

## **Section I.**

### **Why Does the Death Penalty Cost More?**

Death penalty cases cost more than other murder cases because state execution is fundamentally different from sentencing someone to die in prison of other causes. When innocent people are executed, those mistakes cannot be remedied. More than 125 innocent people have been freed from death row across the U.S. since 1971.<sup>11</sup> Growing evidence suggests that several innocent people have been executed just since 1990.<sup>12</sup> In addition, race and poverty have significantly affected who is sentenced to execution in this country. As a result, in 1976, the United States Supreme Court specifically held that the Constitution requires additional precautions before a state may carry out an execution.<sup>13</sup> When the death penalty was reinstated in California in 1977, we had no idea how much those precautions would cost.

The additional expenses accrue from the beginning of the case to the end. Unlike other murder cases, death penalty cases typically have two trials: one to decide whether the defendant is innocent or guilty and one to decide whether a defendant found guilty should be executed. In addition, everyone involved in a death penalty case must be specially “qualified” as capable and experienced, including the defense attorneys, the judge and the jury. Because nearly every defendant facing the death penalty is too poor to hire his or her own attorney, taxpayers almost always end up paying for all of these added expenses.

Little attention has been given to the impact of death penalty cases on prosecutors’ offices and on local law enforcement. Even Police Chief James Abbott of West Orange, New Jersey, who served on the New Jersey Death Penalty Study Commission, was surprised when “[t]he prosecutors who sat on the commission with [him] confirmed through direct experience that capital cases deplete their resources more than any other type of case.”<sup>14</sup> Death penalty cases

consume much additional prosecution and law enforcement staff time because much additional work must be done. Prosecutors must investigate and prepare aggravating evidence for presentation in the sentencing phase of the trial, respond to mitigating evidence, litigate many more motions, and spend significantly more time in court than they would in a non-death penalty case. In addition to these staff costs, prosecutors, like defense attorneys, hire experts and consultants, including consultants to assist with jury selection and witness preparation. Sheriff's departments must transport defendants and must provide additional courtroom security for lengthy death penalty trials, extra expenses that add up quickly. Indeed, a study of the federal system found that prosecution costs were 67 percent higher than defense costs in death penalty cases. The same study found that defense costs in death penalty cases were four times higher than in non-death penalty cases.<sup>15</sup>

The records reviewed for this report, discussed in detail in Section II, vividly demonstrate how much staff time these cases take for prosecutors and law enforcement, and how that affects the other work of these offices. For example, the Scott Peterson trial consumed more than 20,000 hours of prosecutor staff time.<sup>16</sup> This is equivalent to nine full-time staff people for a year. In fact, 33 employees worked on the prosecution's case, including five attorneys and seven investigators. As a result of the increased workload, the county told the state it needed additional funds to hire more prosecutors and that it had already "reduced focus" on consumer fraud cases because of insufficient staff.<sup>17</sup> The Modesto Police also reported that the department spent so much money on staff to investigate the Peterson case that the department would have to delay the hire of 15 additional police officers unless the state provided assistance.<sup>18</sup>

Similarly, staff of the San Luis Obispo District Attorney's Office spent more than 8,700 hours on the death penalty trial of Rex Allen Krebs.<sup>19</sup> This included two attorneys, one investigator and one legal clerk working full time on the case for two years. Lake County was forced to

hire two contract attorneys to prosecute two separate death penalty trials.<sup>20</sup> Other counties have been forced to hire additional staff for both the district attorney's office and the sheriff's department and have incurred tens of thousands of dollars in overtime. San Bernardino County provides extra pay of \$5,400 to \$13,000 per year to some prosecutors handling death penalty cases.<sup>21</sup>

Defense costs in death penalty trials are also significantly higher than in other cases because of the greater obligations imposed on the defense. The United States Supreme Court has used the ABA Guidelines for Death Penalty Representation to establish the appropriate "standard of care" in defending death penalty cases.<sup>22</sup> If the guidelines are not followed, the case may be reversed later. The extent of work needed by defense attorneys to properly represent clients facing executions was not known when the death penalty was reinstated in California in 1977.

The guidelines prescribe a four-member defense team in every potential death penalty case: two attorneys and two investigators. This is twice the usual defense staffing in a murder case and is required because there may be a separate penalty phase trial. Indeed, the largest added expense for the defense team is the requirement that they thoroughly investigate their client's life to present a mitigation case at the penalty phase. The guidelines also require that attorneys and investigators be experienced and specially trained in the defense of death penalty cases. In order to find qualified attorneys and investigators willing to take on the immense burden of handling a death penalty trial, the agencies appointing the attorneys are forced to pay these professionals more than in non-death penalty cases. For example, Siskiyou County asked the state controller for permission to hire a defense attorney at \$75 an hour, rather than its typical rate of \$40 per hour, for a complex death penalty case.<sup>23</sup>

In addition, depending on the facts of the case, the defense team is required to consult professional experts, including psychologists and forensic scientists. DNA evidence that may exonerate the defendant must be analyzed by skilled forensic scientists. Thus, the state Legislature authorized additional reimbursement to Siskiyou County for the Donald Bowcutt death penalty trial because the “case will rely heavily on DNA testing and expert testimony, which is very costly and time consuming.”<sup>24</sup> Experts may also be needed to explain why mistaken eyewitness identification commonly occurs, or to explain why someone might falsely confess. If the defendant shows signs of mental illness, the defense may need to consult psychologists, neurologists, and other specialists, and may need to conduct brain imaging scans to document physical injury to the brain. Modern science has greatly enhanced our ability to distinguish the innocent from the guilty and to identify the mentally ill; but all of this costs money.

The courts, too, spend more on death penalty cases, which typically take years to bring to trial and many months of court time once the trial begins. Jury selection is particularly time consuming and expensive. Jurors who are opposed to executions are not permitted to serve in death penalty trials.<sup>25</sup> Simply questioning jurors about their death penalty views and identifying “death qualified jurors” often takes longer than it would to try a non-death penalty case from start to finish. When substantial court resources are taken up by death penalty trials, the court cannot handle other cases. As a result, additional judges and courtroom staff may be needed. The County of Plumas rented an additional courtroom to accommodate one death penalty trial, and the County of Mariposa was forced to pay for an additional judge because of the courtroom time consumed by the Cary Stayner death penalty case.<sup>26</sup>

All of these factors combine to make death penalty trials much more expensive than non-death penalty homicide trials, costs that are largely borne by the county. In a 2004 letter,

Siskiyou County's auditor-controller-recorder estimated that the county would spend \$19 million in just two years on four death penalty cases. As a result, she concluded, "we find ourselves in a desperate financial situation."<sup>27</sup>

These costs are simply for pursuing a sentence of execution at the trial level. In addition, the many years of appeals, which are longer in cases seeking execution, add to the expense. Even housing people on death row costs more than housing inmates in the general prison population.

Although we do not know exactly how much state execution is costing California, there is no doubt that, system-wide, it is costing hundreds of millions of dollars more than sentencing people to die in prison of other causes. Nor can these costs be substantially reduced.<sup>28</sup> Having state execution means paying more. The questions remain: how much more, and is it worth it?