

## **B. Trial Costs**

Unlike the post-conviction costs incurred at the state level, trial costs of death penalty cases are borne largely by the counties. These costs are the most difficult part of the system to identify. The information that is available and reviewed here includes previous studies that have attempted to estimate the trial level costs, as well as records of the actual costs incurred in a small number of trials.

### **1. Prior Studies on Trial Level Costs**

Three notable but outdated studies have attempted to estimate the cost of death penalty trials in California. The oldest is a 1985 student comment in the University of California Davis Law Review.<sup>i</sup> Nearly as old is a 1988 investigative report by the Sacramento Bee.<sup>ii</sup> The most recent is a 1993 study by a graduate student at the Goldman School of Public Policy at University of California, Berkeley.<sup>iii</sup> All three studies relied substantially on secondary sources rather than actual budget data to arrive at their estimates of trial costs. These secondary sources included attorney questionnaires, interviews, information provided by the California Judicial Council and comparisons with cost studies in other states.

Margot Garey, then a law student at the University of California, Davis, wrote the 1985 paper.<sup>iv</sup> She began her discussion of trial level costs with voir dire, determining that jury selection in death penalty cases takes 5.3 times longer than in non-death penalty cases. She concluded that this can add as much as \$87,440 in courtroom costs alone, not including attorney time. Once the evidence phase of the trial has begun, Garey found that death penalty trials take 3.5 times longer than non-death penalty trials, requiring on average an additional 30 courtroom days (or 6 weeks of court time). This can lead to additional courtroom expenses of as much as \$65,580, again excluding attorney expenses. While documenting the additional courtroom time consumed by death penalty trials, Garey's study

provides little or no information about the costs of prosecution or defense and is now 25 years old.

Twenty years ago, Steve Maganini reported in the Sacramento Bee that Californians spend approximately \$90 million annually to administer the death penalty, with \$78 million a year going to trial expenses.<sup>v</sup> The Bee report found that death penalty cases were taking an average of two years from arraignment to verdict, three times longer than other cases. According to the Bee, the trials alone lasted an average of 79 days in death penalty cases, while non-death penalty trials lasted 15 days. Based on these figures, the Bee concluded that death penalty trials were six times more expensive, costing on average \$592,500. Meanwhile, the Bee estimated that it cost \$93,000 to try a non-death penalty case. Adjusting for inflation to 2007 dollars, the cost of each death penalty trial would be approximately \$1 million compared with \$163,000 for each non-death penalty trial.<sup>vi</sup>

Finally, an unpublished study conducted in 1993 by David Erickson, a graduate student at the Goldman School of Public Policy, concluded that a typical death penalty trial was costing nearly \$1.9 million, while a non-death penalty trial was costing about \$630,000.<sup>vii</sup> These estimates considered the entire range of trial expenses as shown in Chart 2.

**Chart 2**

	<b>Defense Attorneys</b>	<b>Defense Investigation</b>	<b>Prosecution Attorneys</b>	<b>Prosecution Investigation</b>	<b>Court</b>	<b>Jail Costs</b>	<b>Total Cost</b>
Death Penalty	\$386,000	\$49,000	\$772,000	\$49,000	\$506,000	\$137,000	\$1,898,000
Non-Death Penalty	\$160,000	\$5,000	\$320,000	\$5,000	\$82,000	\$55,000	\$627,000

Erickson, like other researchers, examined the length and complexity of death penalty trials, finding that death penalty cases were taking substantially more court time, requiring many more days for jury selection, and involving many more trial motions. Erickson, like the

Sacramento Bee, concluded that death penalty trials consumed at least six times as much court time as non-death penalty trials. Adjusting for inflation, Erickson's estimate of trial costs grows from \$1.9 million to \$2.7 million for each death penalty case and from \$630,000 to \$900,000 for each non-death penalty case, a difference of more than \$1.8 million.

Much has changed to affect the cost of death penalty trials in the years since these studies were completed. The most significant change has been technological: Prosecutors now seek convictions based on sophisticated scientific evidence such as DNA, and defense attorneys must prepare to challenge that evidence. Advances in medical research have also revealed that many psychological problems are tied to physical brain damage. This means that in addition to expert psychologists and medical examiners, defense attorneys now have to hire expert forensic scientists and neurologists to interpret complex scientific evidence and to testify at trial. These changes, along with the more advanced understanding of the work defense counsel must do to defend properly a death penalty case, add costs.

## **2. Records of Actual Trial Expenses**

In an effort to identify the costs of death penalty trials, the ACLU of Northern California requested and reviewed state records of payments made by the California state controller to small counties to cover the costs of homicide trials. While these data do not provide a comprehensive answer to the question of how much death penalty trials cost California taxpayers, they do contain several examples of extensive and nearly complete accounting of the actual costs in death penalty and non-death penalty trials.

Three conclusions may be drawn from the data. First, large sums are at stake. One death penalty trial, that of Charles Ng in Calaveras County, cost California taxpayers more than \$10.9 million. Records from several other cases reveal actual costs in the multiple millions of

dollars. Second, many costs of death penalty trials remain hidden; only more comprehensive accounting practices statewide and greater disclosure will develop the complete picture. Third, the records demonstrate the feasibility of tracking most trial level costs in death penalty cases. All that is required is the will to do so.

#### **a. Brief Explanation of Records Reviewed and the Funding Process**

California law provides that the state shall assist small counties with the costs of expensive homicide trials.<sup>viii</sup> When the costs to a county of one or more homicide trials exceed a threshold level based on the county's tax income, the county may request reimbursement as well as advanced funds for future costs related to the trial. Each county usually is required to pay initially for some portion of the costs of homicide trials, depending on the income level of the county, though in some cases, the state Legislature has passed special legislation exempting a county from its share of expenses.<sup>ix</sup>

The statute specifically provides that reimbursable expenses include: <sup>x</sup>

- investigation costs;
- witness fees and expenses;
- court reporter fees and costs in preparing transcripts;
- overtime and fringe benefits for county employees “directly attributable to the case”;
- sheriff costs “over and above regular personnel costs”; and
- travel expenses and necessary supplies.

The regulations specifically *exclude* in virtually all cases “normal salaries and expenses, incurred by the district attorney,” the sheriff and public defenders for most counties.<sup>xi</sup> But for very small counties, those with populations of less than 200,000, even normal salaries and

overhead are reimbursable;<sup>xiii</sup> and in some cases, the Legislature has passed special statutes expanding the reimbursable expenses to include salaries and related staff expenses.<sup>xiii</sup>

To obtain reimbursement, a county must submit a standard Claim for Payment form, which is prescribed by the State Controller's Office.<sup>xiv</sup> The claim must be "supported by adequate documentation."<sup>xv</sup> In addition, counties with populations of less than 150,000 may apply for advance payments from the state to cover the costs of providing essential civic services.<sup>xvi</sup> After the trial, the county must return to the state any excess funds advanced. The state controller sometimes audits the counties following the conclusion of the trial to ensure that all advanced funds were properly used.<sup>xvii</sup>

#### **b. The Data: PRA Requests and Responses**

Through a series of Public Records Act requests, the ACLU of Northern California obtained from the state controller and Department of Finance all documents pertaining to reimbursements, advancement of funds and audits related to state funding for county homicide trials for a ten- year period, fiscal years 1996-1997 through 2005-2006. Documents received included three complete audits, claims for payment, applications for advance payment, supporting documentation, and communications between the state and county officials.<sup>xviii</sup>

The records encompass claims submitted by 20 counties in 21 identifiable homicide trials and 317 unidentified trials and hearings.<sup>xix</sup> Of the identifiable trials, the cases ranged from low-profile, non-capital cases such as the "Jarvis Homicide Trial" in Trinity County, to the notorious death penalty trials of Charles Chitat Ng, Scott Peterson, Richard Allen Davis and Cary Stayner.

The types of records the ACLU received varied significantly from county to county. All included a Claim for Payment and/or Application for Advance Payment form. But even these forms varied according to the accounting methods used by each county and the level of supporting documentation provided. While some counties provided receipts, bills and detailed spreadsheets, others provided just summaries of their expenses by category. Finally, there was variation between counties in the kinds of expenses included or omitted.

**c. Overall Figures**

During fiscal years 1996-1997 through 2005-2006, the state paid a total of \$45.8 million to 20 counties under the state reimbursement scheme.<sup>xx</sup> The total payouts to individual counties for the ten year period ranged from a low of \$45,700 paid to Lassen County to a high of \$8.9 million paid to Calaveras County. The top 10 counties received together \$43.6 million, or 95 percent of the total. The top five counties alone accounted for \$32 million or 70 percent of the total.

**Chart 3**

**Top Ten Counties in Cost to State, FY 1996-1997 to 2005-2006**

County	Total Amount Reimbursed
1. Calaveras	\$8.9 million
2. Siskiyou	\$6.6 million
3. Shasta	\$6.3 million
4. Mendocino	\$5.3 million
5. Mariposa	\$4.9 million
6. San Luis Obispo	\$2.8 million
7. Lake	\$2.7 million
8. Sonoma	\$2.3 million
9. Stanislaus	\$2.0 million
10. Placer	\$1.8 million

Of the 21 identifiable trials included in the records we received, ten cases stood out for having relatively comprehensive cost accounting for trials involving a single defendant.<sup>xxi</sup> In none of these cases was every trial expense recorded—some excluded prosecutor salaries and some excluded court costs. But in all of these cases, significant trial expenses qualified for reimbursement and the counties, therefore, had a special incentive to keep track of the costs. Chart 4 lists all ten trials and the trial costs. All of these cost figures are based on actual costs incurred as a result of the trial, with the single exception of the Donald Bowcutt case. The records provided for the Bowcutt trial include only the applications for advanced payment, reflecting an anticipated cost of \$5 million, though the actual costs are not documented.<sup>xxii</sup>

#### **Chart 4**

##### **Individual Trials With Most Comprehensive Accounting**

<b>Name of Trial</b>	<b>County</b>	<b>Claimed Costs</b>	<b>Unclaimed Costs</b>	<b>Total Costs</b>	<b>Death Penalty</b>
Charles Chitat Ng	Calaveras	\$10.9 million	N/A	\$10.9 million	Y
Donald Bowcutt	Siskiyou	\$5 million	N/A	\$5 million	Y
Scott Peterson	Stanislaus	\$3.2 million	N/A	\$3.2 million	Y
Rex Allan Krebs	San Luis Obispo	\$2.8 million	N/A	\$2.8 million	Y
Gary Stayner	Mariposa	\$2 million	\$368,000	\$2.4 million	Y
Richard Allen Davis	Sonoma	\$2.3 million	N/A	\$2.3 million	Y
Charles Craft	Lake	\$1.8 million	\$300,000	\$2.1 million	Y
Arturo Juarez Suarez	Placer	\$1.8 million	N/A	\$1.8 million	Y
Michael Franklin	Plumas	\$486,000	\$175,000	\$661,000	N
Robert Allen Wigley	Del Norte	\$348,000	\$68,000	\$454,000	N

Based on the records of actual expenses, the three most expensive cases overall were the Charles Ng trial at \$10.9 million,<sup>xxiii</sup> the Scott Peterson trial at \$3.2 million,<sup>xxiv</sup> and the Rex Allen Krebs trial at \$2.8 million.<sup>xxv</sup> Eight of the 10 cases identified here involved the death penalty; the cost differential from the non-death penalty cases is staggering. A more detailed review of the records reveals the reasons for the added costs in death penalty trials, the many costs not included in these figures, and how more comprehensive cost accounting could be accomplished in the future.

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- <sup>i</sup> Margot Garey, *The Cost of Taking a Life: Dollars and Sense of the Death Penalty*, 18 U.C. Davis L. Rev. 1221 (1984-1985).
- <sup>ii</sup> Steve Maganini, *Closing Death Row Would Save \$90 Million a Year*, *Sacramento Bee*, March 28, 1988.
- <sup>iii</sup> David Erickson, Capital Punishment at What Price, Spring 1993 (on file with the ACLU), available at <http://death.live.radicaldesigns.org/downloads/Erickson1993COSTSTUDY.pdf> (viewed March 15, 2008).
- <sup>iv</sup> Gary, *supra* note 33.
- <sup>v</sup> Maganini, *supra* note 34.
- <sup>vi</sup> Adjustment for inflation calculated with the U.S. Department of Labor inflation calculator, available at <http://data.bls.gov/cgi-bin/cpicalc.pl> (viewed March 16, 2008).
- <sup>vii</sup> Erickson, *supra* note 35.
- <sup>viii</sup> Cal. Govt. Code § 15202; 2 Cal. Code Reg. § 1021.7, et seq.
- <sup>ix</sup> *See e.g.*, State Budget Bill 8180-101-0001-Item 3 (1998) [providing 100% reimbursement for extraordinary costs from the Davis trial]; Chapter 1262, Statutes 1992 [providing 100% reimbursement for all costs of “MacCarlie” trial].
- <sup>x</sup> 2 Cal. Code Reg. § 1021.1 to 1021.8.
- <sup>xi</sup> 2 Cal. Code Reg. § 1021.7.
- <sup>xii</sup> Cal. Govt. Code § 15202(b).
- <sup>xiii</sup> *See e.g.*, State Budget Bill 8180-101-0001-Item 3 (1998) [providing 100% reimbursement for extraordinary costs from the Davis trial].
- <sup>xiv</sup> 2 Cal. Code Reg. § 1023.3.
- <sup>xv</sup> 2 Cal. Code Reg. § 1023.1.
- <sup>xvi</sup> Cal. Govt. Code § 11019.
- <sup>xvii</sup> 2 Cal. Code Reg. § 1020.2.
- <sup>xviii</sup> The Public Record Act requests and all documents received on file with ACLU-NC.
- <sup>xix</sup> Many hearings and trials could not be identified because three counties sought reimbursement for multiple trials and hearings at once and identified each case only by date of filing and case number.
- <sup>xx</sup> Item 1: State Controller’s Office, Division of Accounting and Reporting, Payments by Fiscal Year for Homicide Trial Costs (FY 1996-97 through 2006-07), Government Code Sections 15200-15204 and 11019.5 (on file with ACLU-NC) (hereinafter “Item 1”).
- <sup>xxi</sup> The records also include some multi-defendant trials with fairly comprehensive accounting. For example, the records for the nine defendant trial called the “MacCarlie Trial” in Trinity County included most trial expenses, totaling nearly \$4 million. *See* Trinity County Revised Audit Report, Criminal Homicide Trial Costs Program, July 1, 1991, through June 30, 2005, State Controller (Dated May 2007). However, multi-defendant cases such as these have not been included in the analysis because it is impossible to discern how much was spent on each defendant.
- <sup>xxii</sup> Application for Advance Payments for Cost of Homicide Trial, Siskiyou County, dated May 14, 1997; Application for Advance Payments for Cost of Homicide Trial, Siskiyou County, dated Aug. 26, 1996. The records received do not include any final Claims for Payment, audits or other documentation reconciling the actual costs with the projected costs for the Bowcutt trial.
- <sup>xxiii</sup> Calaveras County, Revised Audit Report, Criminal Homicide Trial Costs, July 1, 1991, through June 30, 2001, prepared by State Controller, May 2006 (on file with ACLU-NC).
- <sup>xxiv</sup> Claim for Payment for Reimbursement of the Cost of Homicide Trial, Stanislaus County, dated Aug. 5, 2005; Claim for Payment for Reimbursement of the Cost of Homicide Trial, Modesto, dated July 29, 2005 (both on file with ACLU-NC).
- <sup>xxv</sup> Claim for Payment for Reimbursement of the Cost of Homicide Trial, San Luis Obispo, dated Apr. 3, 2002 (on file with ACLU-NC).