed if adjudicating capital cases is not to detract from the Court's capacity to deal with other cases. While the task is clear in principle, it is difficult in practice.⁴

In sum, we seek to estimate the opportunity cost of the death penalty. There are two valid but quite different approaches to this task. *We chose the "input cost" approach simply because the alternative "output cost" approach is more difficult to implement. Our estimates can be interpreted as the hypothetical price of adjudicating some cases capitally without reducing the capacity of the system to deal with the remainder of its caseload.

B. Omitted Costs

The costs of investigation, adjudication, and punishment murder cases are borne by a number of government agencies and private individuals. Our analysis is limited to the costs borne by the state or county. Excluded from consideration are costs incurred by the defendant and other participants who are not compensated for their time, such as unpaid witnesses, or by those who receive only partial compensation. In the latter group are some jurors and/or their employers, and some court-appointed attorneys who forego more lucrative business in order to mount an adequate defense.⁵ We also exclude costs incurred by the federal government in connection with federal postconviction proceedings. Thus our estimates provide information on the use of state resources, but understate the full costs of the death penalty.

Also omitted from our estimates is any account of the extra costs incurred by law enforcement officers in capital cases. Note that the relevant question given our perspective is rather subtle. In particular, the question is not whether police tend to investigate serious murders more thoroughly than other crimes -- surely they do. Rather, the question is whether the police tend to investigate serious murders more thoroughly if they expect that the defendant will ultimately receive a capital trial than if they expect there to be a noncapital trial for murder. We do not know the answer, and have not been able to pursue this matter in the course of our research.

C. Plea Bargaining and the Death Penalty

A complete evaluation of the death penalty would require an accounting of the benefits as well as the costs.⁶ This report, however, is for the most part limited to the cost side of the ledger. The most important benefits that have been asserted for the death penalty include crime-preventive effects (deterrence and incapacitation), and justice for the victim's survivors. Another more subtle alleged benefit is that the availability of the death penalty may strengthen the DA's hand in some murder prosecutions, providing a threat that will encourage the defendant to plead guilty. On the other hand, the reverse has also been asserted -- that the availability of the death penalty in aggravated murder cases increases the number of trials.⁷

The Supreme Court of North Carolina has limited the scope of sentence bargaining in capital murder cases, as explained in Chapter 3 above. Nonetheless, most defendants who are convicted of murder are not tried, but rather plead guilty -- usually to second degree murder, for which they can hope to be paroled after ten years. While most of these cases are never considered capital by the relevant actors, there are some that are prosecuted capitally up to the Point when the plea is submitted and accepted. Our sample

of murder cases, which is discussed at length in Chapter 6, provides some evidence on the frequency of pleas in cases that were -Prosecuted capitally. In a sample of 42 such cases, 9 (21 percent) resulted in a guilty plea to murder.⁸ There is little question that the threat of receiving the death sentence persuades some defendants to plead guilty to second degree murder who would otherwise be willing to take their chances with a trial on a first-degree murder charge.⁹

As noted, the contrary argument is that having the death penalty on the books increases the likelihood of a trial in an aggravated murder case, since only a jury can return a death sentence in North Carolina. District attorneys may feel compelled to pursue the death penalty by their understanding of the law or their responsibility to the public, whereas in the absence of the death penalty option they might believe it was acceptable to negotiate a plea for something less than the maximum possible sentence. Since we have no direct evidence on the effect of the death penalty option on the likelihood of trial, and since there are plausible arguments in both directions, we proceed on the assumption that there are neither more nor fewer trials as a result of the death penalty option.

NOTES

1. The Judicial Department in North Carolina includes the Superior and District Court judges and the offices of the District Attorneys and the Public Defenders. It also includes the Clerks of Superior Court, the Appellate Defender's Office and both Appellate Courts.
2. The key assumption is that the courts' budget is set with some regard to the value of what they produce. If an additional assistant district attorney would produce output that has greater value than her salary, then it would be in the public interest to budget that additional position. Ideally the budget will be expanded until the cost and benefit of an additional unit of input are equal. In that case, we can assess changes at the margin by either focusing on outputs or on inputs.
3. The number of law clerks is specified by statute, and can be increased by vote of the legislature. The number of justices, on the other hand, is fixed by the North Carolina Constitution at nine or fewer. N.C. CONST. art. IV § 6. Given this limit, the legislature could increase the number of justices by one or two, but no more.
4. If the Court's capacity is invariant with respect to caseload, then the time spent on capital cases comes at the cost of hearing other cases. The opportunity cost of the capital cases then can be understood in terms of cases that are denied discretionary review. The ultimate result will be delays in testing the constitutionality of new laws, and in settling disputes concerning common law. It would be very difficult indeed to place a monetary value on such costs.
5. In this study we have not attempted to measure the psychological costs incurred by the trial attorneys and other participants in capital litigation. According to several defense attorneys with whom we spoke these can include prolonged periods of sleeplessness, weight loss, anxiety, and other symptoms of severe stress.
6. See generally Richard A. Hoffer and Ann D. Witte, *Benefit-Cost Analysis of the Sentencing Decision: The Case of Homicide*, in THE COSTS OF CREWE (C.M. Gray, ed.) (1979).
7. Margot Garey, Comment, *The Cost of Taking a Life: Dollars and Sense of the Death Penalty*, 18 U.C. DAVIS L REV. 1221,1253 (1985); NEW YORK STATE DEFENDERS ASSOCIATION, INC., CAPITAL LOSSES: THE PRICE OF THE DEATH PENALTY FOR NEW YORK STATE 15 (1982).
8. The sample is for murder cases disposed of in 1990 or 1991 in eight counties. The nine cases in which there was a guilty plea were considered capital at the time of indictment, as indicated to us by one of the attorneys who was involved in the case, or by the fact that the judge appointed two attorneys to represent the (indigent) defendant. We note that there were several other cases that were being prosecuted capitally at the time of indictment but were tried noncapitally, or were disposed of by guilty plea to a crime less than second degree murder. In the latter cases, it seems reasonable to assume that the plea was accepted because the district attorney had reassessed the seriousness of the crime or of the defendant's role in the crime.
9. This observation is confirmed by several conversations we have had with DAs and with the Appellate Defender's Office. We were also told that in some cases DAs refuse to accept the guilty plea because a life sentence with a ten year parole date is not considered sufficient punishment.

5. UNIT COSTS

To estimate the costs of the extra resources required to adjudicate capital cases, we begin by estimating the unit cost to the state of each of the principal "inputs" or "resources," and then ascertaining how many units of each resource were allocated to each murder case in our sample. This chapter explains our approach to estimating the relevant unit costs.

While our objective is to develop estimates that would be generally applicable to murder cases throughout North Carolina, it should be noted that our data collection efforts for trial focused on six prosecutorial districts. Our sampling procedure and its implications are explained in greater detail in Chapter 6.

A. Cost Accounting

The state's costs for a murder trial include both direct expenditures as well as the opportunity cost of the time of a number of state employees and facilities. The direct expenditures, including payments to court-appointed defense attorneys, jurors and expert witnesses, pose no conceptual problem; as long as the relevant accounting records are available, we simply record the amounts and assign them to the relevant case. More difficult is the problem of estimating the costs of resources for which there are no itemized bills: the time devoted to a case by the district attorney and others in the DA's office, the time that a courtroom is used for pretrial motion hearings and the trial, and so forth. In addressing these problems, we were guided by standard cost accounting procedures.¹

We illustrate our approach with the example of the district attorney's office. Our task was to estimate the cost of an hour of time for each of the attorneys and others in the office, and then estimate the amount of time they spent dealing with each of the murder cases in our sample.

In assigning value to time, we made extensive use of the Position Cost Reports prepared by the AOC's Fiscal Services Division. These reports are intended to provide the legislature with the information on the costs of adding new positions within the Judicial Department. Listed on these documents are information on salaries, fringe benefits, equipment, supplies, and other expenses. For each position, costs are divided into annual (recurring) and one time (nonrecurring) expenditures for equipment, furniture, books, and so forth. We amortized the latter on a straight line basis over five years.²

In addition to the attorneys, a DA's office typically includes an administrative assistant, several secretaries, and two or three victim/witness coordinators. Instead of attempting to estimate the actual amount of time each of these support personnel spent on each murder case, we simply assumed that the use of their time was tied directly to the allocation of time by the attorneys in the office. For example, in an office with 10 attorneys and four secretaries, we assumed that each hour of attorney's time on a case was coupled with 4/10 of an hour of secretary's time devoted to that same case. While there is surely some variation from case to case, it seems reasonable to assume that this sort of proportional relationship holds on the average for criminal cases. In the practice of cost accounting, this approach is known as *loading resource units*.³ The key resource in criminal cases is attorney's time, each unit of which we "load" with the value of the proportionate amount of time by support staff.

We did not include investigators in the loading of support staff onto the attorneys' time in the offices of the District Attorneys. Our inquiries revealed that the investigators' duties differ considerably from office to office in North Carolina. Instead of assuming that their time was tied directly to the

attorneys' time, we attempted to obtain direct estimates of how much time investigators spent on each of the cases in our sample.

In general, good accounting practice requires inclusion of the *indirect costs* associated with the cost objective (adjudicating murder cases)⁴. These are costs of general administration or other activities incurred for a common purpose, not readily allocated to any one case. In the trial court system, the Administrative Office of the Courts provides the general support and administrative functions in connection with planning, budgeting, financial management, purchasing, personnel administration, and so forth. For 1991 the AOC's expenditures for such administrative overhead activities amounted to \$11.2 million, which works out to \$4.73 per case disposed of in the District or Superior Courts during that year. Other state government offices provide some support to the AOC, including audit, budgeting, administrative staff payroll, high value purchasing, and legislative budget analysis. Again, the value of these services, when divided among the case load of the court system, is so small as to represent a trivial addition to the cost of processing a murder case. For that reason we have taken no further account of these indirect costs in our calculations.⁵ However, we did incorporate in our estimates the indirect costs associated with the administrative activities of DAs and PDs and their administrative assistants.

We now turn to a detailed accounting of the unit costs for the principal officials and procedures in murder cases.

B. Offices of the District Attorney and the Public Defender

The six prosecutorial districts that were the focus of our study of trial costs included Nash/Edgecombe/Wilson (District 7), Wake (10), Durham (14), Guilford (18), Mecklenburg (26), and Gaston (27A). The last four of these have established public defender offices to defend indigent defendants.⁶ The tables below indicate the number of attorneys and support staff in each of these districts. The "salary and fringe" information is the average for the personnel employed in these districts as of August 1992.⁷ (Fringe payments include retirement, Social Security, and hospitalization insurance premiums.) The "other" costs for each position are based on the relevant Position Cost Statements, with some modifications.⁸

To calculate the "loaded resource units" it is necessary to prorate the cost of support staff time by the ratio of the number of staff to the number of attorneys in the office. (The investigators were omitted from this calculation for the district attorney's offices, as explained above.) Tables 5.1 and 5.2 list the number of attorneys and staff in each district.⁹ We computed this loading factor separately for each district.

TABLE 5.1

PERSONNEL IN SIX DISTRICT ATTORNEY OFFICES

District	#DA& ADAs	Admin. Assist.	Investigator.	Legal Assist.	victim/ Witness
7	10	1	1	4	2
10	18	1	1	5	3
14	10	1	1	4	2
18	16	1	1	5	3
26	26	0	0	9	2
27A	8	1	1	3	2
Salary + Fringe	\$104,069 DA \$57,017 ADA	\$37,431	\$36,036	\$26,262	\$27,756
Other Costs	\$4,386 DA \$3,097 ADA	\$2,400	\$2,973	\$2,456	\$3,449

TABLE 5.2
PERSONNEL IN FOUR PUBLIC DEFENDER OFFICES

District	# PD & APDs	Admin. Assist	Investigator	Legal Assist.
14	9	0	2	4
18	14	0	3	4
26	21	1	4	9
27A	7	0	2	
Salary + Fringe	\$88,865 PD \$54,772 APD	\$37,431	\$41,126	\$26,262
Other Costs	\$4,080 PD \$3,020 APD	\$2,400	\$2,981	\$2,456

The loading factors also include the value of time spent in general administration of the offices. Four DAs and four PDs provided us with estimates of the fraction of their time that is devoted to administration.¹⁰ We combined the value of this time with the position cost of the administrative assistant, and then distributed the resulting total over the number of assistant PIN or DAs in the office.¹¹

The total loading factor -- administration plus staff support -- was calculated for each district for the offices of the DA and PD. Table 5.3 below summarizes the results.¹²

TABLE 5.3

LOADED RESOURCE UNIT COST

Position	Position Cost	Load	Total	Total Per Hour
DA	\$108,455	\$37,797	\$146,252	\$83.10
PD	\$92,945	\$27,280	\$120,225	\$68.31
ADA	\$60,114	\$37,797	\$97,911	\$55.63
APD	\$57,792	\$27,280	\$85,072	\$48.34
DA Investig.	\$39,000	0	\$39,000	\$22.

In translating the annual rate into an hourly rate, it is necessary to estimate the number of hours in an average work year (which can be "banked" for future use) and paid vacation time (ranging from 11.75 days per year for new employees, up to 25.75 days per year for those with 20 or more years seniority). But for elected officials (judges, DAs), and some other professional positions (ADAs, PDs, APDs), there is no statutory provision for either vacation time or illness. For those positions, policies regarding time off differ from office to office, and we have no information relevant to estimating the average. We have adopted as an operating assumption that the average work year is 220 days for trial court personnel, which is what we would expect for an employee who has 5-10 years seniority.¹⁴ Given an 8-hour day, the relevant work year is then 1,760 hours.

The "bottom line" is shown in the last column of Table 5.3. An hour of DA's time costs about \$83, and ADA's is \$56. An hour of PD's time costs about \$68, and APD's is \$48.

C. Court Time

We are interested here in costing out a day in a courtroom of Superior Court. Felony cases are in Superior Court for defendants' first appearances, arraignments, pretrial motions, jury selection, trials, and some postconviction proceedings. For all of these proceedings the cost is primarily the value of time of the various officials and others who are being paid by the state or county. That includes the Superior Court Judge, a court reporter, a deputy clerk,¹⁵ and one or two bailiffs (usually deputy sheriffs from the local county).¹⁶ A separate Accounting is made for the value of time of the attorneys for the prosecution and defense, and the jurors, so they are not included in what follows.

As in section B above, the approach here is to value the time of the relevant officials by use of the AOC's Position Cost Statements. Since only the judge has any staff support, there is no additional cost for the other officials.¹⁷ Table 5.4 provides a summary. The salary numbers included in this tabulation are for everyone in the Judicial Department with that title, rather than "being limited (as above) to those working in one of the six prosecutorial districts."¹⁸

TABLE 5.4

COST COMPONENTS OF A DAY IN SUPERIOR COURT

Position	Position Cost	Load	Total	Total Per Work Day
Superior Ct. Judge	\$122,879	\$16,050	\$138,929	\$631
Senior Resident Superior Ct. Judge	\$132,613	\$16,050	\$148,663	\$676
Court Reporter	\$41,928	0	\$41,928	\$191
Deputy Clerk	\$32,100	0	\$32,100	\$146
Bailiff	\$27,437	0	\$27,437	\$125

Our estimate for the cost of these officials for one day in Superior Court is \$1,242. (As before, we are assuming a work year of 220 days for all of these officials.) This estimate assumes that two bailiffs are present.¹⁹

The other major cost component of a day in court is the value of the courtroom itself. Our approach here was to ascertain the rental value of equivalent space in the eight counties of our sample, by contacting realtors who were familiar with the buildings in question and with the local markets. The median annual rental value for this sample was \$10.00 per square foot per 20 year.

To calculate the number of square feet in a courtroom, we obtained extensive information on the Durham Courthouse.²¹ Superior Court occupies a total of 11,905 square feet on the fifth floor, including three courtrooms, five jury rooms, judges' chambers, and a jury pool room. The area per courtroom is thus 3,968 square feet, with an equivalent rental value of approximately \$41,668 per year at the Durham value of \$10.50 per square foot. That comports well with the AOC's estimate of \$41,080 for an average Superior courtroom in North Carolina.²² To calculate the daily cost of courtroom space requires an estimate of the number of days per year the courtroom can be used. We used an estimate of 240 days,²³ and conclude that the daily rental value is about \$174 per day.

The bottom line for a day in Superior Court, excluding the jury and the attorneys for the prosecution and defense, is \$1,416.

D. The Supreme Court of North Carolina

All defendants sentenced to death, and all those sentenced to life after conviction by a jury of murder in the first degree, have a right of direct appeal to the Supreme Court of North Carolina (SCNC). Capital cases may come back to the Court thereafter for a variety of reasons. All told, murder cases account for a substantial portion of the Court's calendar.

Seven justices sit on the Court. Each of them is allocated two research assistants (law clerks) and one executive assistant. These are the positions for which we develop unit cost estimates. The Court also includes the Supreme Court Clerk's office, and a library. Each of these offices contributes something to the indirect costs of processing cases that come before the SCNC.²⁴ We do not attempt to determine what portion of these offices' budgets should be allocated to any one murder case.²⁵

While the AOC does not prepare Position Cost Statements on Court personnel, we are able to estimate position costs from information on salaries, fringe benefits, and office space.²⁶ The "load" in this

case is the cost of executive assistants' time. Executive assistants divide their time between assignments from their justice and the clerks who work with that justice. While this arrangement differs among the various chambers, be on the average the assistants devote approximately 65 percent of their time to the justices, and the remainder to the law clerks.²⁷

TABLE 5.5

SUPREME COURT OF NORTH CAROLINA, LOADED RESOURCE UNITS

Position Estimated Position Cost	Load	Total	Total Per Hour
Justice \$143,731	\$26,855	\$170,586	\$96.92
Law Clerk \$42,082	7,230	\$49 312	\$28-02

E. Offices of the Appellate Defender and the Attorney General

The attorneys in the Office of the Appellate Defender represent indigent defendants after they have been convicted in the trial courts. Most indigent defendants who have been sentenced to death are represented by attorneys in the AD's office, and these attorneys are also appointed to represent some first degree murder defendants who have been sentenced to life imprisonment.

Within the Appellate Defender's Office is the Resource Center, which has four primary Purposes: the provision of consulting services to attorneys representing defendants in capital representing the State in capital case proceedings following direct appeal and the first petition for cases; maintenance of a clearinghouse of materials to assist attorneys in representing defendants in capital cases; recruitment of members of the bar to represent defendants in state and federal postconviction proceedings; and representation of indigents in state and federal capital postconviction proceedings.²⁸ Over half the Resource Center budget is paid by the federal government, and the remainder by the state.

The AD's Office includes the Appellate Defender (Malcolm Ray Hunter, Jr.) and eight other attorneys (not including personnel in the Resource. Center). The AD spends 35 percent of his time on general administrative matters,²⁹ which together with his administrative assistant's time, constitutes the "overhead" or indirect costs of this office. Table 5.6 presents unit costs for the AD's office.³⁰ We also calculated the value of an hour for each of the attorneys in the Resource Center.³¹

TABLE 5.6
APPELLATE DEFENDER'S OFFICE, LOADED RESOURCE UNIT COSTS

Position	Estimated Position Cost	Load	Total	Total Per Hour (1760 Hrs/Year)
Appellate Defender	\$93,435	\$13,488	\$108,923	\$61.89
Assistant AD	\$63,606	\$13,488	\$77,094	\$43.80

The State is represented in criminal appeals and postconviction proceedings by the Department of Justice, Criminal Division. The heads of the Appellate Section and the Special Prosecution Section assign the preparation of appellate briefs to Justice Department attorneys on behalf of the State. These assignments are not limited to attorneys in the Criminal Division, but include attorneys throughout the

Attorney General's Office.³² There is some specialization, however; the four attorneys in the Capital Case Litigation Project are primarily responsible for a writ of certiorari filed in the United States Supreme Court (which typically is the next step following direct appeal to the Supreme Court of North Carolina). These four attorneys also consult with the district attorneys who are preparing for capital trials, and on occasion themselves prosecute capital cases at trial.

The "resource unit" of interest here is an hour of time spent by an attorney in preparing an appellate brief or presenting an oral argument in court. Estimating the average cost of this unit is made difficult by the fact that so many attorneys are involved on a part time basis. We decided to base our estimate on the four attorneys in the Capital Case Litigation Project, since they devote much more of their time than others to murder cases. Their average salary plus fringe is \$68,511.³³ Adding operating costs and indirect costs yields a total of \$89,545, or \$50.88 per hour.

NOTES

1. *See, e.g.*, U.S. GENERAL ACCOUNTING OFFICE, COST ACCOUNTING ISSUES: SURVEY OF COST ACCOUNTING PRACTICES AT SELECTED AGENCIES GAO/AFMD-90-17 (1990); KENT JOHN CHABOTAR, U.S. DEPARTMENT OF JUSTICE, ANALYZING COSTS IN THE COURTS (1987); BILLY L GRAYSON AND GAEL S. FUNKE, WHAT PRICE JUSTICE? A HANDBOOK FOR THE ANALYSIS OF CRIMINAL JUSTICE COSTS (1989).

2. The selection of a five year useful life was driven by the fact that data processing and duplicating equipment constitutes a large percentage of nonrecurring charges. Any error in this assumption is inconsequential, as nonrecurring expenses represent less than 1.5 percent of the annual expense of a DA or PD's office.

3. *See, e.g.* WAYSON AND FUNKE *supra*, note 1, Chapter 1.

4. For a general discussion of indirect costs, *see* WAYSON AND FUNKE, *supra* note 1, Chapter 1.

5. The information on indirect costs was provided by the AOC Controller, Chris Marks, in conversations with Ken Pettit on June 24 and July 7, 1992. Mr. Marks suggested that we measure the relevant "output" in terms of cases disposed of through the courts, and agreed that the indirect cost per case was immaterial.

6. Each public defender's office includes several attorneys who are salaried employees of the state. In districts with a public defender's office, judges ordinarily appoint one of the attorneys in that office as defense counsel for indigent defendants. Otherwise indigent defense is provided by attorneys in private practice who are paid by the state on a case-by-case basis.

7. These data were provided to us by Margaret Graham, Compensation and Benefits Manager at the AOC. Note that the salary information differs from that on the Position Cost Statements because we are using actual salaries. In most cases the actual average salary exceeds the salary indicated on the PCS because the latter does not take account of longevity pay.

8. The rental value of office space for the attorneys is listed as \$1,800 (Position Cost Statement, 7/6/92), while parking was put at \$180 and furniture at \$2,555 (which we amortized over 10 years). No information is available from these statements on the corresponding numbers for support staff. We assumed that the rental value for staff was \$1,200 and their furniture cost \$1,300. "Other" expenses also include the operating expenses listed on the Position Cost Statements.

9. Mecklenburg was unique among the districts in having among its DA's staff a management specialist and two paralegal specialists. The nonsalary position cost of the former was calculated as if he or she were an ADA.

10. Here are the results for fraction of DA's or PD's time devoted to administration:

District	DistrictAttorney	PublicDefender
7	no response	---
10	.67	---
14	no response	.50
18	.80	.45
26	.95	.80
27A	80	.38

We assumed that the DAs in districts 7 and 14 devoted 80% of their time to administration.

11. Included in the denominator for this calculation is number of assistants plus the fraction of the DA's or PD's time devoted to working on specific criminal cases (i.e., the fraction of their time that is NOT devoted to administration).

12. Also included in the loading factor is the prorated cost of books, photoduplicating equipment, computers, and other gear that is included in the Position Cost Statements for the DA and PD. A useful life of five years is assumed for this equipment.

13. Whether there are 11 or 12 paid holidays depends on which day of the week Christmas falls. This and subsequent information in this paragraph was provided by Katie Gardner, Benefits Specialist, Personnel division of the AOC, in a conversation with Lori Gries on February 12 1993.

14. On the average there are 261 weekdays in a year. Subtracting 12 paid holidays, 12 sick days, and 16.75 vacation days (the amount earned by those with 5-10 years seniority) leaves 220.25 days, or the equivalent of 44 full weeks. Note that even if the employee does not take the full 12 sick days in a given year, they still represent a cost of employment, since the employee will eventually be able to cash them in at retirement if not sooner. Note that for our purposes, there is no difference between paid-time spent for personal purposes and paid time spent on "overhead" activities, such as attending professional conferences, speaking to community groups, consulting with colleagues about matters of general interest, and so forth. These activities represent indirect costs of "production" which should be taken into account in our calculations. For that reason, we believe that our estimate of a 44-week year is not too short. It should be noted that in an entirely different context, Rick Kane, Co-Director of Research and Planning at the AOC, used 44 weeks as the amount of time that trial court judges were available for courtroom activities in a year RICHARD KANE, NORTH CAROLINA ADMINISTRATIVE OFFICE OF THE COURTS, ESTIMATES OF JUDICIAL DEPARTMENT COSTS FOR RESENTENCING TRIALS IN CAPITAL CASES, FOLLOWING *McKoy v. North Carolina* (June 1, 1990).

IS. A deputy clerk must be present at all times when court is in session to swear witnesses, maintain evidence, and respond to requests. The Clerk's office is also responsible for maintaining files on criminal cases and scheduling court proceedings.

16. The bailiffs are paid out of county funds, while all other personnel considered here are paid by the state. *See* N.C. GEN. STAT. § 7A-300 (1989).

17. Senior Resident Superior Court Judge Robert Kirby (Judicial District 27A) told Philip Cook (telephone conversation, February 14, 1993) that he shares the services of a secretary in his home district with one other judge. She also provides some assistance to visiting judges, and he in turn enjoys some clerical support from other districts when he is visiting. On the average, then, it seems reasonable to assume that he enjoys half time support, which we have valued at the average position cost for a legal assistant H. We note that we have not attempted to estimate the indirect costs relevant here. The supervisory and administrative costs for the deputy clerk, court reporter, and deputy sheriff may amount to several thousand dollars per year.

18. The bailiffs' salary is the exception. Bailiffs are usually deputy sheriffs employed by the counties. We estimated an average salary for the eight counties of our trial sample using data from Table II of INSTITUTE OF GOVERNMENT, UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, COUNTY SALARIES (1992).

19. Judge Robert Kirby indicated that during a murder trial there were usually two bailiffs present, one to manage the defendant and one to attend to the jury. For the purpose of this calculation the value of the

judge's day is computed as the weighted average of the senior resident judge's cost and the superior court judge's cost, with the weights based on the fact that there are 44 of the former and 38 of the latter in the state.

20. The annual rental values per square foot of space in the courthouses are as follows:

Gaston	\$ 5.00
Nash	6.00
Edgecombe	6.00
Wilson	8.50
Greensboro	10.00
Wake	10.00
Durham	10.50
High Point	12.00
Mecklenburg	14.00

(Note that High Point and Greensboro are both in Guilford County.) These data were collected during summer, 1992.

21. Information was provided by Mike Turner of the Durham County Department of General Services.

22. This estimate is part of an AOC memo dated 3/27/91 titled "Estimated Costs of a Day in Superior Court for Fiscal 1990-91." Note that the counties bear the cost of the courthouses and their furnishings. *See* N.C. GEN. STAT. § 7A-302 (1980).

23. Louise Wilson, Clerk of Superior Court in Alamance County, told Ken Pettit (telephone call, 6/11/92) that in her county Superior Court was in session 47 or 48 weeks per year. We used the higher number of 48, which suggests a total of 240 days.

24. The Clerk's office maintains the files on each of the cases coming before the Court. The appellate reporter's office is responsible for reporting on opinions issued by the SCNC and the Court of Appeals. The SCNC Library serves all state agencies and the General Assembly. Together these three offices employ a staff of 17. This information was provided by Bob Boswell in the AOC Controller's Office.

25. We believe that this omission will introduce very little error into our estimate of the cost differential between life and death cases. The nature of the tasks performed by the clerk, appellate reporter, and library staff are essentially the same in these two types of cases.

26. The average of justices' salaries in 1992 was \$100,873, including longevity pay. Fringe benefits include Social Security (7.65% of the first \$54,450, or \$4,165), hospitalization insurance (\$1,736), and retirement \$31,495. (26.03% of salary, for an average of \$26,257). The average of research assistants' salaries was \$31,495. Their retirement payments are 10.93% of salary (\$3,422). The rental value of the Justice Building is approximately \$10 per square foot, according to one realtor we consulted. A total of 6,080 square feet is occupied by the justices' chambers, conference rooms, and the courtroom, which suggests a prorated annual rental value of \$8,700 per justice. Research assistants average 200 square feet of office space, with rental value of \$2,000. (These numbers were provided us by Rick Kane, Co-Director of Research and Planning at the AOC, and are taken from a study prepared for the Judicial Center Commission in 1986.

There was some expansion in the research assistants' office space subsequently.) We add \$2,000 to the justices' position costs to cover office expenses and depreciation on furniture, and \$1,000 to the research assistants' position costs to cover these same items.

27. This estimate is based on inquiries made by Pam Britt, Executive Assistant to Justice Louis B. Meyer, on our behalf during the 1992-93 session. Arrangements differ greatly among chambers. The average salary of executive assistants in 1992 was \$29,862, with fringe benefits of \$7,293. Office space amounted to 266 square feet per executive assistant, at an annual rental value of \$2,660 (see note 22). We have added \$1,500 to cover furniture and office expense. The total position cost is \$41,315 per year.

28. NORTH CAROLINA ADMINISTRATIVE OFFICE OF THE COURTS, PURPOSE, ACTIVITIES, AND ACCOUNTING OF GENERAL EXPENDITURES OF THE DEATH PENALTY RESOURCE CENTER 4-6 (1990).

29. This estimate provided by M.R. Hunter, the Appellate Defender, to Philip Cook by telephone on 2/26/93.

30. The annual rent and operating expenses budgeted for the AD's office (1992-93) is \$67,912. The pro rata -share per attorney is \$7,546, which is included in the position cost. (Only 10 percent of this is capital expenditures.) Indirect costs of administration of this office include 35 percent of the AD's time and essentially all of his administrative assistant's time, for a total of \$66,673. The remainder of the "load" is the cost of two word processors, whose total salary plus fringe is approximately \$50,000. The resource unit is defined as attorney's time (not involved *in office administration), which amounts to a total of 8.65 FM. Thus the loading per FM is \$13,488. (The information on administrative time was provided by M.R. Hunter by telephone on 2/26/93. Salary information-was provided by Lorainne Bobbitt, Position Control Supervisor at the AOC.)

The annual rent and operating expenses budgeted for the Resource Center in 1992-93 was \$52,523, plus a capital outlay of \$49,526 (which we expense over 5 years, since most of it was for data processing equipment)

31. The three attorneys in the Resource Center billed a total of 6,018 hours during 1992. Of that total (attorney). The administrative assistant, William Hennis, devoted most of his time to administrative duties. The value of this administrative time was distributed over the remaining time of the attorneys as the basis for calculating an hourly rate. The total of operating expenses, rent, insurance, and so forth for the office was \$37,811, while capital outlays (amortized over five years) amounted to \$9,905. These expenses were distributed over the 6,018 hours billed by the attorneys and added to the load. There was also a legal assistant in the office assisting the attorneys, the value of whose time was included in this figure.

33. For lack of directly relevant data, we used the data from the Appellate Defender's Office as the basis for estimating the per-attorney rent, operating expenses, secretarial support, and administrative costs. The rationale for this procedure is that attorneys in both offices are performing similar tasks, namely preparing appellate briefs on murder cases.

Attorney	Salary + Fringe	Hourly Rate (2006 Hrs/Yr)	Load (Admin. Plus Other)	Total Per Hour
Hill	\$77,054	\$38.41	\$41.66	\$80.07
Dayan	\$61,640	\$30.73	\$41.66	\$72.39
Ingle	\$40,864	\$20.37	\$41.66	\$62.03

32. James Coman, then Chief of the Criminal Division, told us on 10/14/92 that 20 attorneys in the Attorney General's Office write appellate briefs on behalf of the State in death cases.

6. TRIAL COURT COSTS

Our analysis of the extra costs of adjudicating murder cases capitally begins with the initial determination of guilt and sentencing. As explained in Chapter 3, capital cases tend to impose greater burdens on the defense, prosecution, and trial courts than do similar cases that are prosecuted and tried noncapitally. We estimate this difference using data on a sample of murder cases.

A. Data Collection

We began by identifying the prosecutorial districts with the most murder cases. The top nine districts accounted for about 40 percent of an murder cases in the state in 1990. We sought cooperation from the DAs in these districts, and were successful in all but Forsyth, Cumberland, and Robeson counties.

The districts that are included in our sample are Durham, Gaston, Guilford, Mecklenburg, Wake, and the three-county district of Edgecombe, Nash, and Wilson. The AOC provided us with a listing of criminal homicide cases that were disposed of in Superior Court between January 1, 1990, and September 26, 1991, in these districts.¹ We supplemented that list from other sources, especially for Mecklenburg County.²

We then visited the Clerk of Superior Court in each of the eight counties. Identifying the sample cases by the CRS number, we pulled the shucks and copied information concerning the calendar of events in the case, the ultimate disposition, the names of the attorneys for the prosecution and defense, and payments made by the AOC.

To obtain additional information relevant to the costs of processing these cases, we visited with the DAs and Public Defenders and, after obtaining their agreement to cooperate, sent them questionnaires concerning the time that they and their assistants had devoted to each case in the sample. We also sought copies of fee orders submitted by court-appointed defense attorneys, both from the AOC and from the attorneys themselves.

This procedure produced fairly complete information on the murder cases in the sampling frame, which we ultimately defined as the cases where the DA sought a conviction for first or second degree murder. In particular, a case is included in the sample if it meets the following criteria: 1) The defendant was indicted for murder; and 2) The case was ultimately disposed of by a guilty plea to first or second degree murder, or by a murder trial (either capital or noncapital). We succeeded in obtaining data on over 70 percent of such cases for the eight counties.³

As it turned out, this procedure did not produce an adequate sample of cases that had been tried capitally. For that reason, we decided to incorporate cases from counties outside our sample of eight. State-wide lists of capital cases during 1990 and 1991 were provided by the AOC and the Resource Center of the Appellate Defender's Office. These lists included 76 new cases from 42 different counties. For these new cases we attempted to gather the relevant information entirely by mail and telephone,⁴ and were at least partially successful in 41 instances.⁵ A number of these cases were capital cases that had been remanded to Superior Court for resentencing. These cases are analyzed separately in much of what follows.

Since our purpose is to compare the costs of adjudicating capital and noncapital murder cases, we exercised considerable care in classifying the sample cases. Our operating definition of a "*capital case*" is *a case that was prosecuted as such through the guilt phase of the trial*. Indications that a case was

prosecuted capitally include the charge at indictment, the number of defense attorneys appointed (if the defendant was indigent), the motion practice employed by the defense, and the responses to our questionnaire from the PD's office.⁶ In cases where we remained uncertain after considering available information on these matters, we made a follow-up contact with one of the defense attorneys. In a few instances we had to drop the case from our sample for lack of information on this key issue.

There are several cases in our sample that were prosecuted capitally but disposed of by guilty plea. These we keep in a separate category. The "control group" for the capital trials is a sample of noncapital murder trials.

B. Items Included in Trial Court Costs

The items included in our tabulation of costs is summarized here:

1. *Defense costs:*

- *Payments for time and expenses of court-appointed lawyers;
- *Time of attorneys in the Public Defender's Office;
- *Payments to expert witnesses and private investigators;
- *Time of PD investigator and other support staff.

2. *Prosecution costs*

- *Time of DA and ADAs; time of DA's investigator;
- *Payments to expert prosecution witnesses;
- *Time of victim-witness coordinator and other support staff.

3. *Courtroom Costs.*

- *Number of days for pretrial motions;
- *Number of days for jury selection, guilt phase, and sentencing phase;
- *Payments to members of jury pool, expenses for meals and lodging (in some cases).

4. *Other.*

- *Expenses of fact witnesses;
- *Other expenses.

The items denominated in time, including days in court and the time of attorneys in the DA and PD offices, are assigned monetary value by use of the unit cost figures developed in Chapter 5 above.

The quality of data we collected is uneven. Information on payments to court-appointed private defense attorneys and expert witnesses is generally accurate, since it was usually possible to obtain copies of the fee orders or other documentation. Data on the number of days in court are derived from the fee orders or from the court docket sheets, where available; these sources required some interpretation, but we believe the errors tend to be small and more or less random.

Most problematic of the important cost items are the hours of time spent by the attorneys for the prosecution and the defense (when the latter was provided by a public defender) on each case. Attorneys in the DA and PD offices do not ordinarily keep time logs,⁷ so that the data they provided us were estimates from their recollection, aided perhaps by their written records of the sequence of events.⁸ While these recollections are bound to be somewhat inaccurate, we have no reason to believe that they are biased either up or down. On the average, then, the errors may tend to cancel out.

We do not take account of possible differences in pretrial release arrangements. Defendants in capital cases spend more time in jail awaiting trial than do defendants in murder cases that are not being prosecuted capitally. But we do not believe that this difference is important to the overall (cohort-based) difference in cost between capital and noncapital murder cases, since if the defendant is eventually convicted and sent to prison, whatever pretrial time was spent in jail is usually credited toward completion of the prison term. If jail days are substituted for prison days, then the overall costs (including those borne by both state and county) may not be much affected.⁹ This observation does not apply to instances in which the defendant is ultimately executed.

Another omission from our accounting is the costs to the state and local law enforcement. DAs rely on law enforcement investigators to help develop cases for trial. It has been argued¹⁰ that the extent of the police investigation required by the DA's office will be greater if the DA intends to try the defendant capitally than for a similar murder case that is being prosecuted noncapitally. Since our data collection effort did not include the police, we have no basis for testing this claim.

C. Results for Capital and Noncapital Cases

The most valid method for comparing the costs of capital and noncapital cases would be to conduct an experiment in which a series of aggravated murder cases are randomly divided between capital and noncapital prosecution, and the costs for each are tabulated following completion of the trials. Such an experiment would no doubt be unconstitutional." Our method is to compare costs for actual capital and noncapital murder cases, while acknowledging that in the absence of a true experiment, these two groups may not be strictly comparable. For example, as shown in Table 6.1 the cases in our capital sample are more likely than the noncapital-murder trial cases to involve one or more additional felony charges (in addition to murder).¹² On the average, then, capital cases may be more complex and require more time-consuming investigation and presentation at trial than noncapital murder cases.

TABLE 6.1

SOME CHARACTERISTICS OF MURDER CASES IN TRIAL SAMPLE

Sample	# of Cases	% Not Guilty	% Death Sentence	% Life Sentence	% with 2+ Felony Charges	% with Retained Attorney
Capital Trial/ Bifurcated	32	0	56.7	43.3	56.7	9.7
Capital Trial/ Phase Only Guilt	26	7.7	0	80.8	60.0	20.0
Guilt Noncapital Trial	19	57.9	0	21.1	15.8	36.8

It is also true that the capital murder cases are less likely to involve a retained attorney; thus one reason why the state's costs of defending capital murder cases are relatively high is that the capital cases have a higher percentage of indigent defendants. Of course, some defendants who could afford retained counsel in a noncapital case would not be able to afford the extra cost of defending a capital case. If this is the explanation for the higher percentage of indigent defendants in capital cases, then it should not be netted out in estimating the extra costs of capital cases. These differences should be kept in mind in interpreting our results.

We now present our results for the costs of murder trials, beginning with the total and then for each of the important components.

Total Cost. Table 6.2 reports the distributions of total costs for trials in our three samples,¹³ and Figure 6.1 provides a graphical representation of the same statistics. The graph, known as a "box and whisker" plot, represents the interquartile range by the width of the box, with the mean and median indicated by vertical bars inside the box. The "whiskers" indicate the minimum and maximum values.

We see that capital trials are much more costly than noncapital trials on the average; the average (mean) capital trial that ends with the guilt phase costs \$57 thousand, 3.4 times the mean of the noncapital trials (\$17 thousand), while the average bifurcated capital trial is 5.0 times as costly at \$84 thousand. The medians (50th percentiles) for the three categories -- noncapital, capital - guilt phase only, and bifurcated capital -- are, respectively, \$14, \$48, and \$73 thousand.

What is also evident from these statistics is the considerable variability in costs from trial to trial within the same category. For example, the least expensive capital trial was less costly to the state than the median noncapital trial. The most expensive trial in the entire sample was a bifurcated capital trial costing the state \$180 thousand; the least expensive was a noncapital case costing just \$8 thousand.

TABLE 6.2

COSTS OF MURDER TRIALS

	Capital Trial/ Bifurcated	Capital Trial/ Guilt Phase Only	Noncapital Murder Trial
Minimum	\$24,777	\$ 9,802	\$ 7,766
25th %ile	\$46,826	\$32,140	\$10,946
50th %ile	\$75,552	\$47,736	\$13,762
75th %ile	\$110,792	\$72,721	\$22,896
Maximum	\$179,736	\$137,500	\$30,952
Mean	\$84,099	\$57,290	\$16,697
#of Observations	32	26	19

We now report the statistics for several of the important components of the total cost: the length of the trial, the number of attorney hours devoted to the defense, and the number of attorney hours devoted to prosecution.

Trial Cost Compenents Figures 6.2, 6.3, and 6.4 present box-and-whisker plots for the key cost components. Figure 6.2 depicts the days in trial, including time spent in jury selection and both phases of bifurcated capital trials. Figure 6.3 presents the relevant statistics on total hours expended by defense attorneys paid by the state, either court-appointed attorneys or attorneys in the Public Defender's Office. (These statistics are limited to cases in which there were no privately retained defense attorneys.) Figure 6.4 presents statistics on the total hours spent by the DA and his assistants.¹⁴ The means and medians for these statistics are listed in Table 6.3.

FIGURE 6.1
COSTS OF MURDER TRIALS
(IN THOUSANDS OF DOLLARS)

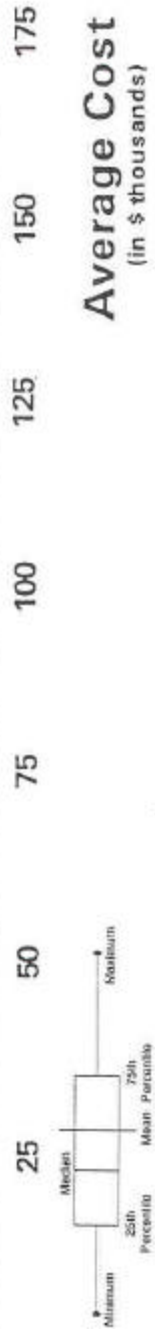
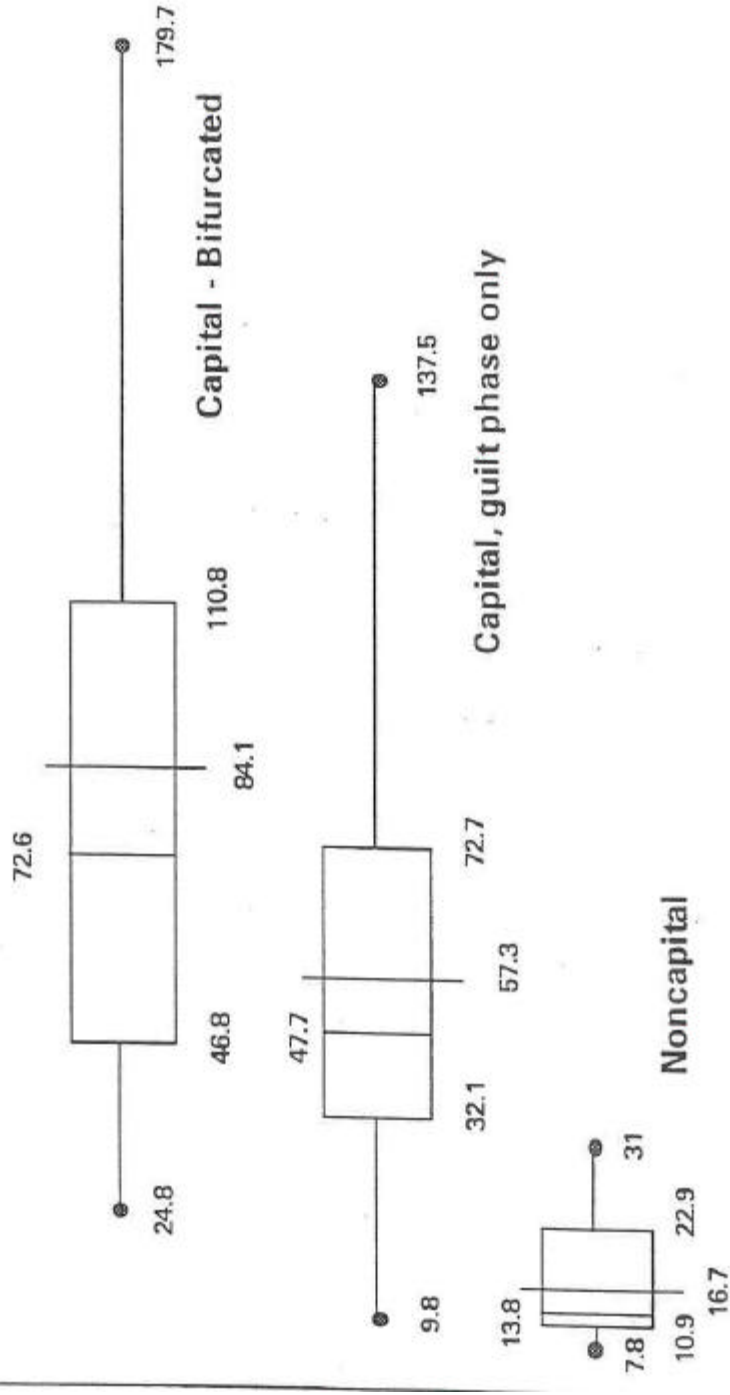


TABLE 6.3
 AVERAGE TIME EXPENDED FOR TRIAL, DEFENSE, AND PROSECUTION
 COMPARISON OF THREE SAMPLES

	Capital Trial/ Bifurcated	Capital Trial/ Guilt Phase Only	Noncapital Murder Trial
Length of Trial (days)	14.6 (n=32)	10.6 (n=26)	3.8 (n=19)
Defense Attys Time (hours)	613 (n=28)	447 (n=20)	150 (n=12)
Prosecution Time (hours)	282 (n=32)	186 (n=26)	61 (n=19)

Breakdown of Total Costs. Our final descriptive results from these data provide a breakdown of the total costs among the three major component activities -- courtroom, defense time, and prosecution time -- and a fourth category for witness fees and expenses and other expenses. (We include under the courtroom expense the cost of the judge, other court personnel, the jury, and the courtroom itself.) Figure 6.5 provides pie charts showing the breakdown among these components for each of the three subsamples. Table 6.4 tabulates the relevant percentages depicted in these charts.

TABLE 6.4
 PERCENTAGE BREAKDOWN OF TOTAL COSTS
 COMPARISON OF THREE SAMPLES

	Capital Trial/ Bifurcated	Capital Trial/ Guilt Phase Only	Noncapital Murder Trial
Courtroom	32.5%	34.7%	40.0%
Defense	43.9%	41.5%	30.3%
Prosecution	22.2%	22.7%	24.2%
Witness Fees and Other	1.4%	1.1%	5.5%
Total	100%	100%	100%

FIGURE 6.2
LENGTH OF TRIAL
(IN DAYS)

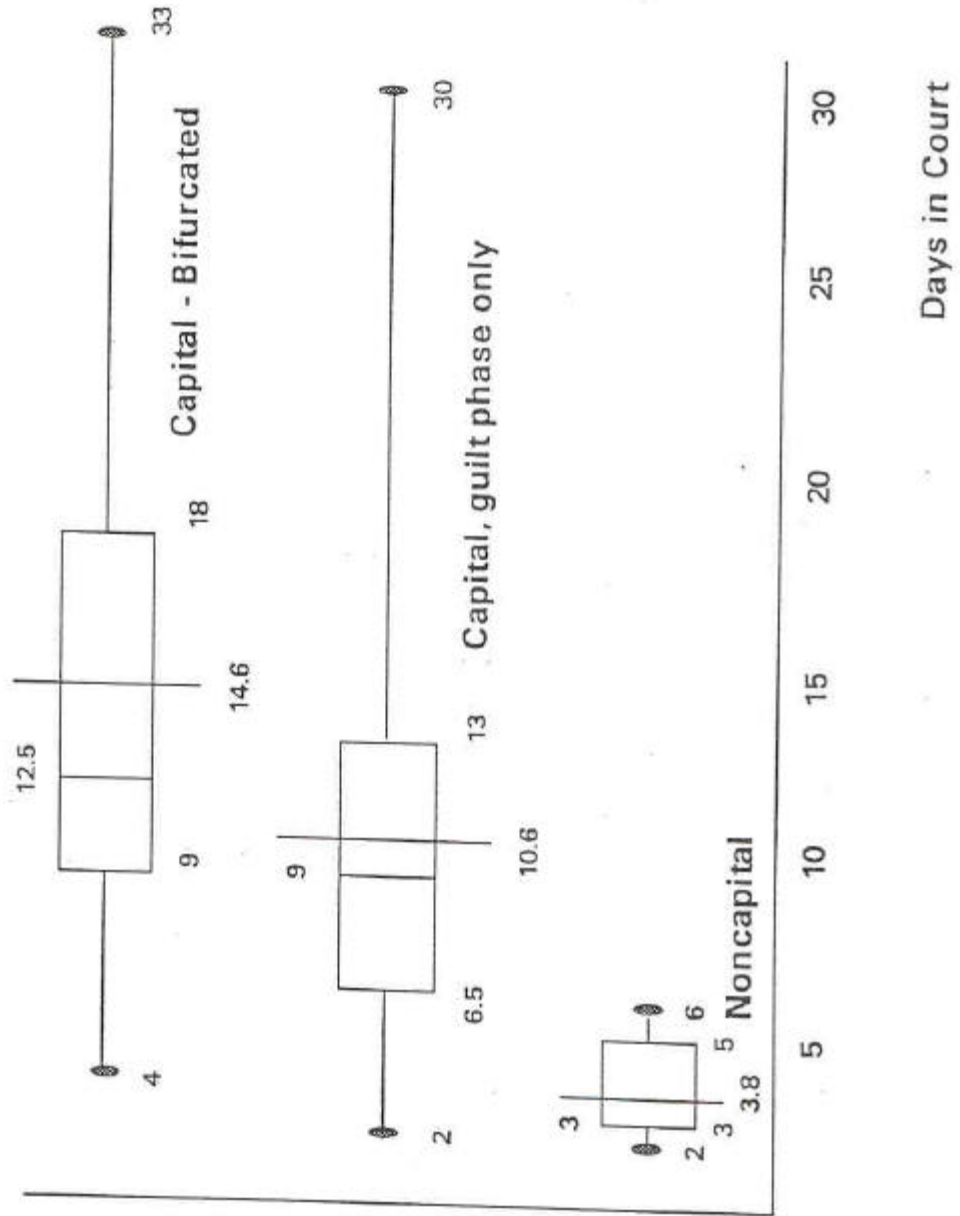


FIGURE 6.3
TIME EXPENDED BY DEFENSE ATTORNEYS
(IN HOURS)

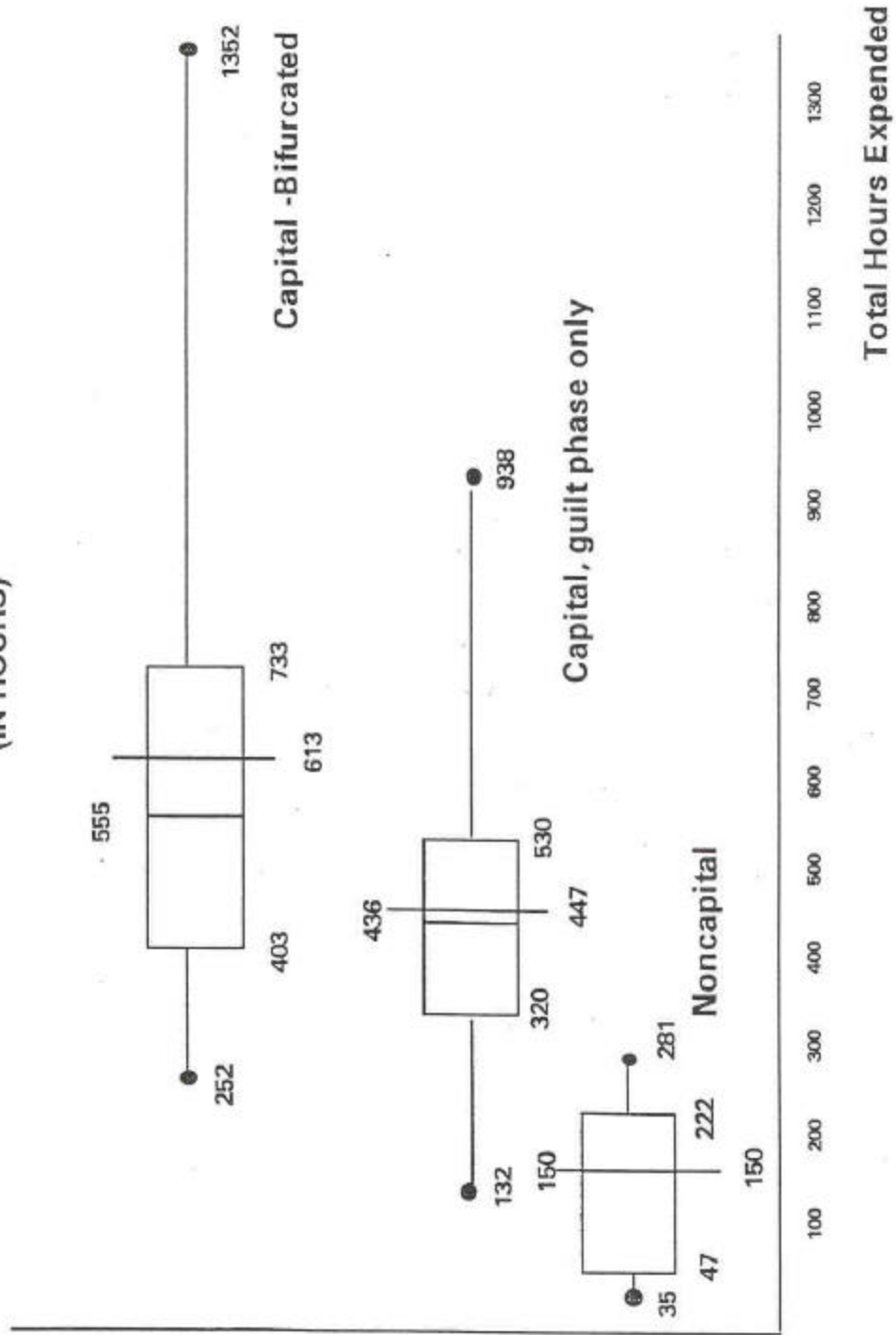
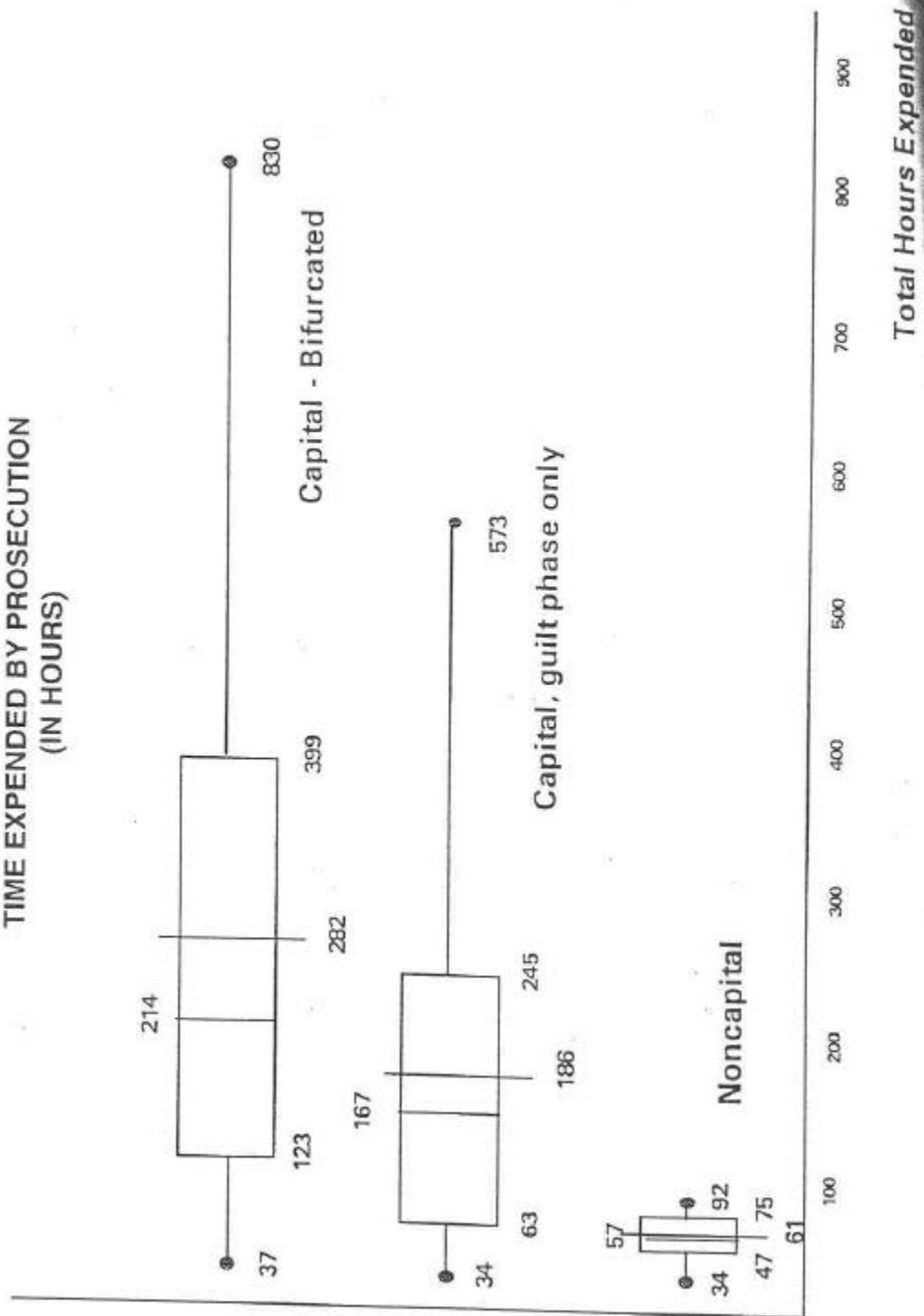
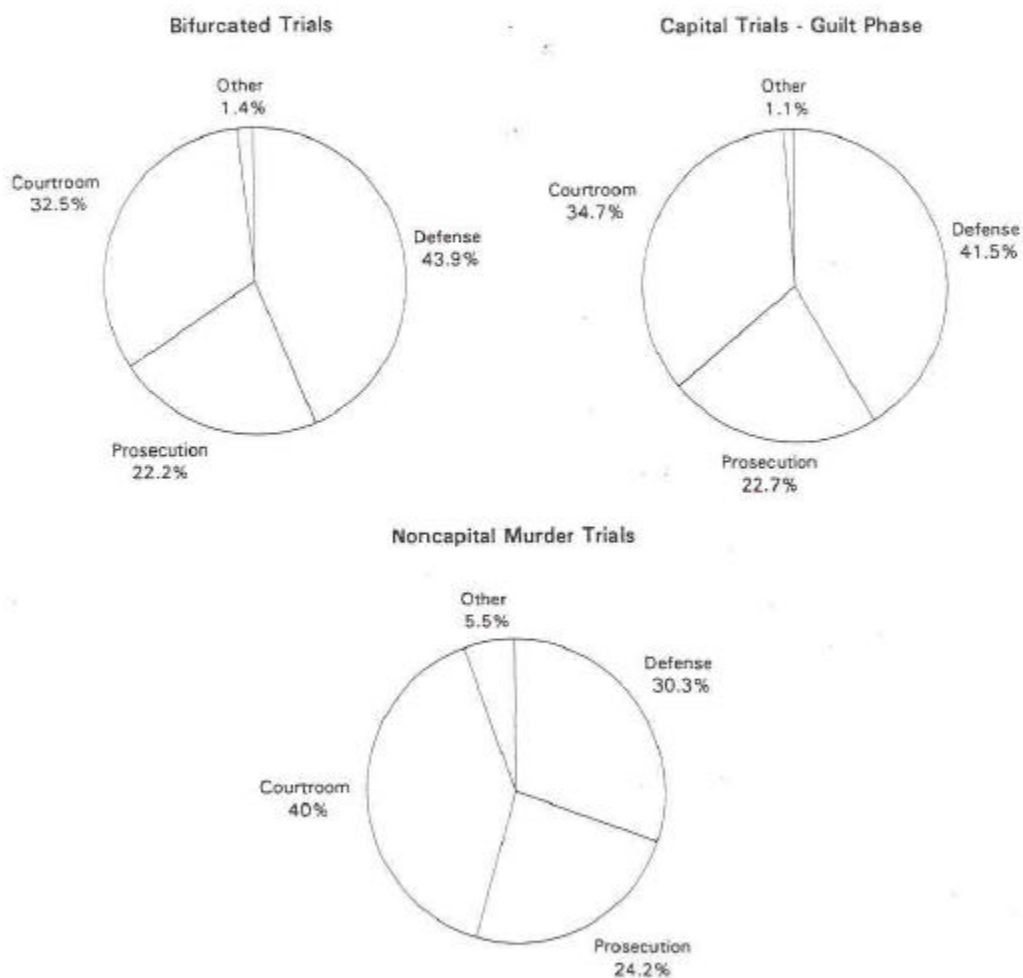


FIGURE 6.4
TIME EXPENDED BY PROSECUTION
(IN HOURS)



**FIGURE 6.5
DISTRIBUTION OF TOTAL COSTS**



D. Alternative Estimates of the Trial Costs per Death Sentence

In this section we provide alternative estimates of the trial-related costs of capital adjudication. As explained in Chapter 2 above, we use two quite different definitions. By the "*single case*" perspective, we define the cost of the death penalty as the difference in the costs of successfully prosecuting a single case as a capital case and as a noncapital case. By the "cohort" perspective, we take account of the cost-implications of the State's low "batting average" in capital prosecutions: in a majority of instances where the State prosecutes a case capitally, the death penalty is not imposed, and if imposed, never carried out.

Single Case Perspective. As we have seen, the average cost to the state and county of a bifurcated capital trial, including the costs of prosecution and defense incurred before the trial, is about \$84 thousand. If these same cases had instead been adjudicated and tried noncapitally how much would they have cost on the average? ¹⁵ The answer suggested by our data is \$17 thousand, since that is the average cost of the noncapital murder trials in our sample. But our noncapital murder trial sample may not be a valid "control group" for the capital trial sample; in particular, we know that the noncapital defendants were less likely to be indigent or to be charged with one or more other felonies in addition to the murder. ¹⁶ There may be other differences in the inherent complexity or costliness of these cases as well.

While there is no perfect way of dealing with this comparability problem, we have attempted to "control for" the intrinsic characteristics of the cases by use of regression, analysis, a common statistical technique for taking a number of different characteristics into account simultaneously. The result is that, other things equal, bifurcated capital trials cost 3.8 times as much as noncapital murder trials, while capital trials that end with the guilt phase cost 2.5 times as much as noncapital murder trials. ¹⁷ The average cost of our noncapital murder cases for which the state paid for the defense was \$19,685; multiplying this number by the factor estimated from the regression equation yields an estimate for the average cost of bifurcated capital trials of indigent defendants as \$75 thousand, and for capital trials that end with the guilt phase as \$49 thousand. The excess costs can be calculated by subtracting \$19,685 from each of these, yielding \$55 thousand and \$29 thousand respectively. (The excess costs for the rare cases in which the defendant retained an attorney are somewhat less.) Note that these regression-based estimates are somewhat less than the difference in means. The reason is that our regression adjusts for two sources of systematic difference between capital and noncapital cases: whether the defendant is indigent for purposes of financing his or her defense, and whether the defendant is tried on more than one felony charge. This approach is conservative, in the sense that the regression adjustment implicitly assumes that indigency and number of charges are determined independent of whether the case is prosecuted capitally, an assumption that is not always correct. Therefore the true differential may lie somewhere between two types of estimates.

Cohort Perspective In North Carolina during 1991 and 1992 there were 94 defendants tried capitally (excluding capital trials and resentencing hearings that resulted from successful appeal). ¹⁸ Here is the distribution of outcomes:

- 29 (31%) Sentence of death imposed by jury
- 30 (32%) Capital trial, sentence of life imposed by jury
- 35 (37%) Capital trial, defendant acquitted or sentenced by judge

We see that only 31 percent of the capital trials resulted in the imposition of the death sentence. Yet all of these trials, regardless of outcome, were more costly than they would have been if they had proceeded noncapitally. Thus the single-case approach understates the average cost to the state per *death sentence imposed*. ¹⁹ Based on these numbers, we assume that for every 100 capital trials, there are 31 in which the death penalty is imposed by the jury, 32 in which the jury

imposes a life sentence after finding the defendant guilty of murder in the first degree, and 37 in which the jury acquits or convicts of a noncapital crime. If all 100 of these cases were tried noncapitally, then the total excess costs would be the sum of the excess costs for the 63 bifurcated trials, and the excess costs for the capital trials that end with the guilt phase. This total excess cost is divided by 31 (the number of death sentences imposed) to calculate the excess costs per death sentence imposed. The calculations are shown in Table 6.5, using both approaches developed above. The middle column of this table uses the sample averages as the basis for estimating excess costs; the result is an estimate of \$185 thousand per death sentence. The last column uses the excess cost estimates derived from the regression analysis, with a result of \$148 thousand per death sentence.

TABLE 6.5
EXCESS COSTS FOR CAPITAL MURDER TRIALS

	Excess Cost Based on Sample Averages (per case)	Cost Estimate based on Regression Analysis (per case)
Capital Trials/Bifurcated	\$67,402	\$55,500
Capital Trials/Guilt phase only	\$40,593	\$29,200
Excess cost per death sentence*	\$185,428	\$147,700

Assuming that 31% of cases result in death sentences, and 32% of cases result in life sentences imposed by juries.

The extra costs to the trial courts of capital adjudication do not end with the original disposition of the case. Historically, at least, death-sentenced defendants have been far more likely to win a new trial from the appeals courts than are other murder convicts. And there is a substantial probability that a death-sentence case will be remanded for resentencing, which requires much the same costly effort as a retrial.²⁰ These new trials and new sentencing hearings are part of the cost of adjudicating the death penalty.

To quantify the extra costs resulting from subsequent trials and sentencing proceedings, we begin by reporting on the relative frequencies of such events in North Carolina (see Appendix 1). During the years 1979 to 1985 there were 69 death sentences imposed.²¹ Of these, 9 were remanded for a new trial on direct appeal, while 18 were remanded for a new sentencing hearing. Subsequently a number of the cases that were affirmed on direct appeal have been granted relief through the appeals process and remanded to the trial courts, while nine of those that received a new trial or new sentencing as a result of direct appeal have cycled back a second time following a new death sentence and new remand. By October 1992, this cohort of 69 capital cases had a total of 33 new sentencing hearings and 12 new trials -- *two such events for every three death sentences* imposed.²² (This history is not yet complete, of course; as of October 1992, 32 defendants from this cohort were still on death row or awaiting their new sentencing hearing, and these cases continue to be litigated.) For the sake of comparison, we also tracked the appeals history of murder convictions that resulted in life imprisonment during the same period, 1979 -1985. Of 161 such cases, just nine (6 percent) were remanded for a new trial.²³

Given these results, we see that the differential cost to the trial courts of imposing a death sentence includes the expected cost of this case returning to the court for subsequent trial or resentencing. Our estimate is based on the average cost of the capital trials and resentencing cases in our sample:²⁴

$$\begin{aligned} & \text{Extra costs due to likelihood of retrial or resentencing} \\ & = (\text{likelihood of retrial}) \times (\text{average cost of capital trial}) + (\text{likelihood of resentencing}) \times \end{aligned}$$

(average cost of resentencing) =
 $(17.4\%) \times (\$84,099) + (47.8\%) \times (\$68,138) = \$47,203.$

From this figure we subtract the cost of retrials in life-sentenced cases, which works out to just \$933 per case.²⁵ The difference ($\$47,203 - \933) is \$46,270. We can combine this result with the excess costs of the original trial, which yields a total of either \$194 thousand or \$232 thousand, depending on which of the estimates is used.

The "bottom line," then, is that the extra costs to the public of prosecution, defense, and trial is about \$200 thousand per death sentence imposed. This estimate does not include the costs of appeals or imprisonment, which are the topics of subsequent sections of this report.

NOTES

1. The AOCs Information Services Division maintains a computerized database to track criminal cases throughout the state. Thomas Havener provided us with an extract of the Court Information System file for cases fitting the definition.
2. Mecklenburg maintains its own database, and does not send complete information to the AOC on cases disposed of in Superior Court. We obtained a sample of cases indicted for murder in Mecklenburg from lists given to us from several sources, including the district attorney and the public defender.
3. The AOC listing included 102 such cases for the seven counties in our sample (excluding Mecklenburg). We obtained fairly complete information on 74 of these cases. In addition, we identified 14 other cases that fit our definition in these counties, and we succeeded in obtaining information on 10 of these. We were also successful in obtaining information on a majority of the relevant murder cases from Mecklenburg.
4. Our research budget did not permit us to travel to these counties and meet with the relevant officials face to face.
5. From the information we obtained from the attorneys involved in these cases, we found that a few of these cases had not been prosecuted capitally. They were included in our noncapital murder subsample.
6. Our questionnaire for the public defenders included the following question: "At the time of indictment, was this considered a capital case?"
7. The public defender's offices do submit fee orders, since the defendant is theoretically responsible for defense costs even if indigent at the time of trial. But there is no necessary relationship between the fee order amount and the actual cost to the state of the public defender's activities.
8. On the cover page of the questionnaire we sent to each attorney in connection with a particular case, we included a table showing some of the key facts of the case that we had obtained from the shucks.
9. A careful calculation here would have to take account of the following facts: a) A day in jail is typically less costly than a day in prison; b) The overall cost calculation should discount future costs to the present, so in a "swap" of future prison time for present jail time the former cost should be discounted; c) For some defendants who are kept in jail before trial, this "swap" never happens, because they are found innocent or die before completion of their prison term or are ultimately executed. We chose to bypass this complications and adopt the working hypothesis that the net effect of pretrial jail time on the difference between capital and noncapital murder cases is not large enough to make much difference in our final conclusion.
10. NEW YORK STATE DEFENDER'S ASSOCIATION, CAPITAL LOSSES: THE PRICE OF THE DEATH PENALTY FOR NEW YORK STATE (1982); Jonathan E. Gradess, *Organizing Around the Cost of the Death Penalty* (document presented at the National Coalition against the Death Penalty Annual Conference, November 15, 1986).
11. In their controversial study of the application of the death penalty in North Carolina, Barry Nakell and Kenneth Hardy conclude that there is a substantial degree of arbitrariness in the decision of which murder cases to prosecute capitally, and that some districts are more likely to prosecute capitally a given sort of

murder case than other districts. From a statistician's perspective, we can interpret these conclusions to mean that there was some degree of randomness in the selection of which cases to prosecute capitally. It should be noted that the Nakell-Hardy study was for a sample of murder cases originating in the year beginning June 1, 1977, and the conclusions may be out of date. *See* BARRY NAKELL AND KENNETH A. HARDY, THE ARBITRARINESS OF THE DEATH PENALTY 152-161 (1,98

12. In some cases the case may be adjudicated capitally precisely because the homicide was committed in conjunction with another felony. In North Carolina a defendant may be convicted of murder in the first degree under a felony-murder theory. In a capital prosecution, if this is the only theory under which the defendant is found guilty, the underlying felony merges into the murder conviction and cannot be used during the sentencing phase as an aggravating circumstance. See, eg., *State v. Weeks*, 322 N.C. 152, 367 S.E.2d 895 (1988); cf. N.C.GEN.STAT. § 15A-2000(e)(5) (1988) (listing as potential aggravating circumstance that "[t]he capital felony was committed while the defendant was engaged, or was an aider or abettor, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any homicide, robbery, rape or a sex offense, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb."). If the jury returns a verdict stating that it finds the defendant guilty of murder in the first degree under both a felony-murder theory and under the alternative theory that he premeditated and deliberated the homicide, then the felony undergirding the felony-murder theory may be used as an aggravating circumstance. E.g., *State v. Ards*, 325 N.C. 278, 384 S.E.2d 470 (1989), *vacated and remanded on other grounds*, 494 U.S. 1023 (1990).

In tabulating the number of cases where the defendant was indicted for one or more other felonies in addition to murder, we omitted secondary charges such as "assault with a deadly weapon" that could be charged in most any murder case.

13. Details on computation of costs are included in this report as Appendixes II and III.

14. It should be noted that the statistics represented in each of these figures are based on just those cases where we had data. The cases for which there were missing values are excluded. In computing the total costs we imputed missing values for specific items according to procedures that are discussed in Appendix III.

15. We could just as well pose the question of how much it would have cost if our noncapital cases had been tried capitally. 'Me logic and the answer are the same.

16. Of course, the classification of the defendant as indigent, and the number of charges filed, may both be influenced by the DA's decision of whether to prosecute the case capitally or not. So this evidence does not really settle the issue of whether the noncapital cases are intrinsically similar to the capital cases.

17. The regression was of all cases in our four samples (including the sample of resentencing cases). 'Me dependent variable is the natural logarithm of the total cost. (This form was used because the variables under consideration are likely to have a multiplicative effect on total cost.) The independent variables are listed below, together with estimates of the coefficients and standard errors.

	Coefficient Est.	SE Est.
Constant	9.10	
Capital trial - Bifurcated	.34	.14
Capital trial - Guilt phase Only	.91	.15
Resentencing hearing	1.17	.18

Additional felony charge	.15	.11
Defendant is indigent*	.75	.16

*There were a few cases in which the defendant retained an attorney but there were also one or more court-appointed attorneys involved in the case. For the purposes of this regression the defendant is classified as indigent if the state paid for 85% or more of the costs of the defense. Note: All variables are binary (0-1) indicator variables.

18. These data were provided by Kin Hennis of the Resource Center in April, 1993.

19. An analogy may help clarify this approach. Suppose we wanted to estimate the extra cost to the state of a student receiving a four-year college degree rather than a two-year degree. Our *single* case perspective would lead us to compare the cost of a student attending a state university for four years, and compare that with the cost of the same student attending a community college for two years. Our cohort perspective would lead us to take account of the fact that a large percentage of the students who matriculate in the state university four-year programs never finish, but do generate costs to the taxpayer during the years they are enrolled. The cohort perspective is clearly more appropriate if we are trying to estimate the average cost of producing four-year degrees.

20. See RICHARD KANE, NORTH CAROLINA ADMINISTRATIVE OFFICE OF THE COURTS, ESTIMATES OF JUDICIAL DEPARTMENT COSTS FOR RESENTENCING TRIALS IN CAPITAL CASES FOLLOWING *McKoy v. North Carolina* (June 1, 1990).

21. The primary source of information for identifying all cases that fit our definition (convicted of murder in the first degree between January 1, 1979 and December 31, 1985 and appealed to the SCNC) was Department of Corrections records. Kenneth Parker, Manager of Research and Planning at the DOC, provided us with a listing of all current inmates who are serving time or on death row for a first degree murder conviction, together with former inmates convicted of first degree murder. We checked this list against three other lists to ensure that it was accurate and complete: a tabulation of death sentences for which the SCNC had ruled on direct appeal by 3/1/86 in James G. Exum, Jr., *The Death Penalty in North Carolina*, 8 CANT. L REV. 1 (1985); a listing of inmates on death row as of 4/30/91, provided by Joan Byers, an attorney with the Capital Case Litigation Project in the Attorney General's Office; and files prepared on the basis of an extensive search in Westlaw databases. In addition we checked the list of those still on death row as of July 1992 to determine how many were undergoing *McKoy* review.

22. It should be noted that several of these resentencing hearings were ordered as a result of *McKoy* error in the instructions to the sentencing jury. Barring future rulings that have such far-reaching effects as *McKoy v. North Carolina*, we would expect a reduced likelihood that future capital cases would be remanded for resentencing.

23. Since these statistics are based on cases that are a decade or so old, it is quite possible that remand probabilities for *current and future* cases are larger or smaller. We have no basis for making this judgment.

24. In our trial sample there were a total of 11 resentencing hearings -- death-sentenced cases remanded for resentencing by a jury. The average cost of these cases was \$68,138. (The median was \$66,324)

25. As reported above, 9 of 161, or 5.6%, were remanded for retrial. The average cost of a (noncapital) retrial was assumed to be \$16,697, from Table 6.2.

7. POSTCONVICTION COSTS

Postconviction proceedings can extend over many years as cases in which the defendants are convicted of murder in the first degree are reviewed by various state and federal courts.' Here, we offer estimates of the costs incurred by North Carolina taxpayers during this process.

A. Direct Appeal

Every defendant who is convicted of murder in the first degree and who is sentenced either to death or to life imprisonment has a right to appeal the conviction to the Supreme Court of North Carolina.² We estimate the amount of time spent both by the Court and by prosecuting and defending attorneys during the appeal of such cases.

It should be noted that most of the life-sentenced cases included in our sample were prosecuted capitally. The life sentences were imposed by the jury during the sentencing phase of capital trials. As a result the appeals on these cases are potentially more complex and costly than they would have been if the trial had been conducted noncapitally with the same outcome. The difference in cost we estimate at thus probably understates the "true" difference somewhat.³

The Supreme Court of North Carolina Survey. There are several reasons why adjudicating direct appeals of death cases might consume more of the Supreme Court's time than would life cases. First, appellate briefs in death cases tend to be more lengthy than those filed in life cases, in part because defense attorneys raise and brief more issues in order to preserve them for review on both direct appeal and in collateral post-conviction proceedings.⁴ Second, proportionality review by the Court is a step required in death cases but not life cases.⁵ Third, certain issues, such as the death-qualification procedures required during jury selection in capital trials, are typically not subjects for review in cases where the defendant received a life sentence at the trial level. From several years' service as a law clerk at the Court, one of the present authors also has observed that appellate attorneys have tended to use more of the time allotted for oral argument during death cases than in most other criminal cases, and that the justices tended to spend more time evaluating death cases after oral argument than life cases.

At our request, from September 1991 through August 1992 the justices⁶ and their law clerks at the Court kept contemporaneous records of the time they spent processing cases of murder in the first degree. Time was kept in 15-minute increments, along with a notation of the particular activity being accomplished (e.g., preparing for oral argument, writing opinion, etc.). Information from all of the time sheets was coded, checked, and entered into a Lotus spreadsheet. Among the cases processed through the Court during the 12-month period, we were able to identify 31 in which review both began and ended during the time frame. Cases in this category⁷ were those in which a) the appellee's brief was filed after July 1991 *and* b) the Court issued a majority opinion before September 1, 1992. Of these, 19 are life cases and 12 are death cases. Interestingly, the average length of the majority opinions for the death cases is shorter than for the life cases. (The averages are 33.6 WESTLAW pages for the death cases vs. 35.3 pages for the life cases.) One likely reason for this surprising result is that the Court found error in eleven of the twelve death cases,⁸ but in only three of the 19 life cases. A finding of error during trial is conducive to a relatively short opinion, simply because it is not necessary for the Court to respond to all the issues raised on appeal by the defense. In support of this notion, we note that the longest opinion in the entire sample was for the lone death case that was affirmed.

A summary of the cost data for these cases is presented in Table 7.1.

TABLE 7.1
 TIME SPENT PROCESSING MURDER CASES ON DIRECT APPEAL, 9/91 TO 8/92
 SCNC JUSTICES AND LAW CLERKS
 (IN HOURS)

		N	Mean	Median	Range
Justices	Life	19	12.3	11.4	1.8 to 31.5
	Death	12	19.5	19.6	6.4 to 31.5
Law Clerks	Life	19	59.5	44.3	3.0 to 212.0
	Death	12	74.3	72.1	17.3 to 176.3

Applying the dollar values attributable to each of these positions, as computed in Chapter 5 above, the following total costs for each of these samples are obtained:

TABLE 7.2
 COSTS OF ADJUDICATING LIFE AND DEATH CASES ON DIRECT APPEAL
 SCNC JUSTICES AND LAW CLERKS

		Mean Cost	Median Cost	Range
Justices	Life	\$1,143	\$1,102	\$170 to \$3,053
	Death	\$1,887	\$1,894	\$622 to \$3,053
Law Clerks	Life	\$1,429	\$1,240	\$84 to \$5,940
	Death	\$2,083	\$2,021	\$483 to \$4,939
Total	Life	\$2,572	\$2,620	\$541 to \$8,032
	Death	\$3,970	\$3,753	\$1,105 to \$7,992

As, expected, the average costs of time devoted by justices and clerks to death cases exceeded that for life cases, although the differences are not large. The mean cost is higher by 54 percent (\$3,970/\$2,572), while the median estimate is higher by 43 percent (\$3,753/\$2,619).

Clerk of Supreme Court. The Clerk of the Supreme Court also provided us with information concerning the amount of time her office spends processing life and death cases. During the direct appeal the costs are small, approximately \$300 per case with no difference on the average between life and death cases.⁹ It is only when a defendant nears execution and last minute petitions are filed that her office is required to devote a substantial amount of time to a murder case.¹⁰

Time Spent by State-Paid Attorneys During Direct Appeal It was not possible during this study to obtain systematic information on the time spent by employees of the Offices of the Attorney General or the Appellate Defender for the appellate representation of defendants who had been tried capitally. Nor were we able to obtain systematic information concerning the fees paid to appointed attorneys for representation of indigent defendants during direct appeal. In an effort to obtain some information about the relative magnitudes of time spent, however, we interviewed attorneys in the Attorney General's and Appellate Defender's Offices and asked them how much time they spent during appellate representation in several recent cases.¹¹ Specifically, the attorneys were asked to choose a typical case which had resulted in a sentence of life imprisonment at trial and another typical case resulting in a death sentence, and to state how much time they spent on each one during the direct appeal of the case to the Supreme Court of North Carolina.¹² In the course of our conversations with these attorneys, however, they provided us with information on a number of recent murder cases in which they were involved, and we recorded all responses on cases that fell within our time frame (1990-1992). These data are summarized in Table 7.3.

TABLE 7.3
TIME SPENT BY STATE-PAID ATTORNEYS DURING DIRECT APPEAL
(IN DAYS)

		N	Minimum	Median	Maximum	Mean
Attorneys in the Office Of the Attorney General	Life	5	7	8.3	30.0	13.2
	Death	8	5.4	14.0	17.5	12.9
Attorneys in the Office of The Appellate Defender	Life	6	5.0	19.5	40.0	20.8
	Death	9	21.9	31.9	55.0	33.8

Combining this information with loaded costs we obtain:

TABLE 7.4
SUMMARY OF COSTS
RECENT APPEALS OF MURDER CASES
IN THE SUPREME COURT OF NORTH CAROLINA

		N	Minimum	Median	Maximum	Mean
Attorneys in the Office Of the Attorney General	Life	5	\$2,849	\$3,378	\$12,211	\$5,357
	Death	8	\$2,198	\$5,699	\$7,123	\$5,261
Attorneys in the Office of The Appellate Defender	Life	6	\$1,752	\$6,833	\$14,016	\$7,278
	Death	9	\$7,764	\$13,140	\$19,272	\$12,953

For the Appellate Defender's Office, both the mean and median costs for death cases are about twice as high as for life cases. For the Attorney General's Office, the median death case was substantially more expensive than the median life case, but the means are nearly equal. The latter reflects the influence on the mean (and not the median) of one exceptionally complex case that took 30 days to brief. Since the mean is the most appropriate measure for our purposes, we use it in what follows, despite its sensitivity to extreme values.

Table 7.5 brings together the mean cost estimates for the Supreme Court of North Carolina, Attorney General's Office and Appellate Defender's Office.

TABLE 7.5
SUMMARY OF AVERAGE COSTS

CASES ON DIRECT APPEAL

	N	Mean
Life		
Justice - SCNC	19	\$1,143
Law Clerk - SCNC	19	\$1,429
Clerk of Court - SCNC		\$ 300
Attorney General	5	\$5,357
Appellate Defender	6	\$7,278
Combined Average		\$15,507
Death		
Justice - SCNC	12	\$1,887
Law Clerk - SCNC	12	\$2,083
Clerk of Court - SCNC		\$ 300
Attorney General	8	\$5,261
Appellate Defender	9	\$12,953
Combined Average		\$22,484

Based on this combined cost of time expended by all of these public officials, we estimate that death cases are 45 percent more costly on direct appeal than life cases, on average (\$22,484/\$15,507).

As before, we distinguish between the *single case* approach and the cohort approach in calculating the cost of the death penalty. The cohort approach requires that we estimate the number of appeals per 100 death-sentenced cases, and compare it with the number of appeals per 100 life-sentenced cases. Our analysis of cases resulting in conviction for murder in the Ent degree during the period 1979-1985 provides a basis for these estimates. A majority of the 69 cases resulting in a sentence of death during that period have since been remanded for retrial or resentencing at least once, while it has been relatively rare for life-sentenced cases to be remanded to the trial courts. Based on the 1979-85 period, we estimate that the ratios are approximately 139 direct appeals per 100 death cases, compared with only 106 direct appeals per hundred life cases. The extra cost engendered by this increased likelihood of a second (or third) direct appeal is hence .34 X (cost per direct appeal). About two-thirds of the subsequent direct appeals were for death sentences, and the remainder for life sentences imposed following a new trial. We estimate the extra cost from subsequent direct appeals in death-sentenced cases to be \$6,584.¹³ In all, the extra cost of direct appeals per death sentence imposed is about \$13,561 -- the difference in cost for the first direct appeal, plus the differential cost from the subsequent direct appeals.

B. Proceedings Following the Direct Appeal

If no relief is granted on direct appeal, capital defendants have recourse to subsequent review in the federal and state courts, as explained in Chapter 3. The postconviction road to execution is long and varied, with many exits along the way where the defendant is awarded a new trial or sentencing proceeding or has the death sentence vacated directly. To estimate the full cost of these postconviction proceedings requires a sample of cases where the death sentence was actually carried out. There are only five such cases in the modern era in North Carolina. We were able to obtain some cost data on just three of them (*Barfield*, *Hutchins*, and *Gardner*).¹⁴ In addition, we have obtained data on the costs of the recent *Maynard* case, which came close to execution before the Governor commuted the sentence to life imprisonment without the possibility of parole. We begin with *Maynard*.

State v. Anson Avery Maynard, 81 CRS 35849. Here, we sought to obtain information concerning all costs to the state for processing this case following direct appeal.¹⁵ The homicide and trial occurred in 1981, and the defendant was sentenced to death. Appellate and postconviction proceedings concluded in January 1992 when the death sentence was commuted by the Governor to life imprisonment without the possibility of parole.¹⁶

Defense Costs. During the trial the defendant retained his attorneys but during the direct appeal the Appellate Defender was appointed to represent him. The assistant appellate defender who undertook the defendant's representation eventually left the Appellate Defender's Office but continued to represent Maynard by court appointment during the remainder of all state and federal postconviction proceedings. This attorney provided us with copies of the fee applications she submitted to both state and federal courts for representation of the defendant.

Attorneys from the Resource Center were also appointed to represent the defendant during federal, and some state, postconviction proceedings. The Resource Center provided us with information concerning the amount of time and expenses spent during the course of representation.

Prosecution Costs. Attorneys from the Attorney General's Office represented the State following direct appeal. We requested an estimate of their time, and were advised that "a fair range for the State's time, on -average, would be 80-85 % of the defendant's time."¹⁷ We use this rule of thumb in estimating the State's costs for both *Maynard* and *Gardner*.

Court Resources. Other resources that were consumed during trial, appeal and postconviction events included courtroom use during hearings on motions for appropriate relief (MARs), salaries of state court personnel, and the costs of commutation proceedings before the Governor. We have estimated most of these costs based on reports of time spent by the defense attorneys and included them in the following table:

¹⁸

TABLE 7.6
STATE COSTS AFTER DIRECT APPEAL FOR STATE V. *MAYNARD*
USING CURRENT UNIT COSTS

Procedure	State Cost (Current Unit Costs)
1984 Cert. Petition to U.S. Supreme Ct.	\$ 7,885
1985-87 State Motion for Appropriate Relief	29,957
1987-88 Petition for Cert. to Supreme Court of N.C.	6,188
1988 State Motion Hearing	2,057
1989 Motion for Stay in Supreme Court of N.C.	833
1989 Motion for Stay in Federal District Court	757
1989-90 Federal District Court Habeas Proceedings	17,383
1990 Motions in Supreme Court of N.C.	3,642

1990-92 Federal Appellate Proceedings	24,556
1991 Motions in N.C. Superior Court	115,247
1991-92 Clemency/Commutation Proceedings (through 1/92)	84,888
Costs	\$293,393

State v. John Sterling Gardner, 83 CRS 14519, 14520. We also sought information concerning all of the costs to the state for processing this case following direct appeal. In this instance, the defendant committed two murders, for which he was tried in 1983. He was sentenced to death for each of them. Appellate and postconviction proceedings concluded in October 1992 when the defendant was executed by the State of North Carolina.

Defense Costs. Here, we obtained copies of fee orders from the files maintained by the Clerk of Superior Court in the county where Gardner was tried and from the attorneys appointed to represent him during state and federal postconviction proceedings. The Resource Center also provided us with information concerning the time and expense expended by that office on postconviction representation.

Prosecution Costs. The Office of the Attorney General represented the State in proceedings following the trial. We assumed that the time devoted to this case by the Attorney General's Office attorneys was in proportion to time devoted by the defense, as explained above.

Court Resources. As with the Maynard case, other resources consumed during postconviction proceedings included courtroom use for MAR hearings, salaries of court personnel, and commutation proceedings.

The following table displays the costs we have estimated:

TABLE 7.7
STATE COST'S AFTER DIRECT APPEAL FOR STATE V. GARDNER
USING CURRENT UNIT COSTS 19

Procedure	State Cost (Current Unit Costs)
1984-85 Cert. Petition to United States Supreme Court	Unknown
1985-86 Motions in N.C. Superior Court	\$ 44,945
1987 Petition for Cert. in Supreme Court of N.C.	23,041
1988 Petition for Cert. in United States Supreme Court	6,630
1988-91 Proceedings in Federal District Court	29,201
1991-92 Federal Circuit Court Review & Subsequent Motions in Federal Courts -	49,033
1992 Motions in N.C. Superior Court	22,409
1992 Commutation Proceedings before the North Carolina Governor	41,127
Total State Costs	\$216,387

We can compare the costs of the two cases as follows:

TABLE 7.8

COMPARISON OF STATE COSTS FOLLOWING DIRECT APPEAL
IN MAYNARD AND GARDNER

Proceedings:	Gardner	Maynard
In Superior Court	\$ 67,354	\$147,261
In Supreme Court of North Carolina	23,041	10,663
In Federal Court	84,864	50,581
In Commutation Proceedings	41,127	84,888
Total Cost	\$216,387	\$293,393

State v. Velma Barfield and *State v. James Hutchins*. These two defendants were executed in 1984. In response to a request by the Chief Justice of North Carolina, the Attorney General prepared a report summarizing the time and expense that his office expended on postconviction proceedings in the *Barfield* and *Hutchins* cases.²⁰ We compare the time the Attorney General reported with the time we estimate the same office expended in *Maynard* and *Gardner* in the following table:

TABLE 7.9
COMPARISON OF POST-DIRECT APPEAL TIME EXPENDED
ATTORNEYS IN THE ATTORNEY GENERAL'S OFFICE
(IN DAYS) 21

	<i>Barfield</i>	<i>Hutchins</i>	<i>Gardner</i>	<i>Maynard</i>
Federal Proceedings	81.5	84.5	196.5	185.7
MAR Proceedings	25.0	8.0	68.6	26.6
Other State Proceedings	7.0	5.0	76.0	105.4
Total	113.5	97.5	341.1	317.7

Thus the *Maynard* -and *Gardner* cases were litigated much more extensively than *Barfield* and *Hutchins*. Since our cost estimates are intended to be useful to forward-looking policy decisions, we would like to know which of these cases better represents the likely future of postconviction proceedings. Statutes, case law, and standard operating procedures are all likely to change over the next few years, and no one may claim to see the future clearly. But it is noteworthy that the celerity with which *Barfield* and *Hutchins* were brought to conclusion is very unusual in the modern era; indeed, of all the people sentenced to death in North Carolina since 1981, only one (*Gardner*) has been executed. The others are still pursuing their appeals, or have been released from death row. We conclude, then, that in the absence of a radical change in both state and federal procedure, the longer and more extensive litigation exemplified by *Maynard* and *Gardner* is closer to the norm both now and in the future.

NOTES

1. See Appendix IV, Case Processing in the Supreme Court of North Carolina: An Overview.
2. In addition to reviewing convictions of murder in the first degree, the Supreme Court adjudicates civil cases and some other criminal cases. Convictions of lesser degrees of homicide are appealable to the Court of Appeals of North Carolina. See generally N.C. GEN. STAT. §§ 7A-27 through 7A-31 (1989).
3. We could have used appeals of second degree murder cases as our control group. These appeals are heard in the Court of Appeals rather than the SCNC. Our decision to use first degree "life" cases as our control group is valid if, for example, we are measuring the cost associated with the creation of a new aggravating circumstance in the North Carolina law governing capital punishment. Then cases that formerly could have been tried noncapitally for first degree murder would necessarily be tried capitally. Under either regime a direct appeal to the SCNC would be available.'
4. See generally N.C. R. App. P. 10; Donald F. Roeschke, *Historical Aspects and Procedural Limitations of Federal Habeas Corpus*, 39 AM. JUR. TRIALS 157 (1989 and Supp. 1991).
5. N.C. GEN. STAT. § 15A-2000(d)(2) (1989). A life sentence may also be challenged under the Eighth Amendment on grounds that the sentence imposed is disproportionate to the crime for which the defendant is convicted. But compare *Solem v. Helm*, 463 U.S. 277 (1983) with *Harmelin v. Michigan*, - U.S. 111 S. Ct. 2680 (1991). However, unlike review of cases in which the defendant has been sentenced to death, such a challenge is not required statutorily during the direct appeal of life cases.
6. In the event, only six justices provided us with these data. We corrected for that omission by multiplying the total justice time by 7/6.
7. Resentencing cases and a case in which there was a guilty plea to first degree murder were excluded from this category.
8. New trials were ordered in nine of the death cases, and new sentencing hearings in two others (one of which was *McKoy* error).
9. The Clerk of the Supreme Court, reported to us by letter dated February 26, 1993 that the following amounts of time were expended during direct appeal of a life case or a death case: the Clerk, 0.75 hours; the Assistant Clerk, 4.4 hours; a Deputy Clerk, 3.6 hours; the Records Clerk, 1.5 hours; and the Printing Department, 1.9 hours.

With the exception of the printing department and records clerk, for whom we have no financial information, we have estimated these costs by multiplying time spent per position by a figure combining the salary, benefits, and rental value of space occupied. The combined cost of the time spent by individuals in these positions for processing a life case or a death case on direct appeal is about \$300. This conclusion is based on estimated position costs for the relevant officials, as shown in the table below. As part of these position costs the amount of space attributable to these positions were: Clerk, 450 square feet, assistant clerk, 200 square feet, deputy clerk, 200 square feet, valued at \$10/square foot. We also add \$1000 per position to cover office expenses and depreciation on furniture and computer equipment.

Salary and	Rent and	Total	Cost/Hours	Hours/Appeal	Cost/Case
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	Fringe	Office Expense		Hour		
Clerk	\$77,054	\$5,500	\$82,554	\$46.91	0.75	\$35.18
Asst. Clerk	\$45,429	\$3,000	\$48,429	\$27.52	4.4	\$121.09
Deputy Clerk	\$27,035	\$3,000	\$30,035	\$17.07	5.1*	\$87.06
					Total	\$243.33

*Includes records clerk

10. See letter dated February 26, 1993, from the Clerk of the Supreme Court of North Carolina.

11. Resource Center employees were not surveyed concerning cases on direct appeal. WESTLAW revealed only two opinions published by the Supreme Court of North Carolina between 1989 and Feb. 5, 1993, in which anyone associated with the Resource Center was listed as counsel of record. *State v. Willis*, 332 N.C. 151, 420 S.E.2d 158 (1992); *State v. Cummings*, 329 N.C. 249, 404 S.E. 2d 849 (1991). From interviews with Resource Center personnel, however, it seems clear that they did assist other attorneys on occasion during the direct appeal process.

12. During these interviews the attorneys mentioned several factors which affected the length of time required to handle any given case during the appellate process. These include: a) whether several charges were joined for trial, b) the experience of counsel and the trial judge, and, c) in the case of prosecutors, whether the appellate. counsel had served as trial counsel.

Particularly relevant to the present study were remarks that (a) capitally tried cases that result in life sentences take longer to handle on direct appeal than cases that had not been prosecuted capitally but which resulted in fife sentences (e.g., a trial for murder in the first degree in which a determination had been made that there was not sufficient evidence to justify submitting an issue regarding aggravating circumstances to the jury), (b) in death cases often more issues tend to be raised on appeal because to omit an issue may waive the opportunity to argue it later, and (c) the presence or absence of alleged McKoy error can affect the length of time required to brief any given death case.

13. To obtain this number we used a weighted average of the cost of a direct appeal for death cases and for life cases, and multiplied the result by .37. The estimate of the number of direct appeals is based on the tabulation of postconviction events in first-degree murder cases for 1979-85. We assumed that death cases resentenced to life as a result of a new sentencing trial did not appeal.

14. Additional data are presented in a report entitled *TIME AND EXPENSE ANALYSIS IN POST-DEATH PENALTY CASES IN NORTH CAROLINA*, prepared for the AOC by The Spangenberg Group in 1988. In this study attorneys who had represented defendants during postconviction proceedings in 23 death penalty cases were surveyed concerning the time expended during postconviction proceedings. The report tabulates the results by type of court. For example, The Spangenberg Group reports that the average hours of defense time in connection with proceedings in U.S. District Court is 335, based on 10 cases that had been heard at that level (p. 12). One problem in interpreting these statistics is that most of the cases had not been brought to a conclusion; some of those 10 cases might return to U.S. District Court, and the same is true for the other courts. Perhaps as a result, the average defense hours in the various federal courts, as reported from the Spangenberg survey, was about half of our estimate for defense hours for *Maynard* and Gardner. We conclude that there is no very good way to translate the Spangenberg statistics into estimates of the postconviction defense litigation costs for death cases.

15. We also sought information concerning the federal costs. The Administrative Office of the U.S. Courts refused to make public the fee orders submitted for federal postconviction proceedings. In both the *Maynard* and *Gardner* cases, however, the defense attorneys provided us with information concerning this time and expense in federal postconviction proceedings.

16. As of March 1993, post-conviction proceedings had not yet ended in Maynard's case. For the present research project we gathered data only through the month in which the Governor of North Carolina commuted the sentence to life imprisonment without the possibility of parole.

17. Letter dated November 5, 1992, from Barry McNeill, Special Deputy Attorney General, North Carolina Office of the Attorney General.

18. The figures in this table and Table 7.7 were derived as follows. We estimated defense time and expense from fee orders and other reports from defense attorneys. As explained in the previous note, we then multiplied defense hours by 0.85 to estimate time spent by prosecuting attorneys. We also made some conservative estimates of the time spent by state court officials during case processing. We then applied the loaded costs developed in Chapter 5 of this report to the state employees, and the current hourly rates paid to appointed attorneys to arrive at the current dollar costs of the proceedings. Thus, the figures represent what it would cost in 1993 to conduct the proceedings listed. Note that we do not include any costs incurred by the federal government in this column. These would include payments to the Resource Center for representation in federal proceedings, and the salaries and overhead of federal court officials.

19. See text accompanying endnote 18 for an explanation of the way the costs here were estimated.

20. Letter dated January 9, 1986, from Lacy H. Thornburg, Attorney General of the State of North Carolina to the Honorable James G. Exum, Jr., The Supreme Court of North Carolina, to which is attached a report entitled ESTIMATED EXPENSES OF THE DEPARTMENT OF JUSTICE IN LITIGATING TO CONCLUSION CAPITAL CASES OF STATE V. JAMES HUTCHINS AND STATE V. VELMA BARFIELD.

21. As explained in the text, the figures for the *Maynard* and *Gardner* cases were derived by multiplying the number of defense hours by 0.85. This factor is an estimate and subject to considerable uncertainty. Note that Resource Center attorneys worked on Gardner's and Maynard's defenses, but not Barfield's or Hutchins's.

8. PRISON COSTS

While adjudicating capital cases is relatively costly at every stage of the process, the death penalty may save the state something in the costs of incarceration. In this section we estimate the differential cost of imprisonment for a death-sentenced convict as compared with a life-sentenced convict. We again make use of the two perspectives in defining this difference:

Single case: a comparison of the incarceration costs for a death-sentenced defendant *who is eventually executed*, with the average incarceration costs for a life-sentenced defendant.

Cohort: a comparison of the average incarceration costs for death-sentenced defendants with those of life-sentenced defendants.

The difference in perspective is in whether or not the comparison is limited to those death-sentenced defendants who are ultimately executed, as in the "single case" definition. The broader "cohort" comparison takes account of the fact that most defendants sentenced to death are never executed. The results of our study of the 69 people sentenced to death between 1979 and 1985 tell the story: only four have been executed, and less than half of the others remain on death row.¹ If only a small fraction of death-sentenced convicts are ultimately executed, and those after long delays, then there is little saving in incarceration costs overall. The death-sentenced convict will typically end up serving approximately the same number of years as the life-sentenced convict.

A- Framework for the Single Case Comparison

To estimate the correctional cost savings from the execution of a death-sentenced defendant, it is necessary to specify the correctional history up to the point of execution, as well as to specify the alternative correctional scenario in which the defendant serves out a life sentence in the North Carolina prisons. Under current law² defendants convicted of murder in the first degree are sentenced either to death or life imprisonment, where the latter carries a 20- parole date. In our analysis we compare the costs of 20 years in prison at varying levels of custody, with the cost of keeping the defendant on death row until execution.³

There is considerable uncertainty about the average delay between the imposition of a death sentence and the execution. The available evidence comes from recent history, and is at best a shaky guide to the future. Here is a tabulation of all executions occurring in the post-*Furman* era:

TABLE 8.1
ELAPSED TIME FROM DEATH SENTENCE TO EXECUTION

Defendant	Date Sentenced	Execution Date	Elapsed Time
Barfield	12/2/78	11/2/84	5 yrs, 11 mos
Hutchins	9/24/79	3/16/84	4 yrs, 6 mos
McDougall	7/25/80	10/18/91	11 yrs, 3 mos
Rook	10/27/80	9/19/86	5 yrs, 11 mos
Gardner	9/23/83	100/92	9 yrs, 1 mo

Thus North Carolina has executed only five convicts in recent times. For the first three executions, the execution occurred relatively soon after the sentence was imposed, but McDougall and Gardner were on

death row for an average of over 10 years. Our study of those sentenced to death during the period 1979 to 1985 found that as of October 1992 there were 26 others still on death row from that period; if any of them are ultimately executed, it will further increase the average elapsed time from sentence to execution for this cohort. Until all members of that cohort have either been executed or are no longer at risk, we cannot make a confident estimate of the average elapsed time from sentence to execution for this group. And even if we did have complete information on this cohort, it would not be a reliable guide to the future.

What we can say with some confidence is that there is no precedent in the modern era for a "streamlined" appeals process that moves from sentence to execution in only a year or two. If history is a guide, ten years is a reasonable estimate of the average time lag. But in what follows, we also estimate the cost savings that would occur if there were only a five year delay from sentence to execution.

Our comparison, then, is the cost of five or ten years on death row with 20 years of varying levels of custody. This comparison is made easier by the fact that the cost of holding an inmate on death row differs very little from the cost of incarcerating a "lifer" for the first ten years. Life-sentenced convicts will serve the first few years of their sentence in close custody and then, if they pose no serious behavior problems, be transferred to medium security. As detailed below, holding an inmate in medium security costs almost the same as holding an inmate in close security or on death row.⁴ Therefore, the initial years of our comparison periods (either five or ten years) is nearly a "wash" as far as costs to the state are concerned. Most of the correctional cost savings from an execution occur in the period in which the life-sentenced convict will still be in prison, while the death-sentenced convict will be gone.

B. Cost of a Year in Prison

Most of the cost of housing a prisoner for a year is the expense of staffing and supplying the prison, rather than capital costs. The Department of Correction periodically prepares an analysis of the operating costs for its 92 facilities, and uses these data to estimate the average cost for each level of custody.⁵ The results are shown in Table 8.2, based on the June 1991 report. The second column reports the results of the DOC's analysis. The third column modifies these results slightly by excluding Central Prison and McCain Hospital, because a substantial share of their (relatively high) daily costs is the result of providing medical care and other special services.⁶ The fourth column includes the cost of special medical and mental health operations that are housed in Central Prison but service the entire system. These costs are averaged across the entire prison population, because they are all eligible for these services. The last column suggests that the costs of close security, including death row, is only 10 percent more than medium security.

TABLE 8.2
OPERATING COST, BY CUSTODY LEVEL

Custody Level	Average For System	Ave. Excluding Special Facilities	Ave. Including Medical Care	Annual Average
Minimum	\$44.71	\$41.65	\$4334	\$15,819
Medium	\$57.45	\$55.78	\$57.47	\$20,977
Close	\$66.97	\$61.43	\$63.12	\$23,039

These figures do not include the capital costs of incarceration. Capital costs are not calculated routinely by the Department of Corrections, but we were able to estimate them for a new medium security

unit. In July 1992, the DOC opened the Brown Creek Correctional Facility. This prison is a medium security, dormitory type facility designed to house 624 inmates. Construction was budgeted at \$17.5 million.⁷ The DOC Central Engineering Division provided an estimate of the facility's useful life as 50 years, with significant renovations being made at 20 and 40 years, each entailing costs amounting to 25% (in real terms) of original construction expense. From these numbers we estimated that the annual capital cost per inmate is \$746.⁸ This result will change somewhat with changes in assumptions about interest and inflation rates.

But whatever we assume about inflation and interest rates, within reason, it remains true that capital costs of incarceration are small relative to operating costs.

C. Cost Saving from Shorter Incarceration for Death-Sentenced Defendants

The present value of the extra 10 or 15 years in prison can be calculated under different assumptions concerning the level of custody.⁹ If all these years are spent in medium security, then the costs are somewhat higher than if the last five years are spent in minimum custody, as would normally be the case in North Carolina prisons. Of these four estimates, we believe that the smallest is the best guide to the future, since it best comports with experience and current practice. For the "single case" perspective, then, our best estimate is that an execution saves \$166 thousand in incarceration costs.¹⁰

TABLE 8.3
COSTS OF DIFFERENTIAL PRISON TIME, LIFE VS. DEATH

Time Until Execution	Complete Term in Medium Security	Complete Last Five Years in Minimum Security
Execution After Five Years	\$288,481	\$266,714
Execution After Ten Years	\$187,687	\$165,920

The cohort *perspective* is also relevant, and yields a far smaller number. The key to estimating the correctional savings for a cohort of death-sentenced defendants is knowing the percentage of these defendants who will ultimately be executed. Recent history suggests that this percentage is quite low--only four (5.8 percent) of the 69 defendants sentenced to death between 1979 and 1985 have been executed to date (March 1993). Of the 26 who remain on death row, it is impossible to predict with confidence how many will ultimately be executed, and even if we could predict correctly, the resulting percentage would not serve as a reliable guide to the future. Our approach is to offer cost estimates for what we consider a reasonable range of possible execution probabilities for future death-sentenced defendants, namely 10-30 percent.

Our calculation of cohort cost savings is based on the assumption that death-sentenced defendants who are not executed will serve 20 years in prison on the average, the last five years of which will be in minimum security. Thus there will be no "savings" for those not executed. The results are as follows:

TABLE 8.4
COST SAVINGS FROM DIFFERENTIAL PRISON TIME, COHORT PERSPECTIVE

Execution Percentage	Cost Saving Per Defendant (10 Year Execution)	Cost Saving Per Defendant (5 Year Execution)
10	\$16,592	\$26,671
20	\$33,184	\$53,343
30	\$49,776	\$80,014

The estimated cost savings depend critically on the percentage of defendants executed, and the elapsed time from sentence to execution. For example, assuming an elapsed time of 10 years and a 20 percent execution rate yields an estimate of \$33 thousand per death sentence imposed; if the execution rate is only 10 percent, the cost saving falls to \$17 thousand.

NOTES

1. As of October 1992 when we completed our tabulation, 27 were on death row (one of whom has since been executed) and five others had new sentencing hearings pending. The means by which other members of this cohort have left death row are as follows: Sentence reduced by SCNC, 9, new trial resulting in acquittal or sentence less severe than death, 9; new sentencing hearing resulting in life sentence by jury, 13; death (other than execution), 2.

2. Defendants convicted of murder in the first degree who receive life sentences are sentenced pursuant to N.C. GEN. STAT. §§ 14-17 (Supp. 1992), 15A-2000 and 15A-2002 (1988). They are eligible for release on parole after serving 20 years. N.C. GEN. STAT. § 15A-1371(al) (1988).

3. Defendants sentenced to life imprisonment after conviction for murder in the first degree are eligible for parole after 20 years in prison. In practice defendants may remain in prison more than 20 years if parole is denied at that point or if they are serving a consecutive term for another crime. It is also possible that defendants will serve less than 20 years. In our study of defendants convicted of first degree murder between 1979 and 1985, we found that as of October 1992 a total of 20 (12 percent) defendants who had been sentenced to life imprisonment were for various reasons (including death) no longer in prison

4. There are four basic levels of custody within the North Carolina prison system. They are, in ascending order of security: minimum, medium, close, and maximum custody. Death row prisoners are categorized as close custody inmates.

There were 76 male prisoners on death row as of July 1992, all housed in Central Prison. (Our information on them was provided by Nathan Rice, former warden of Central Prison and current administrator of special facilities in the Department of Corrections.) Death row inmates perform custodial duties within their block, but are not involved in prison enterprises. This fact does not cost the system anything, since there are a shortage of such jobs available; Death row prisoners do not participate in rehabilitation activities, although they can take correspondence courses. They are housed in a special cell block with its own day room, and are kept separate from the other prisoners at all times. In terms of facilities and staffing there is little difference between death row and other close security blocks.

As of 4/30/91, there were five women on death row, housed in Women's Prison in Raleigh. We lack information on costs for this group.

There is one exceptional cost for which we take no account. Several days prior to the execution date, the inmate is moved to a "death watch" area, consisting of four cells that otherwise stay empty. "Me inmate is kept on strict suicide watch, with two guards around the clock.

5. NORTH CAROLINA DEPARTMENT OF CORRECTIONS, COST PER INMATE RANKED BY UNIT FOR THE YEAR ENDED JUNE 30,1991. This report allocates DOC administrative overhead to the various facilities based on their operating costs relative to the total for locations across the system. This overhead allocation is added to the facility's direct operating costs.

The average cost per inmate is calculated for each of the facilities. The average cost of, say, medium security inmates for the entire system is calculated by a weighted average of the average costs for the 92 facilities, where the weights are equal to the share of the total medium security inmates that reside in each facility. This system is reasonably reliable because most facilities specialize -- most or all of the inmates in any unit are in the same security classification.

6. Blue Ridge Youth Center was also excluded since it was a start-up facility during 1991, and its daily costs are not comparable to those of other facilities.

7. This information was provided by Dwight Sanderford of the Office of State Budget Management. He transmitted a report dated 10/3/91 titled "North Carolina Prison Facilities Development Program: Anson (Brown Creek) Correctional Institution."

8. Suppose that the state borrows sufficient funds to pay for the construction costs and the repair work at 20 years and 40 years. We define the capital cost as the annual payment required to cover interest payments and retire this debt in 50 years, the expected lifetime of the facility. We calculate an annual payment that is constant in real terms, increasing with the rate of inflation. Assuming that the inflation rate averages 5 percent, and that the state pays 4 percent interest on its long-term borrowing, we obtain the indicated result. As of March 1, 1993, the interest rate on 20-year bonds issued by North Carolina was about 4.5%. The 20-year U.S. Treasury bond rate was 6.7%. The latter is a good indication of what the financial markets expect in terms of average inflation rates over the next 20 years, with the interest rate exceeding the rate of inflation by a percentage point or so. Thus the interest rate paid by the state is, roughly speaking, one percentage point less than the anticipated rate of inflation. That conclusion is incorporated in our assumptions.)

9. We assume a 5.5% inflation rate and a 6.5% yield on long-term secure (federal) bonds. The latter is used as the discount rate in calculating the present value.

10. The assumption that a life-sentenced inmate is in medium security by year 10 is supported by a special study done for us by Ken Parker of the DOC. He found that of the 14 inmates sentenced to life imprisonment for first degree murder in 1981 and 1982, and still in prison in 1992, 11 were being held in medium security. (Two were held in higher security, and one in minimum security.)

9. SUMMING UP THE COSTS

To estimate the net cost to the North Carolina public of adjudicating a case capitally, we now combine the estimates from Chapters 6, 7 and 8 above. Table 9.1 tells the story.

TABLE 9.1
EXTRA COSTS TO THE NORTH CAROLINA PUBLIC OF CAPITAL CASES

	Single Case Perspective (per case)	Cohort Perspective (per death penalty imposed)
Trial	\$67,402	\$194,000
Direct Appeal	\$6,977	\$13,561
Postconviction	\$255,000	> > \$25,500
Imprisonment	(\$165,920)	(\$16,600)
Total	\$163,459	> > \$216,461

From the single case perspective, "the" cost of the death penalty is about \$163 thousand per case. The largest entry in this calculation, \$255 thousand for postconviction proceedings, is also the most uncertain. We base this estimate on the average of the two recent cases for which we were able to obtain relatively complete information, *Maynard* and *Gardner* (Chapter 7). It is difficult to predict whether these two cases will provide a reliable guide to the costs of future postconviction litigation for cases that are concluded by carrying out the death penalty (or, as in the *Maynard* case, coming close).¹ The other entries are more straightforward. The estimate for the differential trial cost assumes that the defendant is indigent (see Chapter 6). The savings from cutting short the period of imprisonment is estimated on the assumption that the execution occurred after 10 years (see Chapter 8).

Hence, our first conclusion is this:

The extra costs to the North Carolina public of adjudicating a case capitally through to execution, as compared with a noncapital adjudication that results in conviction for first degree murder and a 20-year prison term, is about \$163 thousand.

The single case approach is a useful beginning in understanding the costs of the death penalty, but it is not directly relevant to policy decisions. Much of the extra costs of death penalty adjudication are generated by cases that stop short of execution. For every death Penalty imposed by a jury there are several others that are prosecuted capitally but tried to a lesser conclusion. And in only a small percentage of cases in which the death penalty is imposed, is the defendant ultimately executed. In policy debate over, say, whether the legislature should change the domain of the death penalty, the relevant cost figure includes the extra costs from all such cases. The second column of Table 9.1 reports these extra costs, calculated on a "per death penalty imposed" basis. The entries require some explanation.

As in the single case estimate, the most problematic entry is for postconviction adjudication costs. The entry here indicates that these costs are much greater than \$25,500, which is 10 percent of the postconviction costs for the single case approach. The logic here is straightforward. Suppose that there is one execution for every ten death penalties imposed, and that postconviction costs for that execution are \$255,000 (as indicated above). The postconviction cost *per death penalty imposed* is the average (over 10 cases) of the \$255,000 and the costs of postconviction proceedings for the nine other capital cases. We have little basis for estimating the postconviction costs of these other cases. A rough calculation suggests

that these other postconviction proceedings may add \$58 thousand or so to the overall average, in which case the cost of postconviction proceedings per death penalty imposed would be \$84 thousand and the total cost would be \$274 thousand.² In Table 9.1, we simply indicate that the true number is much larger than the one given here.

The entry for incarceration cost savings is also based on the assumption that 10 percent of death row inmates are ultimately executed.

As explained in Chapters 6 and 7 above, the entries for trial cost and direct appeal incorporate the likelihood that death sentenced cases return to the trial courts for retrial or resentencing.

Our second conclusion is this:

The extra cost to the North Carolina public of prosecuting a case capitally, as compared with a noncapital prosecution, is more than \$216 thousand per death penalty imposed. This estimate takes into account the likelihood that the jury will actually impose the death penalty, and if so, that the appellate courts will return the case to Superior Court for retrial or resentencing.

It should be noted that there is another natural way to report the cohort costs of the death sentence. Instead of reporting these costs per death penalty imposed, we could report these costs *per execution*. Notice that if we carry through our assumption that there is only one execution for every ten death-sentenced defendants, then the answer emerges directly:

The extra cost per execution of prosecuting a case capitally is more than \$2.16 million.

Of course the assumption that 10 percent of death-sentenced defendants will be executed is open to question. For those who believe that the probability of execution will prove higher than 10 percent in the future, we calculate the implications of higher percentages in Table 9.2.

TABLE 9.2
EFFECTS OF EXECUTION PROBABILITY ON COST PER EXECUTION

Execution Percentage	Postconviction Costs per Death Penalty	Imprisonment Savings per Death Penalty	Total Costs per Death Penalty	Total Costs per Execution
10	>> \$25,500	(\$16,592)	>> \$216,461	>> \$2.16 million
20	>>> \$51,000	(\$33,184)	>> \$225,377	>> \$1.13 million
30	>> \$76,500	(\$49,776)	>> \$234,285	>> \$0.78 million

Our calculations hold constant the cost of trial and direct appeal (from Table 9.1), while varying the likelihood that the death sentence will be carried out. In these calculations, the cost per death penalty does not change much, but the cost per execution is quite sensitive to the execution percentage. Still, for any reasonable imputation of the postconviction costs for other capital cases, the extra cost per execution will exceed \$800 thousand even if the execution probability is as high as an unprecedented 30 percent.³

It is possible to use our data to make a rough estimate of the statewide costs incurred over a particular time period. As noted in Chapter 6, over the two-year period 1991 and 1992 there were a total of 94 defendants tried capitally (excluding retrials and resentencing hearings). Of these, 29 were sentenced to death. These capital trials would have cost the state and counties about \$4.3 million less if they had

proceeded noncapitally.⁴ If the death-sentenced cases follow a postconviction track similar to that of cases from previous years, the cost to the state will total about \$2.8 million for appeals and postconviction proceedings,⁵ and \$1.4 million for retrials and resentencing proceedings ordered by the appellate courts.⁶ If 10 percent of the death-sentenced defendants will be executed, the savings in imprisonment costs will be about \$0.5 million.⁷ Combining all these figures gives an overall extra cost of about \$8.0 million, or an average of \$4.0 million for the two years.

We conclude with a reminder that these estimates do not include federal or private costs, but rather are limited to those that are a direct burden on state and local government. Our numbers indicate that burden is substantial. But we leave it to others to judge whether the benefits of executing some murderers are such that it is worthwhile to expend so much public resources on the effort.

NOTES

1. It should be noted that these two proceeded cases through the appeals and postconviction process in a relatively straightforward fashion, without for example being remanded for retrial or resentencing. So perhaps they will turn out to be less expensive than the average case of the future.
2. Of the 69 defendants sentenced to death between 1979 and 1985 (see Appendix 1), 47 incurred some postconviction costs. Four have been executed. If we assume that three more will eventually be executed (which would match our assumption of a 10 percent execution rate) and that the remainder generate an average of say, \$100,000 in postconviction costs, then the overall average for the 69 defendants works out to \$84,000.
3. As a matter of academic interest, we note that if every death-sentenced defendant were executed, the extra costs per execution would be identical to the single-case result, \$216 thousand.
4. As shown in Table 6.5, the extra cost per death penalty is about \$147,700, which, when multiplied by the 29 death sentences imposed during this period, yields \$4.28 million.
5. This estimate is based on the average excess cost of direct appeals from Table 9.1, \$13,561, combined with the rough cost estimate of postconviction proceedings explained in endnote 2 above, \$84,000. The total multiplied by 29 cases is \$2.83 million.
6. As shown in Chapter 6, the extra costs due to retrials and resentencing proceedings ordered by the appellate courts amounts to \$47,203 per death-sentenced defendant. Multiplying this number by 29 yields \$1.37 million.
7. Table 8.3 presents our best estimate of prison cost savings per execution as \$165,920. If 10 percent of the 29 defendants sentenced to death in 1991 and 1992 are ultimately executed, the savings will be \$0.48 million.

APPENDIXES

- I. Partial Postconviction History and Current Status of First Degree Murder Judgments Entered Between 1979 and 1986
- II. Coding Rules For Murder-Trial Data
- III. Detailed Procedures For Costing Out Murder-Trial Data
- IV. Case Processing in the Supreme Court of North Carolina: An Overview
- V. Table of Costs Incurred in State v. *Anson Avery Maynard*
- VI. Table of Costs Incurred in State v. *John Sterling Gardner*

1. PARTIAL POSTCONVICTION HISTORY AND CURRENT STATUS OF FIRST DEGREE MURDER JUDGMENTS ENTERED BETWEEN 1979 AND 1996

In order to provide descriptive data relevant to assessing postconviction costs of firstdegree murder cases, we tracked a sample of defendants who were sentenced more than seven years ago. In particular, we sought to include all those defendants convicted of first degree murder before 1986 under the "new" capital punishment statutes (enacted in 1977). (We chose 1986 because we thought a seven-year interval would capture a significant amount of postconviction activity.) Those convicted before January 1, 1979 were excluded because of the difficulty in determining which of them were tried under the new statute and which under the old. One result was to omit at least four people who were sentenced to death in 1978, including Velma Barfield.

The primary source of data was a Lotus spreadsheet provided to us in July 1992 by Kenneth Parker, an official in the DOC This file includes an extract of DOC records on all current inmates who are serving time or are on death row for a first degree murder conviction, together with former inmates convicted of first degree murder. The file includes the date of conviction, which was the basis for deciding on eligibility for the sample. It also includes items on current status.

The list generated from the DOC file was checked against three other lists to ensure that it was complete: 1) a tabulation of death sentences on which the Supreme Court of North Carolina had ruled on direct appeal by March 1, 1986, which was presented in an article written by the Honorable James G. Exum, Jr., *The Death Penalty in North Carolina*, 8 CANT. L. REV. 1 (1985); 2) a listing of inmates on death row as of April 30, 1991, provided by Joan Byers, an attorney in the North Carolina Department of Justice; and 3) files prepared on the basis of an extensive search in WESTLAW databases by Seth Blum, a Duke Law School student, which were supposed to identify all appeals involving defendants convicted of first degree murder in North Carolina (the "Appeals" file). (This WESTLAW search did not identify unpublished dispositions of some postconviction proceedings.) In addition we checked the list of those still on death row as of July 1992 to determine how many were undergoing review because they had involved allegedly erroneous sentencing instructions under the case of *McKoy v. North Carolina*.

Based on these checks, we concluded that the list of death-sentenced defendants was complete, but are less confident that we have identified all cases in which the defendant was sentenced to life imprisonment for murder in the first degree within the relevant time frame.

The data elements provided by Parker included dates of admission and conviction, days of jail credit awarded, and current status, and whether the defendant was sentenced under the North Carolina Fair Sentencing Act, N.C. General Statutes sections 15A-1340.1 through 15A-1340.7. Additional elements were added from WESTLAW: whether the original sentence was life or death, the outcome of the direct appeal, and whether there were subsequent reported actions in the appellate and postconviction process that had the effect of sending the case back to the trial court for a new sentencing hearing or a new trial.

The results of this analysis are discussed in various sections of this report.

DEATH SENTENCES
1/1/79 - 12/31/85
SUMMARY STATISTICS

Disposition by SCNC of Direct Appeal. of Judgments Imposing Death Sentences	Court Proceedings Which Followed Direct Appeal (As Reported in WESTLAW)	Most Recent Sentence As Reported by the Department of Correction in November 1992		
		Death	Life	Pending
Affirmed/No Error 35	None Found 25	25		
	New Sentencing Ordered 8	1	3	4
	New Trial Ordered 1		1	
	MAR ^a Hearing 1		1	
New Sentencing Ordered 18	None Found 11	3	8	
	New Sentencing Ordered 5	2	2	1
	New Trial Ordered - NS ^b 1		1	
	Sentence Reduced 1		1	
New Trial Ordered 9	None Found 7		7	
	New Sentencing Ordered 1	1		
	New Trial Ordered 1		1	
Sentence Reduced to Life 7	None Found 7		7	
Total 69	69	32	32	5

^a MAR = Motion for Appropriate Relief

^b The new trial resulted in a death sentence. The case was remanded for a new sentencing hearing (NS) on direct appeal.

DEATH SENTENCES
RESULTS OF NEW SENTENCING AND NEW TRIALS THAT WERE ORDERED
ON DIRECT APPEAL OR DURING OTHER POSTCONVICTION PROCEEDINGS
FOR SAMPLE CASES

	New Sentencing Hearings	New Trials
Life	13	9
Death	15	3
Pending	5	0
Total	33	12

MEANS OF LEAVING DEATH ROW

Still on Death Row	26	38%
Execution	4	6%
Other Death	2	3%
Resentencing Pending	5	7%
New Sentencing	13	19%
New Trial	10	14%
Sentence Reduced	9	13%

LIFE SENTENCES
FIRST DEGREE MURDER CONVICTIONS 1/1/79 - 12/31/85
SUMMARY STATISTICS

Direct Appeal		Current Status	
Affirmed	143	Incarcerated	141
New Sentence	1	Died in Prison	7
New Trial	9	Paroled	3
Sentence Reduced	4	Free	10
Unknown	4		

II. CODING RULES FOR MURDER-TRIAL DATA

General instructions. Make an entry for every question and subquestion. Do not leave any question without an answer. The available answers have been placed in brackets after the question title. In general, if a question is not pertinent to the facts of the case, put "NA", and if a question pertains, but there is not enough information to answer it, put "U". If you are unsure how to answer a question, write down the reasons for your uncertainty on a separate piece of paper and staple it to the coding sheet.

If a time survey was returned showing a range of hours for a given activity (e.g., 10-15), enter the midpoint (12 .5). If the response was in number of days, presume that one day equals eight hours. If the response was in numbers of weeks, presume that one week equals forty hours.

A. CASE IDENTIFICATION

1. Original county [name]

Enter the name of the county where the case originated. E.g., a case was originally filed in Durham County, but a motion for change of venue was granted and the case was eventually transferred to and tried in Lee County. Enter "DURHAM".

2. Case number used in original county [no.]

Enter the CRS number assigned to the first murder charge by the original county. (Sometimes the county to which a case is transferred will assign a new number; do not enter it.) Be careful to examine the data in the file to insure that the number you are entering is for a murder charge and not some other charge which was handled along with it.

3. Defendant's name [last name, first name, middle initial]

It is not uncommon for defendants to have multiple aliases. Use the first name given on the docket sheet from the original county and enter it as follows: last name, first name, middle initial.

4. New case or retrial/resentencing [NT, NS, OT, U]

Sometimes an appellate court will require that a defendant's conviction and/or sentence be thrown out because of error in the trial proceedings. In these situations, the defendant may receive a new trial or sentencing hearing, and this new trial or hearing may be one of the cases in our sample. If you are able to determine that a given case is a retrial or a resentencing, indicate this as follows:

NT	New trial
NS	New sentencing hearing (e.g., a <u>McKoy</u> case)
OT	Original trial or plea bargain
U	Unknown whether it is the original or a retrial or resentencing.

B. BASIC FACTS CONCERNING CASE

5. Offense date [mm/dd/yy]

Enter the date on which the homicide was committed.

6. Arrest date [mm/dd/yy]

Enter the date on which defendant was arrested.

7. Indictment date [mm/dd/yy]

Enter the date on which the defendant was indicted for murder. If there was a superseding indictment (i.e., one which supersedes an earlier indictment), enter the date of the superseding indictment.

8. Indictment(s) charges

a. Murder [MI, M]

Enter the degree of murder listed on the face of the indictment for the first murder.

M Murder

MI Murder in the first degree

b. Other felony # 1 [charge, NA]

Enter the next felony for which defendant was indicted and which was handled with the murder charge. If defendant was indicted for more than one murder, enter the second one here (using "M" or "M1", as above). If defendant was indicted for something other than murder, e.g., kidnapping, conspiracy to commit murder, burglary, rape, etc., enter the name of the charge. If there was none, put "NA".

c. Other felony # 2 [charge, NA]

If the defendant was indicted for more than one murder, enter the third one here (using "M" or "M1", as above.)

d. Other felony # 3 (charge, NA)

Enter here the name of any fourth charge for which defendant was indicted.

e. Defendant prosecuted for more than 4 charges in this case'. [Y, N]

Enter the answer.

9. All charges tried or disposed of together? [Y, N, U, NA]

Put "Y" or "N" if you are certain, or "U" if you cannot tell from the data collected whether all charges were tried or disposed of together.

10. Case considered capital when indicted? [Y, N, U]

Answer "Y" if the defense attorney survey which was returned for the case indicates "yes" to this question. Answer "N" if the survey answer was "no." In all other cases enter "U".

11. Arraignment? [Y, N, U]

Put "Y" if defendant was arraigned, or "N" if he waived arraignment.

12. Co-counsel appointed? [Y, N, U]

In capital cases co-counsel is appointed, and often the fact that someone is the co-counsel is noted on the order appointing the second attorney. If it is clear that a second lawyer was appointed as co-counsel, and not merely to relieve another lawyer because s/he had withdrawn from representation, put "Y. Otherwise, put "N" or "U"

13. Number of motions > = 10? [Y, N, U]

Count up the number of motions checked off on the data collection instrument and answer "Y" if the number is greater than or equal to 10.

14. Number of pretrial motion hearings [no.]

Enter the number of pretrial motion hearings indicated on the data collection instrument as having been held. Usually this will be 0, 1, or 2.

15. Change of venue. [Y, N]

A change of venue means that the case originated in one jurisdiction, but was transferred for trial to another. In the present context it means that a case began in one North Carolina county but was transferred to another county. (If a case began in state court but was transferred to federal court, do not treat this as a change of venue for purposes of this question. Instead, code it as a dismissal under question 18.)

16. Defendant released on bail? [Y, N, U]

Look at data coding sheet to see if any bail conditions were set out after the typical initial denial of bail. If there are, answer "Y". Also answer "Y" if bail was set originally. If there is an indication that bail was denied and there are no modifications of the initial denial of bail, answer "N". If there is no recorded information, answer "U".

17. Time in jail [days, U]

Look at the data coding sheet to see if there is any record of the number of days the defendant spent in a local jail. For cases in the capital trial sample, also check information sent by the clerk of court to see if s/he sent information about the number of days spent in the county or municipal jail. If you find an invoice from the local sheriff or other local correctional official listing a dollar figure, presume that the jail fee is \$5.00 per day, and take a moment to calculate the number of days that the defendant was in the local jail. (There may be more than one invoice: add up their totals if the invoices pertain to different dates-caution, sometimes invoices are cumulative). Enter the number of days under question 17. It is okay to use credit in a sentence unless there are references to transfers pursuant to safekeeping orders in the file (in which case you will need to subtract the number of days in safekeeping).

18. Case disposition [PLEA, JURY, DISMISSED, OTHER]

Here, we are interested in determining the method by which the most serious charge in the case file was disposed.

PLEA	Defendant pled guilty
JURY	Jury returned a verdict, or in a capital sentencing proceeding, recommended a sentence
DISMISSED	Murder charge was dismissed and defendant <u>did not plead guilty to anything</u> in exchange for the dismissal.
OTHER	None of the above apply.

19. Most serious convicted charge [charge, NONE]

Enter the indicated code for the most serious charge to which defendant pled guilty or was adjudicated guilty:

M1	First degree murder
M2	Second degree murder
CONSPIRE	Conspiracy to commit murder
ACCESS	Accessory before or after the fact to murder
VM	Voluntary manslaughter
IM	Involuntary manslaughter
ADWK	Assault with a deadly weapon with intent to kill or inflict serious injury*
FEL	Other felony (e.g., rape, kidnapping, larceny, etc.)
NONE	None

N.B. ADW is not a felony, but ADWK is.

20. Sentenced to life or death? [L, D, U, NA]

If defendant was sentenced to life imprisonment or to be executed by the state for any charge, enter "L" for life or "D" for death. If defendant did not receive a life or death sentence, enter "NA". If defendant received a life or death sentence plus other punishment, e.g., a term of years, enter "L" or "D" here and the information about the rest of the sentence provisions below.

21. Number of unsuspended years sentenced to D.O.C bears, NA]

Here, look at the judgment to see whether defendant was sentenced to any active time, other than a life or death sentence. E.g., "12 years, suspended" would not be active time. Enter the number of years of active time for the most serious charge, disregarding credit given for time spent in jail up to the date of judgment. (D.O.C, Department of Corrections)

22. Other sentence provisions [A, B, C, D, E, NA]

Here, record as many letters of the following as apply for the charges which were adjudicated together:

- A Fine
- B Restitution
- C Defendant pay costs specified on bottom of judgment
- D Probation
- E Other

23. Final date before appellate process (mm/dd/yy, NA]

Enter the last date that anything happened in the trial division. This will usually be the date that judgement is entered, although occasionally a sentencing hearing is held after the judgment is entered, in which case that would be the last date. If a postconviction motion hearing is held after appellate entries have been made but before the appeal is heard in the appellate division, enter the date of the motion hearing.

C. INFORMATION CONCERNING TRIAL

24. Jury impanelled? [Y, N, U, NA]

Look at the data coding sheet. Enter "Y" if a jury was impaneled, "N" if not. If you cannot tell, enter "U". (Note that jury selection can begin without necessarily being followed by impanelment.)

25. Trial or Resentencing? [Y, N, I]

Enter "Y" if the guilt and sentencing phases of a trial were completed, "N" if no trial was ever begun, and "I" (for incomplete) if a trial was begun but was not completed, either because of a hung jury, mistrial, or other reason. For cases where a resentencing was held, count the resentencing hearing as a trial for this purpose.

26. Sentencing hearing separate from guilt phase [Y, N, U, NA]

Enter "y", "N", or, if you cannot tell, "U". Among the most typical situations where this might occur are: (1) a plea bargain followed by the grant of a prayer for judgment continued -- which is often so that a defendant has the incentive to testify in a co-defendant's trial before being sentenced; (2) a sentencing hearing in a capital case, where a formal distinction between the guilt phase and sentencing phase is observed; (3) a new sentencing hearing following the appellate determination that there was no error committed during the guilt phase of a capital trial, but that errors during the sentencing require a new sentencing hearing.)

27. Number of days in pretrial motion hearings [BO, U, NA]

Enter number of days.

28. Number of days in courtroom [no.P, no.E, U, NA]

Number of days including jury selection, trial, and sentencing, but excluding pretrial motion hearings and non-court weekends. Enter a number followed by "P", if you have a precise number, or followed by "E" if you are estimating the number, based on one or more dates on the data coding instrument only.

D. DEFENSE EXPENSES

For trial division work only, not appellate representation. N.B. Do not enter information for attorneys who were retained (i.e., paid) by the defendant.

29. Total defense attorneys appointed (including public defenders) [no.]

Enter the number of defense attorneys whom the file shows worked on the case. N.B.: Look at any correspondence in the file; it may tell you that someone listed on the shuck in fact did not work on the case.

30. Public defender # 1

If a public defender or assistant public defender was assigned to represent defendant, record the following:

a. Time in courtroom [hours, U, NA]

Enter the total amount of time spent by the first public defender (or assistant public defender) in the courtroom, as listed on the survey returned for the case. Enter time in quarter of an hour units, e.g., 1.25, 5.75, etc. If no survey was returned for this case and you know that a public defender represented defendant, put "U".

b. Other time [hours, U, NA]

Enter the rest of the time reported on the survey here.

c. Salary [\$, U, NA]

Enter the annual salary reported for this attorney. If you do not have the information at the time you are filling this out, put "U."

31. Public defender # 2

a. Time in courtroom [hours, U, NA]

b. Other time [hours, U, NA]

c. Salary [\$, U, NA]

See instructions for 30 (a), (b), and (c).

32. Appointed defense attorney # 1

a. Time in courtroom [hours, U, NA]

b. Time waiting [hours, U, NA]

c. Time out of court [hours, U, NA]

Under (a), (b), and (c), enter the total number of hours the attorney spent on the case, including in-court, out-of-court, and waiting. If an appointed defense attorney served as co-counsel to the public defender, enter information under 33. Look to see if the file shows any interim fee orders (which are prime sources of information for time spent.) If we have no information about the time expended, put "U".

d. Total amount paid [\$, U, NA]

Enter the total dollar amount paid to this attorney for his/her time in the case. Make sure to look for interim payments. Exclude here expenses and witness fees.

e. For multiple charges? (Y, N, U, NA)

Enter "Y" if this attorney represented this defendant on more than one charge in this prosecution, put "N" if s/he did not, and "U" if you do not know.

f. Source of information [F, A, D, C, O, NA]

Enter the source of your information for your answers to 32 (a), (b), (c), (d), and (f). If it is solely from one or more fee orders, put "F". If it is solely from correspondence received from the attorney, put "A" (even if that includes a copy of the fee order). If it is solely from the data coding instrument in the file, put "D". If it is from a combination of these sources, put "C". If it is from somewhere else, put "O" (for other).

F	Fee order
A	Information from attorney
D	Data coding instrument in file
C	Combination of sources
O	Other

33. Appointed co-counsel (second chair)

a. Time in courtroom [hours, U, NA]

b. Time waiting [hours, U, NA]

c. Time out of court [hours, U, NA]

d. Total amount paid [\$, U, NA]

e. For multiple charges? [Y, N, U, NA]

f. Source of information [F, A, D, C, O, NA]

See instructions for 32(a), (b), (c), (d), (e), and (f).

34. Additional attorneys

a. Number [no, U, NA]

Not counting the attorneys accounted for above, how many other defense attorneys worked on this case?

b. Time in courtroom [hours, U, NA]

c. Time waiting [hours, U, NA]

d. Time out of court [hours, 1, U, NA]

Record the numbers of hours in quarter hour increments that all of the attorneys from 34(a) spent on the case. If you have information about some but not all of these other attorneys, put an "I" next to the number of hours recorded.

e. Total amount paid [\$I, U, NA]

Record the total amount of money paid to these attorneys for services they rendered (but not expenses) in the case. Again, put an "I" next to the number if you are missing information.

35. Defense expert witness or investigator # I

Here, please record the dollar amount paid by court order to any experts or investigators hired by the defense. N.B.: Sometimes the defense will move for the appointment of an expert witness or investigator but the file contains no record of payment actually made to anyone. We have done our best to locate evidence of all of these fees, so if they are absent from a file, the safest thing is to presume that no payment was made; i.e., if you see an expert, etc., appointed, but no fee ordered, do not make a guess that s/he was actually hired and paid. Also, do not be surprised that someone hired by the defense did not actually testify during the trial. Finally, if you are presented with an order for payment of fees but you cannot determine

whether the person hired was for the benefit of the prosecution or defense, do not enter the information here. Instead, enter it for questions 47 or 48 Mow.

a. Type of expert [type, U, NA]

Enter the kind of expert, if known, e.g. toxicologist, psychiatrist, pathologist, investigator, etc., or enter the person's professional degree, e.g., M.D., Ph.D. Enter "NA" if no experts were appointed.

b. Total amount paid [\$, I, U, NA]

Use "I" if you have some but not all information.

36. Defense expert witness or investigator # 2

a- Type of expert [type, U, NA]

b. Total amount paid [\$, I, U, NA]

See instructions for 35(a) and (b).

37. Amount paid to all other defense experts or investigators NA]

38. Defense attorney amount of expenses [\$, U, NA]

Enter the total dollar amount of expenses other than witness or investigation fees for all defense attorneys.

39. Attorneys for material witnesses? [\$, NONE]

Enter the total dollar amount paid to any defense attorneys who represented material witnesses in the prosecution of this defendant's case(s). Look at fee order to determine if an attorney represented the material witness and not the defendant. (Include expenses, etc. Enter the total amount paid by the AOC.)

E. PROSECUTION EXPENSES

40. District attorney # 1

a. Pretrial and pre-plea-acceptance (from survey) (hours, U]

Record the number of hours reported by the 1st D.A. as having been spent through the return of the indictment and as "post-indictment" activity (i.e., the first two boxes on the form). Put "U" if no time survey is in the file.

b. Other time (from survey) [hours, U]

Enter the rest of the time reported as having been spent by the first D.A. on the survey. Put "U" if no time survey is in the file.

c. Total time [hours, U]

If a survey was returned, record the total amount of time here (Le., add 40(a) and (b) together). If no survey was returned but the prosecutor gave us a total number by letter or other communication, put that number here.

d. Source of information [S, 01]

If you recorded a number under 40(c), enter the source of information. Put "0" for a source other than the survey.

e. Annual salary [\$, U]

Record the annual salary for this DA

41. Other district attorneys

a. Pretrial and pre-plea-acceptance (from survey) [hours, U, NA]

Record the number of hours reported by the other D.A.'s as having been spent through the return of the indictment and as "post-indictment" activity (i.e., the first two boxes on the form). Put "U" if no time survey is in the file.

b. Other time [hours, U, NA]

Enter the rest of the time reported as having been spent by the other D.A.'s Put "U" if no time survey is in the file.

c. Total time [hours, U, NA]

If a survey was returned, record the total amount of time here (i.e., add 41(a) and (b) together). If no survey was returned but the prosecutor gave us a total number by letter or other communication, put that number here.

d. Source of information [S, 0, NA]

If you recorded a number under 41 (c), enter the source of information. Put "0" for a source other than the survey.

e. Annual salary [\$, U, NA]

See instructions for 40(e). Enter an average if there is more than one D.A. listed.

42. Prosecution investigator

a. Time [hours, U, NA]

List the amount of time the prosecution investigator spent on this case, as indicated on the prosecutor survey.

b. Annual salary [\$, U, NA]

43. Victim-witness co-ordinator

a. Time [hours, U, NA]

List the amount of time the victim-witness coordinator spent on this case, as indicated on the prosecutor survey.

b. Salary [\$, U, NA]

44. Prosecution expert witness or investigator # 1

a. Type of witness [type, U, NA]

Enter the kind of expert, if known, e.g. toxicologist, psychiatrist, pathologist, investigator, etc., or enter the person's professional degree, e.g., M.D., Ph.D. Enter NA if the prosecution used no experts.

b. Total amount paid [\$, U, I, NA]

List the dollar amount paid to this prosecution witness.

45. Prosecution expert witness or investigator # 2

a. Type of witness [type U, NA]

b. Total amount paid [\$, U, I, NA]

See instructions for 44 (a) and (b).

46. Total amount paid to all other prosecution experts or investigators [\$, U, NA]

F. OTHER EXPENSES

47. Evaluation at Dorothea Dix? [Y, N, U]

If defendant was sent to the Dorothea Dix State Hospital for a competency evaluation or other psychological assessment or treatment, enter "Y". Enter "N" if our records show that a motion for commitment was denied.

48. Unidentifiable expert # 1

Expert witness not identifiable as having been for the defense or the prosecution.

a. Fees paid to unidentified witness? [Y, N, U]

If there are any fees paid for investigators or experts whom you are not able to identify as having been working for the defense or prosecution, enter "Y" and answer the following questions.

b. Type of expert [type, U, NA]

Enter the kind of expert, if known, e.g. toxicologist, psychiatrist, pathologist, investigator, etc., or enter the person's professional degree, e.g., M.D., Ph.D. If you cannot tell, put "U".

c. Total amount paid [\$, U, NA]

d. Employee of the state [Y, N, U, NA]

Does the Me indicate that this person was an employee of the state at the time s/he worked on this case?

49. Unidentifiable expert # 2

Second expert witness not identifiable as having been for the defense or the prosecution.

a. Fees paid to unidentified witness? [Y, N, U]

b. Type of expert [type, U, NA]

c. Total amount paid [\$, U, NA]

d. Employee of the state? [Y, N, U, NA]

See instructions for 48 (a), (b), (c), and (d).

50. Total fact-witness attendance fees

a. Total amount paid [\$, U, 11]

Add up the total amount paid to fact (i.e. non-expert) witnesses for their expenses (food, lodging, daily compensation, etc.). Enter the dollar number, or if the information is incomplete, put "I". If there is no information in the file put "U".

b. Source of information [D O, NA]

D Data coding instrument

O Other correspondence from AOC officials or clerks of court

51. Unreimbursed county expenses

We asked the clerks of court to inform us if the county incurred any expenses during the prosecution of the capitally tried cases which have not been reimbursed by State funds. List the amount and type reported:

a. Expenses reported? [Y, N]

Were any expenses reported by the clerk of court?

b. **Total amount reported** [\$, U]

52. Miscellaneous other expenses

a. **Type** [type, U]

b. **Total amount paid** [\$, U]

If the information in the file reveals that state funds other than those accounted for above were paid due to the adjudication of this case, indicate the amount and type.

53. Victim's compensation award [\$, U]

If an award was made to the victim's family from the Victim's Compensation Fund, enter the amount here. Do not record here any restitution ordered as part of or conditions of the judgment.

54. Criminal bill of costs? [Y, N]

Is there a criminal bill of costs for this defendant in the file?

55. Judgement docketed against defendant? [Y, N, U]

Were any of the fee orders docketed against defendant?

56. Causes name [last name]

Enter your last name.

57. Today's date [mm/dd/yy]

Enter today's date.,

58. Number of retained attorneys [\$, U]

How many retained attorneys worked on this case?

III. DETAILED PROCEDURES FOR COSTING OUT MURDER-TRIAL DATA

A. Method Used to Fill in Incomplete Data

27 Court Pretrial (days)

When this time was unknown, but the number of pretrial motion hearings was known, the number of pretrial motion hearings was multiplied by the average length of a motion hearing, 2.84 hours (computed in **MTNHRG1.WK1**). Any remaining blanks were then filled in with the median for this category (Capital-bifurcated=3.0, Capital-guilt phase only=2.84, Noncapital=0.00). Hourly figures were divided by 6 to determine portion of days.

28 Court Trial (days)

The number of days spent in court for trial was computed by determining a) the first day of jury selection and b) the day that the verdict or sentence was given (whichever was later). Whenever possible, actual days in court were computed by looking at detailed attorney billing statements. If such statements or other detailed information was not available, it was assumed that court was held from Monday through Friday. Unless otherwise noted, any dates mentioned as trial days were assumed to be full days in court.

31.1 Total Public Defender Time (hours)

When it was indicated that a public defender worked on a case, but the hours were not known, the blank was filled in using the regression of total defense hours paid by the state (dependent variable) on the total trial time (independent variable). The regression result was as follows:

Constant: 132.80361297.

X Coefficient: 29.701897881

Std. Error of X Coefficient est.: 3.9147714667

The total hours paid by the state for assistant public defenders and appointed attorneys was taken from the resulting number to provide the estimate of hours the PD expended.

31.2 Total Assistant Public Defender Time (hours)

The same method was used as described under the public defender section, except that the public defender and appointed attorney hours were taken from the number resulting from the regression equation. In cases where both the public defender and the assistant public defender were indicated but numbers were unknown, the resulting number was divided in half and this amount of time was attributed to each position.

34.1 Total Appointed Attorney Fee (dollars)

In most cases, this amount was taken from the billing statements submitted to the AOC for reimbursement by the appointed attorneys. In cases where this figure was unknown, the above regression equation and method was used to determine hours attributable to appointed attorneys. This hourly figure was then multiplied by the average hourly rate paid to all appointed attorneys in the set. For capital murder cases this rate is \$53.16/hr, and for noncapital murder cases this rate is \$46.97/hr. (This computation can be found in **ATTYFEE.WK1**).

37.1 Defense Experts (dollars)

If this amount was unknown for any case, the median for this category/set was used to fill in the blank. (Capital-bifurcated=3,332.08, Capital-guilt phase only=1,677.50, Noncapital=0)

38. Defense Attorney Expenses (dollars)

If this amount was unknown for any case, the median for this category/set was used to fill in the blank. (Capital-bifurcated=372.08, Capital-guilt phase only=108.67, Noncapital=0)

41.1 Total District Attorney Time (hours)

When it was indicated that a district attorney worked on a case, but the hours were not known, the blank was filled in using the regression of total prosecution hours (dependent variable) on the total trial time (independent variable). The regression result was as follows:

Constant: -5.605979599

X Coefficient: 19.289447766

Std. Error of X Coefficient est.: 4.5098384862

The total hours paid by the state for assistant district attorneys was taken from the resulting number to provide the estimate of hours the district attorney expended.

41.2 Total Assistant District Attorney Time (hours)

The same method was used as described under the district attorney section, except that the district attorney hours were taken from the number resulting from the regression equation. In cases where both the district attorney and the assistant district attorney were indicated but numbers were unknown, the resulting number was divided in half and this portion was attributed to each position.

42a Investigator - District Attorney's Office (hours)

If this amount was unknown for any case, the median for this category/set was used to fill in the blank (all categories of cases = 0).

49.1 Other Prosecution Expenses (dollars)

If this amount was unknown for any case, the median for this category/set was used to fill in the blank (Capital-bifurcated=400.00, Capital-guilt phase only=394.38, Noncapital=40.00).

50a Fact Witness Attendance Fees (dollars)

If this amount was unknown for any case, the median for this category/set was used to fill in the blank (Capital-bifurcated=570.06, Capital-guilt phase only=204.75, Noncapital=654.60).

52.1 Other Expenses (dollars)

If no "other" expenses were reported a 0 was put in the blank.

53.1 Total -Juror Payment (dollars)

If the actual total juror payment was available, it was used. For the remaining cases the total juror cost was determined by using the following equation:

Total Cost = 12 X 14 X (N+1) (cost of jurors @ \$12/day)

+ I[30 X 14 X (T-4)] (cost of jurors @ \$30/day)

+ Avg. Payments to non-jurors (cost of jury panel)

Definitions: . N = Length of Trial (not including voir dire) where n=max of 4

T = Length of Trial (not including voir dire)

I = 1 if trial lasted 5 days or More

0 otherwise

Average payment to non-jurors takes 2 values, average for capital murder cases (\$1,574.67) and average for noncapital cases (\$468).

Note: If trial length was unknown, but the total days spent in court (including voir dire) was known, the breakdown between trial and voir dire from the nearest case that had the same total was used.

Please see JURYSEL2.WK1 for actual computations.

Appendix III Costing Procedure

B. Costing Out a Trial

1. (Total pretrial days + court trial days) x \$1,416/day
2. Total public defender time x \$68.31/hr
3. Total assistant public defender time x \$48.34/hr
4. Total appointed attorney fee (\$)
32d Total paid to defense attorney #1
+ 33d Total paid to co-counsel
+ 34e Total paid to additional appointed attorneys
5. Defense expert cost (\$)
35b Total paid to expert witness or investigator #1
+ 36b Total paid to expert witness or investigator #2
+ 37 Total paid to other expert witnesses or investigators
6. Defense attorney expenses (\$)
7. Total district attorney time x \$83.10/hr
8. Total, assistant district attorney time x \$55.63/hr

9. Total district attorney investigator time x \$22.16
 10. Other prosecution expense (\$)
 - 44b Total paid to prosecution expert witness or investigator #1
 - + 45b Total paid to prosecution expert witness or investigator #2
 - + 46 Total paid to other prosecution expert witnesses or investigators
 11. Fact witness attendance fees (\$)
 12. Other expenses (\$)
 - 51b Unreimbursed county expenses
 - + 52b Miscellaneous other expenses
 - + 48c Total paid to unidentifiable expert #1
 - + 49c Total paid to unidentifiable expert #2
 13. Total juror payment (\$)
- SUM OF #1 - #13 TOTAL COST OF A TRIAL

IV. CASE PROCESSING IN THE SUPREME COURT OF NORTH CAROLINA: AN OVERVIEW

Several internal operating procedures affect the amount of time each justice and his or her law clerks spend on particular cases. While the tasks remain constant, the division of responsibilities for accomplishing them differs widely within each of the seven chambers. The following is a general overview of case processing, with points of variation noted.

A. Personnel in the Supreme Court

The Court has seven justices, each of whom has two attorneys and one "executive assistant" working with him or her. The attorneys are popularly known as "law clerks" and officially as "research assistants." As explained further below, their role includes reviewing cases and preparing bench briefs and opinions, among other tasks. The executive assistants generally perform secretarial work for the justices and the law clerks.

The office of the Clerk of the Supreme Court processes cases as they are presented for review. The Clerk also currently serves as the Court's marshal, a position described by statute as "hav[ing] the criminal and civil powers of a sheriff, and any additional powers necessary to execute the orders of the appellate division in any county of the State." The Clerk of Supreme Court oversees several assistant and deputy clerks and two computer professionals within her office.

Another group of professionals within the Court work under the librarian for the Court. The primary function of the Supreme Court library is to serve the appellate division of the General Court of Justice, although it also is available for use by the public and other divisions of State government.² The Supreme Court librarian also oversees a small staff.

B. Cases in Which an Appeal of Right Has Been Filed or in Which Review Has Been Granted

By statute, "[a]ppeal lies of right to the Supreme Court in all cases in which the defendant is convicted of murder in the first degree and the judgment of the superior court includes a "³ sentence of death or imprisonment for life. Although the statute goes on to provide that appeal of right from judgments based on guilty pleas lies in the Court of Appeals, the Supreme Court has interpreted the term "convicted" in the earlier provision to include judgments of murder in the first degree which were based upon guilty pleas.⁴ Accordingly, all cases in which the defendant pled guilty to, or was convicted by a jury of, murder in the first degree, and in which a sentence of life imprisonment or death was imposed are automatically appealable to the Supreme Court of North Carolina.

Appeal of right to the Supreme Court also lies from decisions of the Court of Appeals which (1) "directly involve[] a substantial question arising under the Constitution of the United States or of this State, or (2) [i]n which there is a dissent."⁵ Thus, for example, an appeal of right to the Supreme Court would be available when a judge on the Court of Appeals dissents from the determination that there was no error in a trial resulting in a defendant's conviction of murder in the second degree. If a defendant's case is not one in which an appeal of right lies to the Supreme Court, he may seek review by filing a petition for a writ of certiorari or in some circumstances, a petition for discretionary review.⁶

When a case has been readied by the Supreme Court Clerk for review by the Court a packet consisting of the record on appeal and briefs submitted by the parties is made available to each of the seven chambers. Either the justice or one of his/her clerks reads the briefs and some or all of the record and then prepares a summary of the materials which is referred to as a "bench brief" or "bench memo." This summary is provided to the other attorneys in the chamber, and then serves as the basis for discussion of the merits of the case before oral argument is held.

Each chamber usually prepares its own bench brief for each of the 25-35 cases scheduled for oral argument in any given month. These summaries differ considerably in length, depending on the complexity of the case, thoroughness of review, and other factors. Infrequently, a brief will be shared by two or more chambers. This practice is dissuaded because it tends to discourage a fresh and independent look at each case by each chamber.

Prior to oral arguments the justice and his/her clerks may meet to discuss most or all of the cases scheduled for argument. The justices also discuss pending cases among themselves, often at lunch, which, in past years, the Court has used as an informal time to confer about Court matters.

Unless excused from a case, each justice hears every oral argument. Justices may require their clerks to attend as many as all or as few as no oral arguments. Other court officials present in the courtroom during argument may include the Clerk of the Court, an assistant or deputy clerk, and a guard provided by the State Capitol police.

Under the Appellate Rules of North Carolina, ordinarily a total of thirty minutes is allowed all appellants and a total of thirty minutes for all appellees for presenting their contentions during oral argument.⁷ Thus, generally, the maximum length for oral argument for any given case is one hour. In its discretion, however, for example when multiple parties are appellants or appellees, the Court will grant additional time for oral argument; usually, though, parties must share the time allotted by the rules. The parties are not required to use the maximum time scheduled, and many times do not.

Immediately following the completion of oral arguments on any given day the seven justices retire to a conference room to discuss and tentatively decide the outcome of the cases. Law clerks are not present during these sessions. During the Court's conference on the last day of oral arguments the cases heard that month are distributed among the chambers for the purpose of preparing written majority opinions. These will eventually be reviewed by each of the justices and then published as the decision of the Court as a whole, along with any concurring or dissenting opinions.

As with bench briefs, responsibility varies within each chamber for the preparation of opinions. Some justices prefer their law clerks to draft all opinions; others prepare many without substantial aid from the clerks. Chambers also vary their practices depending on the workload and backlog intra-chamber in any given month. The variation can be very wide.

The length of time required to draft an opinion may depend on the complexity and number of issues briefed for appellate review. Opinions in capitally tried murder cases which the Court has decided contained no reversible error often take considerable time to draft, since many issues need research and discussion.⁸ In such cases the trial transcripts, which run many volumes, also are carefully read, adding to opinion-preparation time. -On the other hand, some capitally tried murder cases result in very brief opinions; this might occur when the Court has determined that one error during the trial proceedings requires the Court to order a new trial. Thus, the manner of disposition of the case on appeal can be ultimately more determinative of the length of processing in the Supreme Court than the length of the trial or the complexity of the issues presented for review.

Once a chamber has prepared an opinion in nearly final form it is circulated to each of the other justices for his/her review. Sometimes law clerks are asked to review the circulated opinions of other chambers. Substantive as well as grammatical changes are suggested to the justice assigned to the opinion, and sometimes the entire document is substantially rewritten. At this stage any dissenting or concurring opinions are also prepared. Periodically the seven justices will hold a conference to vote upon and issue publicly the opinions which have thus been refined.

C. Petitions for Review and Other Motions

The state's highest court receives numerous petitions and motions, in both docketed cases and in cases in which discretionary review is being sought. Summary motions, such as those requesting an extension of time for the filing of a brief, are processed quickly after minimal conferral among the justices.

Petitions accompanied by lengthy supporting materials are typically assigned to one of the justices for careful review; he or she then circulates a memorandum to the other justices summarizing the merits of the petition. After each justice has evaluated these memoranda they are voted upon by the Court. Typically, law clerks do not participate in this review process.

D. Summary of Tasks Performed in Processing Any Given Case During Appellate Review in The Supreme Court of North Carolina

Cases Appealed as a Matter of Right.

1. Record on appeal and briefs are filed with the Clerk
2. Clerk's office distributes copies of record and briefs to each chamber
3. Justices and law clerks review cases and prepare bench briefs
4. Oral argument is held
5. Justices confer and tentatively decide outcome of case
6. Majority opinion is assigned to a justice
7. Justice and/or clerk(s) prepare opinion and circulate it to other justices who review it
8. Majority opinion is revised, and any concurring or dissenting opinions are written and distributed to each justice for comments
9. Justices convene for final vote on the opinion(s) and issue them publicly. Mandate is issued thirty days later.

Cases Reviewed Upon Petition For Writ of Certiorari or Petition for Discretionary Review.

1. Party files petition and opponent files response
2. A justice reviews materials submitted by the parties and prepares a summary memorandum which is distributed to the other justices
3. The Court votes whether to grant the petition
4. If the petition is granted, the case is processed as though the appeal was of right. -If the petition is denied, the case is not reviewed by the Court.

NOTES

1. N.C. GEN. STAT. § 7A-12 (1989).
2. N.C. GEN. STAT. § 7A-13(b) (1989).
3. N.C. GEN. STAT. § 7A-27 (1989). *See also* N.C. GEN. STAT. § 15A-2000(d)(1) (1988).
4. E.g., *State v. Johnson*, 331 N.C. 660, 417 S.E.2d 483 (1992); *State v. Heatwole*, 333 N.C. 156, 423 S.E.2d 735 (1992).
5. N.C. GEN. STAT. § 7A-30 (1989).
6. N.C. GEN. STAT. § 7A-31 (1989); *see also* N.C. R. App. P., Rules 15 and 21.
7. N. C. R. App. P. 30(b).
8. The opinions do not necessarily discuss every issue briefed for argument.

APPENDIX V
 COSTS INCURRED FOLLOWING DIRECT APPEAL TO THE SUPREME COURT OF NORTH CAROLINA
 STATE V. FEDERAL COSTS ANSON **AVERY MAYNARD**

PROCEDURE	HOURS			EXPENSES	FEE PAID	TOTAL CURRENT PAID	CURRENT DOLLAR VALUE b	CURRENT STATE COSTS
	IN/WAITOUT	TOTAL						
984 Cert Petition to U.S. Supreme Court								
Office of Appellate Defender:	...	75.00	i	U	0.00	0.00	4,641.75	4,641.75
Assistant Attorney General:	---	63.75	a	U	0.00	0.00	3,243.60	3,243.60
985-87 State Motion for Appropriate Relief								
Apptd Def. Atty:	20.75	230.00	256.75	395.00	9,600.00	9,995.00	15,440.00	c 15,440.00
\AG Attorney:	...	...	213.138	U	NA	0.00	10,844.05	10,844.05
udge/Court:	20.75	U	20.75	0.00	N.A.	0.00	3,672.75	3,672.75
987-88 Petition for Cert to Supreme Court of N.C.								
Apptd Def. Atty:	0.00	52.50	52.25	115.10	20090.00	2,205.10	3,250.10	c 3,250.10
\AG Attorney:	---	---	44.4111	U	N.A-	0.00	2,259.58	2,259.58
ustices/Court:	0.00	7.00	d 7.00	0.00	N. A.	0.00	678.44	678.44
988 State Motion Hearing								
Apptd Def. Atty:	5.50	5.00	10.50	0.00	420.00	420.00	630.00	c 630.00
\AG Attorney:	---	-	8.92	a	U	N.A-	0.00	453.85
udge/Court:	5.50	U	5.50	0.00	N.A.	0.00	973.50	973.50
989 Motion for Stay in Supreme Court of N.C.								
Apptd Def. Atty:	0.00	1.50	1.50	0.00	60.00	60.00	90.00	c 90.00
\AG Attorney:	---	---	1.27	a	U	N.A-	0.00	64.62
ustices/Court:	0.00	7.00	d 7.00	0.00	N.A.	0.00	678.44	678.44
989 Motion for Stay in Federal District Court								
Apptd Def. Atty:	0.00	4.50	4.50	0.00	180.00	180.00	562.50	c 562.50
\AG Attorney:	---	---	3.82	a	U	NA	0.00	194.36

PROCEDURE	HOURS			EXPENSES	FEE PAID	TOTAL PAID	CURRENT DOLLAR VALUE b	CURRENT STATE COSTS	
	IN/WAITOUT	TOTAL							
989-90 Federal District Court Habeas Proceedings									
Apptd Def. Atty:	0.00	214.50	214.50	85.80	26,812.50	26,898.30	26,898.30	c	0.00
Resource Center:									
Attorney: Director	---	---	58.40	0.00	N.A.	0.00	4,676.09		0.00
Attorney: Dayan	---	---	29.05	0.00	N.A.	0.00	2,102.93		0.00
Attorney: Staff	---	---	39.70	0.00	N.A.	0.00	2,462.59		0.00
AG Attorneys:	.....	---	341.65 a	U	N.A.	0.00	17,383.15		17,383.15
990 Motions in Supreme Court of N.C.									
Apptd Def. Atty:	---	...	0.00	0.00	0.00	0.00	0.00	C	0.00
Resource Center:									
Attorney: Director	---	---	2.00	0.00	N.A.	0.00	160.14		160.14
Attorney: Dayan	0.00	0.00	23.50	0.00	N.A.	0.00	1,701.17		1,701.17
Attorney: Staff	0.00	0.00	0.00	0.00	N.A.	0.00	0.00		0.00
AG Attorneys:	---	---	21.67 a	0.00	N.A.	0.00	1,102.57		1,102.57
Justices/Court:	0.00	7.00	7.00 d	0.00	N. A.	0.00	678.44		678.44
990-92 Federal Appellate Proceedings 9									
Apptd Def. Atty:	Petersen		2.75	411.50	414.25	1704.14'	51,781.25		53,485.39
Glover	2.75	149.25	152.00	0.00	19,000.00	19,000.00	19,000.00	C	0.00
Resource Center:									
Attorney: Hill	...	---	128.50	0.00	N.A.	0.00	10,289.00		0.00
Attorney: Dayan	---	---	242.00	0.00	N.A.	0.00	17,518.38		0.00
Attorney: Staff			197.30	0.00	N.A.	0.00	12,238.52		0.00
AG Attorneys:	---	...	482.63 a	0.00	N.A.	0.00	24,556.21		24,556.21
991 Motions in N.C. Superior Court									
Apptd Def. Atty:	---	---	0.00	0.00	0.00	0.00	0.00		0.00
Resource Center:				5636.69			5,636.69		5,636.69
Attorney: Hill	---	...	316.00		N.A.	0.00	25,302.12		25,302.12

Attorney: Dayan
Attorney: Staff

... .. 0.00
... --- . 133.00

N.A. 0.00 0.00 0.00
N.A- 0.00 8,249.99 8,249.99

AG Attorneys:
Judge/Court:

--- ---381.65 a
40.00 U 40.00 i

0.00

N.A. 0.00 19,418.35 19,418.35
N.A. 0.00 56,640.00 56,640.00

HOURS	PROCEDURE	IN/WAIT	OUT	TOTAL	EXPENSES	FEE PAID	TOTAL	CURRENT	CURRENT
							PAID	DOLLAR	STATE
							VALUE b		COSTS
1991-92 Clemency/Commutation Proceedings (Through Jan. 1992)									
	Apptd Def. Attys: Petersen	41.00	93.00	134.00	239.00	16,750.00 e	16,989.00	16,989.00 c	0.00
	Glover	61.25	11.00	72.25	0.00	9,031.25 e			
	Resource Center:				1842.58 c		9,031.25	9,031.25 c	0.00
	Attorney: Hill	---	---	290.00		N. A.	0.00	23,220.30	23,220.30
	Attorney: Dayan	---		0.00		N.A-	0.00	0.00	0.00
				164.00	U	N.A.	0.00	10,172.92	10,172.92
	Attorney: Staff	---	...						
	AG Attorneys:	.....---		385.90 a		N.A.	0.00	19,634.59	19,634.59
	Governor & Staff h:	.....---		180.00		N. AL	0.00	31,860.00	31,860.00
TOTALS									
	1990-25		1,193.75	5,221.00	\$10,018.31	\$135,725.00	\$138,264.04	\$469,928.21	\$295,236.77

NOTES:

- a) AG hours 85% of all defense attorney hours.
- b) This column is intended to contain numerical estimates of the costs attributable to time spent by government employees (based on figures combining salary, fringe, overhead, etc.). This study did not attempt to systematically collect data on costs to the federal government. Consequently, this column does not provide a sum of all federal and state costs attributable to this case. This column includes the current value of the attorneys' hour plus expenses.
- c) These figures are what attorneys would be paid today for this proceeding based on the rate of \$60/hour for state proceedings and \$125/hour for federal proceedings
- d) Estimates
- e) These fees were paid with federal funds.
- f) This fee was paid with state funds.
- g) Excludes payment for state clemency proceeding.

h) The commutation hearing was conducted before three individuals appointed by the Governor. The hearing took approximately 60 hours (Interview on January 12, 1993 with Ann Petersen, defense counsel during commutation proceedings.) The Governor was not present during the hearing, and the identities of the three individuals are not in the public record. In the absence of any information as to salaries and overhead of the panelists, we apply the loading factor attributable to a Superior Court Judge: 7.5 days @ \$1,416/day. Note-as with our estimates of the time spent by Superior Court Judges in state motion hearings we make no attempt to estimate the time spent by the Governor's staff preparing for the hearing, or of the Governor in reviewing the case. Ms. Petersen estimated, however, that the Governor spent at least 100 hours reviewing the case.

i) Estimate provided on 3/22/93 by defense attorney who. handled this case. She noted that the U.S. Supreme Court rules concerning petitions have changed substantially since 1994; because the instant study is estimating current state costs, the number given pertains to the average length it would currently take a defense attorney to prepare this petition. is an estimate about the length of the motion hearing.

LOADING FACTORS USED:

Attorney General:	\$50.88/hr
Superior Ct.: \$1,416/day	
Justice - Supreme Court of NC:	\$96.92/hr
OPRC: Hill	\$80.07/hr
Dayan \$72.39/hr	
Ingle \$62.03/hr	
Appellate Defender:	\$61.89/hr
Superior Court	
ASSUMPTION: 8 hour days in	

APPENDIX VI
 COSTS INCURRED FOLLOWING DIRECT APPEAL TO THE SUPREME COURT OF NORTH CAROLINA
 STATE V. FEDERAL COSTS -- JOHN STERLING GARDNER

PROCEDURE	HOURS			EXPENSES OUT	TOTAL	FEE PAID	TOTAL PAID	CURRENT DOLLAR VALUE b	CURRENT STATE COSTS
	IN	WAIT							
984-85 Cert Petition to U.S. Supreme Court									
Retained Defense Counsel:	U	U	U	U	U	U	U	U	
Assistant Attorney General:	No information available								
985-86 Motions in N.C. Superior Court									
Apptd Def. Atty (Elliott):	20.00	370.60	390.60	1,076.46	11,640.00	12,716.46	24,512.46	c 24,512.46	
Assistant Attorney General:	---	---	332.008	U	N.A.	0.00	16,892.16	16,892.16	
Judge/Court:	20.00	U	20.00	0.00	N.A.	0.00	3,540.00	3,540.00	
987 Petition for Cert in Supreme Court of N.C.									
Apptd Def. Atty:	0.00	214.80	214.80	163.93	7,518.00	7,681.93	13,051.93	c 13,051.93	
Assistant Attorney General:	---	---	183.00 a	U	N.A.	0.00	9,311.04	9,311.04	
Justices/Court:	0.00	7.00	7.00 b	0.00	N.A.	0.00	678.44	678.44	
988 Petition for Cert in U.S. Supreme Court									
Apptd Def. Atty:	0.00	39.20		39.20	0.00	1,372.00	1,372.00	4,900.00 c	4,900.00
Assistant Attorney General:	---	---		34.00 a	U	N.A.	0.00	1,729.92	1,729.92
988-91 Proceedings in Federal District Court:									
Apptd Def. Atty:	---	257.80	257.80	1,455.25	5,678.75	7,134.00	33,680.25	c	0.00
Resource Center:				1,302.00			1,302.00		0.00
Attorney: Director	---	---	90.60		N.A.	0.00	7,254.34		0.00
Attorney: Dayan	...	.....	304.50		N.A.	0.00	22,042.76		0.00
Attorney: Staff	---	---	22.30		N.A.	0.00	1,383.27		0.00

Attorney General: --- ---573.92 a U N.A. 0.0029,201.05 29,201.05

PROCEDURE	HOURS		EXPENSE, \$ TOTAL	FEE	TOTAL PAID	CURRENT PAID	CURRENT DOLLAR VALUE b	STATE COSTS
	IN/WAIT	OUT						

991-92 Federal Circuit Court Review &
Subsequent Motions in Federal Courts

Apptd Def. Atty:	1.00	657.80	658.80	887.00	53,625.90	54,512.90	82,237.00	c	0.00	
Resource Center:					5,734.00				5,734.00	0.00
Attorney: Director	---	---	51.50		N.A.	0.00	4,123.61		0.00	
Attorney: Dayan		...	422.00				N. A.	0.00	30,548.58	0.00
Attorney: Staff	---	---	1.50		N.A.	0.00	93.05		0.00	

Attorney General: --- ---963.70 a U N.A. 0.0049,033.06 49,033.06

992 Motions in N.C. Superior Court

Apptd Def. Attys:	2.50	182.75	185.25	253.42	16,631.00	16,884.42	11,368.42	c	11,368.42	
Resource Center:										
Attorney: Hill	---	---	0.00	0.00	N.A.	0.00	0.00		0.00	
Attorney: Dayan	---	.....	69.00			0.00	N.A.	0.00	4,994.91	0.00
Attorney: Staff	...	.....	1.50			0.00	N.A.	0.00	93.05	0.00

Attorney General: --- 217.00 a U N.A. 0.00 11,040.96

992 Commutation Proceedings before the
Governor of N.C. e

Apptd Def. Attys:	...	...	---	600.00	5,000.00	0.00	0.00	80,000.00	0.00	
Resource Center:										
Attorney: Hill	---	0.00							U N. A.	0.00 0.00 0.00
Attorney: Dayan	.....	.....	4.00						U N.A.	0.00 289.56 289.56

Attorney: Staff ... --- 0.00 U N.A. 0.00 0.00 0.00

Attorney General: --- --- 425.00 a U N.A. 0.00 21,624.00 21,624.00

Governor: - 114.00 f U N.A. 0.00 19,213.02 19,213.92

TOTALS 43.50 1,729.95 6,182.97 \$15,872.06 \$96,465.65 \$100,301.71
 \$490,873.72 \$216,386.92

NOTES:

- a) AG hours = 85% of all defense attorney hours.
- b) Ibis column is intended to contain numerical estimates of the costs attributable to time spent by government employees (based on figures combining salary, fringe, overhead, etc.). This study did not attempt to systematically collect data on costs to the federal government. Consequently, this column does not provide a sum of all federal and state costs attributable to this case. Ibis column includes the current value of the attorneys' hour plus expenses.
- c) These figures are what attorneys would be paid today for this proceeding based on the rate of \$60/hour for state proceedings and \$125/hour for federal proceedings
- d) Estimates
- e) Source of information here is an affidavit by Elliott stating that his office spent about 600 hours on this proceeding. The fee application in state court to which this is attached did not compensate him for these hours or expenses.
- f) The defendant spent 4 8-hour days before a 3-member commutation panel appointed by the Governor. During one of these days the Governor was also present. The prosecution spent approximately 12 hours before the panel, during approximately four of which the Governor was also present. Thus, the hearing consumed 102 hours of panelist time and 12 hours of the Governor's time. In the absence of any information as to salaries and overhead of the panelists we apply the loading factor attributable to a Superior Court Judge: \$1,416/day. In 1992 the Governor's salary was \$123,000. We estimate the (loaded) value of 1 1/2 days of his time as: \$1,159.92, We make no attempt to estimate the time spent by the Governor and his staff outside the hearing itself.

LOADING FACTORS USED:

Attorney General:	\$50.88/hr
Superior Ct.:	\$1,416/day
Justice - Supreme Court of NC:	\$96.92/hr
OPRC: Hill	\$80.07/hr
Dayan	\$72.39/hr
Ingle	\$62.03/hr

ASSUMPTION: 8 hour days in Superior Court