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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

11 ERNEST DEWAYNE JONES,
 12 Petitioner,

13 v.

14
 15 KEVIN CHAPPELL, Warden of
 16 California State Prison at San
 17 Quentin,
 18 Respondent.

Case No. CV-09-2158-CJC
DEATH PENALTY CASE

**EXHIBITS IN SUPPORT OF
 PETITIONER'S OPENING BRIEF
 ON CLAIM 27**

VOLUME 3

Exhibit 9

Trent Nelson, *Will Wyoming Turn To
Firing Squads For Executions?*,
CBSNews.com., May 22, 2014



AP / May 22, 2014, 8:30 AM

Will Wyoming turn to firing squads for executions?



The execution chamber at the Utah State Prison after an execution by firing squad June 18, 2010; the bullet holes are visible in the wood panel behind the chair. / TRENT NELSON, AP

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CHEYENNE, Wyo. -- Prompted by the shortages of available drugs for **lethal injections**, Wyoming lawmakers are considering changing state law to permit the execution of condemned inmates by **firing squad**.

A Wyoming legislative committee has directed its staff to draft a firing-squad bill for consideration ahead of next year's legislative session starting in January.

Lawmakers in Utah also may consider a return to firing squads for civilian executions. A Republican state lawmaker there recently announced that he **intends to introduce firing-squad legislation** in his state's next legislative session in January as well.

Utah outlawed execution by firing squad in 2004 but kept it as an option for inmates convicted before that time. It last executed an inmate by firing squad in 2010.



Play VIDEO

British woman's efforts stopped supply of execution drug to U.S.

Bob Lampert, director of the Wyoming Department of Corrections, told members of the Wyoming Legislature's Joint Interim Judiciary Committee last week in Rawlins that drugs for lethal injection **have become increasingly difficult to obtain**.

"In the event that we had an execution scheduled and we couldn't carry it out as a result of lack of substances, I suggested to the Joint Judiciary that we may want to consider having an alternate means of execution, such as the firing squad," Lampert said Wednesday.

Current state law specifies Wyoming would execute condemned inmates in a gas chamber, which the state doesn't currently have, as a backup to lethal injection only if lethal injection were found to be unconstitutional. Existing state law doesn't address how the state should proceed in response to a drug shortage.

Lethal injection is becoming increasingly difficult for states to perform as **pharmaceutical companies withhold drug compounds that states traditionally have used**. Some inmates have raised constitutional challenges as states have



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turned to untried compounds.

Wyoming has no execution drugs on hand, Lampert said.



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Okl. executions on hold after lethal injection goes wrong

Last month, Oklahoma inmate **Clayton Lockett** died of a heart attack more than 40 minutes after corrections officials there started trying to administer drugs at his execution. **President Obama called the Lockett incident deeply troubling** and said he had asked his attorney general to review the application of the death penalty.

Sen. Bruce Burns, R-Sheridan, had proposed a bill in the state's legislative session earlier this year to change state law to allow the use of firing squads. He's a member of the judiciary

committee.

Burns said Wednesday the committee intends to consider the firing-squad approach at its next meeting in July. He floated a bill in the legislative session early this year calling for allowing use of the firing squad, but it failed an introductory vote.

Burns said his fellow lawmakers increasingly seem to recognize that the state needs to act.

Burns said he believes using the firing squad would be a preferable means of execution to lethal injection, in which inmates feel the needle and then have to wait for drugs to take effect.

Wyoming has only one inmate on death row: Dale Wayne Eaton, 69, is pressing a federal appeal of the state court death penalty he received in 2004 for the murder of Lisa Marie Kimmell, 18, of Billings, Montana.

Cheyenne lawyer Terry Harris represents Eaton in his federal appeal. An attempt to reach Harris for comment Wednesday wasn't immediately successful.

Rep. Stephen Watt, R-Rock Springs, serves on the Joint Interim Judiciary Committee. He said he intends to sponsor a bill in the state's coming legislative session to do away with the death penalty entirely but doesn't expect it will get much support.

Watt is a former Wyoming Highway Patrol trooper who was severely injured in a gunfight on the job years ago.

"The biggest and probably the most important one is probably my Christian beliefs that it's wrong for man to kill man," Watt said Wednesday of his opposition to the death penalty. "The second one is because of technology. All the time, we're coming up with more and more technology, and we're finding innocent people that have been wrongly convicted and sentenced to die. It would be a tragedy for one innocent person to die."

Watt said he doesn't consider the firing squad to be a more humane alternative to lethal injection.

"I've been shot," he said. "And I don't care how quickly death comes from firing squad. It still hurts and it's still terrifying. And I think it's cruel and unusual."

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SFTOMMY_012 May 22, 2014 2:2PM

Give the convicted a choice from the police drug confiscation lockers; OD on the one of their choice.

Strap 'em down and let it go....

No costs involved.

LIKE / REPLY

ROADKING041 May 22, 2014 2:2PM

That's what I'm talking about! Lead is cheaper than drugs, and when you see a condemned prisoner. And for all you anti-death penalty whiners, if it was your child that had her head partially blown off with a shotgun, then buried alive as with the Oklahoma murderer that was recently put to death, you would be calling for his head on a platter. As far as i'm concerned heinous murderers on death row SHOULD suffer as much physical and mental pain that can be administered while they take their last worthless breath on this earth. THAT is justice!

LIKE / REPLY

ASKAGAIN May 22, 2014 1:1PM

A wiser move would be to have several execution choices which either the state or the person on death row can choose from. That might avoid some of the frivolous appeals.

LIKE / REPLY

GTR5 May 22, 2014 0:12PM

Just use a rope.

LIKE / REPLY

BETTERUSA *May 22, 2014 0:12PM*

For the people that spout too many innocent ones being executed; execute the the killers that are caught committing the crime. E.g. Holmes, Loughner, the Ft. Hood shooter, are examples of killers that should be executed immediately. I am certain there are many on death row that were 100% guilty like these three examples. Unfortunately, these guilty types are lawyered up and are spending millions of taxpayer dollars fighting the system. Only the lawyers win! Those that are convicted and given death or life without parole should be put in a 5 foot by 5 foot cubicle that is completely without light and fed through a slot in the door. I believe most would beg to be executed instead of living in a coffin.

LIKE / REPLY

DJSEAVY *May 22, 2014 11:11AM*

The death penalty should be abolished, since they seem to manage to put innocent people on death row. I also believe being put in solitude until your dying breath would be better punishment. I realize a lot of people believe death is appropriate in many cases, and I can't say that I disagree. However, the cost of incarceration pales in comparison to the cost of appeals and everything else that goes along with a dp case. And if they execute an innocent person, which is very likely that they have already, then what? It's a sentence that - once carried out - is impossible to reverse.

LIKE / REPLY

ALWAYS SURPRISED *May 22, 2014 11:11AM*

I wouldn't want to be in the firing squad, pretty crappy job. They say it's cheaper to keep him in prison for life. If that's true, probably better, but who can prove that it's cheaper?

LIKE / REPLY

DANNY STEELE *May 22, 2014 11:11AM*

Personally, I'd do away with the death penalty. I've been in a prison cell (I was there as part of construction project). Keeping someone locked up until natural death seems to be a harsher sentence than the death penalty.

LIKE / REPLY

VERITAS830 *May 22, 2014 11:11AM*

Obviously, when the constitution was written & hanging was the most popular form of execution it wasn't considered cruel or unusual. The biggest concern I have is do you have the right guy.

LIKE / REPLY

EMPIRICAL RATIONALIST *May 22, 2014 11:11AM*

@Veritas830 Oh I agree, we need a mechanism in the law that to convict someone of capital murder, there is sound physical scientific evidence. Too many people get convicted simply because they're ugly or unpopular.

LIKE / REPLY

CBCHASE *May 22, 2014 11:11AM*

@Veritas830 Good point. Hangings and firing squads weren't considered unconstitutional while the men who wrote said document were still around, but now it's a major outrage if a guy has a panic attack or feels discomfort from an IV while lying on a bed with a pillow under his head. What?

LIKE / REPLY

EMPIRICAL RATIONALIST *May 22, 2014 10:10AM*

Simple, cheap, quick, effective, and if we are talking headshots, would be quite painless. Throw the body in a bag, and hose down the mess into the drain. It is a great way to execute. Though I think hanging from a rope would probably be a little cleaner, and you can reuse the rope.

1 LIKE / REPLY

PHILS1950 *May 22, 2014 10:10AM*

"And I don't care how quickly death comes from firing squad. It still hurts and it's still

terrifying. And I think it's cruel and unusual."

And feeling that needle slip under you skin, and the warm flow of the drug isn't terrifying? Good to see how the victims felt huh.....

Jeez, being put to death isn't mean to be pleasant, just think of the deaths of the victims of these people, personally I don't care, how they top them off, What I do care about is getting it done in a timely manner, as I really resent supporting these POS in prisons for a couple of decades.

3 LIKE / REPLY

LIVINGSWORD *May 22, 2014 9:9AM*

The gun is the weapon of choice to execute, just ask the NRA and most politicians who support shooting Bambi with assault rifles. Or ask any of the many stone cold murderers who have killed innocent men, women, and children at the many fine colleges, universities, and even grade schools where mass murder by these killing weapons have happened. They will tell you how humane and effective it is to gun down all these people. Ask any muslim terrorist group or any NRA peoson just how wonderful these bullets do their job. Im sure without a doubt that a 'Firing Squad' of maybe just two or three executioners would definately put all these bad people out of their misery once and for all. Like in a New York minute man, or like an instant cup of coffee. Yeah now that is not 'cruel and unusual punishment', at all dude.

1 LIKE / REPLY

NOMORENICEGUY *May 22, 2014 10:10AM*

@LivingSword Or ask the victims...oops..you can't because they're DEAD.

1 LIKE / REPLY

BOBW1212 *May 22, 2014 7:7AM*

...you dip a guy in brown gravy and lock him in a small room with a wolverine who's high on angel dust.

-George Carlin on capital punishment

2 LIKE / REPLY

MERLIN BIKE *May 22, 2014 5:5AM*

Wait, what?

Where are they going to get the ammo?

3 LIKE / REPLY

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Exhibit 10

Josh Levs, Ed Payne, and Greg Botelho,
*Oklahoma's Botched Lethal Injection
Marks New Front In Battle Over
Executions, CNN.com,*
May 1, 2014

Oklahoma's botched lethal injection marks new front in battle over executions

By Josh Levs, Ed Payne, and Greg Botelho, CNN
updated 3:32 PM EDT, Thu May 1, 2014

CNN.com

(CNN) -- A botched lethal injection in Oklahoma has catapulted the issue of U.S. capital punishment back into the international spotlight, raising new questions about the drugs being used and the constitutional protection against cruel and unusual punishment.

"We have a fundamental standard in this country that even when the death penalty is justified, it must be carried out humanely -- and I think everyone would recognize that this case fell short of that standard," White House spokesman Jay Carney said Wednesday.

What went wrong Tuesday in Oklahoma "will not only cause officials in that state to review carefully their execution procedures and methods," said Richard W. Garnett, a former Supreme Court law clerk who now teaches criminal and constitutional law at the University of Notre Dame, "it will also almost prompt many Americans across the country to rethink the wisdom, and the morality, of capital punishment."

"The Constitution allows capital punishment in some cases, and so the decision whether to use it or abandon it, and the moral responsibility for its use and misuse, are in our hands," he said.

Precisely what happened during the execution of convicted murderer and rapist Clayton Lockett remains unclear. Witnesses described the man convulsing and writhing on the gurney, as well as struggling to speak, before officials blocked the witnesses' view.

It was the state's first time using a new, three-drug cocktail for an execution.

Oklahoma halted the execution of another convicted murderer and rapist, Charles Warner, which was scheduled for later in the day.

Thirty-two U.S. states have the death penalty, as does the U.S. government and the U.S. military. Since 2009, three states -- New Mexico, Connecticut, and Maryland -- have voted to abolish it.

States that have capital punishment have been forced to find new drugs to use since [European-based manufacturers banned U.S. prisons](#) from using theirs for executions. One of those manufacturers is the Danish company Lundbeck, maker of [pentobarbital](#).

Carney, speaking to reporters at a daily briefing, said he had not discussed the Oklahoma case with President Barack Obama.

"He has long said that while the evidence suggests that the death penalty does little to deter crime, he believes there are some crimes that are so heinous that the death penalty is merited." The crimes committed by the two men in Oklahoma "are indisputably horrific and heinous," Carney said.

'There was chaos'

Lockett lived for 43 minutes after being administered the first drug, CNN affiliate KFOR reported. He got out the words "Man," "I'm not," and "something's wrong," reporter Courtney Francisco of [KFOR](#) said. Then the blinds were closed.

Other reporters, including [Cary Aspinwall of the Tulsa World](#) newspaper, also said Lockett was still alive and lifted his head while prison officials lowered the blinds so onlookers couldn't see what was going on.

Dean Sanderford, Lockett's attorney, said his client's body "started to twitch," and then "the convulsing got worse. It looked like his whole upper body was trying to lift off the gurney. For a minute, there was chaos."

Sanderford said guards ordered him out of the witness area, and he was never told what had happened to Lockett, who was convicted in 2000 of first-degree murder, rape, kidnapping and robbery.

After administering the first drug, "We began pushing the second and third drugs in the protocol," said Oklahoma Department of Corrections Director Robert Patton. "There was some concern at that time that the drugs were not having the effect. So the doctor observed the line and determined that the line had blown." He said that Lockett's vein had "exploded."

The execution process was halted, but Lockett died of a heart attack, Patton said.

"I notified the attorney general's office, the governor's office of my intent to stop the execution and requested a stay for 14 days," said Patton.

Gov. Mary Fallin issued a statement saying that "execution officials said Lockett remained unconscious after the lethal injection drugs were administered."

Another state, another botched execution

Earlier this year, a convicted murderer and rapist in Ohio, Dennis McGuire, [appeared to gasp and convulse](#) for at least 10 minutes before dying from the drug cocktail used in his execution.

Ohio [used](#) the sedative midazolam and the painkiller hydromorphone in McGuire's January execution, the state said.

Louisiana [announced](#) later that month that it would use the same two-drug cocktail.

Oklahoma had [announced](#) the drugs it planned to use: midazolam; vecuronium bromide to stop respiration; and potassium chloride to stop the heart. "Two intravenous lines are inserted, one in each arm. The drugs are injected by hand-held syringes simultaneously into the two intravenous lines. The sequence is in the order that the drugs are listed above. Three executioners are utilized, with each one injecting one of the drugs."

The execution was the first time Oklahoma had used midazolam as the first element in its three-drug cocktail. The drug is generally used for children "before medical procedures or before anesthesia for surgery to cause drowsiness, relieve anxiety, and prevent any memory of the event," the U.S. National Library of Medicine says. "It works by slowing activity in the brain to allow relaxation and sleep."

The drug "may cause serious or life-threatening breathing problems," so a child should only receive it "in a

hospital or doctor's office that has the equipment that is needed to monitor his or her heart and lungs and to provide life-saving medical treatment quickly if his or her breathing slows or stops."

Cruel and unusual?

The question for courts is whether using such drugs in executions constitutes "cruel and unusual" punishment, in violation of the Eighth Amendment to the U.S. Constitution.

After his execution, McGuire's family filed a lawsuit seeking an injunction of the execution protocol the state used.

"The lawsuit alleges that when Mr. McGuire's Ohio execution was carried out on January 16th, he did endure frequent episodes of air hunger and suffocation, as predicted," the office of the family's attorney Richard Schulte said in a statement. "Following administration of the execution protocol, the decedent experienced 'repeated cycles of snorting, gurgling and arching his back, appearing to writhe in pain,' and 'looked and sounded as though he was suffocating.' This continued for 19 minutes."

In Oklahoma, attorneys for both Lockett and Warner have been engaged in a court fight over the drugs used in the state's executions.

They'd initially challenged the state Department of Corrections' unwillingness to divulge which drugs would be used. The department finally disclosed the substances.

Lockett and Warner also took issue with the state's so-called secrecy provision forbidding it from disclosing the identities of anyone involved in the execution process or suppliers of any drugs or medical equipment. The Oklahoma Supreme Court rejected that complaint, saying such secrecy does not prevent the prisoners from challenging their executions as unconstitutional.

After Lockett's execution, Adam Leathers, co-chairman of the Oklahoma Coalition to Abolish the Death Penalty, accused the state of having "tortured a human being in an unconstitutional experimental act of evil."

"Medical and legal experts from around the country had repeatedly warned Oklahoma's governor, courts and Department of Corrections about the likelihood that the protocol intended for use ... would be highly problematic," said Deborah Denno, death penalty expert at Fordham Law School.

"This botch was foreseeable and the state (was) ill prepared to deal with the circumstances despite knowing that the entire world was watching. Lethal injection botches have existed for decades but never have they been riskier or more irresponsible than they are in 2014. This outcome is a disgrace," Denno said.

Amnesty International USA called the botched execution "one of the starkest examples yet of why the death penalty must be abolished."w

"Last night the state of Oklahoma proved that justice can never be carried out from a death chamber," Executive Director Steven W. Hawkins said in a statement.

Investigation

The Oklahoma attorney general's office is "gathering information on what happened in order to evaluate," said spokeswoman Dianne Clay.

Fallin ordered an independent review of the state's execution procedures and issued an executive order granting a two-week delay in executions.

"I believe the legal process worked. I believe the death penalty is an appropriate response and punishment to those who commit heinous crimes against their fellow men and women. However, I also believe the state needs to be certain of its protocols and its procedures for executions and that they work," she told reporters Wednesday.

Fallin gave no deadline for the review, which will be led by Department of Public Safety Commissioner Michael Thompson. If it is not done within the 14-day period, the governor said she would issue an additional stay for Warner.

Lockett's attorney slammed the announcement and called for a "truly" independent investigation.

"The DPS is a state agency, and its Commissioner reports to the Governor. As such, the review proposed by Governor Fallin would not be conducted by a neutral, independent entity.

"In order to understand exactly what went wrong in last night's horrific execution, and restore any confidence in the execution process, the death of Clayton Lockett must be investigated by a truly independent organization, not a state employee or agency," Dean Sanderford said in a statement.

Lockett was convicted in 2000 of a [bevy of crimes](#) that left Stephanie Nieman dead and two people injured.

Nieman's parents released a statement Tuesday prior to Lockett's scheduled execution.

"God blessed us with our precious daughter, Stephanie for 19 years," it read. "She was the joy of our life. We are thankful this day has finally arrived and justice will finally be served."

Warner, who now awaits execution, was convicted in 2003 for the first-degree rape and murder six years earlier of his then-girlfriend's 11-month-old daughter, Adrianna Waller.

His attorney, Madeline Cohen, said further legal action can be expected given that "something went horribly awry" in Lockett's execution Tuesday.

"Oklahoma cannot carry out further executions until there's transparency in this process," Cohen said. "... Oklahoma needs to take a step back."

In a CNN/ORC poll earlier this year, 50% of Americans said the penalty for murder in general should be death, while 45% said it should be a life sentence. The survey's sampling error made that a statistical tie. Fifty-six percent of men supported the death penalty for murder in general, while 45% of women did.

A Gallup poll last year found 62% of Americans believe the death penalty is morally acceptable, while half as many, 31%, consider it morally wrong.

CNN's Dana Ford, Elliott C. McLaughlin and Ross Levitt contributed to this report.

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Exhibit 11

Dana Ford and Ashley Fantz,
*Controversial Execution In Ohio Uses
New Drug Combination*, CNN.com,
January 17, 2014

Controversial execution in Ohio uses new drug combination

By Dana Ford and Ashley Fantz, CNN

updated 1:01 PM EST, Fri January 17, 2014

CNN.com

(CNN) -- Ohio inmate Dennis McGuire appeared to gasp and convulse for roughly 10 minutes before he died Thursday by lethal injection using a new combination of drugs, reporters who witnessed it said.

McGuire was convicted in 1994 of the rape and murder of 22-year-old Joy Stewart, who was seven months pregnant. Her relatives were at Southern Ohio Correctional Facility in Lucasville to witness his death, according to tweets from [television reporter Sheila Gray](#).

McGuire's "children and daughter-in-law were crying and visibly upset," Gray tweeted.

She said McGuire, before the drugs took effect, thanked Stewart's family for a letter he apparently received.

"To my children, I'm sorry. I love you. I'm going to heaven and I'll see you there when you come," McGuire reportedly said, according to [CNN affiliate WDTN](#).

Columbus Dispatch reporter Alan Johnson said that the whole execution process took 24 minutes, and that McGuire appeared to be gasping for air for 10 to 13 minutes.

"He gasped deeply. It was kind of a rattling, guttural sound. There was kind of a snorting through his nose. A couple of times, he definitely appeared to be choking," WDTN quoted Johnson as saying.

The convicted murderer was pronounced dead at 10:53 a.m. ET.

The execution generated controversy because, like many states, Ohio has been forced to find new drug protocols after European-based manufacturers banned U.S. prisons from using their drugs in executions -- among them, Danish-based Lundbeck, which manufactures pentobarbital.

According to Ohio's corrections department, the state used a combination of the drugs midazolam, a sedative; and the painkiller hydromorphone.

Both the length of time it took for McGuire to die and his gasping are not typical for an execution, said Howard Nearman, an anesthesiologist at University Hospitals Case Medical Center in Cleveland.

"Why it took 24 minutes, I really can't tell you," he said. "It just makes you wonder -- what was given? What was the timing, and what were the doses?"

In an opinion piece written for CNN this week, a law professor noted that McGuire's attorneys argued he would "suffocate to death in agony and terror."

"The state disagrees. But the truth is that no one knows exactly how McGuire will die, how long it will take or what he will experience in the process," wrote Elisabeth A. Semel, clinic professor of law and director of the Death Penalty Clinic at U.C. Berkeley School of Law.

Speaking on behalf of McGuire's legal team, attorney Allen Bohnert called on the governor to impose a moratorium on future executions because of what took place Thursday.

"At this point, it is entirely premature to consider this execution protocol to be anything other than a failed, agonizing experiment," he said in a statement.

"The people of the State of Ohio should be appalled at what was done here today in all of our names. Ohio, like its citizens, must follow the law. The state has failed."

CNN's Sonny Hostin said that McGuire's execution will likely spark debate over whether how inmates react to the use of the drugs constitutes cruel and unusual punishment prohibited by the U.S. Constitution.

"Whenever there's a change in the lethal injection process clearly it's subject to legal proceedings and perhaps we will see those," Hostin said.

Ohio ran out of pentobarbital, which is a narcotic and sedative barbiturate, in September, according to JoEllen Smith, spokeswoman for the Ohio Department of Rehabilitation and Correction.

In response to that shortage, the department amended its execution policy to allow for the use of midazolam and hydromorphone.

Stewart's body was discovered by hikers near a creek in southwestern Ohio in February of 1989. Her throat was cut and she had been sodomized.

[Death penalty states scramble for lethal injection drugs](#)

There are currently 138 men and one woman on death row in Ohio.

The state was set to execute death row inmate Ron Phillips using the new drug combination last year, but Gov. John Kasich granted the convicted killer a stay of execution pending a review of a possible organ donation to his family members.

CNN's Joe Sutton, Ross Levitt and Deborah Feyerick contributed to this report.

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Exhibit 12

PriceWaterhouseCoopers, *Cost of
Private Panel Attorney Representation in
Federal Capital Habeas Corpus Cases
from 1992 to 1998, February 9, 1999*

***Cost of Private Panel Attorney Representation in Federal
Capital Habeas Corpus Cases from 1992 to 1998***

February 9, 1999

PRICEWATERHOUSECOOPERS 

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Section I: Executive Summary

1.1 Introduction

In September 1998 the Administrative Office of the United States Courts (AOUSC) requested that PricewaterhouseCoopers (PwC) analyze the costs of private panel attorney¹ representation of federal capital habeas corpus cases from 1992 to 1998. In particular, PwC was asked to identify regional differences in costs and potential reasons for those differences. The following report is the result of that analysis.

Federal capital habeas corpus involves federal court review of a state capital murder conviction and a death sentence that has already been upheld by a state court. The petitioner—the person sentenced to death—makes a claim that his constitutional rights were violated at some point during the state proceedings.² Thus, the writ of habeas corpus serves as a check on state courts and their application of federal constitutional protections, but does not determine the prisoner's guilt or innocence. The procedural and substantive legal rules governing federal capital habeas corpus review are evolving and very complicated (see I.2. The Nine Steps of Capital Litigation below).³

¹ Private panel attorneys are private attorneys who are compensated with public dollars to provide representation to those financially unable to secure adequate representation in criminal and related proceedings. As such, they are part of the Defender Services Program operated by the Administrative Office of the U.S. Courts. These attorneys are often referred to as CJA panel attorneys in reference to the Criminal Justice Act of 1964, which provides authorization for compensating them.

² Claims are typically made under the 4th, 5th, 6th, 8th, and 14th Amendments.

³ See Section 3 for a detailed discussion of the life cycle of a federal capital habeas case.

Concern about regional differences in the costs of federal capital habeas corpus representations by CJA panel attorneys arose, in part, from a 1998 Coopers & Lybrand report on the costs of the Defender Services Program. In that report, Coopers & Lybrand noted that the Ninth Circuit, driven by the California districts, accounted for 60 to 76 percent of capital habeas representation costs, in contrast with 48 to 63 percent of the representations between 1992 and 1997.⁴

Following a House Appropriations Subcommittee hearing during which this finding was discussed, Judge John G. Heyburn II, Chair of the Judicial Conference Budget Committee, and Leonidas Ralph Mecham, AOUSC Director, wrote to Representative Harold Rogers, Chairman of the House Subcommittee, outlining the judiciary's efforts to control the cost of capital habeas cases in the Ninth Circuit and California. These measures include mandatory case budgeting as well as Circuit Judicial Council review and approval of case budgets for all pending and new capital habeas proceedings. In addition, the AOUSC awarded PwC a contract to study the issue.

In this study, PwC used three sources of data and information to identify the costs and regional disparities in the costs of federal capital habeas corpus cases, as well as the possible reasons behind these costs and regional disparities:

1. Analysis of vouchers from the CJA Panel Attorney Payment System database, which contains information on costs incurred and hours spent on CJA panel attorney cases;

⁴ Report on Costs and Recommendations for the Control of Costs of the Defender Services Program, Coopers & Lybrand L.L.P., page 25.

-
2. Analysis of responses to a survey distributed to a sample of CJA panel attorneys; and
 3. Case studies of seven separate cases from six states, including two cases from California.

None of the analyses included in this report should be taken as representing PwC's recommendations as to what are, or should be, *appropriate* costs of federal capital habeas corpus cases. In particular, comparison of the average costs of cases by circuit, district, and state does not, by itself, indicate whether costs are too high or too low in any particular region.

1.2 The Nine Steps of Capital Litigation

Beginning with the state trial, a capital case may pass through nine steps of litigation before the case is finally closed. These nine steps are:

- Step 1: State trial and sentencing;
- Step 2: Direct appeal at the state level;
- Step 3: Petition for certiorari review of state conviction in the U.S. Supreme Court;
- Step 4: State collateral review (post-conviction proceedings);
- Step 5: Appeal of state collateral review decision at the state level;
- Step 6: Petition for certiorari review of state collateral review in the U.S. Supreme Court;
- Step 7: Petition for writ of habeas corpus in federal district court;
- Step 8: Appeal of federal district court decision in the federal court of appeals; and

Step 9: Petition for certiorari review in U. S. Supreme Court.

The federal capital habeas corpus stage begins at Step 7 and ends at Step 9, but the time taken for a case to pass through these steps depends heavily on what occurs at the state level in the prior six steps. Therefore, petitioner's counsel must familiarize himself or herself with all that went on in the case before it reaches Step 7. The volume and complexity of the work involved in providing representation in a federal capital habeas corpus case can therefore be substantial.

Moreover, there are various sub-steps in the federal habeas corpus stage. They include:

- Appointment of counsel;
- Request for stay of execution, and appeals (if relevant) of denials of stay;
- The hearing of dispositive motions; and
- The holding of an evidentiary hearing (if needed) and oral arguments before the judge.

These steps do not always proceed uninterrupted. At any point in the process this sequence of sub-steps may be suspended: a case may be sent back to the state court; an appeal may be made to the circuit court; or procedural litigation, such as whether the time limits imposed by the Anti-terrorism and Effective Death Penalty Act apply, may be instigated. Each delay adds to the cost of a case as attorneys take time to review the case again, learn new statutory and case law, renew contact with witnesses, and so on. The life cycle is discussed more fully in section III.

1.3 Costs of Federal Capital Habeas Corpus Cases⁵

Total Costs of Federal Capital Habeas Corpus Cases: The total cost of CJA panel attorney representation in 1,009 federal capital habeas corpus cases between 1992 and 1998 was \$112.1 million. PwC removed certain vouchers and cases (totaling \$9.8 million) deemed inappropriate for the analysis,⁶ leaving \$102 million in total costs for 783 cases. The analyses and figures in the rest of this report relate to these 783 cases.

Almost 90 percent of these costs (about \$90 million) were incurred in 631 open cases, while approximately 10 percent of the total costs analyzed were incurred in the 152 closed cases.⁷ Of the open cases, most of the costs (\$85 million) were incurred in active cases, while only a small proportion of the total costs (\$5 million) were incurred in open cases that are dormant.⁸

⁵ The costs analyzed in this report do not include the costs of services provided by Post-Conviction Defender Organizations (PCDOs) staff in Federal Defender Organizations, assistance provided by law school interns, or the value of pro bono work performed by other attorneys. Many of the cases in the database received assistance from one or more of these sources, especially from the PCDOs, that were operational from 1989 to 1996.

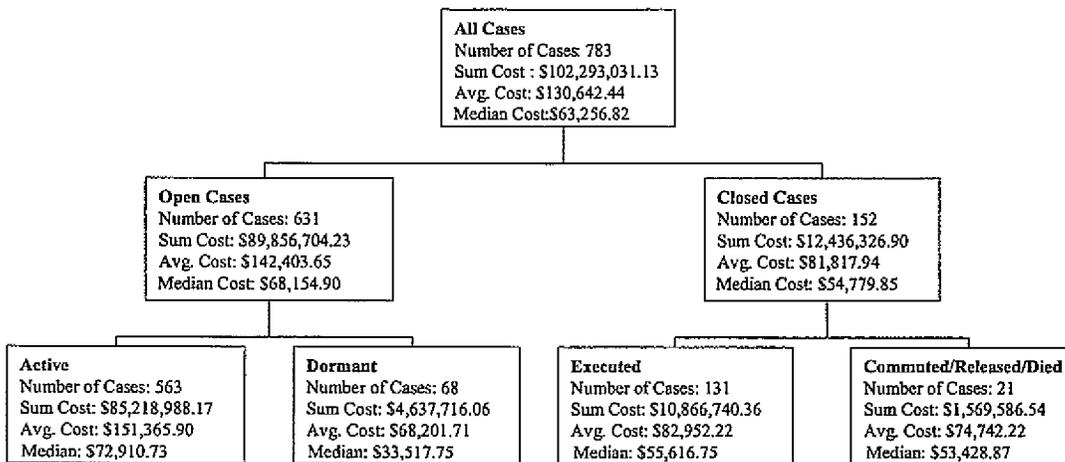
⁶ A case was unsuitable for analysis if the stage of proceeding was not noted on any of the vouchers for that case, if the case's vouchers only included experts' costs, if the case had started within the past 6 months, or if the case was under seal.

⁷ Cases are considered closed if the petitioner died in prison, was executed, was granted habeas relief and released (or received a reduced sentence as a result), or if the death sentence was commuted and the state court reduced the sentence. Otherwise, cases are considered open.

⁸ Open cases are considered active if the attorney submitted a voucher within the last 2 years. Otherwise open cases are considered dormant.

CJA Panel Attorney Payment System Data

Open and Closed Cases by Case Disposition



ES Figure 1: Total Cost of Federal Capital Habeas Corpus Cases

Average and Median Costs of Federal Capital Habeas Corpus Cases:

Open cases are, on average, more costly than closed cases, and active open cases are more costly than dormant cases. For closed cases there is little difference in cost by the final disposition of the case, as shown in ES Table 1 below.

ES Table 1: Average and Median Costs of Open and Closed Federal Capital Habeas Corpus Cases

<i>Status of Case</i>	<i>Average Cost</i>	<i>Median Cost</i>
All Cases	\$130,642	\$63,257
Open Cases	\$142,404	\$68,155
Closed Cases	\$81,818	\$54,780
<i>Disposition of Case</i>		
Open Cases: Active	\$151,366	\$72,911
Open Cases: Dormant	\$68,202	\$33,518
Closed Cases: Executed	\$82,952	\$55,617
Closed Cases: Committed/Released/Died	\$74,742	\$53,429

The median costs (that is, the cost of the “middle” case⁹) for all categories of case are lower than the average costs, implying that the distribution of costs is skewed to the low end (that is, there are more cases with below-average costs than above-average costs). As discussed below, this is due in large part to the number of high-cost California cases. Otherwise, the median costs show a similar pattern to the average costs: open active cases are still the most costly, and there is little difference in the median cost of closed cases by case disposition.

The relatively low average cost of closed cases compared to open cases is due largely to the impact of the large number of open and high-cost California cases. When the costs of only non-California cases are compared, there is little difference between the average cost of a closed case (\$81,806) compared to an open case (\$66,931).

Cost of Federal Capital Habeas Corpus Cases by Stage of

Proceeding: Preparation of the habeas petition is the most costly part of a case, most likely because not only does the bulk of investigation and research take place at this time but arguments are developed. This is true for both open and closed cases. For open cases, the evidentiary hearing stage is the next most costly stage. However, for closed cases the next most expensive stage is the appeal stage. This is shown in ES Table 2 below.

⁹ By definition, 50 percent of the cases are more costly than the cost of the median case, and 50 percent of the cases are less costly.

ES Table 2: Average and Median Costs per Stage of Proceeding¹⁰

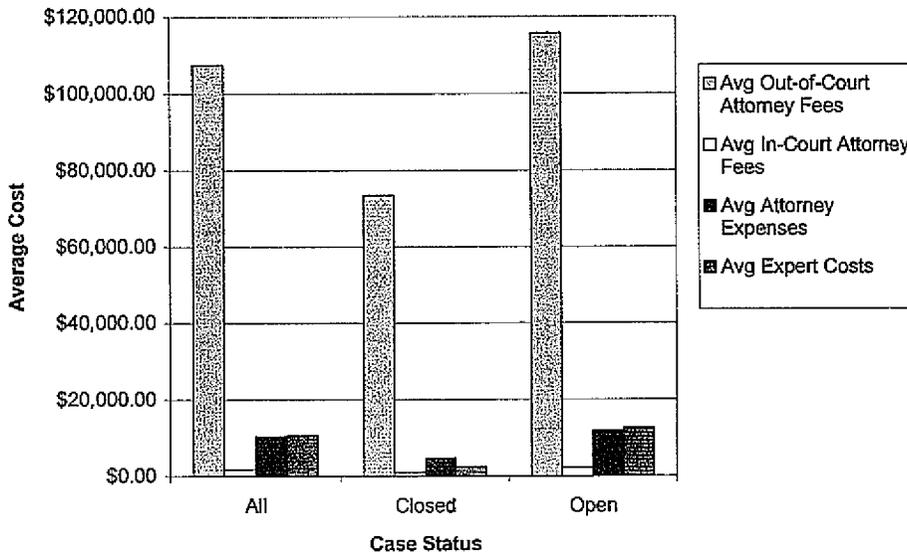
<i>Stage of Proceeding</i>	<i>Open Cases</i>		<i>Closed Cases</i>	
	<i>Average</i>	<i>Median</i>	<i>Average</i>	<i>Median</i>
Habeas Petition Stage	\$129,363	\$46,614	\$42,366	\$27,715
Evidentiary Hearing	\$54,594	\$17,200	\$20,060	\$8,937
Dispositive Motions	\$24,570	\$12,398	\$22,976	\$8,921
Appeal Stage	\$29,428	\$20,713	\$30,041	\$21,140
Petition for Cert	\$9,333	\$8,025	\$11,762	\$8,351
Other Stages	\$11,216	\$4,836	\$11,015	\$4,608

The cost discrepancies between open and closed cases is, again, primarily due to the impact of California cases.

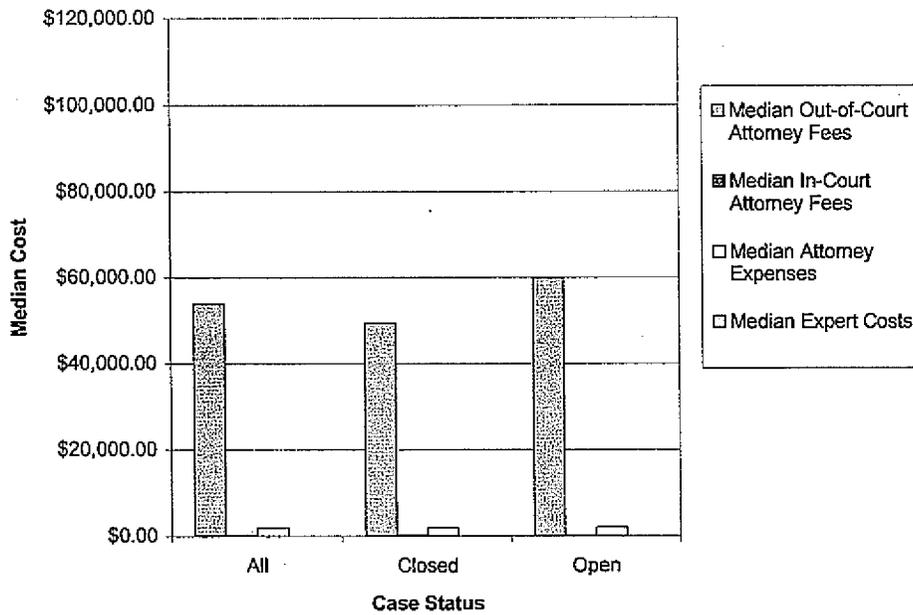
Costs of Federal Capital Habeas Corpus Cases by Cost Components:

The majority of costs (over 80 percent) for both open and closed cases can be attributed to attorney fees for time spent out of court. The next most costly component is compensation for experts, followed by attorney expenses. Attorney fees for in-court hours are, by comparison, minimal. ES Figure 2 and ES Figure 3, respectively, show the average and median costs for each of these components.

¹⁰ The average cost of each stage of proceeding is calculated by dividing the total costs in the database for that stage of proceeding by the number of cases that had that stage of proceeding. Each case does not go through every stage (for example, not every case has an evidentiary hearing). Therefore, the sums of the average cost by stage (\$258,504 and \$138,220 for open and closed cases respectively) exceed the averages for open and closed cases given above (\$142,404 and \$81,818 respectively).



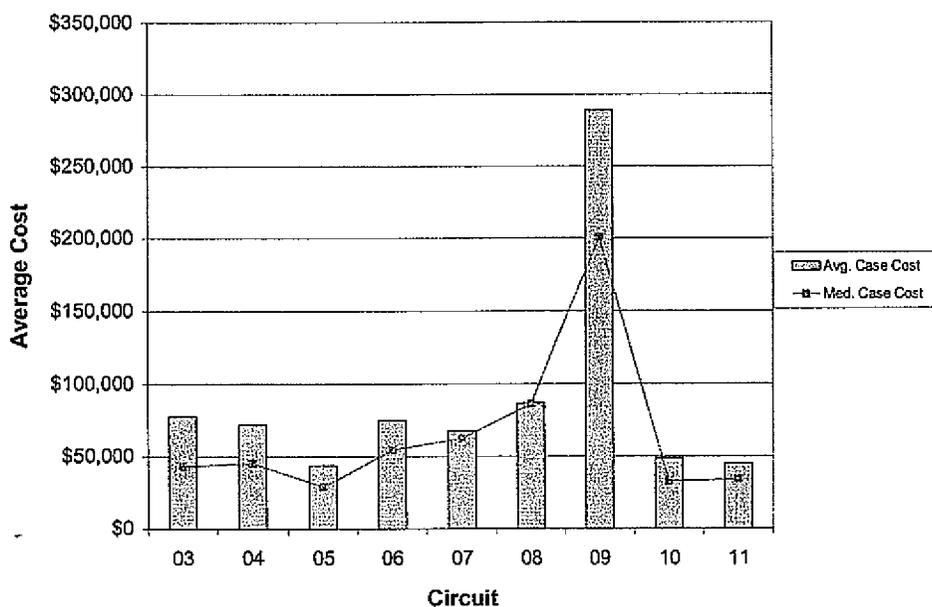
ES Figure 2: Average Federal Capital Habeas Corpus Costs by Component



ES Figure 3: Median Federal Capital Habeas Corpus Costs by Component

I.4 Regional Differences in the Costs of Federal Capital Habeas Corpus Cases

Average Cost of Cases By Circuit: The average cost of a case in the Ninth Circuit is more than three times the average case cost in any other circuit, as shown in ES Figure 4.



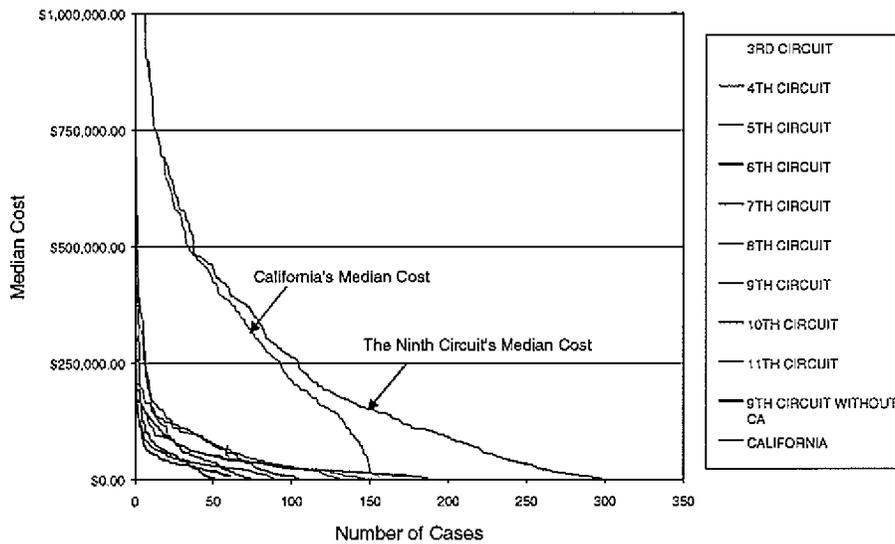
ES Figure 4: Cost of Federal Capital Habeas Corpus Cases by Circuit

The high average cost of a Ninth Circuit case is not simply the result of a small number of very expensive cases. ES Figure 5 shows a curve for all cases in each circuit that links the cost of those cases, starting with the most costly case and ending with the least costly case.¹¹

Curves for California and non-California Ninth Circuit cases have also been included in the chart. Several facts are immediately apparent:

¹¹ Although cases in the Ninth Circuit were the most costly, all circuits had at least one case whose costs exceeded the national average and median.

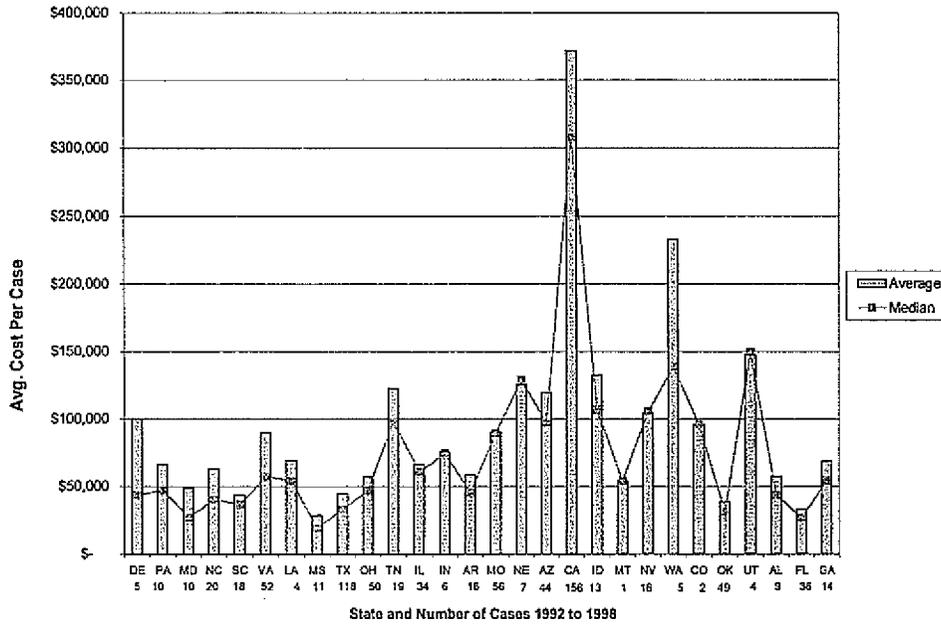
- District courts in the Ninth Circuit have a larger caseload than district courts in other circuits, with approximately 300 cases out of a total of 783;
- The median cost of a case in the Ninth Circuit is very high relative to that of other circuits; in fact 95% of the cases in these other circuits cost less than the median cost of a case in the Ninth Circuit; and
- California cases drive Ninth Circuit costs.



ES Figure 5: Cost of All Cases By Circuit

Average and Median Cost of Cases by State: Further evidence that the high average and median cost of Ninth Circuit cases is driven by the costs of California cases is shown in ES Figure 6 below, a comparison of costs by state. Note that for most states, the median cost is lower than the average cost, again indicating that in most states low-cost cases outnumber high-cost cases. The high average costs and

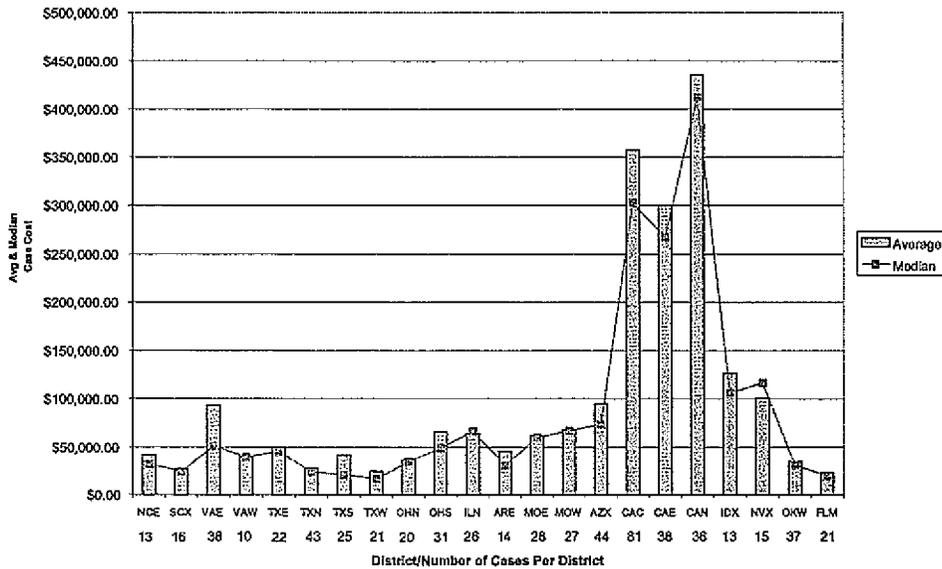
the large number of California cases mean that California cases account for \$58 million, or 57 percent, of the total national cost of \$102 million.



ES Figure 6: Average and Median Cost of Federal Capital Habeas Corpus Cases by State

Average Cost of Cases by District: PwC also analyzed average case costs by district for districts with more than 10 cases in the CJA Panel Attorney Payment System database (see ES Figure 7 below). All California districts had a very high average case cost (and median case cost), ranging from California Eastern’s \$300,000 to \$436,000 in California Northern (California Southern is not shown because it only had one case). No other district outside of California approached the average California case cost, although many of the non-California Ninth Circuit districts had relatively high average costs compared to non-Ninth Circuit cases. This suggests that part, but only a small part,

of California's high costs can be attributed to factors relating to the Ninth Circuit as a whole.



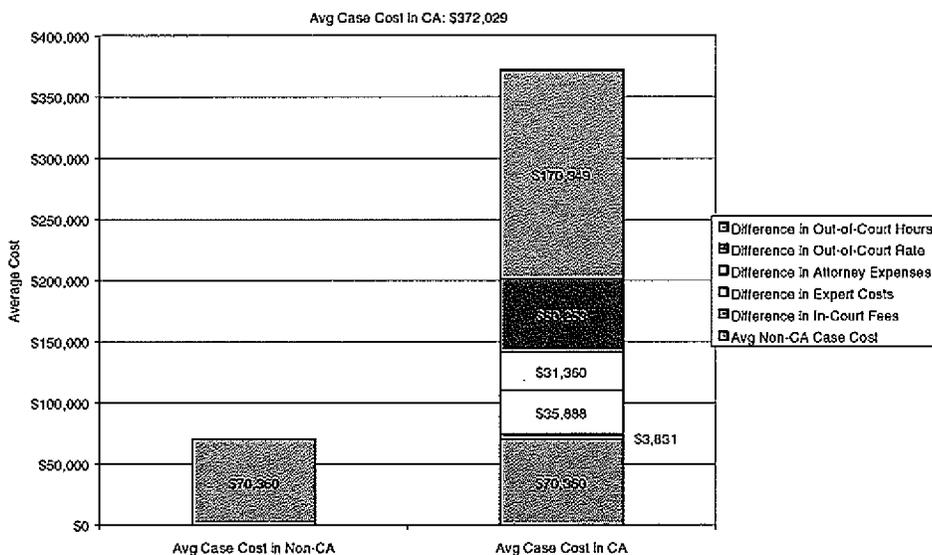
ES Figure 7: Average and Median Cost Per Case By District (Districts With More Than 10 Cases)

Average California and Non-California Costs: The average cost of a case originating in California was \$372,029, and the average cost of a non-California case was \$70,360. Most of the difference between these two averages (\$301,669) is due to the additional out-of-court hours that California attorneys work, as shown by the following breakdown of the difference in averages:

- \$170,349 is due to the additional out-of-court hours worked by California attorneys (an average of 2,180 hours for California cases compared to an average of 578 hours for non-California cases);

- \$60,253 is due to the higher attorney hourly rates in California (\$133.90 average per hour for California cases, compared to \$106.30 average per hour for non-California cases);¹²
- \$35,888 is due to higher expert costs in California cases (an average of \$39,462 in expert costs in California cases, compared to an average of \$3,574 in non-California cases);
- \$31,360 is due to higher attorney expenses in California cases (an average of \$35,566 in California cases, compared to an average of \$4,205 in non-California cases); and
- \$3,831 is due to additional in-court attorney fees in California (an average of 134 in-court hours in California cases, compared to an average of 106 in-court hours in non-California cases).

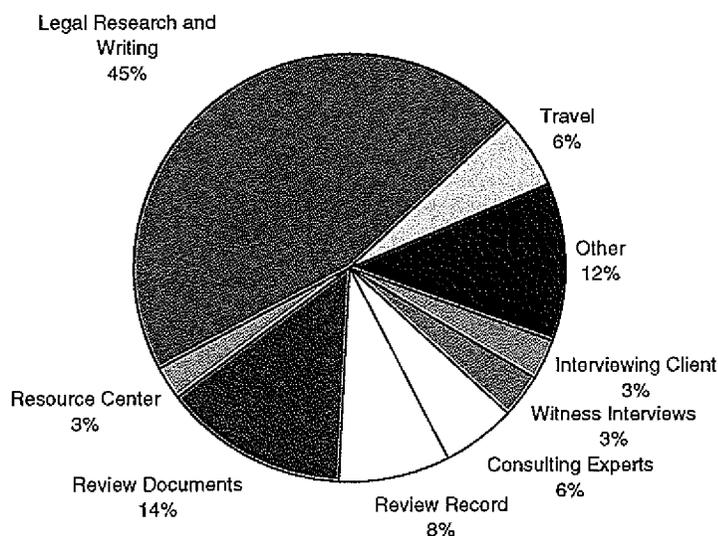
This breakdown is shown graphically in ES Figure 8.



ES Figure 8: The Cost Difference Between the Average Case Cost in Non-California Cases and the Average Case Cost in California

¹² The hourly rate is now capped at \$125 by statute.

Of the \$170,349 resulting from the difference in out-of-court hours, almost half (45 percent) was due to additional time spent performing legal research and writing, as shown below in ES Figure 9. California attorneys spent, on average, 135 more hours reviewing the (typically much longer) trial record than their non-California counterparts (188 hours for California cases compared to 53 hours for non-California cases) for an additional cost of \$14,377, and 89 more hours consulting with experts (107 hours for California cases compared to 18 hours for non-California cases) for an additional cost of \$9,507.



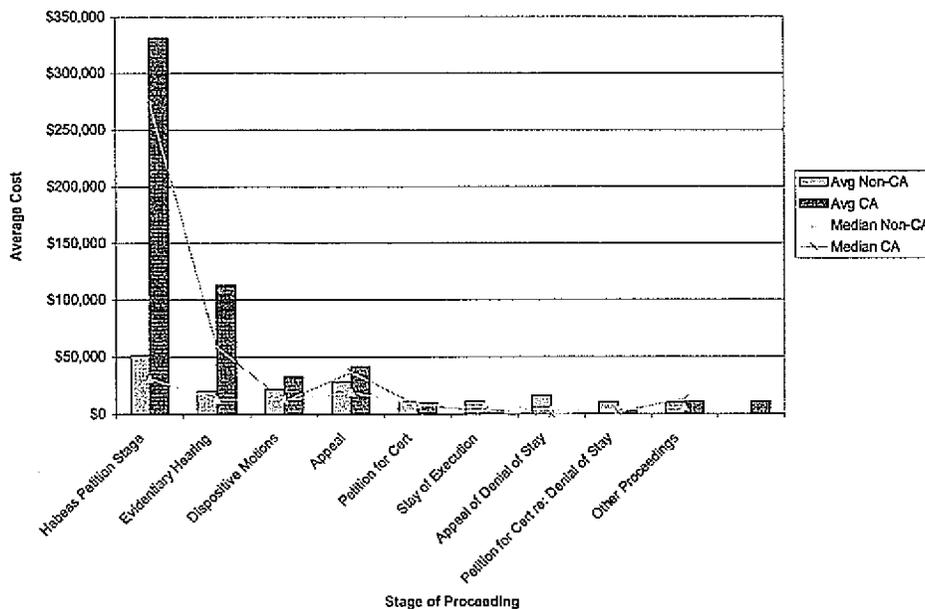
ES Figure 9: Additional 1,600 Attorney Out-of-Court Hours Spent in California Cases Compared to Non-California Cases Broken Down by Activity

Average California and Non-California Costs By Stage of

Proceeding: The greatest difference between the average cost of a California case compared with a non-California case can be attributed to the difference in costs incurred during the habeas petition stage

(approximately \$330,000 for California cases, compared to \$50,000 for non-California cases).

An evidentiary hearing in California is also more costly (approximately \$113,000 for California cases compared to \$20,000 for non-California cases).



ES Figure 10: Difference Between Average Cost of Stage of Proceedings for California and Non-California Cases

1.5 Factors Driving Costs of Federal Capital Habeas Corpus Cases

Many factors drive the costs of federal capital habeas corpus cases.¹³ A statistical analysis of the impact of nine factors on the costs of 84 non-

¹³ The factors driving the costs of all cases may differ from the factors that explain why the costs of California cases are greater than the costs of non-California cases.

California cases only accounted for only 14 percent of the total costs.¹⁴ This supports the notion that the costs of cases are typically based on case-specific factors, such as the complexity of the petitioner's personal background, the particulars of the circumstances surrounding the crime, and the idiosyncrasies of the state trial. These factors are difficult to quantify and include in a statistical model.

PwC therefore sent out a survey to CJA panel attorneys as part of this study. The survey results showed that the attorneys believe the following factors are the most important in driving the costs of cases. The factors are listed in descending order of importance:

- *The level of competency of state trial counsel:* More than 80 percent of the attorneys who were surveyed raised "Ineffective assistance of counsel" (at the state trial) as a habeas claim. A poor defense by counsel at the initial trial often leads to underdevelopment of the facts of the case.
- *The lack of development of facts during the state trial:* At the federal habeas corpus stage, an underdeveloped case may, in turn, lead to more investigation, research, and development of an argument of ineffective assistance of trial counsel. Such investigation and research typically occurs years after the initial trial, and can be time-consuming and costly.
- *The degree of legal research required, especially for new or original claims:* New claims (that is, claims for which a precedent

¹⁴ These factors were: attorney experience; size of trial record; number of habeas corpus claims raised; whether investigation at trial involved travel to other states; continuity of counsel from state to federal post-conviction proceedings; number of state post-conviction proceedings; denial of attorney requests (for experts, attorney fees, and for evidentiary hearings) at the federal post-conviction proceedings; denial of a request for an evidentiary hearing at the state post-conviction proceeding; and whether funding was provided for the state post-conviction proceeding.

has not been set) typically require more hours spent in research and writing than claims which follow precedents.

- *The complexity of the petitioner's personal background:* The complexity of the petitioner's personal background and the idiosyncrasies of the state trial (which may give rise to habeas claims) also play a part in affecting costs. The degree of complexity of these issues can differ significantly from case to case. But these issues provide the basis for habeas petition claims and can therefore dictate the number of hours spent in investigating, researching and writing, and developing the case.
- *The "aggressiveness" of the state attorney general:* The attitude and tactics of the state attorney general's office can increase costs in a number of ways. For example, decisions by the attorney general's office to raise, rather than waive, the exhaustion defense¹⁵ can increase the amount of time spent in litigation and prolong the entire judicial process. The strategy of the California Attorney General's Office in litigating claims is believed to have a major impact on the costs of cases in California, as discussed below.

1.6 Factors Explaining the Cost Differential Between California and Non-California Cases

PwC identified several possible reasons for the regional difference in average costs. However, in linking these reasons directly to costs,

¹⁵ The exhaustion defense is an argument that petitioner's counsel did not raise all the claims contained in the federal habeas corpus petition in the state courts, either on direct appeal or in state post-conviction proceedings. If petitioner's counsel did not exhaust all claims during the state proceedings before filing in federal court, the federal court can require the petitioner to present the claims to the state court before continuing the federal proceedings.

PwC encountered two problems. First, while the CJA Panel Attorney Payment System Database shows the amount of time spent on specific tasks, there is no way of knowing from the database the *causes* for time being devoted to those tasks. Secondly, many of the factors identified are related and mutually reinforcing, creating a set of interlocking factors that create a high-cost environment. For example, a perfunctory state post-conviction process that results in an undeveloped case may lead to high investigation costs at the federal level as the petitioner's counsel investigates the facts. Similarly, if the federal court requires rigorous review of the facts of the case, investigation costs may also be high. When these two factors are combined—that is, when the state has a perfunctory post-conviction process and the federal court requires rigorous review of the facts of the case—investigation of the case at the federal level may become very costly. In this case it is almost impossible to separate the relative importance of the two factors. It is the combination of the two factors that drives costs.

The two factors described above are typical of California state and federal court processes. A state that exhibits one, but not both of these characteristics, may have relatively low costs. For example, compared to other states and similar to California, Texas has a relatively cursory post-conviction review process at the state level. But when cases reach the federal courts, Texas cases do not receive the attention afforded California cases. This is one reason why Texas, unlike California, is a low-cost state.

Despite these problems, there is anecdotal, circumstantial, and quantifiable evidence that supports the following reasons as being key factors that affect costs. However, the relative significance of these reasons cannot be accurately determined.

The Litigation Strategy Employed by the California Attorney

General's Office: One factor that emerged during the case studies was the litigation tactics used by the California Attorney General's Office.¹⁶ For example, attorneys interviewed by PwC stated that the California Attorney General's Office will rarely waive the exhaustion defense (see footnote 15). Eighty-three percent of the California attorneys surveyed by PwC, but only 38 percent of non-California attorneys surveyed, stated that their cases were, at one point, pending in the federal court while simultaneously in the state court for exhaustion proceedings. This delays the federal proceedings while the case is in state court, potentially increasing costs. Attorneys need time to review the case and new statutory and case law following the state proceedings. Attorneys also need to renew contact with witnesses and experts.

In addition, since the Anti-terrorism and Effective Death Penalty Act (AEDPA) was passed in 1996, the California Attorney General's Office has litigated the application of the AEDPA in every case—a practice unique to California. An alternative strategy used in other states is to litigate the issue once in a test case in federal court and use the result as precedent, thereby limiting the number of these AEDPA-

¹⁶ A new California Attorney General was elected in the 1998 elections.

related hearings. The attorneys interviewed for the case profiles provided many examples of the California Attorney General Office's litigation practices in this regard.

This type of litigation strategy is familiar to attorneys who practice in California, but it is difficult to quantify the financial impact of such strategies. More litigation results in more time spent out-of-court preparing motions and undertaking legal research and writing. A hypothetical example demonstrates how an intensive litigation strategy could potentially increase out-of-court attorney fees and hence costs. For example, if two attorneys each spend an additional 80 out-of-court hours (or 2 weeks each), at a rate of \$125 per hour responding to issues raised by the California Attorney General's Office, the additional cost to that case would be \$20,000. If the response took 400 hours (or 10 weeks) each, the additional cost would be \$100,000.

Judicial Practices and Jurisprudence of the California State and Federal Courts: These factors can have a very direct impact on the cost of cases. For example, the combination of relatively limited state post-conviction proceedings and thorough federal post-conviction proceedings adds to costs in a variety of ways. Differences in the jurisprudence between the Ninth Circuit Court of Appeals and the California federal district courts can also lead to more time being spent by attorneys as the case goes from federal district to federal circuit court and possibly back to the district court again. Some of the most important jurisprudential factors that affect costs are as follows:

- *Provision of funding for investigation and experts by the federal courts.* Federal capital habeas corpus attorneys in California cases

spend \$15,000 per case on investigators compared to \$1,600 in non-California states at the federal post-conviction level. This is in part to make up for factual underdevelopment of the case at the state post-conviction level. For example, according to attorneys surveyed, requests for discovery at the state level are more often denied in California than in other states: in California, 88 percent of requests for discovery were denied, as opposed to 59 percent of requests for discovery in other states.

- *The granting of evidentiary hearings at the federal level because the state courts deny evidentiary hearings at the state post-conviction stage.* The average cost, including costs for expert services, of an evidentiary hearing in the federal courts in California is \$112,800 compared to \$20,200 in other states. Moreover, evidentiary hearings are more common in California federal courts than in the federal courts in other states. Of cases that have progressed to the appeal stage, 42 percent of the California cases had an evidentiary hearing, compared to only 11 percent of the non-California cases. This is probably related to the fact that requests for evidentiary hearings are routinely denied during the state post-conviction proceedings in California. In their responses to the PwC survey, California attorneys indicated that requests for evidentiary hearings at the state level were denied or sharply reduced. By contrast, non-California attorneys responded that such requests were minimally reduced. The federal courts may hold an evidentiary hearing to promote the complete development of facts that in other states are revealed during the state post-conviction evidentiary hearing.

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- *California cases are more likely to have an interlocutory appeal¹⁷ than cases from other states.* Of 129 cases covered in the survey, 65 percent of the California cases had an interlocutory appeal to the circuit court, whereas only 22 percent of non-California cases had an interlocutory appeal. Interlocutory appeals increase the amount of time spent on a case because attorneys need to prepare and respond to filings related to the appeal.

Note that the costs of all cases—both California and non-California cases—are reviewed and approved by the judicial officer presiding over the case. Judges in the Ninth Circuit are little different from judges in other circuits with respect to the percentage of claimed attorney fees and expenses they approve. According to the CJA Panel Attorney Payment System database, Ninth Circuit judges approve 97 percent of claimed costs whereas judges in all other circuits combined approve 95 percent of claimed costs. While these approval ratios are similar, there is a large difference in the dollars approved, because claimed costs are significantly higher in the Ninth Circuit (and particularly in California) than in other circuits. Even though Ninth Circuit judges have expressed concern about the high costs of this type of case (and have taken steps to reduce costs), the high approval ratio implies they believe that most claims for fees and expenses have reasonable grounds in the context of current laws and judicial procedures.

¹⁷ An interlocutory appeal occurs when a federal circuit court will hear and rule on an issue before the federal district court proceedings are complete.

Adoption of a Rigorous Evaluation of the Petitioner's Mental

Health: In California, an examination of the petitioner's mental health is common during the federal habeas proceeding, and the petitioner's attorneys generally use the services of mental health experts. Direct costs resulting from the more frequent use of experts amount to an additional \$8,000 spent on psychologists and psychiatrists in an average California case, compared to an average non-California case. In addition, California attorneys spend more time—and therefore more money—consulting with such experts and performing their own investigation in this area.

Use of Panel Attorneys from Large Corporate Law Firms: Beginning in the late 1980s, a shortage of panel attorneys in California led the federal courts to ask large corporate law firms to represent federal capital habeas corpus petitioners. This practice has since largely stopped, but some cases in the study include costs of representation by panel attorneys from these firms. In a limited review of the 36 most expensive California cases, PwC asked an attorney familiar with these cases to identify the counsel for the petitioners who worked for large, corporate law firms. This led to a list of 33 civil attorneys who provided representation in these cases. The total payments to these 33 attorneys contributed \$88,441 to the average cost of *all* California cases. In other words, removing the vouchers submitted by these civil attorneys would lead to a drop in the average cost of a California case from \$372,029 to \$283,588, a decrease of 24 percent.

Of course, this does not mean that all these costs could have been avoided if criminal attorneys had been appointed instead of civil

attorneys. The work performed by the civil attorneys would have been performed by someone else. Nevertheless, it is reasonable to suppose that some of the time billed by these attorneys, who most likely were inexperienced in representing habeas corpus and capital cases, was for hours spent learning the notoriously complex federal capital habeas corpus case law. Corporate law firms are accustomed to billing for however many attorney hours it takes to research complex legal issues, a practice different from smaller, criminal law firms.

Moreover, on average these 33 civil attorneys spent three times as much on non-travel expenses as criminal attorneys (\$64,139 compared to \$22,534 per case). This, also, this may reflect the different billing practices of large corporate law firms compared to smaller, criminal law firms.

The Relatively High Cost of Living in California: As noted above, the difference in the higher attorney rates in California, compared to rates in other states accounts for approximately one-fifth, or \$60,000 of the \$300,000 differential in average costs of California cases relative to non-California cases.

Other Factors: In addition to the factors presented above, there may be other factors, more difficult to pinpoint, that contribute to the high average cost of a case in California. During this study, several people commented that the legal “culture” of California contributes to the high costs. Where possible, PwC has tried to identify the particular elements of the culture that may add to costs, such as the strategy used by the California Attorney General’s Office, or the adoption of a

rigorous evaluation of the mental health of the petitioner. However, other factors related to California's legal culture may be too nebulous to measure easily.

Further, many of the factors presented in this report are related and mutually reinforce each other, sustaining a relatively high-cost environment. The rest of the report considers the costs of federal capital habeas corpus cases, and the reasons for these costs, in more detail.

Section II: Background to Study

II.1 The Defender Services Program

The Sixth Amendment of the United States Constitution guarantees an accused person the right to counsel in criminal prosecutions. When the Congress passed the Criminal Justice Act (CJA) of 1964, it ensured this right to representation in federal courts by establishing, within the judicial branch, a program to provide compensation and reimbursement of expenses for attorneys appointed to represent petitioners otherwise unable to afford representation in federal criminal and related proceedings (18 U.S.C. 3006A). The Administrative Office of the U.S. Courts (AOUSC) operates the Defender Services Program to compensate and reimburse attorneys appointed to represent such petitioners.

The mission of the Defender Services Program is to ensure that the right to counsel guaranteed by the Sixth Amendment, the CJA, and other congressional mandates is enforced on behalf of those who cannot afford to retain counsel and necessary defense services. The goals of the program are to:

1. Provide assigned counsel services to all eligible persons in timely fashion;
2. Provide appointed counsel services that are consistent with the best practices of the legal profession; and
3. Provide cost-effective services, limiting increases in costs to those due to inflation and those necessary to respond to changes in the

law or changes in prosecutorial, judicial, or law enforcement practices.

In FY 1999, to carry out its mission and goals, the Defender Services Program was appropriated \$360 million.

In general a Federal Public Defender Organization, Community Defender Organization, or private attorneys who serve on a panel designated or approved by the court provide representation. These panel attorneys submit vouchers to the court for time and expenses. Funding for these expenditures is provided in the Defender Services appropriation. For death penalty cases (including federal capital habeas corpus cases), panel attorneys, who provide the majority of representations, are compensated at a rate and in an amount determined by the presiding judge to be reasonably necessary to obtain qualified counsel, with a statutory limit of \$125 per hour for cases beginning on or after April 24, 1996. The presiding judge also approves the amount of funding provided for experts and other associated expenses for each case. In cases beginning after April 24, 1996, expenditures for investigative and expert services are limited to a total of \$7,500 unless the district court finds that a higher sum is warranted for "unusual" services and that finding is approved by the Chief Judge of the circuit.

II.2 The Cost of Federal Capital Habeas Corpus Review

In the past few years, the House and Senate Appropriations Subcommittees on the Departments of Commerce, Justice, and State, the Judiciary, and related agencies have grown increasingly concerned

over growth in costs of the Defender Services Program. In particular, the subcommittees were concerned about the cost per representation and what is believed to be different rates of cost growth for specific judicial districts and types of cases. In attempts to explain costs to Congress, the AOUSC has produced several reports explaining why total costs for death penalty cases were growing at a significantly faster rate than the increase in the number of annual representations. In 1997, the Administrative Office, following discussions with Congressional Appropriations Subcommittee staff, engaged the services of the consulting firm Coopers & Lybrand L.L.P. (C&L) to help develop a report entitled "The Report on Costs and Recommendations for the Control of Costs of the Defender Services Program." C&L made the following summary finding:

*Defender Services Program costs are in line with what one would expect from the increase in the number of representations, the increasing proportion of capital and capital habeas representations, and the costs incurred in a handful of extraordinarily costly representations each year.*¹⁸

C&L's analysis of six years of federal capital habeas corpus data also showed that the Ninth Circuit, driven by the California districts, accounted for 60 percent to 76 percent of federal capital habeas corpus representation costs, but 48 percent to 63 percent of the representations

⁹ Report on Costs and Recommendations for the Control of Costs of the Defender Services Program, Executive Summary, January 28, 1998, Coopers & Lybrand, L.L.P., p. 3.

from FY 1992 to FY 1997¹⁹. Because of this high proportion of costs, California cases drive the national average cost of federal capital habeas corpus cases.

II.3 Reason for This Study

The House and Senate Appropriations Subcommittees held their hearings on the Judiciary's FY 1999 appropriations requests on March 4 and March 12, 1998, respectively. During the House hearing, Chairman Rogers and Judge Heyburn, Chair of the Judicial Conference Budget Committee, discussed the finding in the recent C&L report that "the Ninth Circuit drives the nation's capital habeas average annual cost-per-representation as well as overall capital habeas costs."²⁰ Chairman Rogers expressed concern and indicated that if the judiciary did not address this issue, the Congress would. As a result, on March 31, 1998, Judge Heyburn and AOUSC Director Leonidas Meham wrote to Chairman Rogers outlining the following:

- On February 27, 1998, the Judicial Council of the Ninth Circuit unanimously adopted a new Ninth Circuit policy that requires the attorneys for each capital habeas petitioner to submit a case budget at the beginning of each proceeding. This budget is then reviewed by a judge from another district to achieve a more consistent and proportionate use of resources. In addition, the Ninth Circuit has

¹⁹ Report on Costs and Recommendations for the Control of Costs of the Defender Services Program, IV Findings- 25 C&L, L.L.P, p. 25.

¹⁴ Report on Costs and Recommendations for the Control of Costs of the Defender Services Program, Executive Summary, January 28, 1998, Coopers & Lybrand, L.L.P, p. 12.

“established presumptive maximum rates for second attorneys and associates, paralegals and law clerks, as well as a minimum rate of 60 pages per hour for review of case records,” in addition to the statutory cap on hourly fees paid to attorneys. Finally, the Ninth Circuit has adopted a special process to review all state death penalty habeas corpus cases to ensure costs are reasonable and are reduced wherever possible.

- Furthermore, within the Northern District of California, the Court has adopted guidelines that require case management conferences for complex cases, set presumptive rates for experts and expenses, and establish requirements for seeking payments which exceed statutory maximums. In the Central and Eastern Districts, capital habeas representation units have been established within the federal defender organizations to allow specially trained attorneys to represent federal capital habeas petitioners previously represented by large corporate law firms. It is hoped that this measure will improve the quality and efficiency of federal capital habeas corpus representation. These steps illustrate the commitment of the Ninth Circuit Judicial Council to contain costs in the Ninth Circuit, particularly in the high-cost state of California.

Subsequently, staff from the Administrative Office’s Office of Finance and Budget (OFB) met with James Kulikowski, Staff Director for the House Appropriations Subcommittee, to discuss the letter from Judge Heyburn and Director Mecham to Chairman Rogers. Mr. Kulikowski informed OFB staff that he had a plan to track costs of federal capital habeas corpus cases by circuit to: (1) ensure that Ninth Circuit (California) costs decrease; and (2) identify lower cost circuits to

determine why the costs are lower and whether procedures in place in those circuits could be applied to the higher cost circuits. Although the AOUSC can identify costs by circuit and district, only anecdotal information is available to explain the disparity in costs.

This study was undertaken to enable the AOUSC to better understand costs associated with private attorney representation of federal capital habeas corpus cases and to further explain regional disparities by linking costs to region-specific procedures, and culture. This report provides explanations for the Ninth Circuit's, and more specifically California's, higher average costs per case.²¹

²¹ This report does not provide an opinion on what average or median case costs for representing a federal capital habeas corpus case should be. Rather, the report explains what the costs are, when they are incurred during a federal capital habeas corpus case, and the regional cost disparities that exist.

Section III: Federal Capital Habeas Corpus Case Life Cycle

III.1 Definition of Federal Capital Habeas Corpus

Federal capital habeas corpus involves federal court review of a state capital murder conviction and a death sentence upheld by a state court. The petitioner—the person sentenced to death—makes a claim that his constitutional rights were violated at some point during the state proceedings.²² The primary function of the writ of habeas corpus is to release the petitioner from unlawful imprisonment or an unconstitutional death sentence. The office of the writ is not to determine the prisoner's guilt or innocence. The only issue presented is whether the prisoner is unlawfully restrained of his liberty.²³

III.2 Background on Federal Capital Habeas Corpus

The writ of habeas corpus can be traced back to thirteenth-century common law as a way to “challenge unlawful detention of citizens by the executive under the English crown.”²⁴ Eventually, the writ evolved to correct injustices that occurred during criminal trials. Petitioners pleaded for relief through both a summons and a court-issued order that gave the court the authority to question the cause for

²² Claims are typically made under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments.

²³ Henry Campbell Black, *Black's Law Dictionary*, West Publishing Co., 1991, p. 491.

²⁴ *Criminal Justice Policy Review*, “The Federal Habeas Corpus Process: Unraveling the Issues.” 116.

imprisonment. This summons and order became known as the writ of habeas corpus. As with any legal procedure with such longevity, the writ has adapted to hundreds of years of progress and change.

Habeas corpus emerged in the United States with the writings of Alexander Hamilton in the Federalist Papers. The concept was incorporated into the Constitution, Article I, Section 9, as a protection for the newly defined citizen against arbitrary imprisonment by governmental authorities. The value of the writ was challenged during the Civil War when President Lincoln imprisoned southern sympathizers who had settled in the North and suspended the writ as a means of preventing their release. The importance of the writ in the judicial process was affirmed when Lincoln's actions were overturned by the Supreme Court in the landmark case *Ex Parte Milligan*. During Reconstruction, fearing that southern states might "vengefully incarcerate postwar northern Reconstructionists," Congress enacted further legislation allowing state prisoners the right to review by the federal courts, thus "federalizing protection of the writ."²⁵ In this century, the Supreme Court has interpreted the 1867 statute as "providing the federal courts with broad review of federal habeas petitions."²⁶

As the courts continued to extend to state prisoners the right to seek federal habeas corpus relief, and as the prison population continued to

²⁵ *Criminal Justice Policy Review*, "The Federal Habeas Corpus Process: Unraveling the Issues." 117.

²⁶ *Criminal Justice Policy Review*, "The Federal Habeas Corpus Process: Unraveling the Issues." 118

expand, the number of prisoners seeking habeas corpus relief increased from less than 1,000 between 1941 and 1961 to more than 12,000 between 1962 and 1992.²⁷ The implications of this dramatic increase have been widely debated in the legal community. According to Professor Robert Pursley of Buffalo State University, in recent years, the habeas corpus debate has included four major parts:

1. The ability of habeas corpus to postpone the imposition of a sentence;
2. Jurisprudential, constitutional, and workload issues caused by the length of habeas corpus cases;
3. The federal courts' ability to intervene over state court decisions; and
4. Recent attempts by the Supreme Court to curtail the rights of state prisoners who wish to seek federal review.²⁸

During the 1990s, there has been a renewed interest in habeas corpus reform and, more specifically, its application in capital cases. Current Supreme Court Chief Justice William Rehnquist noted that "statutory habeas corpus procedures, particularly those dealing with capital cases, are an area where careful reform can preserve the benefits of the Great Writ while rationalizing its application and eliminating the repetitive and time-intensive demands on the federal courts."²⁹

²⁷ *Criminal Justice Policy Review*, "The Federal Habeas Corpus Process: Unraveling the Issues." 118.

²⁸ *Criminal Justice Policy Review*, "The Federal Habeas Corpus Process: Unraveling the Issues." 120.

²⁹ "Federal Habeas Corpus Reform: The State's Perspective" by Christopher E. Smith, *The Justice System Journal*, Volume 18, Number 1, p. 3.

The discussions over this issue culminated with the passage of the 1996 Anti-terrorism and Effective Death Penalty Act (AEDPA). The AEDPA includes a requirement that a petitioner file a federal capital habeas corpus petition within a year after the state court denies the direct appeal. In addition, the new law:

- Greatly restricts review of same-claim successive petitions;
- Requires prisoners to obtain permission from a three-judge appellate panel before filing new-claim successive petitions;
- Limits the issues available for federal capital habeas corpus review in states that establish a system for appointing and compensating competent counsel for state post-conviction proceedings in capital cases; and
- Enacts timetables for federal courts to act on petitions brought by death row inmates (only if the state established a system for appointing and compensating counsel in state post-conviction proceedings in capital cases).

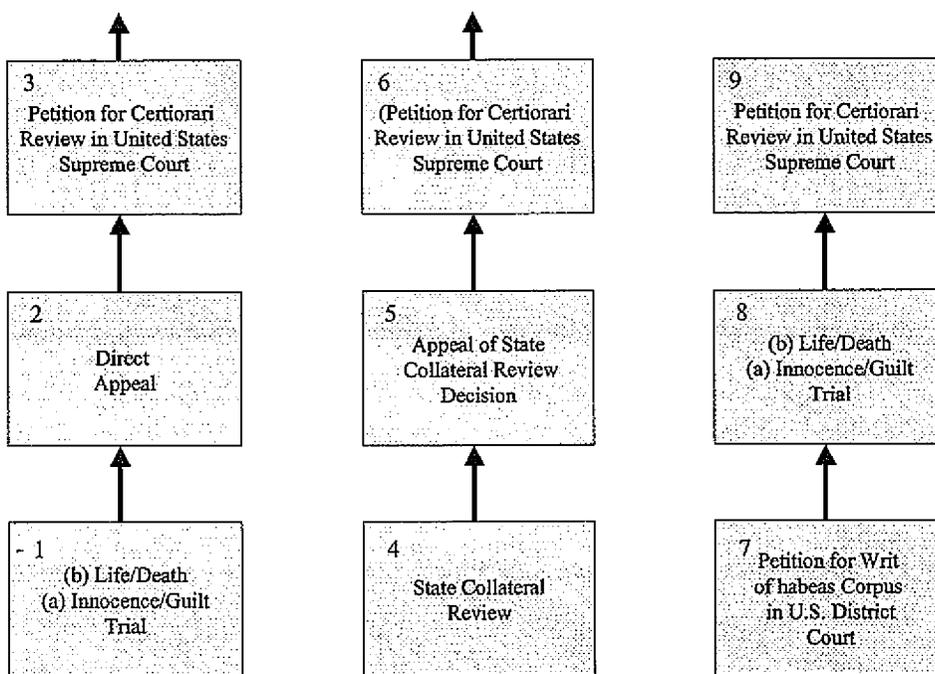
The AEDPA follows a national strategy of implementing more stringent sentencing laws, increasing law enforcement, and ultimately limiting opportunities for federal capital habeas corpus review.

Because this law was only recently enacted, its effects on the cost of federal capital habeas corpus cases have yet to be seen.

III.3 The 9 Stages of Capital Litigation

This section describes how a capital case typically moves through the state and federal court system. Each step is numbered to allow for

easy identification of the stages. It should be noted that the federal capital habeas corpus stage begins at Stage 7. However, what occurs during previous stages determines how a capital case proceeds through federal capital habeas corpus review. For this reason, all nine stages, as illustrated in Figure III-1, are discussed here.



*This portrayal was provided by Mark Olive, capital habeas litigator and trainer for the habeas Assistance and Training Project.

Figure III-1: The Stages of Capital Litigation

(1) State Trial and Sentencing

A state capital trial is conducted in two independent stages. First, in the “guilt phase,” the jury or judge decides whether the prosecution has proved beyond a reasonable doubt that the defendant is indeed guilty of a capital crime. Second is the “sentencing phase,” in which the prosecution may present evidence and argue the existence of

“aggravating factors,” circumstances such as the defendant’s prior criminal record, which may weigh in favor of a death sentence. In the same proceeding, the defense may present evidence and argue the existence of “mitigating factors,” circumstances such as the defendant’s lack of a prior criminal record, which may weigh against the imposition of a death sentence. The judge or jury then must consider the aggravating and mitigating factors and decide whether or not to impose the death penalty.³⁰ As a result of this two-step process, a capital case is more complicated than a non-capital case, because attorneys must not only investigate the crime and prepare for the guilt phase, but also must prepare for the sentencing phase. To complicate matters further, these cases often involve complex crimes and defendants with complex histories or psychological backgrounds.

Most states have the two-step, or bifurcated system described above. However, California has a three-step, or trifurcated system. In the first step, the court decides whether the defendant is guilty of the crime. In the second step, separate hearings are held to determine whether or not the offense is a capital offense. Finally, in the third step, the court weighs the aggravating and mitigating factors in deciding whether the defendant should receive the death penalty. Thus, the three steps are:

1. Decision as to whether or not an act of first-degree homicide was committed;
2. Decision on whether or not the homicide was a capital offense; and

³⁰ For most capital cases, juries must choose between the death sentence and life without the possibility of parole.

3. Comparison of the aggravating and mitigating factors and decision as to whether or not to impose the death penalty.³¹

The added step (step 2) increases the complexity and cost of California's state capital cases. In addition, this system partly explains why California typically has longer trial court transcripts than other states.

If the petitioner is found guilty and sentenced to death, he or she may initiate a direct appeal (stage 2). Depending on state law, the trial court may set an execution date immediately after sentencing, or no date may be set until after the direct appeal has been completed.

(2) Direct Appeal

In some states, the defendant must appeal a conviction and a death sentence directly to the state supreme court. In other states, the petitioner must go through an intermediate circuit court of appeals before reaching the state supreme court. In a direct appeal, the petitioner's counsel can raise only those issues which appear on the trial record.³²

This is the last stage in which representation by counsel is guaranteed by the Constitution. As a cost-cutting and timesaving measure, state courts often assign the same attorney who represented the petitioner

³¹ Telephone conversation with Professor James Liebman of Columbia University Law School on October 9, 1998.

³² For example, an improper jury instruction would appear on the court record and, therefore, could be raised in a direct appeal. However, jury misconduct that occurred out of court could not be raised until step 4, the State Collateral Review.

during the original trial to the direct appeal. If a new attorney is appointed to the case, then he or she must quickly learn the case, mainly by reading the trial record. In the appellate briefing, the attorney must raise all issues that indicate that the petitioner was incorrectly convicted or sentenced. If the direct appeal is denied by the state's highest court, the appellant's next option is to petition for certiorari review in the U.S. Supreme Court.

(3) Petition for Certiorari Review in U.S. Supreme Court

The petitioner may or may not choose to petition the U.S. Supreme Court for review by writ of certiorari. The right to Supreme Court review is not constitutionally guaranteed; the Supreme Court does not have to hear every criminal case that petitions for review, but may, if it so chooses, hear individual cases. In addition, at this point, legal representation is not guaranteed. Some states compensate counsel for preparation of a certiorari petition; in others, representation may be provided pro bono or by a local legal aid or defender organization. If certiorari review is granted, a briefing is prepared and an oral argument held before the Court. The petitioner may raise only those issues previously presented to the state courts on direct appeal. If certiorari is denied, the appellant has the choice of pursuing state collateral review or filing a federal capital habeas corpus petition in federal district court.

(4) State Collateral Review (Post-Conviction Proceedings)

In addition to direct appeals, all states have post-conviction proceedings in which issues that occurred *outside* of the court record

may finally be introduced into state court. State post-conviction proceedings generally do not begin until direct appeal proceedings are completed and certiorari is denied by the U.S. Supreme Court. In some states, however, state post-conviction proceedings may begin while direct appeal proceedings are ongoing. To prepare the state post-conviction petition, all prior proceedings must be reviewed, and all possible claims suggested by the record and prior investigation in the case must be investigated. This investigation includes looking into the facts of the underlying offense, the petitioner's background, and other issues such as ineffective assistance of counsel, the state's suppression of exculpatory evidence, or jury exposure to extraneous information. There is no constitutional right to counsel in state post-conviction proceedings. While some states provide for the appointment and compensation of competent counsel, many do not. Without a thorough investigation by counsel, many material facts are not discovered and many potential claims for relief remain undeveloped.

(5) Appeal of State Collateral Review Decision

In many states, post-conviction review begins with the filing of a post-conviction petition in trial court, often before the same judge who presided over the original state trial and sentencing. The trial judge considers the claims presented and may or may not hold an evidentiary hearing to develop the facts prior to the court's decision. In these states, if the petitioner is unsuccessful at the trial court level, he or she may appeal. While this appeal ultimately goes to the state supreme court, it often initially goes through an intermediate court. In other states, state post-conviction review begins with filing the post-

conviction petition in the state supreme court. If the court decides an evidentiary hearing is warranted, it may remand the case for a hearing before the trial court. After the hearing the case returns to the Supreme Court for briefing, argument, and a final ruling on the merits. Either way, if the petitioner wishes to exhaust his claims for federal capital habeas corpus review, he must present all claims to the state's highest court with appellate jurisdiction. Accordingly, most capital petitioners do so. Quite often, once state post-conviction proceedings are complete, the state will set an execution date.

(6) Petition for Certiorari Review in U.S. Supreme Court

On completion of state post-conviction proceedings, the petitioner may again petition for certiorari review in the U.S. Supreme Court. This stage is similar to stage 3 in that the certiorari petition will be constructed and delivered in the same way, but the petition may raise only those issues arising from the state post-conviction proceedings. This stage is not necessary to exhaust claims for presentation to the federal courts in habeas corpus proceedings. As counsel is generally neither provided nor compensated for filing a certiorari petition following denial of state post-conviction relief, and because of time pressures resulting from either an execution date or the AEDPA's statute of limitations, many capital petitioners bypass this stage.

(7) Petition for Writ of Habeas Corpus in U.S. District Court

Once stage 6 has been completed or bypassed, the case moves from the state to the federal court system. Stages 7 through 9 describe the stages of a typical federal capital habeas corpus case.

Figure III-2 tracks the possible steps of litigation of a capital habeas case once it has reached the federal level. In federal habeas corpus cases, the petitioner brings his or her suit against the warden of the state penal institution in which he or she is incarcerated. The State Attorney General's office represents the warden in court. At various times throughout this process, the case may move up to circuit court on an interlocutory appeal, or may be sent down to state court to satisfy exhaustion requirements.

Lifecycle of a Federal Capital Habeas Corpus Case

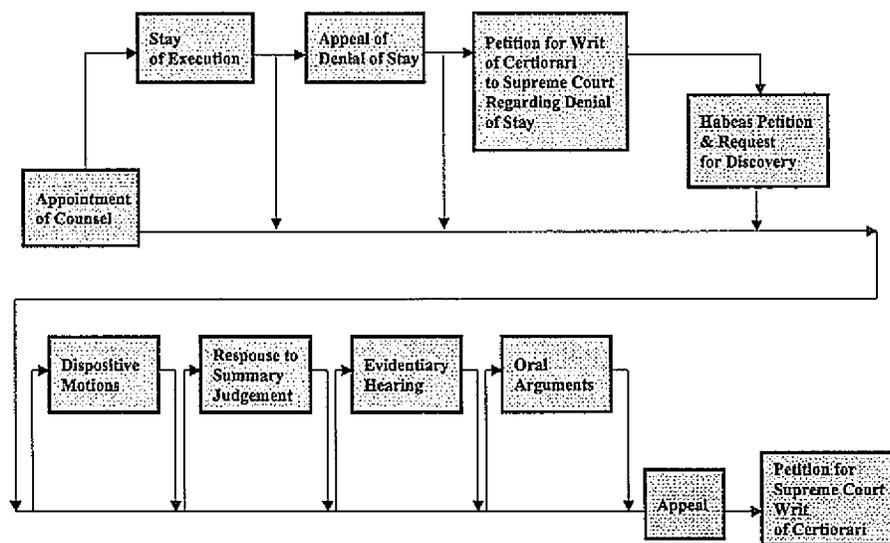


Figure III-2: Life Cycle of a Federal Capital Habeas Corpus Case

Appointment of Counsel

A federal capital habeas corpus case usually begins when a motion is filed for the appointment of counsel to represent a petitioner who is

seeking habeas corpus relief, along with a request for a stay of execution. The motion for counsel is filed under Section 848 of Title 21 of the United States Code. Section 848 requires the appointment of at least one attorney (and allows for the appointment of two attorneys) for anyone accused or convicted of a capital offense.

Section 848 also provides a statutory right to expert and investigative assistance in federal capital habeas corpus cases. On a case's arrival in the federal court, many potential claims have not yet been fully investigated in any of the prior proceedings. In *McFarland v. Scott*, 512 U.S. 849 (1944), the Supreme Court decided that under Section 848 an indigent capital petitioner may invoke these statutory rights to counsel and investigative assistance *before* the habeas petition is filed. Hence, counsel will seek funds to investigate colorable³³ claims for relief to determine if they should be included in the petition.

Once a request for counsel and experts is made, the federal court must enter a stay of execution to allow for preparation of the petition. In order to be compensated, attorneys must file a motion in district court to allow a petitioner to proceed *in forma pauperis* (as a pauper). Protocol for filing this request varies by district and circuit.

Stay of Execution

If the state trial judge has set an execution date, the petitioner may file a motion for a stay of execution simultaneously with the request for appointment of counsel. The petitioner asks the court to vacate the

³³ A claim that appears worthy of further investigation and court review

execution date to allow time for petition preparation. If the district court grants a stay of execution, then the execution date is postponed, and the petitioner's counsel may take more time to prepare. Specific petition preparation time frames are discussed below. However, the district court may deny this motion.

Request for Stay from Circuit Court of Appeals

If the motion for a stay of execution is denied, the petitioner's counsel may file a request for a stay in the court of appeals requesting that the court grant a stay of execution. If the court of appeals denies the stay, the petitioner may request one from the U.S. Supreme Court.

Request for Stay from U.S. Supreme Court

If the district and appellate courts have denied a stay, the petitioner seeks a stay from the U.S. Supreme Court. If the Supreme Court denies the stay, then the petitioner's counsel must complete the habeas petition and receive a ruling before the execution date.

Petition Preparation

On appointment by the federal court, the petitioner's counsel will begin to prepare the federal capital habeas corpus petition. Preparing the petition can be an extraordinarily time-consuming task.

Petitioner's counsel must review the record from the state trial, appellate, and post-conviction proceedings, conduct further investigations and legal research to support arguments. Trial records can range from 100 to 70,000 pages of text, all of which the counsel

must review fully to write a thorough petition. Investigation and legal research may also require significant amounts of time.

According to PwC's surveys, on average, between 11 and 40 habeas claims were presented in a typical federal capital habeas corpus petition. These claims often vary in their complexity. For example, a claim for relief that pleads counsel's ineffectiveness for failing to investigate a viable alibi is likely to be more time-consuming and costly to investigate and document than a simple case of jury misconduct. The petition for the writ of habeas corpus will likely raise those constitutional issues that were presented to the state courts during direct appeal and state post-conviction proceedings. Under the Supreme Court's decision in *McCleskey v. Zant*, federal capital habeas counsel is required to include all colorable claims for relief in the first federal capital habeas corpus petition.

For example, when investigating colorable claims for relief, counsel must thoroughly research the facts of the case and petitioner's background to uncover evidence that should have been presented to the jury at trial as a basis for an acquittal of the capital crime or a sentence less than death. This often requires the use of investigators, as well as mental health professionals and other experts. Investigation of the client's background is difficult, because a typical federal capital habeas corpus petitioner often has a previous criminal record or has moved several times throughout his life, thus limiting access to various witnesses and state records owing to the possibility of incurring prohibitive travel costs. Once complete, the petition often includes a lengthy appendix that references expert reports and historical records.

Because of the amount of resources necessary to complete a petition, this is generally the most costly stage in a federal capital habeas corpus case.

Before 1996, the length of the petition preparation stage varied from one month to several years and was generally determined by the setting of an execution date. However, not all states set execution dates. Further, some states, for example, Florida, Georgia, and Texas, set execution dates arbitrarily—one convicted felon might not receive one until all state appellate and post-conviction proceedings were complete. The petitioner with the set execution date, therefore, has less time to prepare his petition than the petitioner with no set date. Often, the setting of execution dates and the granting or denial of stays determined the date by which a federal capital habeas corpus petition had to be filed.

In 1996, a 1-year statute of limitations for filing a federal capital habeas corpus petition was enacted in the Antiterrorism and Effective Death Penalty Act (AEDPA). The interpretation of this statute of limitations provision is still being litigated, and individual federal courts are interpreting this time frame in slightly different ways. In most cases where the AEDPA applies, it appears that the time for petitioner's counsel to prepare the federal capital habeas corpus petition will be significantly shorter than before the statute of limitations provision was enacted. After the petition is filed, all other time limits are contingent on the court's orders.

Petition and Discovery

Once the petition is prepared, the petitioner's counsel files the petition and an accompanying appendix (if necessary) in court. The petition must show that for each claim, the petitioner's constitutional rights were violated and that either the conviction or the death sentence should be vacated. For example, for a claim pleading the prosecutor unconstitutionally suppressed exculpatory evidence, the petitioner must present facts demonstrating that evidence was suppressed, that the evidence was exculpatory, and that if the evidence had been presented, the result of the case would have been different. A discovery request and a motion for an evidentiary hearing may be filed with the petition. Once the petition is filed, petitioner's counsel must wait for the state Attorney General's reply, but in the meantime, he or she may continue to investigate the case.

The Answer And Motions For Summary Judgment

The State Attorney General (AG), representing the warden of the state, will typically respond to the petition with an answer as well as opposition to any requests for discovery. In addition to, or instead of, an answer, the AG may file a motion for summary judgment, asserting that there are no disputes of material fact warranting an evidentiary hearing and that the state is entitled to a judgment as a matter of law on some or all of the claims presented in the petition.

Opposition to Summary Judgment

In an Opposition to Summary Judgment, petitioner's counsel responds to all of the points raised by the AG. If a dispute of material facts exists, the petitioner's counsel may choose to file a motion for an evidentiary hearing.

At this point, the judge may hear an oral argument and rule on some or all of the claims presented in the petition. For instance, in a case with 10 claims, the judge may rule on four claims and grant an evidentiary hearing to develop the underlying facts prior to a decision on the other six claims.

Evidentiary Hearing

If an evidentiary hearing is granted, the parties may introduce new evidence and argue why it should be allowed. The judge then decides on whether or not the evidence is credible, and on whether or not it demonstrates that the petitioner is entitled to habeas corpus relief.

The time dedicated to preparing to present evidence and question witnesses in a federal capital habeas corpus evidentiary hearing can be enormous. Many experienced federal capital habeas counsel described the preparation required for an evidentiary hearing as similar to that required for an entire capital trial. In particular, the coordination in serving subpoenas and working out the logistics of getting experts in court to testify is time-consuming and costly. Petitioner's counsel must pay experts for interview time, preparation time, time spent waiting outside of the courtroom to testify, travel

expenses, and so forth. The evidentiary hearing is followed by a post-hearing briefing during which petitioner's counsel must convince the judge of the significance of the facts presented at the hearing and demonstrate that relief is warranted.

Oral Argument

At any time during the federal capital habeas corpus process, the judge may request an oral argument to clarify points or to receive additional information. To prepare for the hearing, petitioner's counsel must thoroughly review the relevant documents, the supporting case law, and practice delivery of his or her argument. On listening to the arguments delivered during the hearing, the judge may rule on various issues or take new information under advisement.

Motions to Alter or Amend Judgment/ Notice of Appeal

The petitioner's counsel has 10 days after entry of the judgment in which to file a motion in district court to alter or amend the district court's decision under Rule 59 of the Federal Rules of Civil Procedure. A Rule 59 motion asks the district court to reconsider its decision. Rule 59 motions are usually denied in federal capital habeas corpus cases.³⁴ However, the judge may grant the Rule 59 Motion and alter the judgment in some material manner. For example, if the district court initially decides to deny habeas corpus relief, it may reconsider and decide to grant relief. If the motion is denied, then petitioner's

³⁴ Discussion with Mark Olive, October 8, 1998.

counsel must decide whether to appeal to the circuit court of appeals. This is another point in time when the state may set an execution date.

To appeal, petitioner's counsel must file a notice of appeal in the district court and request a Certificate of Appealability (which used to be called a Certificate of Probable Cause) from the district court. If the district judge believes that there are no substantial questions warranting further review, it can deny the petitioner's request for a Certificate of Appealability. Petitioner may then seek a Certificate of Appealability from the circuit court of appeals. If the Certificate of Appealability is granted, the district court will transcribe any necessary hearings from the proceedings. Generally, the petitioner's counsel must designate those portions of the record which counsel would like to be made part of the appeal within 30 days of filing for the appeal.

(8) Appeal of District Court Decision in the Circuit Court of Appeals

On certification by the district court that the transcripts have been prepared, the circuit court of appeals will set a briefing schedule. The petitioner's brief may raise various claims arising from the district court proceedings. Then, the state must file an answering brief, and petitioner's counsel can file a reply brief. At any time, the court may ask questions or request supplemental briefs to further explain particular issues.

Once the opening brief, answering brief, and reply brief are filed, the case goes before a three-judge panel. The judges select an oral argument date that is usually held 2 to 4 months after the last reply

brief has been submitted. Each side is provided with 30 minutes to state their arguments. After the hearing, the judges may or may not request supplemental briefing. Once the case has been fully briefed and argued, the judges will rule on the case. The circuit court of appeals may rule on the merits of petitioner's claims, or may remand the case back to district court for additional consideration. For example, if the district court failed to hold an evidentiary hearing on one or more of petitioner's claims, the circuit court of appeals may order the district court to hold a hearing.

If the circuit court grants habeas corpus relief, the state will likely petition for writ of certiorari to the U.S. Supreme Court. If the circuit court panel affirms the district court's denial of habeas corpus relief, the petitioner can seek a rehearing from the court of appeals, suggest that all the judges on the court of appeals rehear the case en banc, or seek certiorari review in the U.S. Supreme Court.

(9) Petition for Certiorari Review in U.S. Supreme Court

A petition for writ of certiorari must be filed in the Supreme Court within 90 days after the circuit court's final decision. Often, a petition will be filed sooner, if an execution date is quickly approaching. There is no right to appeal to the Supreme Court, and the Supreme Court grants review in only a few federal capital habeas corpus cases each year. If certiorari review is granted, the case is briefed and argued before the Court. If certiorari review is denied, the proceedings on petitioner's first federal capital habeas corpus petition are complete.

Ultimately, if habeas corpus relief is granted as to the petitioner's conviction, the case returns to the state trial court for possible retrial. If relief is granted only as to the death sentence, the case may be returned to the state trial court for a new sentencing trial. If habeas corpus relief is denied, the petitioner may seek authorization from the circuit court of appeals to file a second habeas petition in the district court. Authorization by the U.S. Supreme Court to hear the case will likely be denied, and the petitioner will be executed.

One of the final options available for the petitioner is an application to the governor's office for a clemency proceeding. If the governor grants a clemency proceeding, the petitioner may argue his case to the governor and, after reviewing the evidence presented, the governor will decide whether to vacate the petitioner's death sentence. If the governor denies a clemency proceeding or grants a clemency proceeding but denies clemency, then the death sentence remains. If the governor vacates the petitioner's sentence, a trial court must re-sentence the petitioner.

Section IV: Methodology

IV.1 Overall Methodology

PwC, in cooperation with the AOUSC, developed a methodology to examine the costs, and the factors driving the costs, of federal capital habeas corpus cases. The methodology involved combining findings from three data sources:

1. The CJA Panel Attorney Payment System database, which contains information on the costs of and hours spent on CJA panel attorney cases³⁵;
2. A total of 129 responses to a survey sent out to approximately 400 panel attorneys; and
3. A case study of seven separate cases, which included interviews with the panel attorneys who provided representation in those cases.

Using data and information from these sources, PwC conducted three different types of analyses:

1. Data analysis: analysis of the cost components of federal capital habeas corpus cases using data from the CJA Panel Attorney Payment System database;
2. Statistical analysis: data, correlation, and regression analyses using CJA Panel Attorney Payment System and survey data; and

³⁵ The CJA Panel Attorney Payment System database contains vouchers submitted by panel attorneys to the AOUSC to be reimbursed for attorney fees, expert costs, travel costs, and other expenses. The vouchers include in-court, out-of-court, rate, and attorney activity information.

-
3. Case study analysis: a comparison of the factors that drove the costs in the seven case studies.

Together, these three sources of data and analytical methods permitted more comprehensive analysis than would have been possible with only a single data source.

IV.2 Data Analysis Methodology

The data analysis portion of the Defender Services study used information in the CJA Panel Attorney Payment System database. The data analysis followed a structured methodology to ensure the most in-depth analysis possible using this data. The methodology consisted of the following:

1. Quality control;
2. Identification of additional information; and
3. Analysis of the data.

Quality Control

The cost data used in this report were extracted from the AOUSC's CJA Panel Attorney Payment System database. PwC's previous work with the database gave the team an understanding of the content and of the type of quality control needed. The data was converted to an MS Access database and stored on a secure hard drive accessible only to PwC team members. PwC checked to ensure that the database was transferred correctly to the new format. Next, PwC studied the contents of the database and identified possible data problems. The team then cleaned the database.

PwC identified cases with duplicate vouchers, missing data, input errors, and vouchers not related to federal capital habeas corpus cases. The list of cases was presented to the AOUSC, which then provided corrections or recommended removing cases from the analysis. The original database contained 1,021 cases with 13,168 vouchers (or 12.9 vouchers per case). During the database cleaning, PwC removed the following:

- 179 cases that did not list the stage of proceeding³⁶ for any voucher;
- 22 cases that had no vouchers submitted for attorneys;
- 12 cases that were not federal capital habeas corpus cases; and
- Four sealed cases.

PwC also removed 24 cases that had started within the past 6 months. For this analysis, recent cases with low costs incurred would have skewed the results.

At the end of the cleaning, the number of cases in the database dropped to 783 from 1,021, and the number of vouchers fell from 13,168 to 12,217 vouchers.

Identification of Additional Data

Open and Closed Status

After the database was cleaned, PwC identified the gaps between the information available in the database and the information required for

³⁶ Each voucher submitted by panel attorneys indicates to the stage to which costs should be attributed. The stages include habeas petition, evidentiary hearing, dispositive motion, petition to Supreme Court for writ of certiorari, stay of execution, appeal or denial of stay, petition to Supreme Court regarding denial of stay, or other.

thorough analysis. A key piece of missing data was case status—whether cases were open or closed. This information was important in analyzing costs, since it would be misleading to compare the costs of completed cases with those that are still incurring costs. To collect this information on case status, PwC first performed independent research to find publicly available case status information. By contacting non-profit organizations that collect information on death penalty appeals, the team determined open or closed status for approximately half the cases. For closed cases, PwC also obtained information on case disposition. The Death Penalty Information Center, for example, provided information on recent executions. In addition, PwC classified two sets of cases as open:

- Cases in which at least one voucher was submitted in the last 6 months; and
- Cases whose vouchers were only for the habeas petition stage.

PwC provided the AOUSC with a list of the remaining cases (approximately 400 cases). The AOUSC contacted the lead attorneys for those cases and obtained information on:

1. Open/closed status;
2. Final disposition of a closed case;
3. Denial/granting of habeas petition; and
4. Status of appeal, if any.

Active and Dormant Status for Open Cases

For open cases, PwC wanted to differentiate between those currently incurring costs and those not incurring costs. PwC defined open cases

as either active or dormant. A case was defined as active if vouchers have been submitted in the past 2 years, or if attorneys contacted by the AOUSC indicated that the case is still open. Otherwise, the case was classified as dormant.

Stage of Proceeding Information

The AOUSC had requested an analysis of costs by stage of proceeding. However, there were many vouchers for which the stage of proceeding was not identified. PwC identified stage of proceeding information for many of these by comparing the dates of vouchers for the same petitioner that did contain stage of proceeding information. For example, if a voucher submitted January 1995 did not indicate the stage of proceeding, but a voucher for the same case submitted three months later indicated that case was in the habeas petition stage, the January 1995 voucher was also classified as a habeas petition stage voucher. At the end of this process, approximately 90 percent of the vouchers contained information on the stage of proceeding.

Data Analysis

PwC first analyzed all cases to show national trends and cost drivers. This analysis was performed for all cases, open cases, and closed cases. As only 152 of the 783 cases under study were closed, PwC analyzed cases by individual stage of proceeding, circumventing the problem noted above of comparing costs of open cases with costs of closed cases. In this way, PwC was able to integrate both open and closed cases into the study.

PwC conducted similar analyses by circuit and state, focusing on high-cost stages. PwC also selected two groups of states to analyze further to identify the cost disparities between California cases and cases from other states:

1. Ninth Circuit states; and
2. The six states from which the case studies were taken.

Ninth Circuit costs were analyzed to compare the costs of states within the high-cost circuit. The case study states were selected to examine regional disparities in costs, particularly between California and lower cost states. These states all had multiple cases as well as a mix of high-, medium-, and low-cost cases. The states chosen for each comparative analysis were:

Ninth Circuit States	Case Study States
California	California
Arizona	Texas
Washington	Pennsylvania
Nevada	Alabama
Idaho	Missouri
	Illinois

IV.3 Survey Methodology

Survey Design

The CJA Panel Attorney Payment System database does not contain data on case-specific or geographical factors that cause disparities in

time or costs in different cases. For example, factors such as the complexity of case and judicial attitudes are not documented in the CJA Panel Attorney Payment System database or elsewhere. Therefore, PwC designed a survey aimed at collecting information to supplement data from the CJA Panel Attorney Payment System database. The survey was designed through a collaborative effort between PwC, federal capital habeas corpus litigators, and representatives of the Defenders Services Division of the AOUSC. A copy of the survey is provided in Appendix B.

Case Selection

Because of the time and costs involved in collecting information on all cases in the database, PwC sent surveys to a sample of attorneys representing 392 of the total 783 cases. The sample was selected based upon the following criteria:

- 295 cases that had reached the appellate level;
- 47 cases with comparatively low costs; and
- 50 cases with comparatively high costs.

Of the 392 surveys sent, 129 (32 percent) were returned. On receiving the data, PwC consolidated the data into a database. PwC then used the survey data as the source data for a regression analysis.

Regression analysis is a method of testing the statistical importance of various factors influencing a variable (in this instance the costs of federal capital habeas corpus cases). A more detailed explanation of regression analysis is provided in Appendix A.

IV.4 Methodology for the Case Studies

The case study portion of the analysis was a study of the actual experiences of seven federal capital habeas corpus attorneys. PwC gathered and analyzed information on seven cases from six states (the six case study states to better understand the factors affecting the time and money spent in different regions of the United States. The case studies also provided the opportunity to discuss PwC's preliminary findings with attorneys who have represented and submitted vouchers for these types of cases. The seven case studies are described in Appendix C.

Case Selection

With the assistance of the AOUSC, PwC chose 7 cases based on the following criteria:

1. Geographically, the cases were from a diversity of states;
2. The appointed counsel completed their survey;
3. The case had progressed at least to the circuit court of appeals stage; and
4. The case had at least one district and one circuit voucher.

The final list of seven cases included:

- One case from Pennsylvania (Third Circuit);
- One case from Texas (Fifth Circuit);
- One case from Illinois (Seventh Circuit);
- One case from Missouri (Eighth Circuit);
- Two cases from California (Ninth Circuit); and
- One case from Alabama (Eleventh Circuit).

All of the cases had progressed through the appellate stage. In addition, almost all of the original crimes were double homicides with an accompanying felony.

The Attorney Interviews and Group Discussion

All of the attorneys who represented these cases were interviewed as part of the study; four attorneys were interviewed in San Francisco, California, and three in Washington, D.C. The interviews, which lasted approximately 2 hours each, covered the history of the case and the various factors impacting the cost of the case. In California, PwC also conducted a focus group to discuss preliminary findings and generate discussion of regional differences in practice and culture.

Corporate Law Firm Analysis

During the case study interviews, the California attorneys hypothesized that the costliest cases were all represented by large corporate law firms. By contrast, although corporate law firms represent many capital habeas corpus petitioners pro bono in a number of states, panel attorneys from Texas, Pennsylvania, Illinois, Missouri, and Alabama were unaware of such firms billing the federal courts for their work in federal capital habeas corpus cases in the states where they practiced.

To examine the hypothesis, PwC gathered information on 36 of the 37 most costly cases in the CJA Panel Attorney Payment System database, all of which were from California. Because the CJA Panel Attorney Payment System database does not indicate the type of law a panel attorney practiced when he or she represented the case, PwC

asked a federal capital habeas corpus expert whether or not a large corporate law firm employed the attorney providing representation in these 36 cases.

The expert classified attorneys as “civil” attorneys, if a large corporate law firm employed them; otherwise they were categorized as criminal attorneys. In addition, the Martindale-Hubble Directory of attorneys provided information on several attorneys the expert was unable to classify. This was not a foolproof method of accurately identifying the cases represented by large corporate law firms, and conclusions drawn from this analysis are subject to methodological error. However, given the limitations in time and information, this was the best possible method for identifying attorneys who worked for large corporate law firms while providing federal capital habeas corpus representation.

Section V: CJA Panel Attorney Payment System Database Analysis

V.1 National Costs

PwC analyzed the cost of federal capital habeas corpus cases from the CJA Panel Attorney Payment System database for the years FY 1992 to FY 1998, subject to removal of some cases as described in the methodology. As depicted in Figure V-1 below, the sum costs of the 783 cases analyzed was \$102,293,031.³⁷ The average cost per case was approximately \$130,000, and the median was approximately \$63,000 per case.

CJA Panel Attorney Payment System Data

Open and Closed Cases by Case Disposition

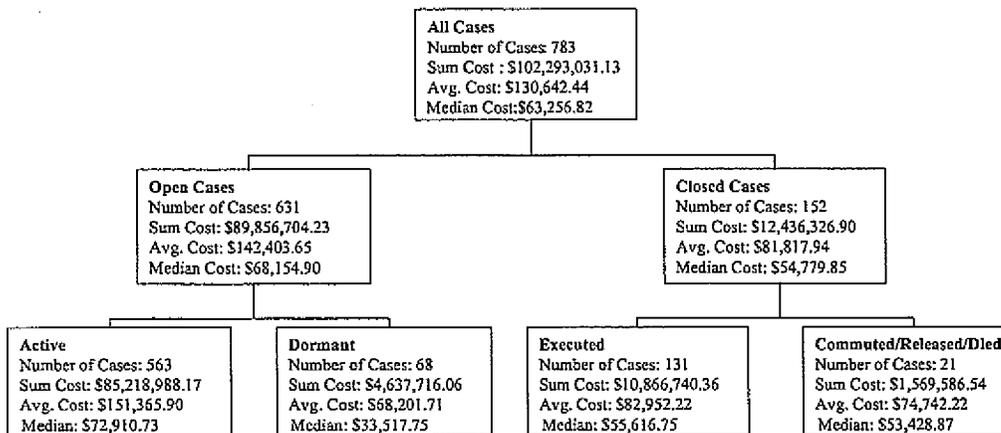


Figure V-1: Distribution of Costs and Number of Cases

³⁷ The figures above reflect only those amounts paid to private panel attorneys to cover attorney fees, expenses, and expert costs. However, the attorneys that PwC interviewed also cited the use of other resources, including the defunded Resource Centers, law school students, interns, and pro bono attorneys. The attorneys suggested that this use of additional resources is common practice nationwide. The costs noted here understate the true value of resources provided in the representation.

Overall, open cases incurred 88 percent of all costs (\$89.9 million), whereas closed cases incurred only 12 percent of costs (\$12.4 million).³⁸ Moreover, open cases that are active were the most costly:

- \$82,952 average (and \$55,617 median) cost of closed cases in which the petitioner was executed;
- \$74,742 average (and \$53,429 median) cost of closed cases in which the petitioner died in prison, was released or in which his or her sentence was commuted;
- \$151,366 average (and \$72,911 median) cost of open cases that are active; and
- \$68,202 average (and \$33,518 median) cost of open cases that are dormant (that is, nonactive).

California cases largely drive the high average cost of open cases. If the California cases were removed, the average cost of open cases would drop to \$66,931— a decrease of almost 50 percent. In contrast, the average cost of non-California closed cases is \$81,805, *higher* than the average cost of non-California open cases. Therefore, if California cases are removed, closed cases are more costly than open cases.

V.2 Breakdown of Costs by Stage of Proceeding

Most of the costs of open cases were incurred during the habeas petition stage (shown in Figure V-2 below). This result is not

³⁸ The estimate for closed costs, however, may be low since many of those cases may have incurred costs before 1992, and are not reflected in the totals in the CJA Panel Attorney Payment System database. In 119 open cases and 51 closed cases, attorneys were appointed prior to FY 1992.

surprising considering that most work in a federal capital habeas corpus case involves preparation of the petition. For all cases, the petition stage accounted for, on average, 789.5 of the average 913.8 hours billed per case, equivalent to 86 percent of the average hours billed per case.

CJA Panel Attorney Payment System Data

Open Cases by Stage of Proceeding

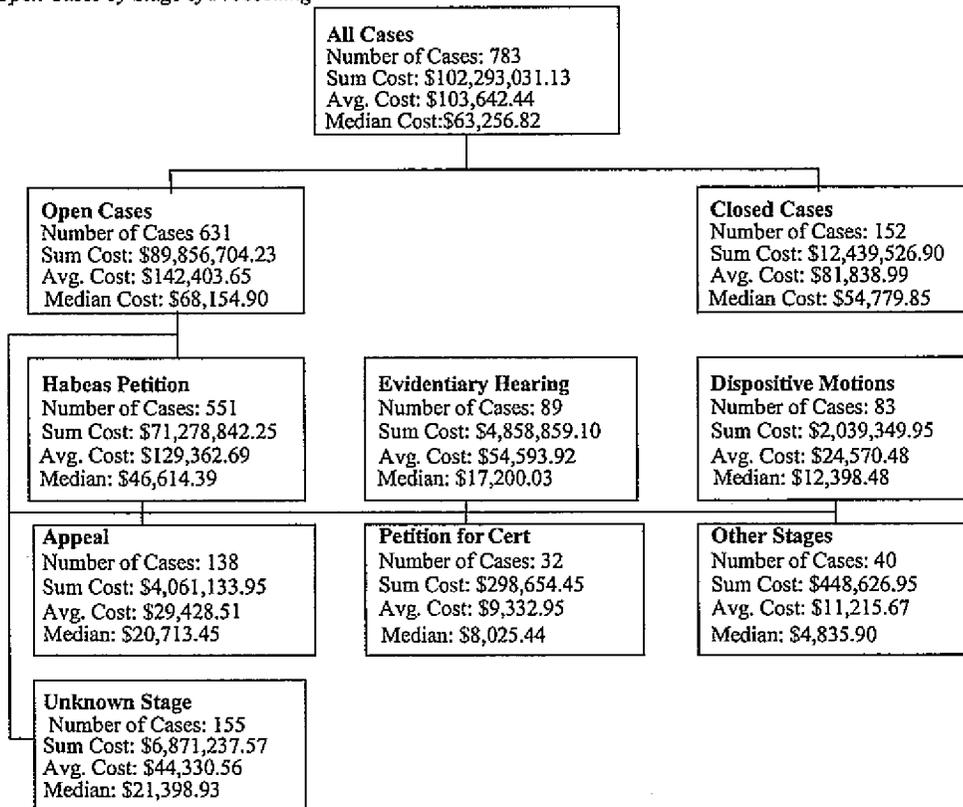


Figure V-2: Distribution of Costs and Number of Open Cases

The habeas petition stage is the most costly stage and drives the total cost of a case. The average and median costs of the habeas petition stage for *open* cases (\$129,363 and \$46,614 respectively) are close to the average and median costs of all cases all stages for all cases combined (\$130,642 and \$63,257, respectively). As noted above,

discrepancies in costs between open and closed cases are due to the preponderance of California cases among the open population. Open cases also incur high costs in the evidentiary hearing and appeal stages. These stages incur average and median costs of over \$15,000. However, because not all cases have reached these stages (and some may never reach these stages), the total costs represented by these stages is approximately \$11 million, compared to a total of \$71 million for the petition stage.³⁹

Similarly, for closed cases, most costs were incurred in the habeas petition stage. However, the appeals stage also accounts for a large proportion of the total costs of closed cases (see Figure V-3 below). This is partly due to two reasons. First, more closed than open cases have reached the appellate stage. Eighty-three percent of closed cases have reached the appellate level as opposed to 26 percent of open cases. Secondly, while the appellate stage has the same cost on average (nearly \$30,000), regardless of whether the case is open or closed, closed cases are less costly in total, partly due to the impact of California cases noted earlier, and partly due to the relatively age of closed cases compared to open cases. Closed cases were, on average, 17.3 months old on October 1, 1991—the date of the first voucher in the database—and hence had incurred more costs than open cases. Open cases were 11.3 months old on October 1, 1991 on average.

³⁹ The unknown stage also had high costs. A voucher was assigned to the unknown stage if the stage of proceeding was not noted on the voucher. Based on a review of voucher submission dates, PwC believes that many vouchers assigned to the 'unknown' stage really belong in the habeas petition stage.

CJA Panel Attorney Payment System Data

Closed Cases by Stage of Proceeding

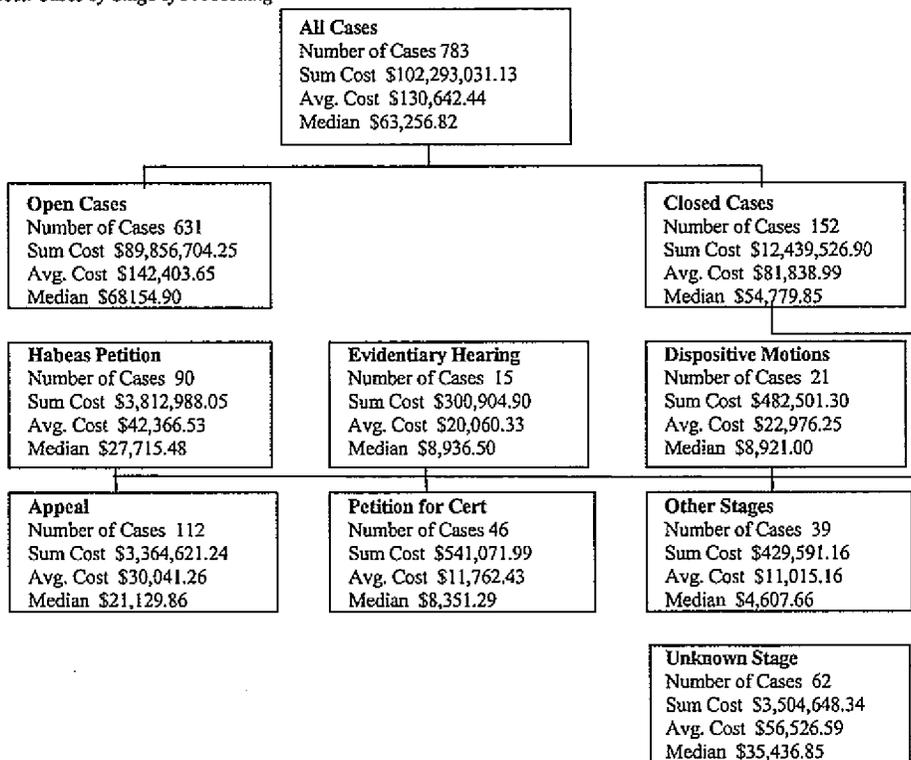


Figure V-3: Distribution of Costs and Number of Closed Cases

In contrast, the average cost of an evidentiary hearing is almost twice as much for an open case as for a closed case. This is largely due to the impact of California cases. If the California cases are removed, the average cost per case for open cases is only \$20,004.

Prior to 1995, attorney vouchers did not specify stage of proceeding, and therefore, many vouchers submitted prior to 1995 were attributed to the “unknown” stage of proceeding. For closed cases, “unknown” vouchers account for almost 30 percent of total dollars, as opposed to approximately 7 percent of total costs for open cases. Since the habeas petition and evidentiary hearing stages occur early in the life cycle of a

case, it is likely that most of the \$3 million in the “unknown” stage is attributable to the habeas petition or evidentiary hearing stages. This would increase the average cost for each of these stages.

Figure V-4 and Figure V-5 below present some of the same information in the form of pie charts. The figures show the percentage of total costs incurred between FY 1992 and FY 1998 for open and closed cases, broken down by stage of proceeding. Figure V-4 shows that 80 percent of the total costs of open cases were incurred during the habeas petition stage. Figure V-5 shows that for closed cases, the appeal stage incurred the same percentage of total costs as the habeas petition stage. As noted above, this may simply reflect the age of the closed cases; older cases would have incurred costs in the petition stage prior to the period covered in this analysis.

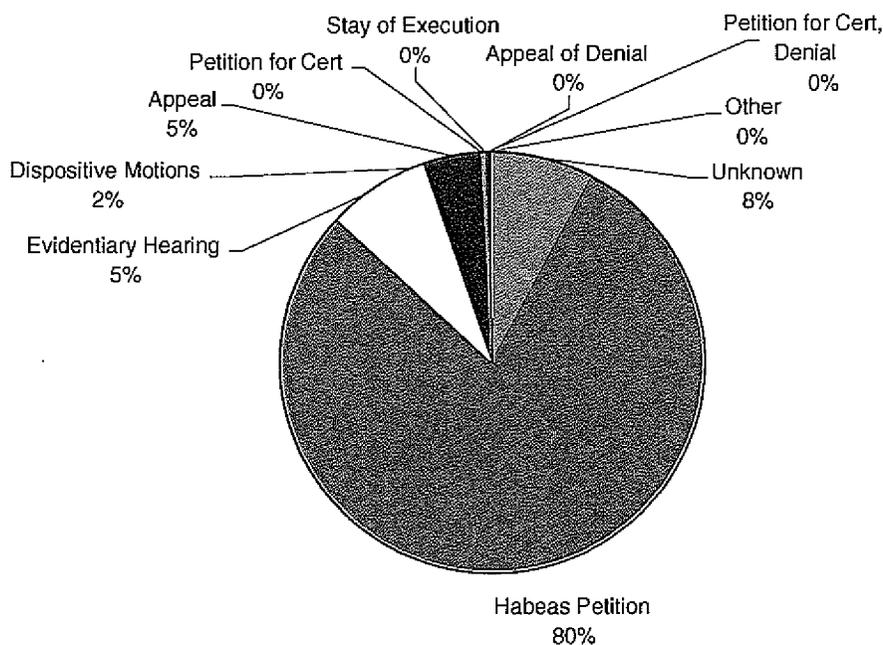


Figure V-4: Total Cost of Open Cases by Stage of Proceeding

V-43

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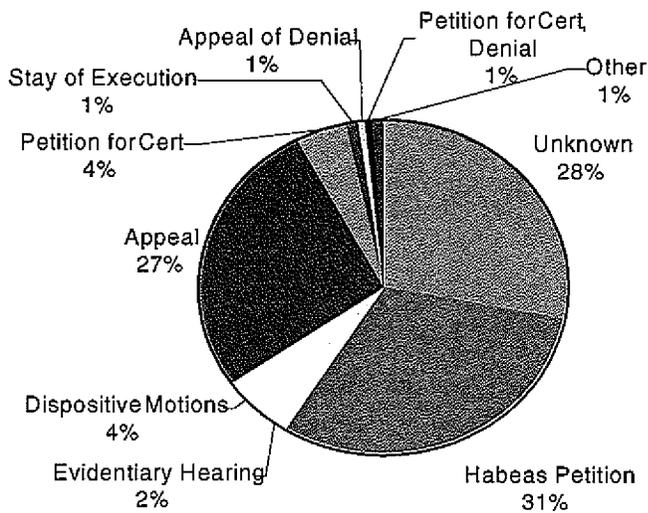


Figure V-5: Total Cost of Closed Cases by Stage of Proceeding

Because the habeas petition, evidentiary hearing, and appeal stages account for the vast majority of costs, PwC's analysis of stages focused on the costs of these stages of proceeding.

V.3 Breakdown of Costs by Component

A breakdown of costs by component shows that the largest component is, by far, out-of-court attorney fees. This is followed by expert costs, attorneys' expenses, and finally, in-court fees. This is shown in Figure V-6 below.

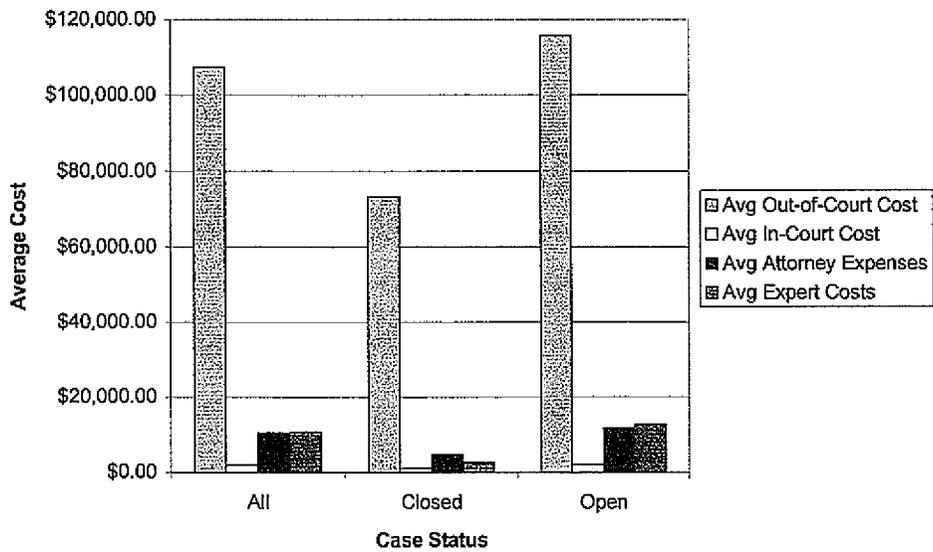


Figure V-6: Average Cost Per Case—Attorney, Expert Costs and Expenses

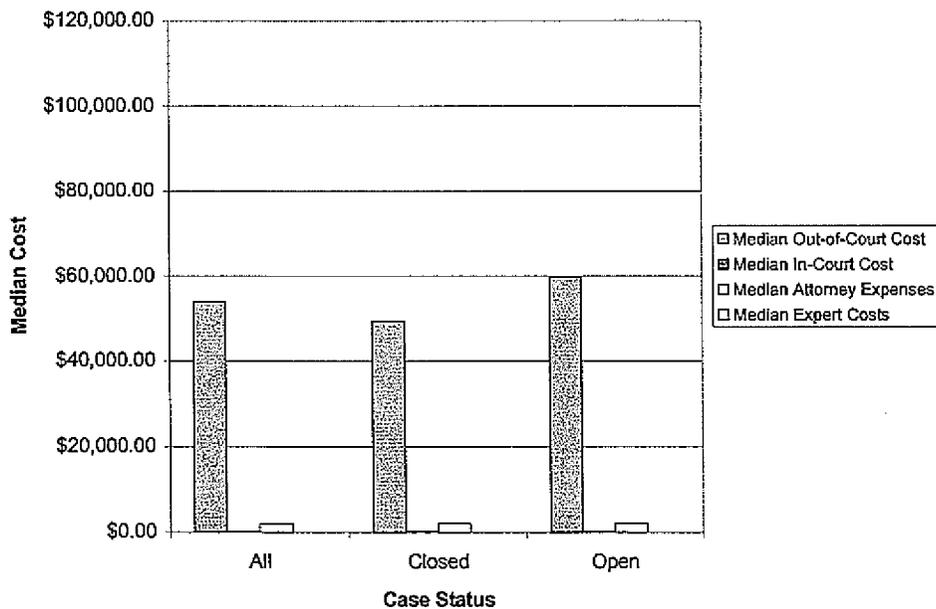


Figure V-7: Median Cost Per Case--Attorney, Expert Costs, and Expenses

The large proportion of out-of-court costs occur because federal capital habeas corpus cases require extensive amounts of out-of-court time for petition preparation, client interviews, background research, and investigation. Attorneys only spend a small amount of in-court time for courtroom presentations such as an evidentiary hearings or dispositive motions.

V.4 Breakdown of Costs by Circuit

PwC compared the average cost of cases by circuit (see Figure V-8).

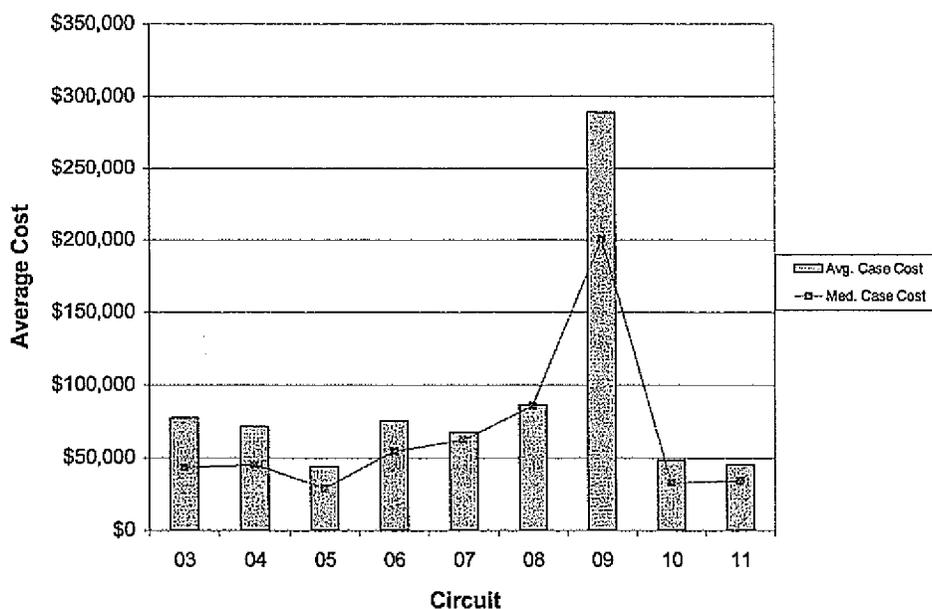


Figure V-8: Average and Median Cost Per Case By Circuit

Overall, Ninth Circuit cases had a significantly higher average cost than cases in other circuits. The average cost in the Ninth Circuit was \$289,054, compared to an average of \$62,483 for all other circuits. Moreover, the Ninth Circuit accounts for the 37 most costly cases in the CJA Panel Attorney Payment System database. If those cases are

removed, the national average cost drops by approximately 25 percent to \$97,556 from \$130,642. The average cost per case in the Ninth Circuit would drop by \$89,000 or 30 percent, to \$199,912. This emphasizes the impact that Ninth Circuit cases have on average costs nationwide.

The cost per open case in the Ninth Circuit is \$299,318, slightly more than the overall average cost per case in the Ninth Circuit of \$289,053. However, the average cost of closed cases in the Ninth Circuit is on par with average costs of closed cases in other circuits. This indicates that there are not many closed cases that push down the average cost for all cases in the Ninth Circuit.

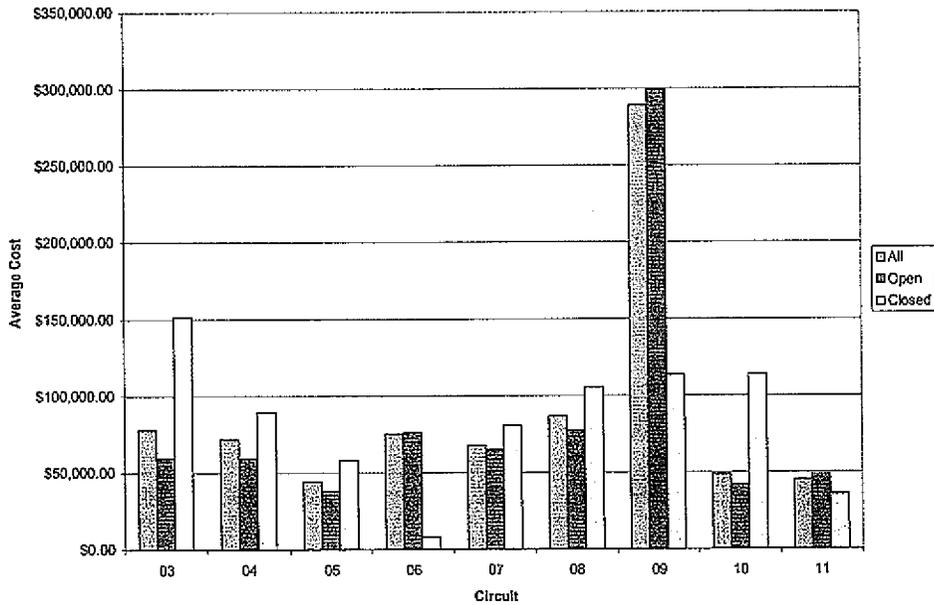


Figure V-9: Average Cost of All, Open and Closed Cases by Circuit

In fact, closed cases account for only 5 percent of all cases in the Ninth Circuit; the remaining 95 percent are open. This implies that it is not

just the proportion of cases that leads to higher average costs, but that specific Ninth Circuit factors associated with open cases drive costs.

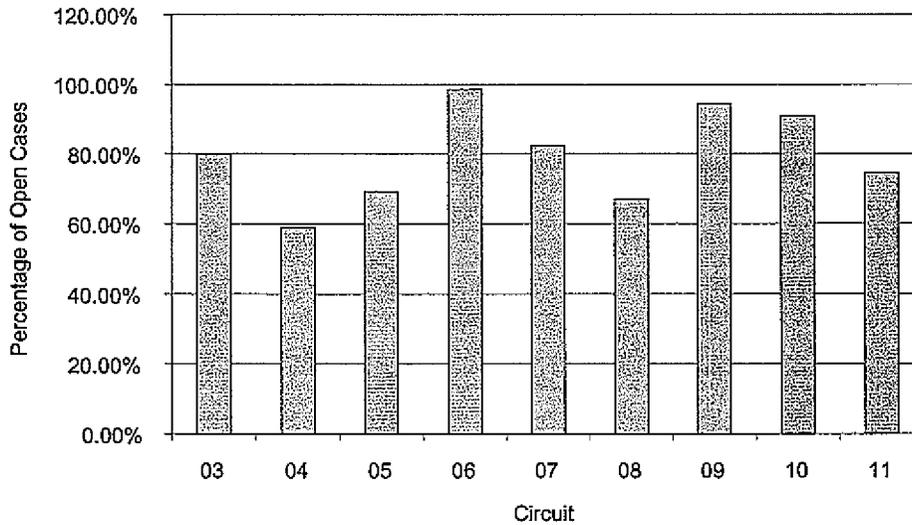


Figure V-10: Percentage of Open Cases by Circuit

When costs are compared by state, California cases have the highest average and median costs nationwide (see Figure V-11 below).

Given the large number of California cases (20 percent of all federal capital habeas corpus cases), it is clear that the cost of California cases is driving the cost of all cases. California cases make up 57 percent of the \$102 million in total costs. Since 95 percent of California cases are open, it is also clear why the average cost of open cases is much higher than the average cost of closed cases—the 149 open California cases drive up the average cost of all open cases.

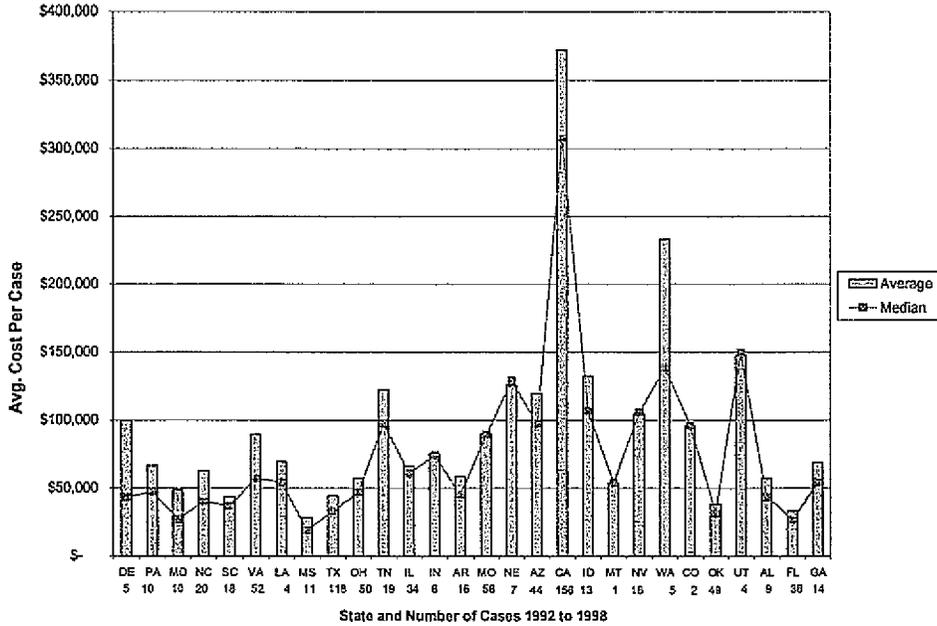
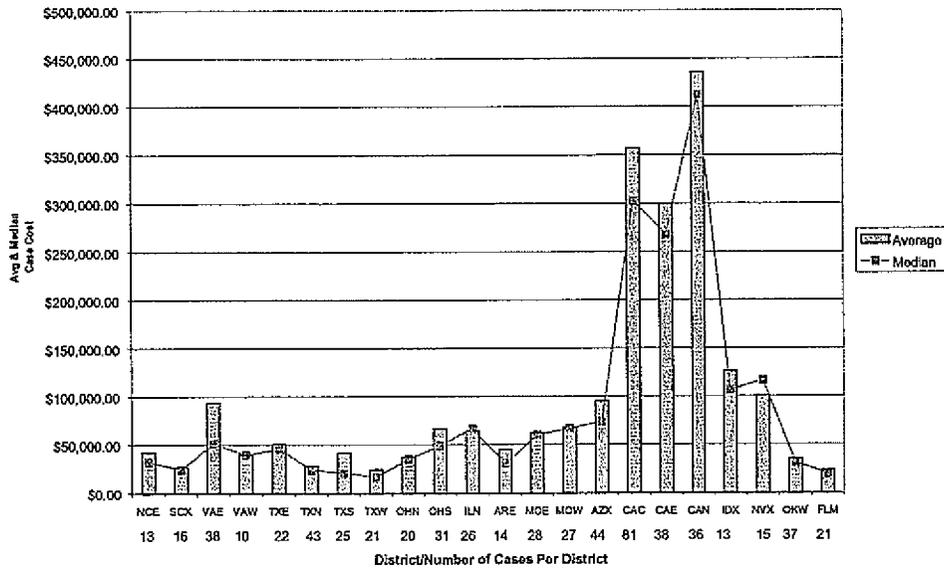


Figure V-11: Average and Median Cost By State

PwC analyzed the costs of cases by district for all districts with more than 10 cases in the database. Not surprisingly, PwC found that cases in the California districts were much more costly than cases in any other district in the country. California Southern only had one case, so it was not included in the analysis, but case costs in the three other California districts averaged at least \$299,000. Several other Ninth Circuit districts had high average costs. Idaho, Nevada, and Arizona districts all had an average cost of approximately \$100,000 per case. This suggests that some of the high average cost in California can be attributed to factors that relate to the Ninth Circuit as a whole. However, California districts were the only districts with higher average costs than the national average, indicating that much of the additional cost is concentrated in practices that are specific to California.



**Figure V-12: Average and Median Cost Per Case By District
(Districts with more than 10 cases)**

The difference between the cost of cases in California, in the Ninth Circuit, and in other circuits can be seen in Figure V-13. In the chart below, the median cost of each case is connected by a line for each circuit, and the vertical axis (y-axis) shows the cost of each case. The costs of the cases have been ranked within each circuit to create a smooth curve that connects the few high-cost cases with the more numerous lower cost cases for each circuit. The Ninth Circuit has also been divided into California and non-California cases to show the impact that California cases have on Ninth Circuit costs.

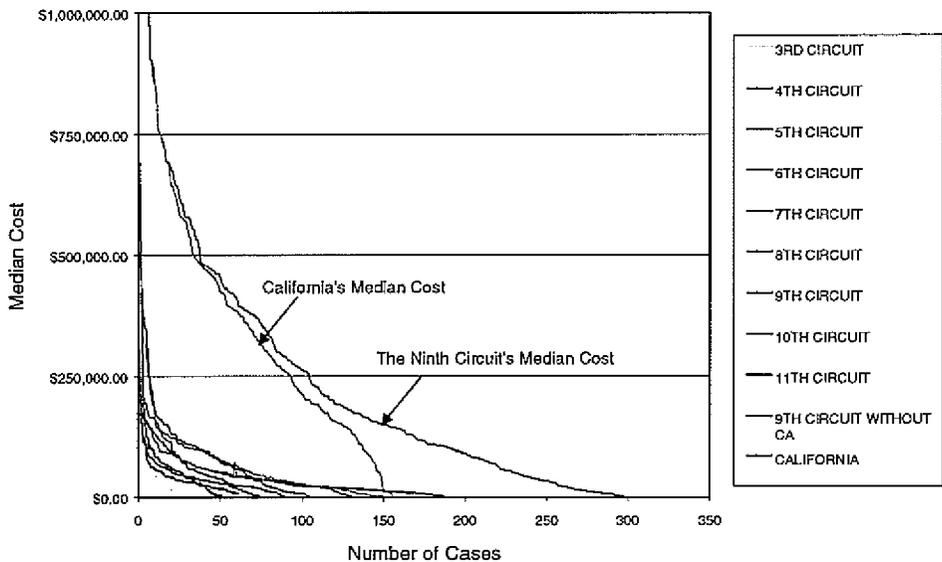


Figure V-13: Plot of All Cases for All Circuits and California

Immediately evident is that California's high costs are driving Ninth Circuit costs and are considerably higher than the costs of cases in other circuits. In the Ninth Circuit as a whole, average costs are just below \$290,000, whereas in California average costs are close to \$372,000. Overall, California cases account for \$58.0 million of the \$67.9 million in the Ninth Circuit and the \$102.3 million in the whole of the United States. In other words, California cases alone account for 57 percent of the total costs of the CJA Panel Attorney Payment System database and 85 percent of all Ninth Circuit costs. In addition, of the 37 most costly cases nationally, 36 are in California.

The average cost of California cases is over \$370,000, compared to approximately \$70,000 for non-California cases. The median for

California cases is \$307,666, and the median for non-California cases is \$48,401. This is shown in Figure V-14.⁴⁰

CJA Panel Attorney Payment System Data

California and Non-California Cases by Open and Closed

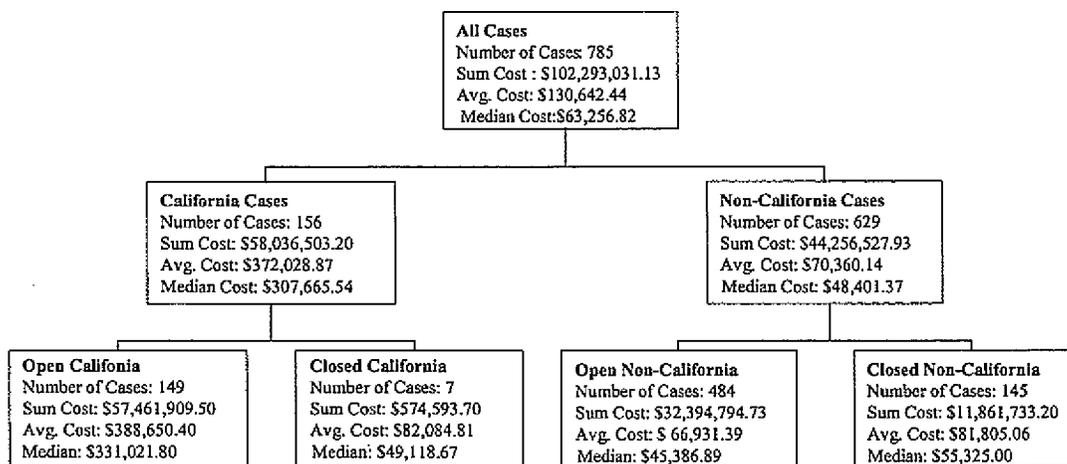


Figure V-14: Comparison of Costs of California and Non-California Cases

The difference in costs between circuits can be partly accounted for by the fact that attorneys in the Ninth Circuit bill more out-of-court hours than attorneys in other circuits, as shown in Figure V-15 below.

⁴⁰ The number of California plus non-California cases in the figure above equals 785, not 783, because two petitioners had cases in two different states. In PwC's analysis these are treated as the same case; this does not materially affect the results of the analysis.

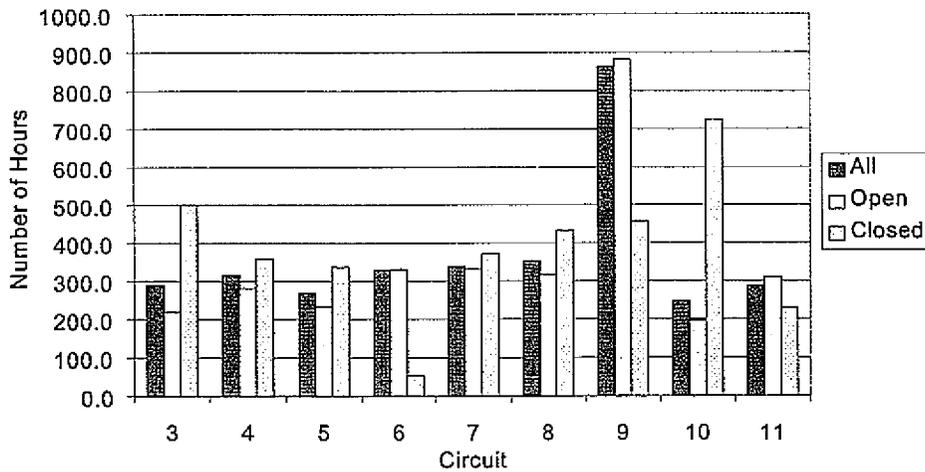


Figure V-15: Out-of-Court Hours Spent by Attorney per Case per Circuit

On average, an attorney in the Ninth Circuit spends 861.7 out-of-court hours per case—almost three times the average for all other circuits (306.3 out-of-court hours per attorney per case). In contrast, the Ninth Circuit hourly out-of-court rate (\$128.45 per hour) was only slightly higher than the average rate for other circuits (\$111.46), as shown in Figure V-16 below. This implies that it is primarily the amount of time spent by attorneys working on California cases that drives the high costs, not the average hourly rate.

Given that out-of-court time is the largest cost category in federal capital habeas corpus cases, the amount of time spent per attorney per case in the Ninth Circuit for open cases is the largest cost driver of CJA panel attorney costs.

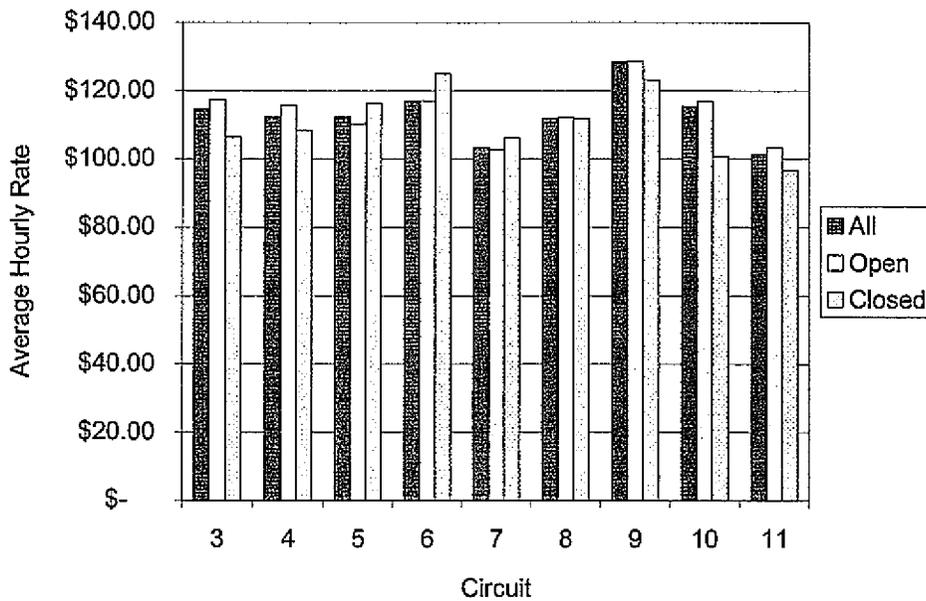


Figure V-16: Average Out-of-Court Attorney Rate per Circuit

To discover how attorneys spend their time, PwC looked at 10 categories of attorney time in the stages of proceeding that incur the most costs: the habeas petition stage, the evidentiary hearing stage, and the appeal stage (Figure V-17, Figure V-18, Figure V-19). In all of these stages, most attorney time was spent conducting legal research and writing. Discussions with attorneys and representatives from the AOUSC revealed that this broad category is often used as the default category by attorneys that fill out the CJA vouchers from which the data is drawn.

Figure V-17 shows the average amount of time spent per attorney in the preparation of the habeas petition, by circuit. Time spent in legal research and writing dominates other activities, costing attorneys in the Ninth Circuit \$53,053 per case on average.

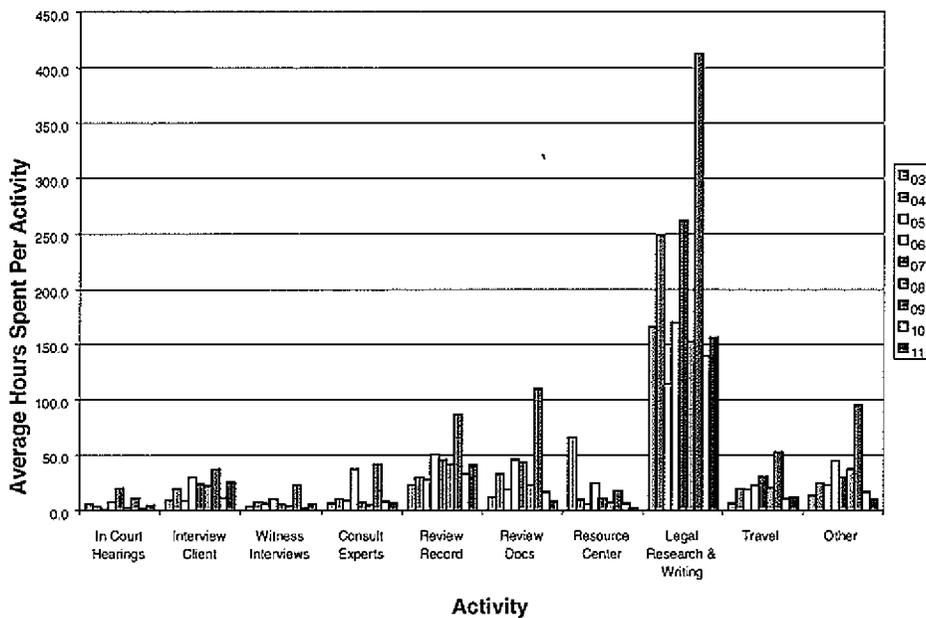


Figure V-17: Average Attorney Hours in the Habeas Petition Stage by Circuit

It is noticeable that attorneys in the Ninth Circuit spend approximately twice as much time reviewing documents and the trial record as attorneys in other circuits. This costs \$10,789 more for reviewing documents, and \$6,513 more for reading the trial record. This is most likely due to the large size of trial records and counsel files in California relative to other states, as well as to the litigious nature of defending a case in California. California attorneys who were interviewed for the Case Study Section of this report supported this hypothesis. Attorneys in California also spend more time interviewing clients and witnesses, traveling, and spending time on “other

activities.”⁴¹ Section V-6 will discuss the costs associated with the extra time California attorneys spend in these activities.

In the evidentiary hearing stage, attorneys in the Ninth Circuit spend more time interviewing clients, consulting with the Resource Centers (defunded in 1995), consulting with experts, and reviewing documents.

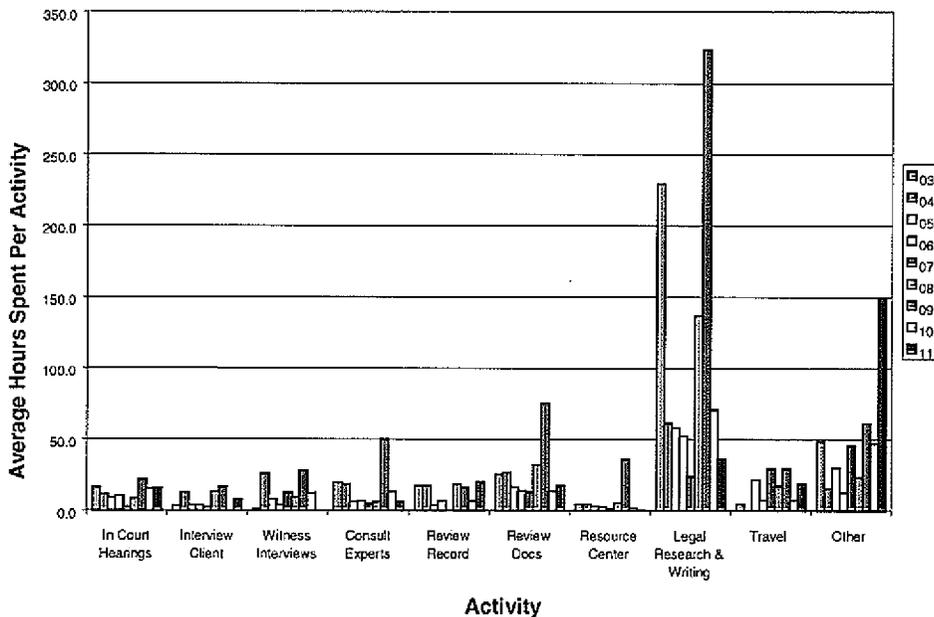


Figure V-18: Average Attorney Hours in the Evidentiary Hearing Stage by Circuit

In the appeal stage, attorneys in the Ninth Circuit spend more time conducting legal research and writing, and to a lesser extent, reviewing

⁴¹ The practice of spending more time reviewing the record, interviewing clients, traveling and doing “other activities” may reflect a more general practice in California by attorneys working on any type of case (capital, capital habeas corpus, and noncapital), not just federal capital habeas corpus.

documents. However, the differences as to how time is spent are not as significant as for the other stages of proceeding.

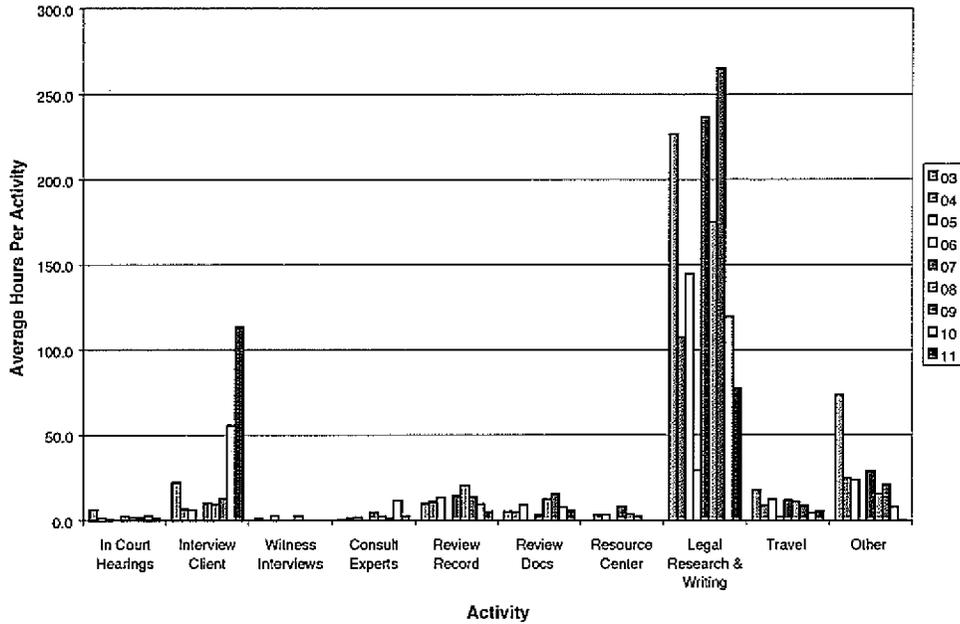


Figure V-19: Average Attorney Hours Spent in the Appeal Stage By Circuit

Attorneys in the Ninth Circuit spend much more time consulting with experts than their counterparts in other circuits. This is consistent with the high average expert costs per case in the Ninth Circuit. As shown in Figure V-20 below, average expert costs in the Ninth Circuit are more than twice the average cost for experts in the other circuits.⁴² Comparison of the average number of experts per case in California and non-California cases explains this difference. In California, an

⁴² This average is computed for only those cases with expert vouchers, not for all cases.

average case has 4.3 experts, whereas a non-California case has 0.8 experts.

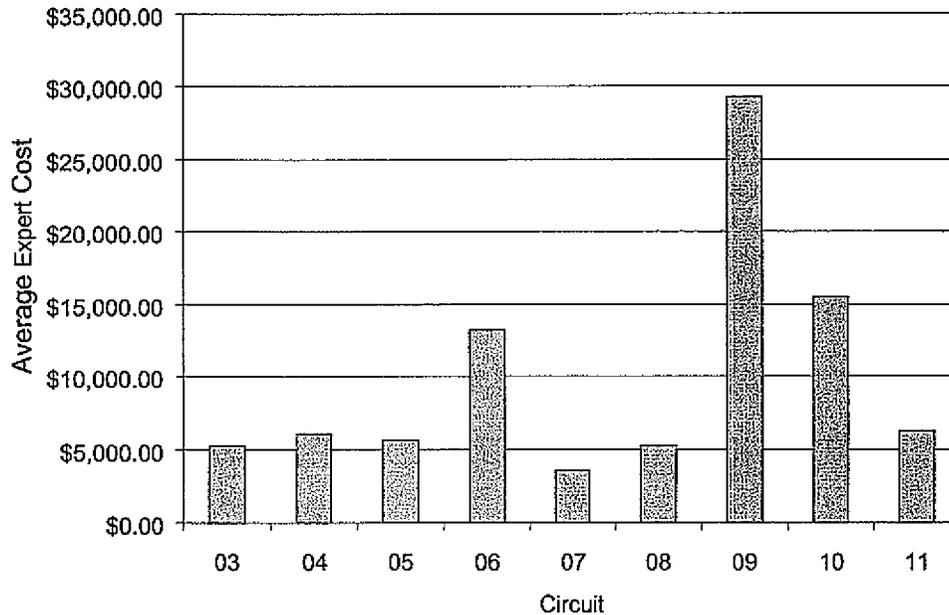


Figure V-20: Average Expert Cost Per Case by Circuit

This preliminary analysis leads to several findings regarding the costs of federal capital habeas corpus cases in California and the Ninth Circuit:

- The average and median cost of cases in the Ninth Circuit are significantly higher than those of other circuits;
- The cost of cases in the Ninth Circuit are driven by the cost of California cases;
- Attorneys in the Ninth Circuit spend almost three times as much time working out-of-court as their counterparts in other circuits;
- Expert costs are, on average, over three times as high in the Ninth Circuit as they are in other circuits.

V.5 Study of Ninth Circuit Cases by State

The comparison of states within the Ninth Circuit focused on the following factors:

1. Average cost per case for each stage of proceeding;
2. Average hourly rate per attorney per case;
3. Average number of out-of-court hours per case;
4. Average number of attorneys per case; and
5. Average time spent per activity per case.

The conclusions drawn from these analyses have to be qualified due to the low number of cases in some states. For example, Washington has only five cases, so there is no such thing as a “representative” case in Washington. Montana, which has only one case in the database, was not included in this portion of the analysis. When the population size is small, PwC indicates how many cases constitute the population in each state.

Overall, the non-California Ninth Circuit average cost per case is \$125,204—twice the \$62,483 average cost per case outside of the Ninth Circuit. Even without California, the Ninth Circuit would still show high costs. This extra \$63,000 of costs is most likely attributable to Ninth Circuit factors and is not a function of the special circumstances in California. This section will highlight differences between the states of the Ninth Circuit, and also between the Ninth Circuit and the country. Later sections will explore differences between California and non-California states.

Examination of Ninth Circuit cases began by analyzing the average cost per case by state. California was clearly the most costly state. The findings are presented in Table V-1.

Table V-1: Average Cost Per Case in Ninth Circuit States

State	Average Cost Per Case
Arizona	\$95,231
Nevada	\$101,058
Idaho	\$126,407
Washington	\$184,396
California	\$324,176

PwC next studied the costs of the major stages of proceeding (habeas petition and evidentiary hearing) for costs incurred prior to the case reaching the appellate level. For this analysis, appellate-level costs were excluded.

For the habeas petition stage, the average cost of non-California Ninth Circuit cases is \$117,155, while the median cost is \$46,614. In California, the average cost of \$294,400 is more than twice the national average. Washington state also had a high average but only a small number of cases. Figure V-21 displays these results below:

Average and Median Cost Per Stage For Ninth Circuit States

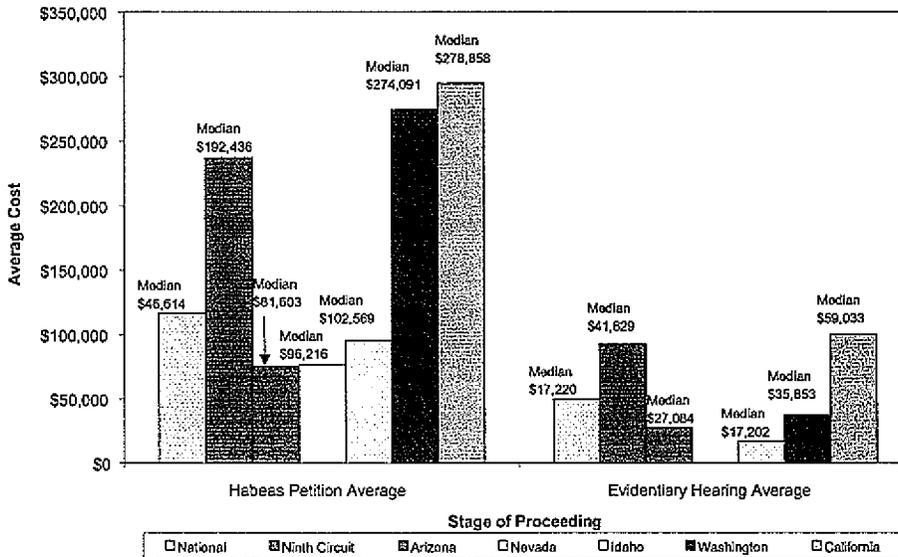


Figure V-21: Average Costs Per Case for Habeas Petition and Evidentiary Hearing Stages

In the evidentiary hearing stage, comparison between the states was not meaningful due to the small population sizes of all states except for California (see Table V-2). For example, Arizona and Washington had average costs for this stage of \$25,197 and \$36,836 respectively. However, since they each only had two cases in this stage of proceeding, it was difficult to draw any conclusions about average or typical costs. Thirty-two of the 36 Ninth Circuit cases with evidentiary hearings were in California. For the habeas and evidentiary hearing stages, it is not surprising that California, with an average cost of \$100,357, drives the Ninth Circuit's average cost of \$92,653. This is about twice the national average of \$49,614.

Table V-2: Number of Cases by Stage of Proceeding

State	Total Case Pop.	Habeas Petition Pop.	Evidentiary Hearing Pop.	Percentage of Total Reaching the Ev. Hearing Stage
Arizona	44	29	2	5%
Nevada	14	13	0	0%
Idaho	13	13	0	0%
Washington	5	1	2	40%
California	156	149	32	21%

This analysis shows California's costs in key stages of proceeding are higher than those of other Ninth Circuit states. California has unique factors contributing to habeas petition and evidentiary hearing costs that are not common to the other Ninth Circuit states.

The next step was a comparison of attorney rates per case in each state. The rates were calculated by dividing the total out-of-court attorney fees by the total number of out-of-court hours for all cases. Out-of-court costs and hours were used rather than in-court costs and hours, because out-of-court time is the primary driver of case costs.

California's out-of-court rates were somewhat higher than both the national average and other states in the Ninth Circuit, but not high enough to account for the large disparities in average costs per case. Figure V-22 shows that California's average out-of-court rate was \$136.05, not significantly higher than that of other states in the Ninth Circuit.

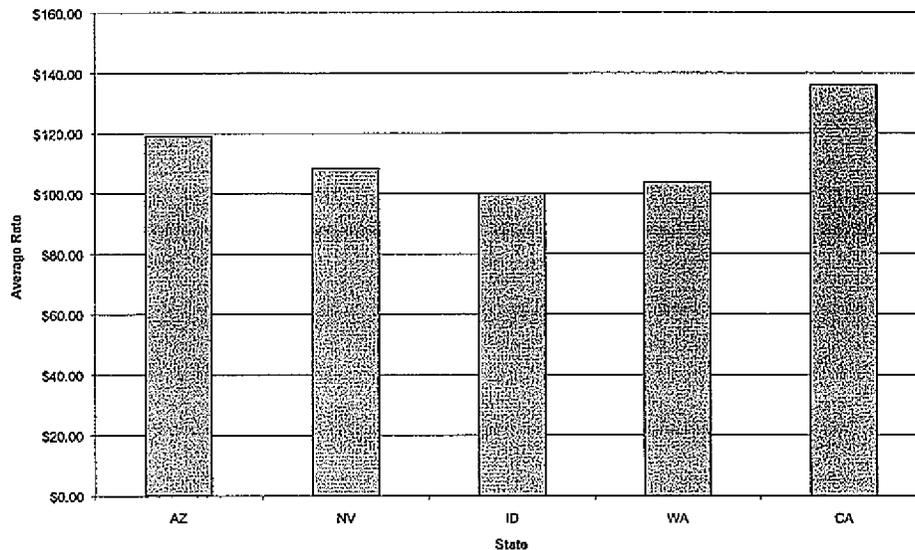


Figure V-22: Average Out-of-Court Rate Per Case in the Ninth Circuit, By State

The rate is approximately 6 percent higher than the Ninth Circuit average of \$128.45, and 10 percent higher than the national average of \$123.25.

Further analysis shows that the number of out-of-court hours in California is much higher than in any other state in the Ninth Circuit. The average amount of out-of-court time spent on non-California Ninth Circuit cases was 900 hours. In comparison, California averages 2,115. Figure V-23 below compares California to other Ninth Circuit states.

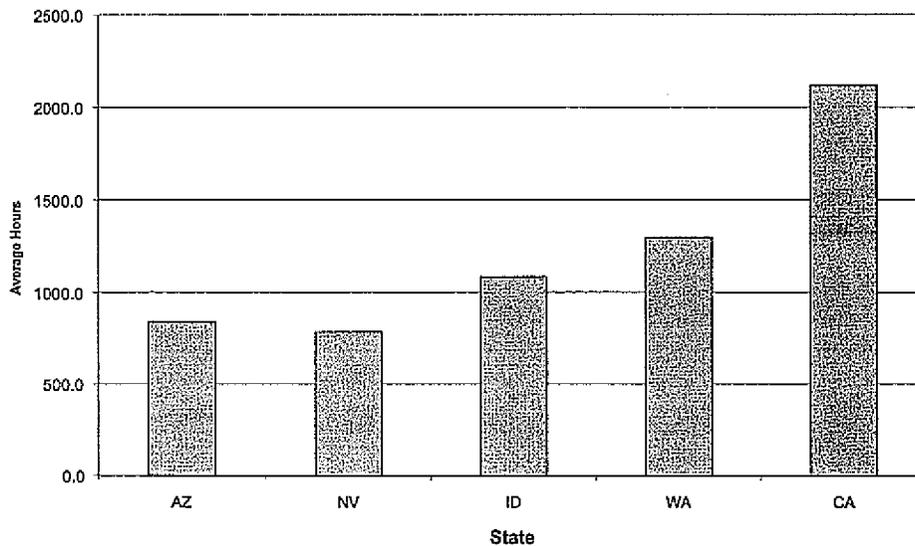


Figure V-23: Average Number of Out-of-Court Hours per Case in the Ninth Circuit

Combining the data on rates and hours shows that the hours spent on a case are the major determinant of California's higher costs. In addition, these results show that significantly more time is being spent on Ninth Circuit cases compared to non-Ninth Circuit cases.

One possible factor contributing to the number of hours spent in a case is the average number of attorneys working on a case in each state. In California, an average of 2.14 attorneys worked on a case over its lifetime (Figure V-24). This was not, however, the highest in the Ninth Circuit—California's average was only the median value of the five states. Figure V-24 shows that in both Idaho and Washington more attorneys were assigned to cases, on average, than in California.

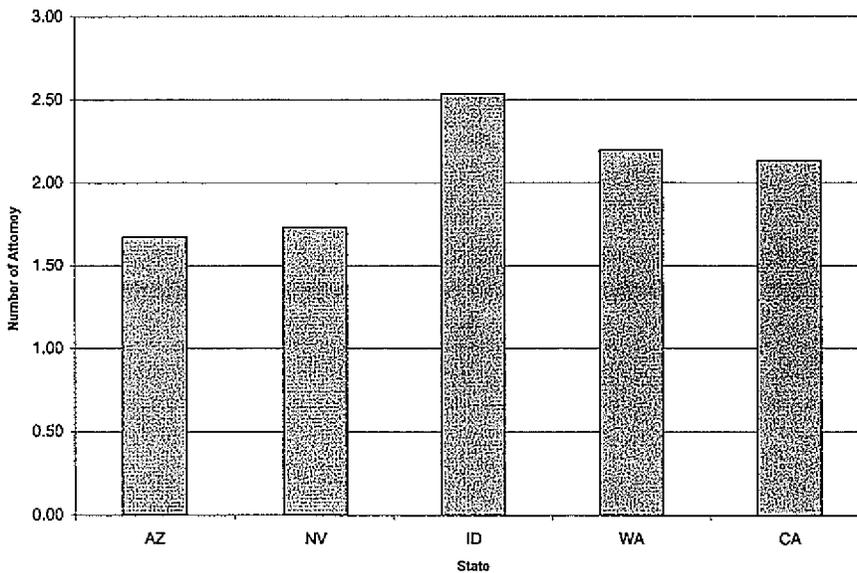


Figure V-24: Average Number of Attorneys Per Case in the Ninth Circuit, By State

The higher number of attorneys per case does not necessarily correlate with higher average costs. However, two qualifiers should be mentioned. First, the CJA Panel Attorney Payment System database did not allow PwC to determine accurately if two attorneys were working at the same time, if attorneys worked successively, or both (an attorney may have started as co-counsel and replaced the lead counsel later). Secondly, the data used to calculate these numbers only showed the number of attorneys who billed their time. In some cases, one attorney may have represented a law firm, where a number of attorneys were working on the case, but submitted a consolidated bill. These issues are further explored in Section VII.

Since out-of-court time was the primary driver of costs, the final step in our comparison of cases was a further breakdown of how attorneys

spend their time in each Ninth Circuit state. This analysis was performed in the same way as the breakdown of attorney time in the stage of proceeding and circuit analyses. PwC eliminated those cases with no information submitted for attorney time activities. For the remaining cases, PwC then found the average amount of time spent on each activity per case for each state.

As shown in Figure V-25 below, California attorneys spent more time in every category except for courtroom hearings. As in other analyses, legal research and writing was the main cost-driver. On average, attorneys in California spent 562.3 hours, or approximately \$70,000 on legal research and writing.⁴³

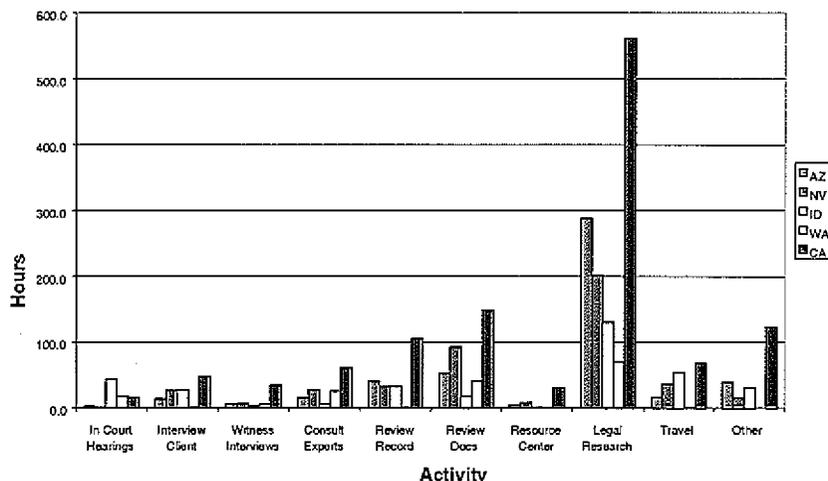


Figure V-25: Average Time Spent Per Case Per Activity

⁴³ The time spent on each activity are underestimated. On average, California cases consumed over 2,000 attorney out-of-court hours. Of these, 914.5 hours are not allocated to any particular activity in the CJA Panel Attorney Payment System database. The remaining 1,200 hours are divided among different activities as shown in Figure V-25.

In conclusion, several factors differentiate cases in California from other Ninth Circuit cases with respect to costs, but primarily it is the amount of time that attorneys spend on a case that drives the high costs of federal capital habeas corpus cases in California.

V.6 Accounting for the Cost Differential Between the Average California and Non-California Case

To determine the source of the difference in costs of California and non-California cases, PwC compared an average non-California case with an average California case by cost component, including:

1. Out-of-court hours;
2. Out-of-court rate;
3. Attorney expenses;
4. Expert costs; and
5. In-Court fees;

In addition, the costs of California and non-California cases were compared by identifying cost differences by stage of proceeding.

The average case originating in California cost \$372,029, and the average non-California case cost \$70,360. The medians were \$307,666 for California and \$48,401 for non-California states—both slightly less than the averages. The \$301,669 difference in the average costs can be divided into the five components listed above. The results are displayed in Figure V-26 below.

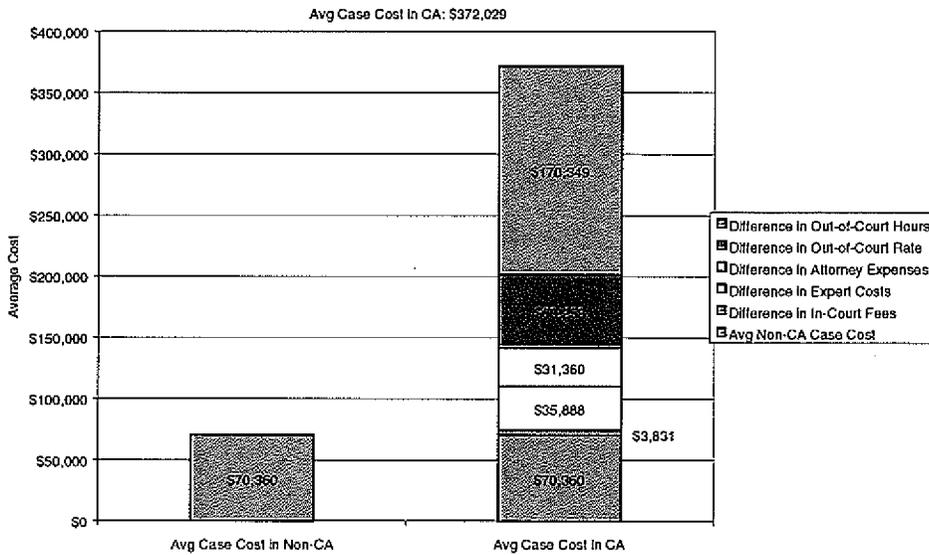


Figure V-26: The Cost Differential Between the Average Case Cost in Non-California Cases and the Average Case Cost in California

The percentage of the \$301,669 difference in costs attributable to each factor is shown in the pie chart below:

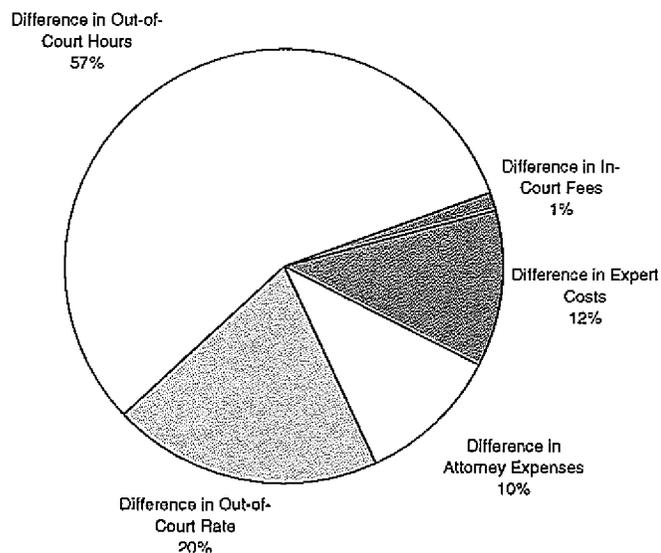


Figure V-27: Percentage of the Cost Differential Between California and Non-California Cases Attributable to Certain Factors

V.6.1.1 Out-of-Court Hours

As expected, the vast majority of the difference in average costs can be attributed to out-of-court hours. In fact, over half the difference in the costs between California and non-California cases can be explained by this single factor.

To further understand the difference in costs attributable to out-of-court hours, PwC analyzed differences in the amount of time attorneys spent on certain activities. The CJA Panel Attorney Payment System database contains information on nine out-of-court activities. PwC broke down the percentage of time attorneys spent on each activity, and compared the averages for California and non-California. Figure V-28 below shows the results:

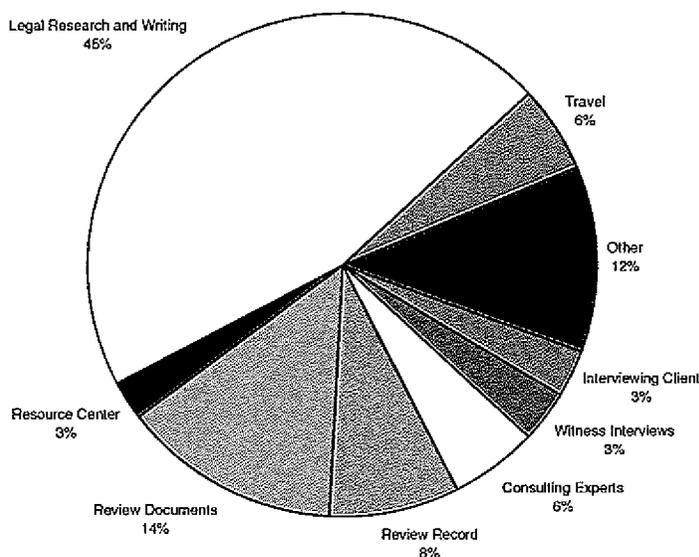


Figure V-28: Percentage of Out-of-Court Cost Attributed to Each Attorney Activity

Almost half the difference is attributable to legal research and writing. However, as noted earlier in the report this is a broad category that captures many tasks and activities, making it difficult to draw any conclusions about what causes this difference in hours.

Part of the difference in total out-of-court hours can be explained by the longer state trial records that California federal capital habeas corpus attorneys must review. When attorneys broke down their time by activities, California attorneys indicated that they spent on average 187.8 hours reviewing the trial records, compared with 52.5 hours for attorneys from non-California cases. This excludes time they spent reviewing other court documents. The difference of 135.2 hours translates into \$14,377 at the non-California attorney rate of \$106.30 per hour. This figure is the direct cost of reading the longer California trial records.

California attorneys also spend more time consulting with experts. On average, attorneys in a California case spent 107.3 hours in this activity, while outside of California attorneys spent 17.9 hours consulting with experts. Multiplying the difference, 89.4 hours, by the average non-California rate (\$106.30 per hour), results in \$9,507. This is on top of the additional money that California attorneys spent directly on experts, as discussed below.

Some of the additional time was spent traveling. Attorneys representing a California case spent an average of 90.8 hours per case traveling, compared with 30.3 hours per case for attorneys in other

states. This translates into approximately \$9,655 in additional costs. The amount of money that attorneys billed to travel is discussed below.

V.6.1.2 Out-of-Court Rate

The difference in attorney hours does not entirely explain the higher costs in California. The second greatest factor was the difference between average California and non-California rates that accounted for \$60,253 of the difference in costs. In part, this is because the difference in rates was multiplied by the average number of hours spent on a case in California (not the number of hours spent on a non-California case), so much of this \$60,253 arises from the greater number of hours billed by California attorneys. The rest is simply the result of California attorneys billing at a rate of \$133.90, 9 percent higher than the \$106.30 average for the rest of the country.

V.6.1.3 Attorney Expenses

Although attorney expenses accounts for only about 10 percent of the difference between average California and non-California costs, California attorneys charged an average of \$35,564 in expenses, more than eight times the average non-California attorney's expenses of \$4,204. In comparison, the total cost of a California case is, on average, approximately five times the cost of a non-California case. These figures show that attorney expenses compose a higher percentage of total case costs in California than in non-California cases. Attorney expenses are the sum of travel and "other" dollars in the CJA Panel Attorney Payment System database. When average expenses in California are broken down by these categories, an average

of \$3,116 was incurred for travel and the remaining \$32,449 for “other” (non-travel) expenditures. This compares with \$706 worth of expenditures for travel and \$3,499 spent on “other” in the average non-California case. The CJA Panel Attorney Payment System database does not differentiate between types of non-travel expenses.

The difference in travel accounts for only \$2,410 of the additional cost of a California case, compared to a non-California case. Combined with the \$9,655 extra cost of time spent traveling discussed above, only \$12,065 of the \$301,669 cost differential can be explained by travel. The difference in “other” expenses remains unexplained.

However, one possible source of the difference between California and non-California costs is the use and billing practices of attorneys from large corporate law firms. While this use could not be fully analyzed within the limits of the study, the issue is briefly discussed below in Section VII.

V.6.1.4 Expert Costs

The difference between the average expert cost in California and the average expert cost outside of California explained approximately 12 percent of the total difference in costs. However, experts in California cost an average of \$39,461 per case—eleven times the non-California average cost of \$3,574. Again, this is disproportional to the overall cost difference—California cases are on average, five times more costly than non-California cases. To explain the higher expert costs, PwC examined the data and found, not surprisingly, that experts are being used more often in California. Although the same types of

experts are used in all states, California attorneys simply use more of them more often. It might also be true that experts bill at higher rates in California, but that could not be ascertained from the information in the CJA Panel Attorney Payment System database.

In California, on average 4.3 experts work on a case, compared with 0.80 experts per case for all non-California states. In addition, when comparing the use of experts for California and non-California cases, experts were used in a much greater proportion of California cases than non-California cases.

Table V-3: Percentage of Cases Using Experts

Percentage of Cases Using Experts			
	All	California	Non-California
Total Cases	783	156	627
Investigator	30%	86%	13%
Interpreter	1%	6%	0%
Psychologist	20%	64%	9%
Psychiatrist	16%	58%	7%
Polygraph	0%	0%	0%
Documents	1%	3%	0%
Fingerprint	0%	2%	0%
Accountant	0%	1%	0%
CALR	0%	1%	0%
Chemist	1%	3%	0%
Ballistics	1%	3%	1%
Other	30%	78%	15%

The table above shows that attorneys most often employ psychiatrists, psychologists and investigators as experts. For both California and non-California cases, these expert costs occur most often in the habeas

petition stage, followed by the evidentiary hearing and dispositive motions stages, as shown below in Figure V-29.

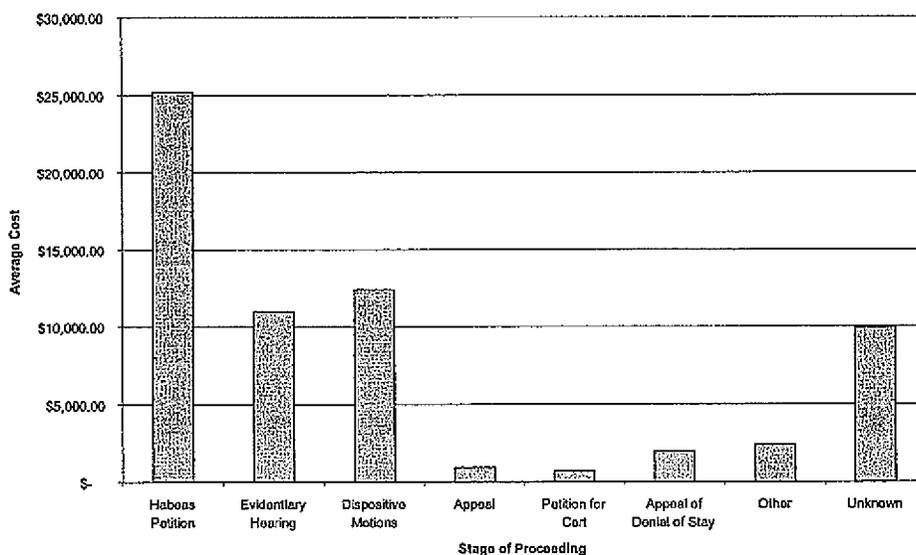


Figure V-29: Average Cost Per Case For Experts in All Stages

As shown in Table V-4, California experts have higher average costs than non-California experts for the habeas petition and evidentiary hearing stages. This indicates that, in California, experts are used much more in discovery and investigation. Attorneys interviewed in the case studies suggested that the greater use of mental health experts in California could be a possible cause of higher costs. This corresponds to the data in Table V-3 above, which shows that psychiatrists and psychologists are used in over half the cases in California.

Interestingly, average expert costs were lower in California than in non-California states for the dispositive motion stage. More curious is that non-California cases used experts more in the dispositive motion stage than in an evidentiary hearing or habeas petition stage.

Table V-4: Average Cost Per Expert by Stage of Proceeding

Stage of Proceeding	Non CA	CA	All
Habeas Petition	\$10,235	\$41,429	\$25,200
Evidentiary Hearing	\$5,939	\$20,787	\$10,972
Dispositive Motion	\$18,398	\$2,357	\$12,382
Appeal	\$957	\$318	\$923
Petition for Cert	\$683		\$683
Appeal of Denial of Stay	\$1,991		\$1,991
Other	\$1,920	\$4,731	\$2,388
Unknown	\$8,126	\$15,269	\$9,938

To further explore expert costs, PwC compared the amount of money spent on mental health experts (psychologists and psychiatrists), investigators, and all other experts in California and non-California.

As depicted in Figure V-30 below, attorneys representing California cases spend more, on average than attorneys representing non-California cases, for all three types of experts. In fact, California attorneys spend an average of 10 times more on each type of expert than non-California attorneys.

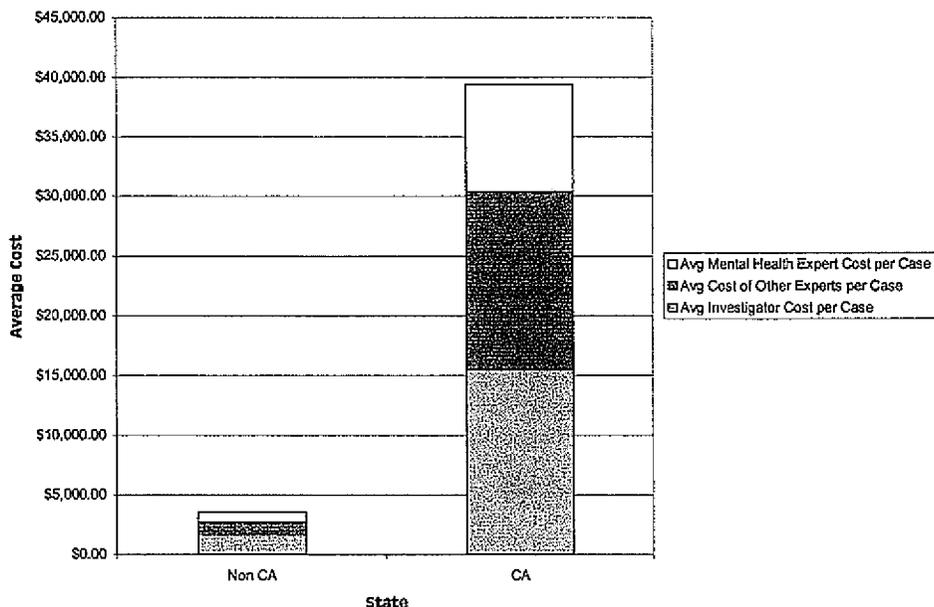


Figure V-30: Average Cost per Case by Expert Type, California Cases vs. Non-California Cases

California cases use an average of 1.54 mental health experts per case, while the average for a non-California case is 0.26. In California, \$9,092 per case is spent on mental health experts on average, compared to \$863 in non-California cases. The use of these mental health experts supports the theory mentioned above, that the mental health of the petitioner is more rigorously evaluated in California than elsewhere.

Outside of California, 0.22 investigators used per case on average, costing \$1,688. In California, attorneys use an average of 1.30 investigators costing \$15,473. Thus, the average case in California spends almost 10 times as much on investigators as the rest of the country. This suggests that more time is spent in California cases researching both the facts and the history of the case than in non-California cases.

There is little difference in the mix of experts used in California and non-California cases. The average California case has, on average, more than five times the number of experts overall, six times the number of mental health experts, and six times the number of investigators compared to the average non-California case. The experts in California are more costly partially because of a greater use of experts, and possibly due to higher rates or to more time worked.

V.6.1.5 In-Court Attorney Fees

Finally, in-court attorney fees represented only 1 percent of the difference in the average costs of California and non-California cases. California attorneys charged an average of \$5,006—three times the average of \$1,175 billed by non-California attorneys. In-court attorney compensation is only a small factor in explaining California's higher average cost per case.

V.6.1.6 Stage of Proceeding

PwC compared the costs of California and non-California cases by stage of proceeding. The results are depicted in Figure V-31 below.

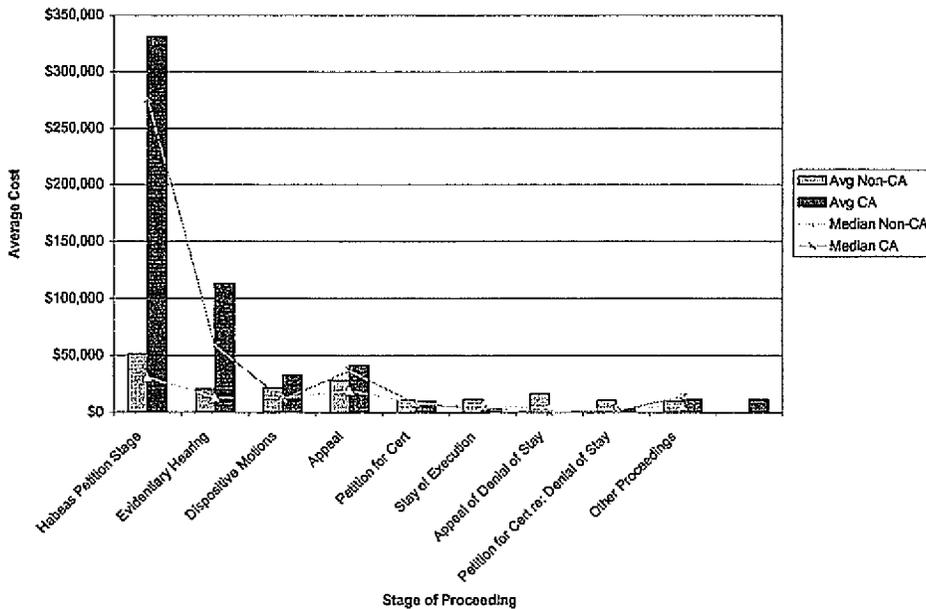


Figure V-31: Average and Median Cost by Stage of Proceeding for California and Non-California Cases

The differences between California and non-California costs were most pronounced in the habeas petition stage. In California, the habeas petition stage costs an average of \$331,295, compared with \$51,517 in other states, a difference of almost \$280,000. The bulk of the differential between California and non-California cases therefore lies in this stage. Part of this cost difference may be due to new discovery and investigation at the federal level to explore issues overlooked at the state post-conviction stage. The California attorneys interviewed as part of the case study analysis stated that federal capital habeas corpus cases often were not fully developed during the state post-conviction proceedings, thus requiring more research and investigation at the federal level to fully address all issues. Eighty-eight percent of attorneys from California who were surveyed stated that their requests for discovery at the state post-conviction proceedings were “denied or

sharply reduced.” This compares with 59 percent of non-California attorneys. The fact that California attorneys spent an additional \$13,785 on investigators compared to their non-California counterparts supports the hypothesis that more investigation and research was needed in California cases than in non-California cases (or California attorneys perceive this to be so).

The evidentiary hearing stage also showed a substantial cost disparity of \$92,000 between California and non-California cases. In California, the average evidentiary hearing cost \$112,799 compared with \$20,245 for non-California states. Part of this substantial difference is due to additional expert costs, since \$14,800 of the extra expert cost per case in California occurs in the evidentiary hearing stage. However, most is attributable to attorney out-of-court hours. In addition to the higher cost of an evidentiary hearing in California, evidentiary hearings are held more often there. The CJA Panel Attorney Payment System database showed that, of the cases that went to the appeal stage, 42 percent of California cases had evidentiary hearings, compared to 11 percent of non-California cases. The surveys told a similar story. Both California and non-California attorneys usually request evidentiary hearings at the federal level (95 percent of California and 97 percent of non-California attorneys surveyed requested an evidentiary hearing), but California attorneys are granted evidentiary hearings more frequently. Eighty-three percent of California attorneys were granted hearings, compared to 40 percent of non-California attorneys.

The other stages of proceeding show minor differences between the costs of California and non-California cases. In California, dispositive motions cost \$11,000 more than non-California cases, and appeals cost \$13,000 more. The remaining stages had minimal differences or showed non-California cases to be slightly more costly. These stages also had a low volume of cases, making a comparison of costs of little value.

Section VI: Factor Analysis

The previous analysis shows that the costs of all cases are largely driven by the number of hours spent out of court preparing the habeas petition. In addition, comparison of California cases with non-California cases reveals that the higher costs in California are due to:

- More time spent by attorneys out of court in preparing the petition (57 percent of the cost difference);
- Higher attorney compensation rates in California compared to other states (20 percent of the cost difference);
- Higher expert costs in California (12 percent of the cost difference); and
- Higher attorney expenses (10 percent of the cost difference).

This leads to two questions:

1. What, typically, are the factors that drive the costs of federal capital habeas corpus cases (and hence drive the amount of time spent preparing the petition) of all cases; and
2. What factors make California so different from the rest of the country?

To address these questions PwC sent out a questionnaire to 392 panel attorneys who provided representation in at least one federal capital habeas corpus case. The questionnaire asked about the factual details of the case and post-conviction proceedings, as well as the attorney's opinion of the factors driving the costs of the cases in which they were

involved. A copy of the questionnaire is provided in Appendix B. The responses were used in a variety of ways. First, PwC examined the reasons attorneys gave for high case costs. Secondly, PwC used regression analysis to identify factors that were strongly related to the costs of cases.⁴⁴ The factors that PwC used in the analysis were based on the reasons the attorney gave for high-cost cases and on suggestions from representatives of the Defender Services Division of the AOUSC. Responses to particular questions that differentiated California from non-California cases were also analyzed, to see whether those responses supported or conflicted with cost factors suggested by the case study analysis.

VI.1 Attorney Opinions

The surveys listed possible factors that might contribute to the costs of federal capital habeas corpus cases. Attorneys were asked to give each factor a score of 1 to 4. Attorneys gave a score of 1 to those factors they believe made a high contribution to costs, and a score of 4 to factors they believed did not contribute to costs.

PwC calculated the average response for each factor and then ranked them in order of importance, as shown in Table VI-1 below. A score of 2.5 is the average response, so all responses that received below 2.5 reported an above-average contribution to costs.

⁴⁴ A discussion of regression analysis is included in Appendix A.

Table VI-1: List of Factors

Possible Factors Contributing to the Costs of Federal Capital Habeas Corpus Cases	Contribution to Costs (1=High Contribution, 4=No Contribution)		
	All	CA	Non-CA
Competency of state trial counsel	1.55	1.25	1.63
Other	1.57	1.75	1.53
Incomplete factual development in state court	1.61	1.25	1.70
Significant legal research to support motions	1.62	1.58	1.63
Complex defendant personal background	1.83	1.61	2.13
Aggressiveness of the Attorney General	1.85	1.88	1.84
Large number of habeas claims	1.94	1.52	2.04
Large number of expert witnesses required	2.19	1.63	2.35
Competency of state post-conviction counsel	2.20	2.05	2.21
Number of motions	2.30	2.08	2.36
Court evidentiary hearings	2.32	2.07	2.37
Number of pages of trial record	2.36	2.29	2.37
Expedited briefing required because of execution date or other limitations	2.37	3.14	2.30
Geographically dispersed evidence and witnesses	2.40	2.46	2.39
Large number of capital charges or aggravating circumstances	2.42	2.47	2.41
Difficulty in locating state records	2.52	2.22	2.60
Number of pages of trial counsel files	2.54	2.50	2.54
Number of pages of appellate counsel files	2.67	2.78	2.88
Need for translators/interpreters	3.76	3.85	3.71

This table shows that the views of attorneys in California and non-California states do not greatly differ with respect to the contribution of various factors to total case costs. In all three categories, attorneys believe that the most significant factor contributing to the costs of the federal capital habeas corpus case is the competency of state trial counsel. Incomplete factual development in the state trial proceedings is also ranked as a high contributor to costs. These factors are related. Ineffective counsel in the state trial will result in incomplete factual development at the trial. "Ineffective assistance of counsel" is commonly raised as a federal capital habeas corpus claim. Eighty-one percent of attorneys surveyed made an "ineffective assistance of counsel" claim for the guilt phase of the trial, and 83 percent made this claim for the sentencing phase. A likely reason for the common use of the ineffective assistance of counsel claim is that it can encompass

many other claims about the weakness of a trial. Claims based on the Fourth, Eighth, and Fourteenth Amendments are more restricted.

Several differences arose in the comparison of California attorney responses with non-California attorney responses. First, California attorneys gave the category “large number of habeas claims” a score of 1.52, as opposed to 2.04 for non-California attorneys. The survey responses showed that, California attorneys raise more claims than their non-California counterparts, as shown in Table VI-2.

Table VI-2: Survey Results on the Percentage of Habeas Claims Per Case

Number of Habeas Claims Sought	All	CA	Non-CA
1	7%	8%	7%
2 to 5	36%	24%	40%
6 to 10	34%	44%	33%
11 to 20	16%	20%	16%
21 to 30	5%	4%	5%
31 to 40	0%	0%	0%
More than 40	0%	0%	0%
Unknown Cases	3	1	2
Total Number of Cases	126	25	101

Secondly, California attorneys consider the number of expert witnesses required as a more substantial contributor to costs than non-California attorneys (see Table VI-1). This supports the prior findings on the impact of expert witnesses on the costs of California cases. Third, California attorneys, more than non-California attorneys, believed that the complexity of the petitioner’s personal background had a larger impact on costs.

The survey also asked attorneys whether a number of possible environmental factors, including the attitudes of the local community, the judge, and the attorney general, toward both the crime and the death penalty itself, increased the costs of the case. The factors and responses are shown in Table VI-3 below. The table shows the percentage of attorneys who believed that each factor increased the costs they represent.

Table VI-3: Attitudes that Affect Costs

Factor	Increased Costs
Local community attitudes toward the original crime	29%
Local community attitudes toward the death penalty	31%
Attitude of the judge toward the original crime	34%
Attitude of the judge toward the death penalty	34%
Attitude of the Office of the Attorney General toward the original crime	63%
Attitude of the Office of the Attorney General toward the death penalty	70%

Most attorneys surveyed believe that the attitude of the Office of the Attorney General increased the costs of their case. Only one-third of the attorneys surveyed believed the judge's attitude either towards the original crime or toward the death penalty, increased the costs. This is consistent with the high ranking of the aggressiveness of the Office of the Attorney General as a cost driver in Table VI-1.

VI.2 Regression Analysis

While the views of attorneys provided useful insights into the causes of costs of federal capital habeas corpus cases, they are subjective measures, dependent on attorney expectations, experiences, and beliefs, and may be limited to specific knowledge of local state and federal court practices.

PwC used regression analysis, a type of statistical test as a means of using objective data to test which factors affect the costs of federal capital habeas corpus cases. This involved developing two models of factors likely to affect costs and testing the significance of these factors through statistical calculations. The two models were designed to analyze:

1. The impact of various factors on the costs of 105 cases (all cases with a fully completed survey); and
2. The impact of various factors on costs of 84 non-California cases (all non-California cases with a fully completed survey).

The reason for including the second (non-California) model was to determine if the factors that apparently influence the costs of all cases—based on the results of the first regression analysis—also appear to affect the costs of non-California cases. This helped differentiate between the factors that drive the costs of all cases and the factors that drive the costs of non-California cases.

The factors tested in both models included:

-
- Whether travel was required for investigation to other states (at trial);
 - Whether the case originated in California;
 - Whether there was continuity of counsel from state to federal post-conviction proceedings;
 - The number of prior capital representations by counsel;
 - The number of pages of trial record;
 - The number of state post-conviction proceedings;
 - Whether the federal judge denied attorney requests (for experts, attorney fees, and for evidentiary hearings) at the federal post-conviction proceedings;
 - Whether the state judge denied a request for an evidentiary hearing at the state post-conviction proceeding;
 - Whether the state provides funding for the state post-conviction proceeding; and
 - The number of claims made in the federal capital habeas corpus petition.

The second model excluded the variable as to whether the case originated in California (as by design, they were all non-California cases).

Summary

The combined results of the two models were inconclusive. The results suggested that:

-
- Many factors drive the costs of non-California federal capital habeas corpus cases. The factors noted above explained only 14 percent of the costs of the 84 non-California cases;
 - One or more factors driving the costs of cases in California are not captured in either model; and
 - None of the factors included were robust predictors of case costs. That is, the statistically significant factors in one model were not statistically significant in the other model.

The results appeared to depend on the sample of cases—a different sample of cases in the analysis would likely have yielded different results as to which factors are significant. In addition, many factors not included in the regression model influenced costs.

For these reasons, the regression analysis supports the notion that case costs are based on a variety of unpredictable factors. As suggested by attorneys, such factors might include, the complexity of the petitioner's personal background, particulars of the crime and the circumstances surrounding the crime, and the idiosyncrasies of the state trial.

Methodology

PwC initially reviewed the factors suggested by attorneys for high costs of federal capital habeas corpus cases. These factors included:

- Attorney experience (number of previous capital cases and years of experience);
- Number of murder victims;

-
- Number of co-defendants;
 - Judicial denial of resources at the state or federal post-conviction stages;
 - Size of trial record;
 - Number of habeas corpus claims raised;
 - Defendant history of mental illness;
 - Length of state trial;
 - Whether investigation at trial involved travel to other states;
 - Continuity of counsel from state to federal post-conviction proceedings;
 - Number of state post-conviction proceedings;
 - Denial of attorney requests (for experts, attorney fees, and for evidentiary hearings) at the federal post-conviction proceedings;
 - Denial of a request for an evidentiary hearing at the state post-conviction proceedings; and
 - Whether funding was provided for the state post-conviction proceedings.

From these factors, PwC removed those during initial testing did not show an impact on case costs. PwC then developed two final regression models to test.

The results of the two regression analyses are shown in Table VI-4 and Table VI-5 below. The factors that showed the most significant impact on costs are in bold and are at the top of the table. The table shows:

- *The value of the coefficient*—this shows how much the costs of the case increase if the relevant factor increases. For example, if the

number of years of attorney experience is a factor (X_1), and the coefficient of that factor is -\$1,000, then for each year of attorney experience, on average the costs of a federal capital habeas corpus case decrease by \$1,000. If the sign of the coefficient is negative, the factor decreases costs rather than increases costs.

- *The level of confidence in statistical significance*—the factor (and value of the coefficient) can only be considered to affect case costs if the factor is statistically significant, which depends on the results of statistical tests. The regression analysis only provides evidence that the factors with a “yes” in these columns affect the costs of cases. For columns with a “no,” the value of the coefficient is not statistically reliable.
- *The value of “ r^2 ”*—the percentage of the difference in costs explained by the factors in the model; the “ r^2 ” value of 0.65 means that 65 percent of the costs of the cases are explained by the factors in the model, and the remaining 35 percent of the costs are unexplained (or due to other factors).

The level of confidence in the statistical significance of the variables is shown for both a 95 percent confidence level (the generally accepted level of confidence by statisticians) and at the 90 percent confident level (a lower level of confidence). When a factor is statistically significant, it is unlikely that the regression results are due simply to sampling error (that is, picking a sample that is unrepresentative of all cases). A factor that is statistically significant most likely affects costs, either increasing costs or decreasing costs, depending on the sign of the coefficient.

Results

The first table shows the results of the model that analyzed the costs of both California and non-California cases, and the second table shows the results of the second model that analyzed the costs of non-California cases only.

For the model that included all cases, three factors appear to be statistically significant:

1. Whether travel to other states for investigation was required at the trial—an indication of the need for travel at the federal post-conviction stage;
2. Whether there was continuity of counsel between the state and federal post-conviction stages—as expected, continuity of counsel decreases the costs at the federal level (that is, the coefficient is negative); and
3. Whether the case originated in California—not surprisingly, this confirmed previous findings, that cases in California are significantly more costly than non-California cases.

Neither of the first two factors was statistically significant in the second model of non-California cases. This implies that the need for travel and continuity of counsel had a different impact on the costs of non-California cases compared to the impact on California cases. In fact, no factor was statistically significant at the generally accepted 95 percent level of confidence in the non-California model. This implies that there are other factors, not included in the list above, that affect the cost of cases.

During the case study interviews, attorneys identified several reasons why costs in California may differ significantly from the costs of non-California cases—such as the impact of the California’s Office of the Attorney General on increasing the hours spent in litigation. Some of the reasons—for example, the tendency of the attorney general’s office to litigate exhaustion requirements—cannot be easily converted into objective quantifiable data that can be analyzed using regression analysis.

A curious result of the non-California model is that the number of pages of the trial record is statistically significant at a 90 percent level of confidence, but the coefficient was negative. This suggests that after taking all the other factors in the analysis into account, the longer the trial record, the lower—not higher—the costs. This is counterintuitive, and at odds with the finding in the data analysis that shows that more time is spent in California cases reviewing the trial record and documents than in non-California cases. This is one indication that the results of the analysis may be subject to sampling error, or that the models fail to capture some of the most important cost drivers.

Less surprisingly, attorney experience is a statistically significant factor at the 90 percent confidence level (the more experienced the attorney the lower the costs), as is the number of state post-conviction proceedings. (The more times the case enters the state courts, the lower the costs at the federal post-conviction stage, presumably, because the issues are dealt with effectively at the state level and require less investigation and research at the federal level. This is inconsistent

with an alternative hypothesis that costs increase if the case “bounces” between state and local courts as issues as attorneys take time to refresh their memory, familiarize themselves with new laws and case law, renew contact with witnesses, and so on). However, to conclude that these factors are statistically significant, PwC has to decrease the acceptable level of confidence from the generally accepted standard of 95 percent to 90 percent. Thus, while there was evidence that suggests these two factors are statistically significant, the evidence is not strong.

Finally, the value of r^2 in the first model was 0.65. This means that 65 percent of the costs of these cases is explained by the factors shown in the table. This is a substantial percentage of costs. In contrast, the value of r^2 in the non-California model—which excluded California cases—was only 0.14, or 14 percent. The reason for the difference is the impact of the California variable in the first model. The analysis shows—confirming the data analysis—that California cases have higher costs. In the second model, California costs were excluded to rule out the impact of California cases on the model results and to see whether the analysis can determine the factors driving the costs of non-California cases. Removing the California cases and the California variable from the model clearly changes the results, as shown below in Table VI-4. This is the basis for concluding that the same factors affect the costs of California and non-California in different ways.

Table VI-4:- Regression Model of All Cases

Factors	Coefficients	Statistically Significant at 95% Confidence Level?	Statistically Significant at 90% Confidence Level?
Travel for Investigation (at trial)*	63,167.27	YES— Increases Costs	YES— Increases Costs
California Case*	400,739.50	YES— Increases Costs	YES— Increases Costs
Continuity of Counsel from State to Federal PCP*	-46,527.00	YES— Decreases Costs	YES— Decreases Costs
No. of Prior Capital Representations by Counsel	-857.22	NO	YES— Decreases Costs
Pages of Trial Record (by category)	-19,339.66	NO	YES— Decreases Costs
No. of State PCPs	-17,245.36	NO	YES— Decreases Costs
Judge Denied Resources at Federal PCP*	4,219.47	NO	NO
Judge Denied Evidentiary Hearing at State PCP *	9,721.91	NO	NO
Provision of Funding for State PCP*	-12,840.08	NO	NO
Number of Claims (Federal PCP)	436.29	NO	NO
Number of Cases	105		
Value of r ² (r-squared)	0.65		

Table VI-5: Regression Model of Non-California Cases

Factors	Coefficients	Statistically Significant at 95% Confidence Level?	Statistically Significant at 90% Confidence Level?
Number of Claims (Federal PCP)	959.71	NO	YES—Increases Costs
Pages of Trial Record (by category)	-11,248.78	NO	YES—Decreases Costs
Travel for Investigation (at trial)*	-8,560.28	NO	NO
Continuity of Counsel from State to Federal PCP*	-19,478.77	NO	NO
No. of Prior Capital Representations by Counsel	16.07	NO	NO
No. of State PCPs	-3,154.21	NO	NO
Judge Denied Resources at Federal PCP*	7,787.59	NO	NO
Judge Denied Evidentiary Hearing at State PCP *	-19,349.73	NO	NO
Provision of Funding for State PCP*	15,204.80	NO	NO
Number of Cases	84		
Value of r^2 (r-squared)	0.14		

To further investigate the factors driving costs, and why the factors examined in the regression analysis did not show significant results, PwC analyzed the costs of cases in particular states.

Section VII: Comparative Study of Selected States

This section analyzes the average case costs of six states, as well as procedural and cultural factors of those states, in an attempt to further explain cost disparities between California and non-California federal capital habeas corpus cases. The states examined are the same as those for which case studies were collected. In order to concentrate on the costliest parts of a case, this analysis concentrates on the three stages of proceeding in which most costs are incurred:

- The habeas petition stage;
- The evidentiary hearing stage; and
- The appeals stage.

Because some factors influence case costs in more than one stage, a final category entitled “All Stages” discusses those factors that may contribute to costs over the lifetime of a case.

This section combines findings from the CJA Panel Attorney Payment System database, the survey results, and the case studies. The case study profiles are furnished in Appendix C. The three sets of data support each other in providing reasons for California’s significantly higher average costs per case.

VII.1 Habeas Petition Stage

As shown earlier, California has a more costly habeas petition stage than any other state—almost \$250,000 more costly on average than the second most costly state studied. Because the habeas petition stage accounts for so much of costs, there is a correlation between the

average cost of an entire case and the average cost of the habeas petition stage of proceeding. For example, Texas was the least expensive state studied and also had the lowest average cost per case for the habeas petition stage.

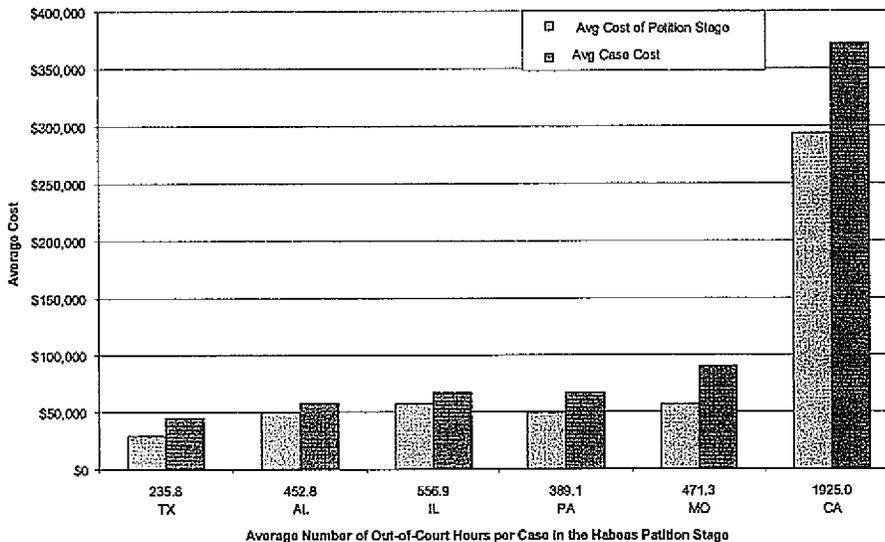


Figure VII-1: Average Cost of the Habeas Petition Stage of a Case for Selected States

The case studies offer some explanation for the differences shown in Figure VII-1 above. For the two California cases, many of the facts in the cases were underdeveloped at the state level and required many hours of investigation at the federal level. Attorneys hypothesized that lack of funding at the state post-conviction level resulted in underdeveloped cases reaching federal court. The California attorneys stated that as a result, they spent more time performing investigations at the federal habeas corpus petition stage than attorneys in other states. In support of this assertion, the payments to investigators are

much higher in California than in the other states studied. By contrast, most of the investigation in the case study from Alabama took place at the state level; hence investigation costs were low.

The survey data also indicates that California attorneys are denied resources at the state post-conviction proceedings more frequently than non-California attorneys. Eighty-three percent of California attorneys surveyed stated that their requests for discovery in state court were denied or sharply reduced, compared with 59 percent of non-California attorneys.

Among the four states in Figure VII-2 below (Alabama and Pennsylvania did not have any cases which billed for investigators), California attorneys were four times more likely to use investigators than attorneys in the other states. On average, investigators in an average California case cost more than \$15,000 compared with \$1,000 in Missouri, \$1,100 in Texas, and \$700 in Illinois. These figures do not include attorney time spent on investigation, and indicate that investigations may be much more thorough in California federal courts. A high level of investigation may also explain the relatively high average cost in Missouri, where the attorney interviewed emphasized the necessity of conducting new investigations at the federal district level.⁴⁵

⁴⁵ See Case study #3 in Appendix C.

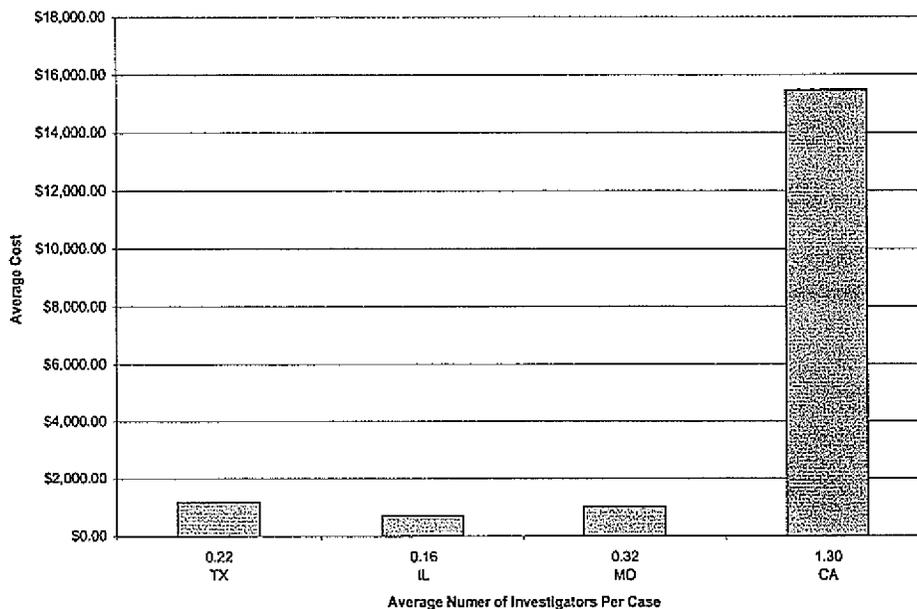
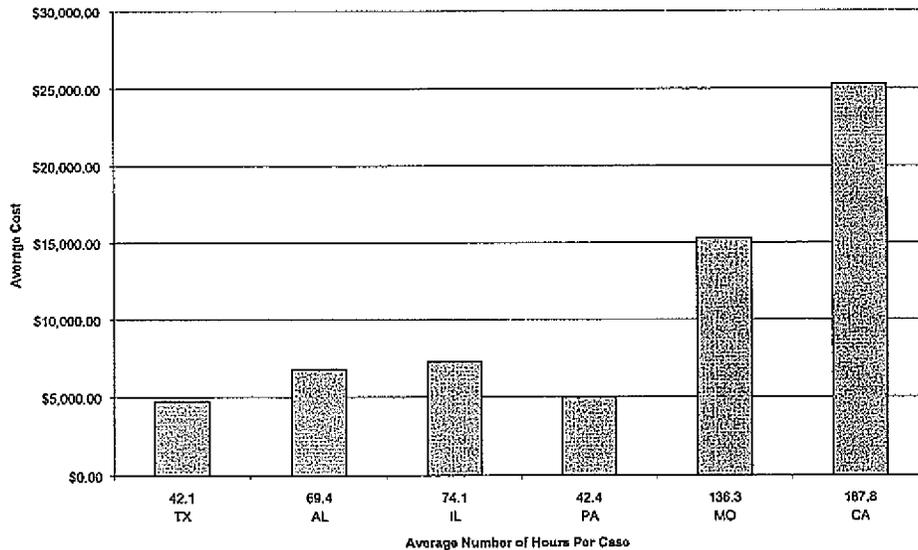


Figure VII-2: Average Cost of Investigators Per Case for Selected States

In addition, the trial records in California are longer than trial records in other states, requiring attorneys to spend substantial time reading and understanding the case's history. As federal capital habeas attorneys read the record, they must not only look for general themes of the case, but they must also decide which specific portions of the record are relevant when writing the federal habeas corpus petition.

The data in the CJA Panel Attorney Payment System database supports the anecdotal evidence provided in the case studies on the amount of time that attorneys spend reviewing the trial records. California attorneys spend an average of 188 hours per case, compared with 136 hours in Missouri. The product of the average number of hours and the average out-of-court rate provides the average cost per case. In California, attorneys spent \$25,300 for reviewing the record, which is

\$10,000 more than Missouri, and \$20,000 more than a typical state like Pennsylvania.



**Figure VII-3: Average Cost Per Case for Selected States
of Reviewing Court Records**

The case studies illustrated one factor possibly limiting costs in Texas and Alabama. This factor is that the attorneys did not bill for all their work because of historically low payments. Judges can also decide how much of a voucher is worthy of reimbursement and can cut what they want. Sometimes an attorney could choose not to bill because of an expectation that a judge will cut his or her voucher. In California, attorneys stated that they are generally paid the full amount of a submitted voucher. One of the California attorneys stated that when the judge tried to cut his vouchers, he argued with the judge and in the end, received the money. Different billing practices in each state, therefore, may partly explain the variations in costs.

VII.2 Evidentiary Hearing Stage

In California, the average cost of the evidentiary hearing stage was almost twice the average cost of the average evidentiary stage in the next most costly case study state. In fact, the average cost of an evidentiary hearing in California, over \$100,000, was greater than the average cost of an entire federal capital habeas corpus case of the other case study states examined. The graph below provides a more detailed comparison.

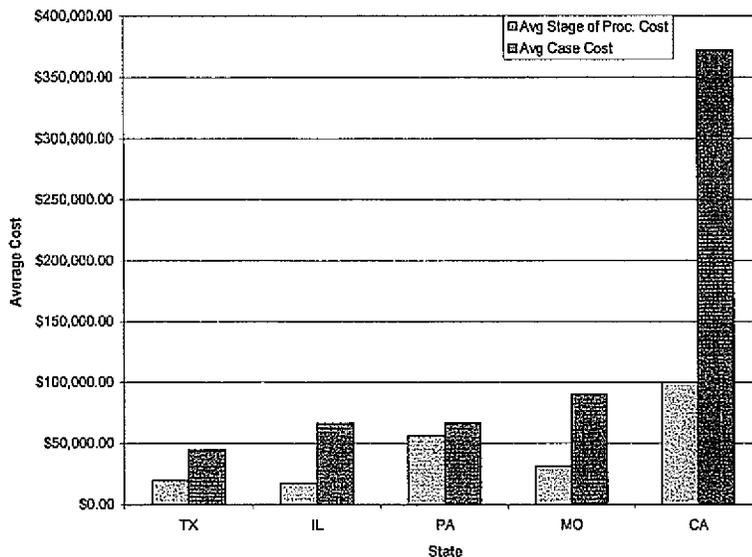


Figure VII-4: Average Cost Per Case of the Evidentiary Hearing Stage for Selected States

Again, the case studies suggested reasons for these differences in costs. A California attorney stated that in California, the State Supreme Court rarely holds evidentiary hearings during state post-conviction proceedings. Holding an evidentiary hearing at the state level may

decrease the need for an evidentiary hearing at the federal level. However, if an evidentiary hearing is not held at the state level, the district court may want the evidence to be presented at the federal level. Special circumstances, such as the discovery of new evidence and so on may create the need for a hearing in both state and federal court. Part of the reason why hearings in the federal level might be more expensive than at the state level is because so much time has elapsed since the state trial. Changes in the law and delays in interviewing witnesses create additional challenges for the federal capital habeas attorney. According to data in the CJA Panel Attorney Payment System database, 42 percent of all California federal capital habeas cases proceeding to the appeals stage had evidentiary hearings.⁴⁶ In all of the other states, only 11 percent of cases had an evidentiary hearing by the appeal stage.

The higher cost of evidentiary hearings can also be attributed to the frequent use of experts in California cases, especially mental health experts (psychiatrists and psychologists). On average, a California case uses 4.3 experts per case, more than three times the number of experts used in Missouri and eight times the number used in Texas or Pennsylvania (no Alabama case billed for expert costs). This translates into an average expenditure of \$39,500 per case in California, while other states averaged less than \$4,000. Thus, the average cost per case of experts in California is at least 10 times higher than in other states.

⁴⁶ The California attorneys interviewed believed that almost all California federal capital habeas corpus cases have an evidentiary hearing at some point—possibly on remand by the Ninth Circuit.

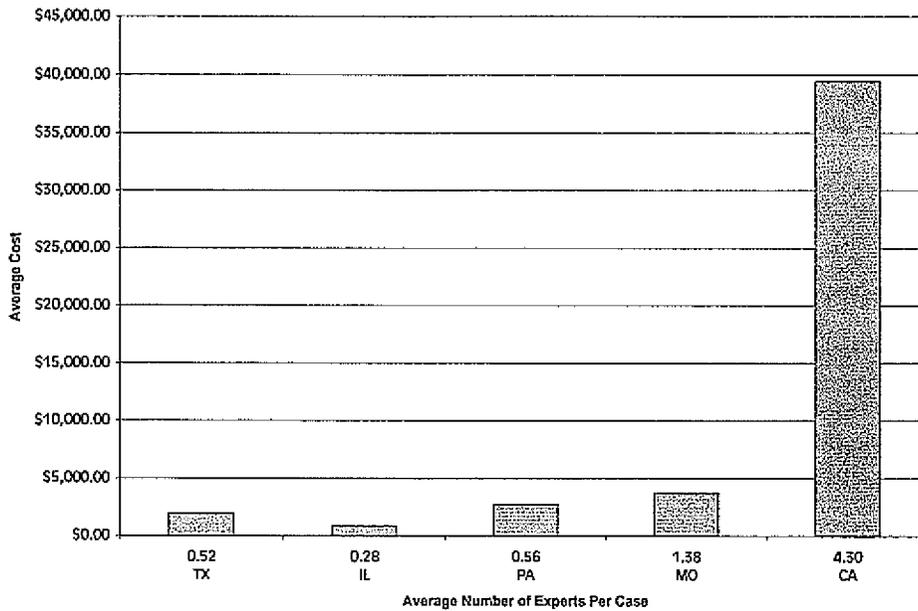


Figure VII-5: Average Cost of Experts Per Case for Selected States

Equally important is the difference between cases in California and other states in the likelihood of using mental health experts. The attorney who provided representation in one California case study considered the cost of the psychologist and psychiatrist very costly. The CJA Panel Attorney Payment System database and the survey data show that this was typical of California cases. California federal capital habeas corpus cases average 1.54 mental health experts per case, seven times the 0.20 average of other states. The average cost of mental health experts per case in California was \$9,000, 10 times the average cost in Pennsylvania, the median state.

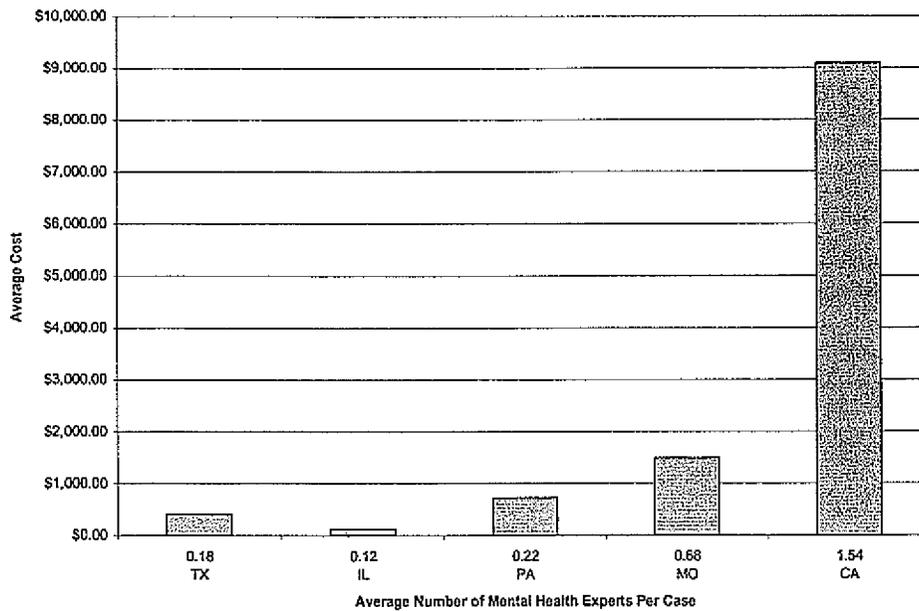


Figure VII-6: Average Cost Per Case of Mental Health Experts for Selected States

In addition to the higher expert costs, California attorneys on average spent more time consulting experts. The average amount of time spent per case in California was 107 hours, which, when multiplied by the average out-of-court attorney rate, translates into \$14,500 per case, \$12,000 more than Missouri. Non-California attorneys in the case studies stated that if they were granted more money for experts, they could greatly improve the strength of their cases.

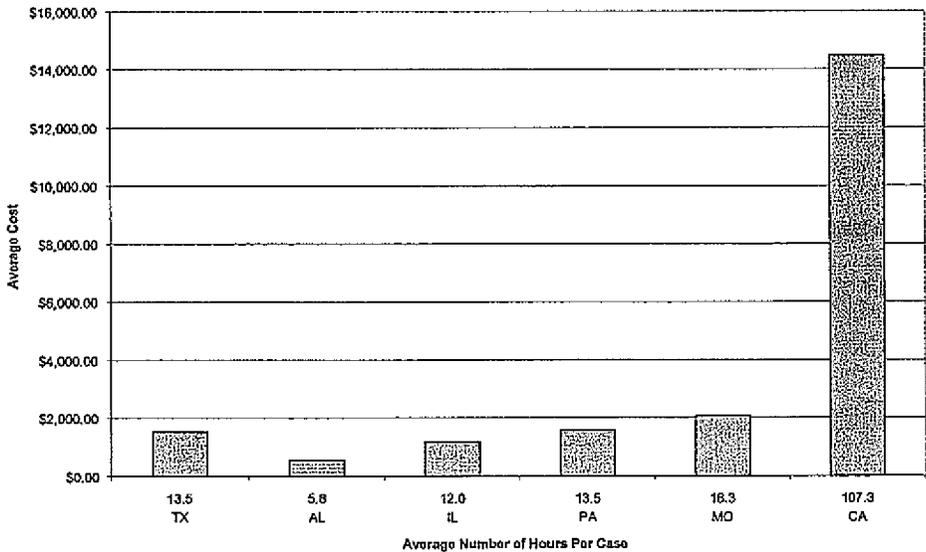


Figure VII-7: Average Cost Per Case of Consulting With Experts for Selected States

VII.3 Appeal Stage

An item of further study was a comparison of the cost of the appeal stage. California had the highest average cost at the appellate stage, but there was no direct correlation between the cost of the appeal stage and the average case cost, since the cost of the appeal stage is typically a smaller component of total case costs than other stages.

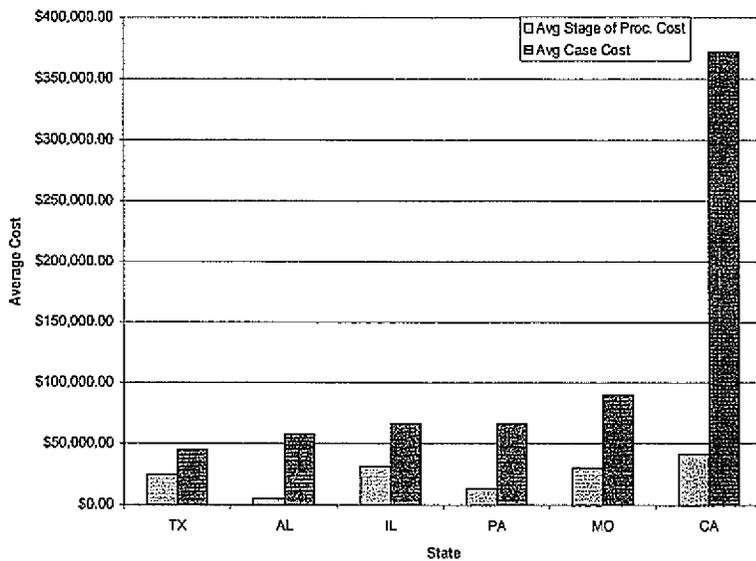


Figure VII-8: Average Cost Per Case of the Appeal Stage for Selected States

In the appeal stage, California cases do not cost much more on average than cases from other states. The average cost of the appeal stage in California was 39 percent higher than in Missouri, the state with the next highest costs. This indicates that most of the higher costs are in other stages and are concentrated in the district courts.

VII.4 All Stages

There are several factors that can drive the costs of a typical federal capital habeas corpus case in more than one stage. Some of these factors are discussed below.

Litigation Strategy of the Attorney General

California attorneys emphasized that the California Attorney General's Office never waives exhaustion requirements and litigates all matters. The California Attorney General's litigation of exhaustion requirements often sends cases back to state court while the federal habeas corpus proceedings are ongoing. Survey responses showed that California cases were more likely to be simultaneously in federal and state court. Eighty-three percent of California cases were in both courts at some point in time, compared with 30 percent of non-California cases. The case studies revealed that in the states of Alabama, Texas, and Pennsylvania (with the exception of Philadelphia), the representation for the state typically waives exhaustion claims and enforces procedural defenses to expedite the entire habeas corpus process. In these places, the state provides compensation for representation in proceedings that return to state court. The attorneys interviewed suggested that the actions of the California Attorney General's Office drive a portion of California federal capital habeas corpus attorney activity, which increases case costs. However, the litigation strategy of each state's attorney general's office cannot be quantified in terms of costs.

Movement of Cases Among the State, District, and Circuit Courts

As well as "bouncing" down from the federal district to the state court, cases can also "bounce" up from the federal district to the federal appellate court. Cases may be remanded to the state court to resolve exhaustion requirements that the Attorney General pursued, or because the district court finds that some issues are underdeveloped. The

Attorney General also often files interlocutory appeals, challenging the California district courts' rulings on procedural matters. The survey data showed that 65 percent of California cases had an interlocutory appeal taken to the Ninth Circuit Court of Appeals, compared with 22 percent of non-California cases. The case studies suggested that this tendency to move back and forth might contribute significantly to the number of hours spent both preparing and filing documents and researching the appropriate court proceedings.

Use of Attorneys from Large Corporate Law Firms⁴⁷

In response to an apparent shortage in the number of available panel attorneys, during the 1990s, judges assigned a number of federal capital habeas corpus cases to attorneys from large, corporate law firms. It is possible that the use of attorneys from such firms increased the total, average, and median costs of California cases during the late 1980s and early 1990s. One possible cause is that the attorneys may have been inexperienced in this type of law, and may have used different billing practices from smaller criminal law firms who typically represent these cases. This factor may not be relevant to costs in recent or future federal capital habeas corpus cases, because large corporate law firms are generally no longer appointed in federal capital habeas corpus cases.

⁴⁷ Note that this section is not a judgment on the competency or efficiency of one set of attorneys as opposed to another. Rather, the point is more intuitive: costs are likely to be lower if the attorney does not need to spend significant amounts of time learning about federal capital and habeas corpus law.

To investigate the possible cost impact of using attorneys from large corporate law firms to provide representation, PwC analyzed the costs of the 36 most expensive cases in California. The average cost of these cases is approximately \$758,000, with costs ranging between \$500,000 and \$2,000,000. These cases represent only 24 percent of all California cases but 44 percent of the total costs in California. As a result, these 36 cases add \$139,771 to the average cost of all the 156 California cases. When the costs of these 36 cases are broken down by type of attorney⁴⁸, compensation is discovered to be \$13,796,719 for the 33 civil attorneys and \$11,531,164 for 47 criminal attorneys. This data indicates that civil attorneys were billing more per case than criminal attorneys. On average, the 33 civil attorneys contributed \$88,441 to the average case cost of \$372,029 for California's 156 cases. Thus, without the vouchers submitted by 33 civil attorneys, the average cost of California cases would have been \$283,588, rather than \$372,029.

This section does not indicate that if the civil attorneys had not provided representation, the average cost would have fallen by \$88,000. Someone still would have been needed to perform the work. The question is whether by criminal attorneys would have performed the same work at lower costs.

There are reasons to believe why this may be the case. Attorneys from civil law firms may have been more costly, because they frequently used several associates on one case, all of whom bill for the hours that

⁴⁸ PwC asked an attorney familiar with California cases to identify which of the 80 attorneys providing representation in these cases were employees of large corporate law firms ("civil" lawyers, or of firms that specialize in criminal cases ("criminal" lawyers).

they expended. These attorneys may have also needed to familiarize themselves with federal capital habeas corpus law, thus incurring costs that would not be charged by experienced capital habeas corpus attorneys.

Billing practices of civil law firms may also differ from those of criminal firms in the area of non-travel expenses, which may include the cost of paralegals, research assistants, and administrative expenses. On average, civil attorneys in the top 36 most expensive cases spent three times more money on non-travel expenses than criminal attorneys. In the 36 most expensive cases, civil attorneys spent an average of \$64,139 on non-travel expenses, while criminal attorneys spent an average of \$22,534. In fact, civil attorneys charged an average of \$24.83 per hour in non-travel expenses, compared to criminal attorneys, who charged an average of \$14.28 per hour in other expenses, which is 43 percent less.

Section VIII: Conclusions

The three kinds of analyses described above are consistent in their portrayal of the costs of federal capital habeas corpus cases and the factors that drive those costs. These analyses also suggest why costs of cases originating in California are much higher than cases that originate in other states. Nevertheless, the issue of why costs are higher in California than in other parts of the country is complex, one that involves the interaction of many social, judicial, behavioral, political and economic factors that create a high-cost environment in that state.

The factors driving the costs of federal capital habeas corpus cases are difficult to determine due to the uniqueness of each case:

- The costs of the federal post-conviction proceedings are determined partly by what happens at the state trial and during the state post-conviction proceedings; analyzing the costs of federal capital habeas corpus cases is relatively similar to examining what drives the cost of inspecting products rolling off the end of a faulty production line.⁴⁹
- The hours spent on an individual case are often determined by several factors specific to the case that make generalizations difficult; specific factors include:
 - The complexity of the petitioner's personal background;

⁴⁹ The analogy is only partly true: the cost to the federal courts also includes tearing the faulty product (that is, case) apart and rebuilding it or debating whether the product and product line is faulty at all.

-
- Actions undertaken by the trial counsel and the state post-conviction counsel;
 - Unusual incidents that happen during the course of the original state trials; and
 - The “novelty” of the constitutional claims being raised.

In spite of these difficulties, PwC was able to reach several conclusions on non-case-specific factors as a result of this study. These conclusions flow from the data analysis, the factor analysis, and the case studies.

VIII.1 The Costs of Capital Federal Habeas Corpus Cases

National Findings

- *Of the 783 federal capital habeas corpus cases examined, 631 were open and 152 were closed. However, 90 percent of the total \$102 million costs of the 783 cases were incurred by open cases and only 10 percent by closed cases.* The proportionately low percentage of costs incurred by closed cases is due to the large number of open and costly cases from California. If California cases are not included in the analysis, the difference between the average cost of open and closed cases disappears.
- *Eighty-six percent of out-of-court hours are spent preparing and writing the habeas petition.* As discussed below, this is most probably due to the amount of investigation and legal research required during this stage.
- *Other costly stages include the evidentiary hearing stage and the appeal stage.* On average, an evidentiary hearing costs \$55,000 for

open cases and \$20,000 for closed cases. An average appeals stage costs \$29,000 for open cases and \$30,000 for closed cases.

- ***In total, the costs of federal capital habeas corpus cases are largely a function of the number of hours spent out of court.*** Approximately 80 percent of the costs of cases are composed of attorney fees for time spent out of court.

Regional Findings

- ***The cost of cases in the Ninth Circuit is approximately four times greater than the cost of cases in all other circuits.*** For both open and closed cases, the average cost per case in the Ninth Circuit is \$289,054, compared to \$62,483 for all other circuits combined.
- ***The high cost of cases in the Ninth Circuit is primarily due to the high costs of California cases.*** The average cost of California cases is more than \$370,000, compared to approximately \$70,000 for non-California cases. The median cost of California cases is \$307,666, and the median cost of non-California cases is \$48,401.
- ***The combined impact of the sheer number (156 cases out of 783) and high average cost of California cases is that cases originating in California have generated more than 57 percent of the total CJA panel attorney payments between FY 1992 and FY 1998.***⁵⁰ The total amount of CJA payments (including expert expenses) was \$102 million between 1992 and 1998. Cases originating in California account for \$58 million of this total. In

⁵⁰ This includes only the payments analyzed in this study. Some vouchers and cases were not included in the analysis for various reasons presented in the methodology section.

other words, 20 percent of the cases have generated 57 percent of the costs.

- ***Attorneys in the Ninth Circuit spent almost three times as much time working out of court as their counterparts in other circuits. In addition, expert costs are, on average, more than three times as much in the Ninth Circuit as in other circuits.*** These differences account for a large part of the cost differences between cases in the Ninth Circuit, compared to cases in other circuits.
- ***California cases cost five times as much as non-California cases (from all circuits).*** There is a gap of approximately \$300,000 between the average cost of a case in California (\$372,029) and the average cost of a non-California case (\$70,360). This difference is made up of:
 - \$170,000 resulting from the additional out-of-court hours worked by attorneys in California;
 - \$60,000 resulting from the higher attorney hourly rates in California;
 - \$35,000 resulting from higher expert costs in California cases;
 - \$31,000 resulting from higher attorney expenses in California cases; and
 - \$4,000 resulting from additional in-court attorney fees in California.

While most of the additional costs in California are due to the additional out-of-court hours, expert costs and attorney expenses in California are many times the equivalent costs of non-California cases (eight times for attorney expenses and 11 times for experts).

- ***Forty-five percent of California attorney out-of-court time is spent conducting legal research and writing.*** Fourteen percent is

spent reviewing documents, 8 percent in reviewing the record, and 6 percent in consulting with experts.

VIII.2 Factor Analysis

Many factors influence the costs of federal capital habeas corpus cases. PwC attempted to identify some of these factors through the use of regression analysis, a type of statistical analysis. Due to the number and complexity of factors that influence case costs and the variation in costs of cases that, on paper, appear similar in terms of case, petitioner, and attorney characteristics, the regression analysis was inconclusive. One reason for this is that many factors that influence case costs were not included in the analysis, either because the factors were too difficult to quantify, or because data describing the factors was not available.

- ***Regression analysis found that two factors—whether investigation for the trial involved travel to other states and continuity of counsel between state and federal post-conviction proceedings—were significant cost drivers.*** However, these two factors were not statistically significant when California cases were excluded from the analysis, most likely because there are one or more other factors affecting costs in California that were not captured in the analysis.
- ***The regression analysis of non-California cases found no factor that was statistically significant (at the 95 percent level of confidence) in driving costs of cases.*** This means that many factors influencing the costs of federal capital habeas corpus cases not easily quantifiable. The regression analysis was unable to

identify any single variable that consistently showed a statistically significant relationship to case costs in different tests. Moreover, the factors in the model for non-California cases only accounted for 14 percent of the costs of cases. The remaining costs were accounted for by factors outside of the model. This suggests that costs are driven by many factors, some of which may be difficult or impossible to quantify.

Although many factors are influencing case costs, attorney survey responses indicated the factors that attorneys believe to be the most important:

- ***The single most important factor driving the costs of federal capital habeas corpus cases is the competency of the state trial counsel.*** Not only is this the view of the attorneys surveyed by PwC, but “ineffective assistance of counsel” (at the state trial) is the most common claim raised in federal capital post-conviction proceedings. Over 80 percent of the attorneys surveyed raised this issue in their petition to the federal courts. The problem stems from the fact that federal habeas corpus review is, in essence, a quality control procedure. Consequently, the costs of this procedure depend heavily on whether mistakes were made earlier on in the process. This, however, does not explain why costs are higher in California compared to elsewhere.
- ***Most attorneys surveyed (70 percent) believe that the attitude of the office of the attorney general for the state increased costs in the federal capital habeas corpus case they represented.*** This finding supports assertions to this effect made by the case study attorneys, notably those from California. Many attorneys noted that the behavior of the state attorneys plays a significant role in

determining the length and hours spent on a case. For example, decisions by the attorney general's office (or the attorney representing the state) to raise, rather than waive, exhaustion, and other defenses will add to the time spent in litigation and will prolong the whole process. As described below, the litigation practices of California's Office of the Attorney General appear to have a major impact on the costs of cases.

VIII.3 Case Study Analysis and Analysis of States in the Ninth Circuit

The case studies were a useful tool in understanding the factors that drive costs of individual federal capital habeas corpus cases. In addition, attorneys reviewed statistical findings to ensure that PwC was drawing appropriate conclusions from the data. Generally, these attorneys were not surprised by the findings and did not challenge them. The attorneys also suggested other factors and explained why they may be difficult to quantify and capture in responses to a questionnaire or in statistical analysis.

These answers, in combination with the data analysis, the regression analysis, attorney opinions, and survey responses, allowed PwC to develop, and to some extent test, various hypotheses as to why costs in California are higher than cases from other parts of the country.

- ***Much time spent by attorneys in California is in response to challenges and decisions made by the state attorneys.*** A strong and common theme from attorneys who practice, or who have practiced, in California is that the attorneys representing the state

are persistent in making legal challenges to the actions of the petitioner's attorneys at every step in the process. Such behavior was not common in other states. For example, the attorneys representing the state of California will consistently maintain that not all of the habeas claims made by the petitioner have been exhausted during the state post-conviction proceedings. Therefore, the case is remanded from federal to state court. According to the seven case study attorneys, state attorneys in other states, such as Texas, often waive this challenge. The Office of the Attorney General seems to play an important role in determining the speed with which a case moves through the federal courts in California and in generating a workload that is unparalleled in other states.

- ***Among the top 36 most costly California cases, civil law firms account for a disproportionate amount of costs.*** The use of attorneys from large corporate law firms as counsel for some of the petitioners possibly increased the total and average costs of cases in California. While the top 36 cases represent only about 24 percent of California cases, they incurred 44 percent of the total costs in California. In fact, the 36 most costly cases added about \$139,771 to the average cost of the 156 California cases. In these 36 cases, 33 "civil attorneys" (attorneys who were employed in a large corporate law firms) provided representation for total fees of just under \$13.8 million. It is likely that many of these civil attorneys were inexperienced in representing habeas corpus and capital cases, and spent many hours learning the notoriously complex case law. Corporate law firms are accustomed to billing for however many attorney hours it takes to research complex legal issues, a different practice from smaller, criminal law firms who have fewer

attorneys' hours to allocate. These 33 civil attorneys also averaged \$64,139 in non-travel expenses, while attorneys who practiced in a criminal practice averaged \$22,534. This also may reflect different billing practices between large, corporate law firms and smaller, criminal law firms.

- ***The federal courts in California will generally allow an evidentiary hearing to be held at some point in the process.*** This is not always true of judges in other federal districts or circuits. Based on attorney survey results, 83 percent of requests for evidentiary hearings in California are granted as opposed to 40 percent of requests for evidentiary hearings in non-California cases. The high cost of evidentiary hearings in California (average \$92,000 per case) contributes to the high total cost of California cases. This begs the question of why evidentiary hearings are typically allowed in California cases. Part of the explanation may be that the state post-conviction procedures in California rarely, if ever, allow for an evidentiary hearing at that stage. This puts pressure on federal judges to grant an evidentiary hearing to account for the lack of one during the state post-conviction proceedings. By contrast, the state post-conviction proceedings in Missouri will often include an evidentiary hearing, lessening the need for one at the federal level. However, according to the case study attorney from Texas, evidentiary hearings are rare in Texas at both the state and the federal level.
- ***Federal judges in California approve vouchers for higher amounts than judges in other states.*** PwC heard several examples where judges in other districts and circuits were surprised at the cost of cases on their docket, while the cost of these cases were

lower than the cost of the average case in California. There is the possibility that approval of vouchers for high-cost cases sets expectations that may guide the attorney in his or her next case. As judges consistently approve vouchers for high-cost cases, attorneys for the petitioner—in their duty to provide adequate representation—request the resources required.

- ***The significant difference between the average costs of experts in California and non-California cases suggests that judges in California approve the use of expert witnesses more often than those in non-California states.*** As stated above, California cases employ more experts and incur more expenses for experts than non-California cases. The difference in the costs of experts may be due to a number of factors: the high cost of living in California, the process for evaluating mental health, and difficulty in finding local experts willing to provide services at the low rates provided by the courts.
- ***The absence of a rigorous state post-conviction process, combined with procedurally conscientious judges in the California district courts and the Ninth Circuit Court of Appeals, create a situation whereby the federal courts pick up costs that state courts would incur otherwise.*** The suggestion from some attorneys is that the combination of a perfunctory state post-conviction process in California with a rigorous federal post-conviction process means that the federal courts are performing tasks, such as holding evidentiary hearings, that would normally be undertaken during state post-conviction proceedings. However, the costs of California cases are so much higher than they are in non-California cases (average difference of approximately \$300,000)

that it does not appear to be the result of a simple cost-shifting (deliberate or not) process.

Further understanding of the explanatory power of each of the above factors would require a more in-depth examination of how California attorneys spend their time and for what reason. This requires going beyond the data provided in the CJA Panel Attorney Payment database, but interviewing or surveying more attorneys with experience of practicing in California and other states to understand more how they spend their time. Given the affect of case-specific factors on costs, even this analysis would not necessarily provide an explanation of the costs of specific cases.

APPENDICES

A, B, & C

**APPENDIX A:
REGRESSION ANALYSIS
METHODOLOGY**

APPENDIX A: Regression Analysis Methodology

Overview of regression analysis¹

Regression analysis is a form of statistical analysis that shows how one variable—called the *dependent variable*—is related to one or more other variables—called *independent variables*. For example, regression analysis might be used to show that the number of votes cast for an incumbent president (the dependent variable) is the result of a number of other factors, such as indicators of the strength of the economy and dollars spent on the campaign (independent variables). Investment banks use regression analysis to try to predict how exchange rates are a function of other economic variables.

To identify such relationships, regression analysis compares a large number of *observations*, or sets of dependent and independent variables, and then computes an equation that links them. Each observation must include one value for each independent variable and one value for the dependent variable. The number of votes cast for President Carter in 1979 and the inflation rate at the time of the election together constitute an example of a single observation for a regression analysis that relates the number of votes for an incumbent president with inflation rates. Generally, the more observations included in the comparison, the greater the confidence in the results.

¹ For a fuller discussion of regression analysis see Mansfield, Edwin, *Statistics for Business and Economics*. 1991. W.W. Norton and Company: New York, pp. 457 to 467.

Regression analysis creates an equation that relates the variables being considered. For a regression analysis that only considers one independent variable, the equation is generally in the form of:

$$Y = a + bX$$

where “Y” represents the dependent variable, “X” represents the independent variable, and “a” and “b” represent constants that relate the independent variable to the dependent variable. For example, a hypothetical study using regression analysis to investigate the relationship between the number of years a person spends in higher education to a person’s salary at the age of 40 might result in an equation:

$$Y = \$20,000 + \$5,000 \times X$$

where “Y” represents the person’s salary at the age of 40, “a” = \$20,000, “b” = \$5,000 and “X” represents the number of years that person spends in higher education. This equation would show that a person with four years of college would, on average, be earning \$40,000 at the age of 40 (\$20,000 + \$5,000 x 4).

Goodness of Fit

Of course, there are many factors besides the number of years spent in higher education that affect a person’s salary. For this reason, the regression equation shows only a *statistical* relationship (the likely

impact of education on salary), not a *deterministic*² relationship (a guaranteed impact of education on salary). In the example above, the equation only represents what happens when all of these other factors that influence a person's salary are held constant (that is, if they gain another year of higher education but there are no other changes that would affect their salary).

In reality these other factors are never constant. Gaining an additional year of higher education may lead to a person's salary increasing more or less than \$5,000, depending on these other factors. Regression analysis includes the calculation of a number, known as " r^2 " (r-squared), that tells the researcher how well the independent variable or variables—and only the independent variables—explain or predict the value of the dependent variable, ignoring the effect of these other variables. The value of the " r^2 " is the percentage of variation in the dependent variable explained by the independent variables and is also known as the "goodness of fit."

In the example above, the value of " r^2 " shows how much of the differences in peoples' salaries are explained by the number of years spent in higher education alone. Suppose the value of " r^2 " is 10 percent. This means that 10 percent of a person's salary is explained by the number of years that person spent in higher education. This also means that 90 percent of a person's salary is explained by other factors. In this case, the 10 percent figure is low (the figure is probably higher in real life). If more independent variables are added (such as

² Mansfield, Edwin. 1991. *Statistics for Business and Economics*. W.W. Norton and Company: New York, p. 460.

IQ scores or scores on tests that measure a person's diligence), then the value of " r^2 " will increase. However, because the world is a very complicated place, with many factors influencing salaries, the value of " r^2 " would never reach 100 percent for this regression analysis.

At the same time, there is no set "acceptable" level of " r^2 " for regression analysis. The acceptable level depends on the specifics and complexity of the analysis being undertaken.

Regression analysis is commonly used in many academic disciplines and in business to try to identify some of the *causes* of a dependent variable (for example, what causes the number of votes cast for an incumbent president, or what causes the unemployment rate).

However, strictly speaking, regression analysis can only show statistical relationships between variables, not *causal* relationships.

For this reason, it is important that a regression analysis be built on a theory as to *why* the variables being analyzed should be related. A theory as to how variables are related should be developed before the regression analysis begins. If the regression analysis shows a statistical relationship consistent with the theory, then causal relationships between the variables being analyzed are inferred, although not proven.

The use of a theory is one way to avoid faulty conclusions. For example, regression analysis potentially could show that the rainfall in the state capital on a given day is statistically related to the unemployment rate in the state. However, without a theory that explains why these should be related—such as why years of higher

education should be related to a person's salary—the analysis is not very meaningful.

Statistical Significance

Even if a theory is supported by the regression analysis, the possibility exists that the statistical relationship shown by the regression analysis happens just by chance. This might be so if the regression analysis is based on only a *sample* of all the total possible observations, which is often the case. For example, no statistician would be able to collect all possible observations of the number of years of higher education and that person's salary at the age of 40, for this would require collecting information on everyone in the U.S. population aged 40 and over.

Researchers typically use a sample instead, and then draw conclusions about the population (that is, all possible observations) based on the results of the sample. The question becomes how does the researcher know that the regression results are not simply the result of a sample that is not representative of the population?

There is one measure calculated by regression analysis typically used to measure the probability that the relationship shown by the regression analysis simply results from choosing a skewed sample. This is called the standard error. The standard error can be used to determine the likelihood that the value of "b" (from the equation above) is greater (or less, if the sign of "b" is negative) than zero, due to choosing a skewed or unrepresentative sample.

Statisticians will adopt an acceptable level of probability, prior to the regression, that the value of “b” is greater (or less) than zero due to an unrepresentative sample. For example, a statistician may create a rule that says any value of “b” where the chance of that value being greater than zero *simply by the selection of an unrepresentative sample* is greater than 95 percent shall be called a statistically significant value. This means that the statistician will accept a value as being statistically significant if the standard error shows that the chances of that value being greater than zero is 95 percent. The statistician can be confident that the probability of the value of “b” being greater than zero is 95 percent (called the level of confidence). As with the acceptable level of “r²” there is no universally accepted level of probability. However, the convention is that the 95 percent level of confidence is used unless there is a reason to adopt a higher (or lower) level of confidence.

Model Building

Once a level of confidence has been adopted, model building for the regression can begin. This involves selecting the most appropriate variables or factors to put into the equation, using an underlying theory (see the preceding discussion). Model building may entail trying out several different variables to see which group of variables provides the best fit, and shows an acceptable level of confidence. However, care must be taken to avoid simply selecting the variables that provide the best fit without developing any underlying theory to explain why those variables are appropriate.

Once the model is built with appropriate variables, various tests can be performed—such as the statistical significance test—to ensure that the methodology and the results are valid. Discussions of these tests can be found in standard statistical textbooks.

**APPENDIX B:
FEDERAL CAPITAL
HABEAS CORPUS SURVEY
FOR PANEL ATTORNEYS**

Federal Capital Habeas Corpus Survey for Panel Attorneys
CONFIDENTIAL INFORMATION

If you are not a panel attorney or have not represented a federal capital habeas corpus petitioner, please contact the Administrative Office of the US Courts representative, Elizabeth A. Brown, at (202) 273-1670 or the PricewaterhouseCoopers representative, Mindy Murch, at (703) 633-4619. Please return the completed survey in the postage paid envelop or fax it to (703) 633-4300 by *Friday, November 13, 1998*.

A. Attorney Background Information

1. Total number of years practicing criminal law:
 - Less than 1 year
 - 1 to 3 years
 - 4 to 7 years
 - 8 to 10 years
 - 11 to 15 years
 - More than 15 years (*specify*) _____

2. Total number of years practicing in federal court:
 - Less than 1 year
 - 1 to 3 years
 - 4 to 7 years
 - 8 to 10 years
 - More than 10 years (*specify*) _____

3. Total number of years representing this petitioner in federal capital habeas corpus proceedings:
 - Less than 1 year
 - 1 to 3 years
 - 4 to 7 years
 - 8 to 10 years
 - More than 10 years (*specify*) _____

4. Have you previously provided representation in: (*Please enter number of cases.*)

Federal capital habeas corpus	_____	Capital trial	_____
Direct appeal of a death sentence	_____	Trial of a non-capital homicide	_____
State capital post-conviction	_____	Trial of a felony	_____
Direct appeal of non-capital homicide	_____	Non-capital federal habeas corpus	_____
Direct appeal of a felony	_____	Other trial	_____

5. Approximate number of hours spent in training programs on federal capital habeas corpus litigation (prior to this case)?
 - 0 to 10 hours
 - 11 to 20 hours
 - 21 to 30 hours
 - 31 to 40 hours
 - More than 40 hours

6. Did the court provide you with access to computer-assisted legal research? Yes No

7. Was co-counsel appointed to this case? Yes No

B. Profile of Petitioner

1. Age of Petitioner at the Time of the Crime:
 - Under 20 years of age
 - Between 20 and 29 years of age
 - Between 30 and 39 years of age
 - Between 40 and 49 years of age
 - 50 years of age or older

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2. Gender of Petitioner: Male Female
3. Race of Petitioner:
 American Indian or Alaska Native Black or African American
 Native Hawaiian or Other Pacific Islander Asian
 White
4. Citizenship of Petitioner: U.S. Other
5. Does petitioner suffer from mental illness, mental retardation, or other infirmity?
 Yes No
- If yes, did the mental illness, mental retardation, or other infirmity make the representation more costly? Yes No
6. Did you require the use of a translator to communicate with the petitioner?
 Yes No
7. Did the petitioner have previous criminal convictions when he was arrested for the crime tried at the state level?
 Yes No
8. Were these convictions in another state?
 Yes No

C. Information on State Court Proceedings

1. Was this a felony-murder case? Yes No
- If yes, what was the underlying felony? (*Please mark all that apply.*)
- Robbery Arson
 Burglary Torture
 Rape Other (*specify*) _____
 Kidnapping

2. Aggravating factors presented by the Prosecution: (*Please mark all that apply.*)

Aggravating Factors	Please mark here
a. Prior criminal conviction(s) If marked, please circle number of crimes 1 2 3 4 5 6 7 8 9 10 or more	<input type="radio"/>
b. Unadjudicated prior bad acts If marked, please circle number of acts 1 2 3 4 5 6 7 8 9 10 or more	<input type="radio"/>
c. Multiple murder	<input type="radio"/>
d. Murder committed during the course of a felony	<input type="radio"/>

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Aggravating Factors	Please mark here
e. Murder was "heinous," "depraved," "cruel," etc.	<input type="radio"/>
f. Murder committed by lying-in-wait	<input type="radio"/>
g. Murder committed for financial gain	<input type="radio"/>
h. Murder for hire	<input type="radio"/>
i. Murder committed to avoid arrest	<input type="radio"/>
j. Torture of victim	<input type="radio"/>
k. Vulnerable victim	<input type="radio"/>
l. Public official victim	<input type="radio"/>
m. Future dangerousness	<input type="radio"/>
n. Defendant's lack of remorse	<input type="radio"/>
o. Defendant's age	<input type="radio"/>

3. Mitigating factors presented by the Defense: *(Please mark all that apply.)*

Mitigating Factors	Please mark here
a. Absence of criminal history	<input type="radio"/>
b. Remorse	<input type="radio"/>
c. Abuse suffered as a child	<input type="radio"/>
d. Youth	<input type="radio"/>
e. Mental retardation	<input type="radio"/>
f. Medical problems	<input type="radio"/>
g. Mental illness or defect	<input type="radio"/>
h. Emotional disturbance	<input type="radio"/>
i. Post-traumatic stress syndrome	<input type="radio"/>
j. Fetal alcohol syndrome	<input type="radio"/>
k. Addiction/substance abuse or intoxication	<input type="radio"/>
l. Adjustment to prison	<input type="radio"/>
m. Cooperation with police/prosecution	<input type="radio"/>
n. Cultural background	<input type="radio"/>
o. Potential for rehabilitation	<input type="radio"/>
p. Disparate sentencing of co-defendants	<input type="radio"/>
q. Lingering doubt of defendant's guilt	<input type="radio"/>
r. Dysfunctional family	<input type="radio"/>
s. Institutional failure	<input type="radio"/>
t. Poverty	<input type="radio"/>
u. Military service	<input type="radio"/>
v. Positive relationship with family and friends	<input type="radio"/>
w. Tolerance of life sentence by family of victim	<input type="radio"/>
x. Other positive acts/attributes of defendant	<input type="radio"/>

Federal Capital Habeas Corpus Survey for Panel Attorneys
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4. How many charges were there in addition to the murder charge?
 0 2 4 6 or more
 1 3 5
5. Number of Co-Defendants:
 1 2 3 4 5 6 or more
6. Number of Murdered Victims:
 1 4 7 10 or more
 2 5 8
 3 6 9
7. Number of Other Victims:
 0 3 6 9
 1 4 7 10 or more
 2 5 8
8. How many months did the trial last? (From appointment of counsel to handing down of sentence.)
 Months _____
9. Did the investigation require travel to other states? Yes No
 If yes, how many states? _____
10. Did the investigation require travel to another country? Yes No
 If yes, how many countries? _____
11. Was a translator used to communicate with the petitioner during the trial?
 Yes No
12. What was the level of media exposure or interest in the case?
 Low Medium High

13. Did the following factors affect the costs associated with the case? If yes, did they increase or decrease costs?

Factors	Yes	No	Increase	Decrease
a. Local community attitudes toward the original crime.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
b. Local community attitudes toward the death penalty.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
c. Attitude of the state judge toward the original crime.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
d. Attitude of the state judge toward the death penalty.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
e. Attitude of the prosecutor's office toward the original crime.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
f. Attitude of the prosecutor's office toward the death penalty.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
g. Experience of the prosecutors assigned to the case.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

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14. Overall, to what extent did the judge deny or reduce defense requests for the following during the state trial?

Requests	Denied	Sharply Reduced	Minimally Reduced	Did Not Reduce	N/A
a. Requests for experts	<input type="radio"/>				
b. Requests for discovery	<input type="radio"/>				
c. Requests for investigation	<input type="radio"/>				
d. Requests for travel	<input type="radio"/>				

D. State Trial Attorneys

1. In your state, are defense attorneys for state capital trials chosen by a set of criteria?

Yes No

If yes, please list the criteria:

- a. _____
- b. _____
- c. _____
- d. _____
- e. _____
- f. _____
- g. _____
- h. _____
- i. _____

2. Had the lead counsel at trial previously represented a client in: *(Please enter number of cases.)*

Direct appeal of a death sentence	_____	State trial of a non-capital homicide	_____
State capital post-conviction	_____	State trial of a felony	_____
Direct appeal of non-capital homicide	_____	Non-capital federal habeas corpus	_____
Direct appeal of a felony	_____	Other trial	_____
State capital trial	_____	Unknown	_____

3. What was the hourly rate of compensation for lead counsel at trial?

- Pro Bono
- Less than \$20
- Between \$20 and \$39
- Between \$40 and \$59
- Between \$60 and \$79
- Between \$80 and \$99
- \$100 or more

4. Did the state trial judge deny or reduce defense requests for attorney fees?

- Denied Sharply Reduced Minimally Reduced Did Not Reduce

5. Did or do you represent the federal capital habeas corpus petitioner in the state trial?

- Yes No

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6. Was co-counsel appointed to this case at the state trial level? Yes No

E. Information on State Post-Conviction Proceedings

1. How many state post-conviction proceedings have there been in this case?
 1 2 3 4 5 or more
2. Where were the state post-conviction proceedings originally filed?
 Trial Court Appellate Court
3. How many months did the state post-conviction proceedings last? (*If more than one proceeding, please provide total months.*) Months _____
4. Was additional investigation undertaken for the state post-conviction proceedings?
 Yes No
5. If yes, did the investigation require travel to other states? Yes No
 How many states? _____
- To other countries? Yes No
 How many countries? _____
6. What was the level of media exposure or interest in the state post-conviction proceedings?
 Low Medium High
7. Did the state provide funding for state post-conviction representation? Yes No
8. To what extent did the judge deny or reduce defense requests for the following during the state post-conviction?

Requests	Denied	Sharply Reduced	Minimally Reduced	Did Not Reduce
a. Requests for experts	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
b. Requests for discovery	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
c. Requests for evidentiary hearings	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
d. Requests for investigations	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
e. Requests for travel	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

F. State Post-Conviction Attorneys

1. Was there continuity of counsel from the state trial to the state post-conviction process?
 Yes No

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2. In your state, are defense attorneys for state post-conviction proceedings chosen by a set of criteria?
 Yes No

If yes, please list the criteria:

- a. _____
- b. _____
- c. _____
- d. _____
- e. _____
- f. _____
- g. _____
- h. _____
- i. _____

3. Had the lead counsel in the state post-conviction proceeding previously represented a client in:
(Please enter number of cases.)

Federal capital habeas corpus	_____	State capital trial	_____
Non-capital federal habeas corpus	_____	State trial of a non-capital homicide	_____
Direct appeal of a death sentence	_____	State trial of a felony	_____
State capital post-conviction	_____	Other trial	_____
Direct appeal of non-capital homicide	_____	Unknown	_____
Direct appeal of a felony	_____		

4. What was the hourly rate of compensation for lead counsel for the state post-conviction proceeding?
 Pro Bono Between \$60 and \$79
 Less than \$20 Between \$80 and \$99
 Between \$20 and \$39 \$100 or more
 Between \$40 and \$59
5. Did the state post-conviction judge deny or reduce defense requests for attorney fees?
 Denied Sharply Reduced Minimally Reduced Did Not Reduce
6. Did or do you represent the federal capital habeas corpus petitioner in the state post-conviction proceedings? Yes No

G. Information on Federal Capital Habeas Corpus Case

1. How many months were there between the entry of the death sentence in state court and the commencement of federal proceedings? Months _____
2. How many months from the conclusion of the first state post-conviction proceeding to the commencement of federal proceedings? Months _____

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3. Was the case ever pending at the federal level while it was simultaneously in state court for exhaustion proceedings?
 Yes No

If yes, for how long? Months _____

4. Number of Habeas claims:
 1 6 to 10 21 to 30 More than 40 (*specify*) _____
 2 to 5 11 to 20 31 to 40

5. Claim(s) on which Habeas was sought (*Please mark all that apply.*):

- | | | | |
|--|-----------------------|-------------------------------|-----------------------|
| Actual innocence | <input type="radio"/> | Ineffective appellate counsel | <input type="radio"/> |
| Ineffective assistance of counsel in guilt phase | <input type="radio"/> | Jury misconduct | <input type="radio"/> |
| Ineffective assistance of counsel at sentencing | <input type="radio"/> | Jury selection | <input type="radio"/> |
| Prosecutorial misconduct | <input type="radio"/> | Other _____ | <input type="radio"/> |
| Newly discovered evidence | <input type="radio"/> | | |

6. What is the current case status ? Open Closed

7. If open, current stage:
 Pre-Petition Pending Hearing or Dispositive Motion
 On Appeal of Grant or Denial of Relief On Certiorari

8. If closed, method of disposition:
 Habeas Granted Habeas Denied Government Dismissed

9. Did the state set an execution date? Yes No

If yes, did the execution date affect the cost of the federal capital habeas corpus process?
 Yes No

10. How many months did it take to complete the stages listed below? (*Please enter number where applicable.*)

Stage	Months	Stage	Months
Habeas petition	_____	Petition for Supreme Court Writ of Certiorari	_____
Evidentiary hearing	_____	Stay of execution	_____
Dispositive motions	_____	Appeal of denial of stay	_____
Appeal	_____	Petition for Writ of Certiorari to Supreme Court regarding denial of stay	_____
Other	_____		

11. How long was the trial record?
 0 to 500 pages 30,001 to 50,000 pages
 501 to 1,000 pages 50,001 to 75,000 pages
 1,001 to 10,000 pages More than 75,000 pages
 10,001 to 30,000 pages

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12. How many pages were the trial counsel files?
 0 to 500 pages 30,001 to 50,000 pages
 501 to 1,000 pages 50,001 to 75,000 pages
 1,001 to 10,000 pages More than 75,000 pages
 10,001 to 30,000 pages
13. How many pages were the appellate counsel files?
 0 to 500 pages 30,001 to 50,000 pages
 501 to 1,000 pages 50,001 to 75,000 pages
 1,001 to 10,000 pages More than 75,000 pages
 10,001 to 30,000 pages
14. Did you request an evidentiary hearing? Yes No
15. Were you granted an evidentiary hearing? Yes No
16. Was the case decided by the grant or denial of a dispositive motion? Yes No
17. Was an interlocutory appeal taken to the Circuit Court of Appeals? Yes No
18. Was the case reversed on appeal? Yes No
- If yes, was the case remanded to the District Court? Yes No
19. What was the level of media exposure or interest in the case?
 Low Medium High

20. What were major contributors to costs? Please rate the following with respect to their effect on total case costs.

	High Contribution	Moderate Contribution	Little Contribution	No Contribution	Not Applicable
a. Complex defendant personal background	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
b. Large number of capital charges or aggravating circumstances	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
c. Competency of state trial counsel	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
d. Competency of state post-conviction counsel	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
e. Incomplete factual development in state court	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
f. Large number of habeas claims	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
g. Number of pages of trial record	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
h. Number of pages of trial counsel files	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
i. Number of pages of appellate counsel files	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
j. Difficulty in locating state records	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

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	High Contribution	Moderate Contribution	Little Contribution	No Contribution	Not Applicable
k. Large number of expert witnesses required	<input type="radio"/>				
l. Geographically dispersed evidence and witnesses	<input type="radio"/>				
m. Number of motions	<input type="radio"/>				
n. Significant legal research to support motions	<input type="radio"/>				
o. Court evidentiary hearings	<input type="radio"/>				
p. Expedited briefing required because of execution date or other limitations	<input type="radio"/>				
q. Need for translators	<input type="radio"/>				
r. Aggressiveness of the Attorney General					
s. Other _____	<input type="radio"/>				

21. Were or are there any state specific statutes or laws which have increased or decreased costs in this case? Yes No

If yes, please list them below:

Increased _____

Decreased _____

22. Were there any state specific clemency laws which have increased or decreased costs in this case?

Yes No

If yes, please list them below:

Increased _____

Decreased _____

Federal Capital Habeas Corpus Survey for Panel Attorneys
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23. Did any of the following factors affect the cost of the federal capital habeas corpus case? If yes, did they increase or decrease costs?

Factors	Yes	No	Increase	Decrease
a. Local community attitudes toward the original crime.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
b. Local community attitudes toward the death penalty.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
c. Attitude of the judge toward the original crime.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
d. Attitude of the judge toward the death penalty.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
e. Attitude of the Office of the Attorney General toward the original crime.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
f. Attitude of the Office of the Attorney General toward the death penalty.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

24. Overall, to what extent did the federal judge deny or reduce defense requests for the following during the federal capital habeas corpus process?

Requests	Denied	Sharply Reduced	Minimally Reduced	Did Not Reduce	N/A
a. Requests for experts	<input type="radio"/>				
b. Requests for evidentiary hearings	<input type="radio"/>				
c. Requests for attorney fees	<input type="radio"/>				

25. Did you employ any of the following techniques as a means of lowering case costs?

- | | | | | |
|--|-----------------------|-----|-----------------------|----|
| Conduct independent or unilateral case budgeting | <input type="radio"/> | Yes | <input type="radio"/> | No |
| Conduct case budgeting with judicial oversight | <input type="radio"/> | Yes | <input type="radio"/> | No |
| Employ paralegals | <input type="radio"/> | Yes | <input type="radio"/> | No |
| Consult with expert counsel | <input type="radio"/> | Yes | <input type="radio"/> | No |
| Other _____ | <input type="radio"/> | Yes | <input type="radio"/> | No |

If you did consult with expert counsel, was counsel associated with:

- The Federal Habeas Assistance and Training Counsel Project
- A Federal Defender Organization
- A State or Local Defender Organization
- Other _____

26. Overall, did you lose money as a result of representing this petitioner?

- Yes No

*Thank you for completing the survey. Please return the completed survey in the postage paid envelop or fax it to (703) 633-4300 by **Friday, November 13, 1998.***

APPENDIX C: CASE STUDY PROFILES

Appendix C: Case Study Profiles

The case study section describes in detail the proceedings of 7 cases from 6 different states: California, Texas, Alabama, Illinois, Pennsylvania, and Missouri. The table below, which summarizes state- and case-specific information, provides two sets of data. The first half of the table details state-specific cost and procedural information. The second half of the table describes case-specific information for each case study conducted.

Table C-1: Breakdown of Costs and Cost Factors by Selected State

A Regional Comparison of Cost Factors
in the States of the Case Profiles¹

State	California	Missouri	Texas	Pennsylvania	Alabama	Illinois
Circuit	Ninth Circuit	Eighth Circuit	Fifth Circuit	Third Circuit	Eleventh Circuit	Seventh Circuit
Average/Median Cost	High	Medium-High	Low	Medium	Medium-Low	Medium
Average Total Case Cost by State	\$324,176	\$74,975	\$35,092	\$66,418	\$57,480	\$67,163
Median Case Cost by State	\$266,105	\$65,959	\$24,289	\$42,464	\$30,401	\$64,459
Average In-Court Attorney Costs	\$ 5,006	\$ 725	\$ 350	\$ 1,339	\$ 257	\$ 1,681
Average Out-of-Court Attorney Costs	\$ 292,815	\$ 90,832	\$ 40,880	\$ 57,096	\$ 53,900	\$ 61,348
Average Expert Costs	\$49,462	\$3,714	\$1,907	\$2,756	--	\$843
Standards of Qualification to Represent Indigent Defendants in a Capital Case	Yes	No	No	No	Yes	No
Number of Capital Offenses Prosecutable by State	First Degree Murder with special circumstances ²	1	8	18	18	15

¹ The above data and information were extracted from the following sources: the CJA Payment System, The Bureau of Justice Statistics, Federal Capital Habeas Corpus Attorney Case Profiles, and an article by Stephen Bright of Emory University Law School and the Southern Center for Human Rights.

² According to the California Attorneys in the Case Profile, there are over 300 offenses that can make a defendant eligible for the death penalty.

Table C-2: Breakdown of Costs and Cost Factors by Profiled Case

Specific Case Profile Comparison ³						
Petitioner Name	Petitioners # 1 & # 2	Petitioner # 3	Petitioner # 4	Petitioner # 5	Petitioner # 6	Petitioner # 7
Total Case Costs	# 1: \$670,782 #2: \$386,306	\$112,822	\$48,777	\$53,180	\$59,267	\$65,654
Total In-Court Attorney Costs	#1: \$30,710 #2: \$10,218	\$250	\$88	\$925	\$450	\$790
Total Out-of-Court Attorney Costs	#1: \$526,343 #2: \$307,459	\$107,291	\$46,813	\$50,550	\$57,825	\$64,761
Total Expert Costs	#1: \$3,468 #2: \$52,168	\$1,690	\$0	\$0	\$0	\$0
Attorney General Litigated Exhaustion Requirement and Waives Procedural Default	# 1: Yes #2: No	No	No	Yes ⁴	No	Yes
District Evidentiary Hearing	Granted (in Both Cases)	Denied	Denied	Denied	Denied	Denied
State Post-Conviction Evidentiary Hearing	No (in Both Cases)	Under Time Limits Only	Sometimes Granted	Usually Granted	Sometimes Granted	Usually Granted
Attorney Utilized Resources Outside of CJA Compensation	Yes (in Both Cases)	Yes	Yes	Yes	Yes	Yes
Court Cut This Attorney's Expenses/ Vouchers	No	Yes	No	No	No	No

Following is a summary of each case and the factors contributing to costs.

³ See Appendix C for the Case Profile Analysis.

⁴ Federal Habeas Attorney # 4 stated that only in Philadelphia are exhaustion requirements waived. Also, Pennsylvania has a unique state criminal prosecution system, guided by local District Attorneys, rather than by a centralized Attorney General's Office.

Case Profile # 1

Table C-3: Profile for Petitioner # 1

Petitioner Name	Petitioner #1
<i>Case Background</i>	
Circuit, State, and District	Ninth Circuit, California, Northern
Number of Original Charges	3
Number of Murdered Victims	2
Crime Description	Double Homicide/Robbery
Case Disposition	Open: Active
Number of Habeas Claims in Petition	11-20
Most Recent Stage of Proceeding	Application to United States Supreme Court for Writ of Certiorari

<i>Amount of Time and Money Spent</i>	
Breakdown of Attorney Hours	Number of Hours
Attorney In-Court Hours	230
Attorney Out-of-Court Hours	4,209
Total Attorney Hours	4,439
Breakdown of Attorney Fees	Amount of Money Spent
Attorney In-Court	\$30,710
Attorney Out-of-Court	\$526,343
Total Attorney Costs	\$557,053
Breakdown of All Fees by Stage	Amount of Money Spent
Habeas Petition	\$281,352
Evidentiary Hearing (District and Circuit)	\$200,694
Dispositive Motion	\$30,622
Appeal	\$149,594
Application to Supreme Court for Certiorari	\$8,520
Total Case Costs	Amount of Money Spent
Attorney, Expert and Expenses in District	\$492,130
Attorney, Expert and Expense in Circuit	\$178,652
Total Case Costs	\$670,782

Background to the Crime

In the early 1980s, Petitioner # 1, a foreign national, moved to California only 18 months before his arrest. Petitioner # 1 was convicted and sentenced to death for a robbery in which two people were killed.

The State Trial

During the state trial, two public defenders represented Petitioner # 1. The public defenders office had two part-time investigators and four experts working on the case. Petitioner # 1 was the only person arrested for the crime, but the circumstances of the offense raised the possibility that someone else may have been involved. However, trial counsel did not pursue an accomplice defense. Rather, even though there was significant forensic proof that Petitioner # 1 was at the scene of the crime, his trial counsel argued that he was not there. The jury rejected Petitioner # 1's alibi defense, and he was convicted of first-degree robbery murder.

During the penalty phase, the prosecution used the fact that Petitioner # 1 had been convicted for a crime in his native land as an aggravating factor. During the penalty phase presentation, the defense neither challenged the validity of the foreign conviction, nor investigated for mitigating evidence in Petitioner # 1's homeland. Even though Petitioner # 1 had only been in the United States for 18 months, defense counsel provided little mitigating evidence beyond witnesses who testified that Petitioner # 1 was a good person and a well-behaved prisoner.

The Direct Appeal

In California, there is an automatic direct appeal to the State Supreme Court in death penalty cases. This case was one of the earliest death penalty appeals heard before the California Supreme Court. In

Petitioner # 1's case, the trial record was approximately 5,500 pages, the average size of a case tried in California at this time. The appeal raised issues regarding tapes of a conversation between Petitioner # 1 and a friend. The California State Supreme Court denied the petitioner's appeal.

State Post-Conviction Proceedings

During state post-conviction proceedings, a large corporate law firm was appointed to represent the petitioner. Counsel was provided \$3,000 in seed money for investigation, but no additional funds were granted. Without holding an evidentiary hearing, the Court issued a summary decision in which it denied some of the habeas claims and simply did not rule on the others. The Court did not detail the reasons for its decision. The case profile attorneys from California stated that in California, the State Supreme Court does not typically provide a written opinion to clarify its position on the issues within a case. Therefore, when the case progresses to federal court, the district judge must first try to discern for himself or herself why the claims were denied at the state level and then must rule on the claims. This creates a longer review process. In contrast, attorneys from other states have stated that the highest court in their state often writes opinions that can easily be reviewed by the district courts.

Proceedings in the Federal District Court

Petitioner # 1's case moved to federal district court in 1988. State post-conviction counsel continued as representation on the case. In his

petition, Petitioner # 1 claimed that had trial counsel investigated in his native country, he not only would have uncovered extensive mitigating evidence, but also that Petitioner # 1's prior criminal conviction was inappropriately used as an aggravating factor. The California Resource Center (CAP) performed most of the investigation for the petition. The district court judge denied Petitioner # 1's entire habeas petition without holding an evidentiary hearing.

In his appeal to the Ninth Circuit Court of Appeals, one issue that demanded a large amount of time and money was the debate over whether the district court should have permitted an evidentiary hearing. In its decision, the Ninth Circuit Court of Appeals determined an evidentiary hearing was required and remanded the case to the district court for a hearing.

The day the case returned to the district court, the judge ordered the evidentiary hearing to be held two weeks later. In preparation for the hearing, Federal Habeas Attorney # 1 traveled to the petitioner's native country (charging his firm, because he was not granted travel expenses by the federal district court judge). There, he interviewed the petitioner's family and reviewed the records relating to Petitioner # 1's prior conviction.

The evidentiary hearing consisted of many exhibits, even though counsel's motion for discovery was granted very late. Because this was one of the first federal capital habeas corpus cases to have an evidentiary hearing in California, a lot of novel issues were raised. About a dozen witnesses were called to the stand, including trial

counsel and some family members. The court approved travel expenses for members of Petitioner # 1's family who were witnesses, leading to costly travel expenses. The examination of trial counsel lasted about 4 days instead of the usual one. In all, the evidentiary hearing lasted 2 weeks. After the evidentiary hearing was complete, Federal Habeas Attorney # 1 filed extensive post-trial briefings and requested further hearings on the ineffective assistance of counsel claim.

Following the passage of the Antiterrorism and Effective Death Penalty Act (AEDPA) in April 1996, there was another round of briefings needed regarding the application of AEDPA to Petitioner # 1's case. In the spring of 1996, Federal Habeas Attorney # 1 discussed the possibility of a settlement with the Attorney General. The Attorney General rejected the proposed settlement. Several months later, the district court entered a decision against the petitioner over the course of a 3-hour telephone conversation with the attorneys.

Proceedings in the Ninth Circuit Court of Appeals

Before the hearing was held, Petitioner # 1's case returned to the Ninth Circuit Court of Appeals twice. According to a California attorney, the Ninth Circuit Court of Appeals differs from other circuits, because it grants the writ of Mandamus in about 80 percent of cases.⁵ The writ of Mandamus effectively overturns the summary judgment and orders the

⁵ PwC was not able to verify or disprove this claim.

district court to rule on specific matters. In this case, the writ stated that:

1. Federal Habeas Attorney # 1 was entitled to expert witnesses; and
2. When the district court judge cross-examined Petitioner # 1 on the witness stand, the petitioner was entitled to a Fifth Amendment defense.

After the district hearing, Federal Habeas Attorney # 6 submitted a 35-volume record of the district court proceedings. At the beginning of 1998, the appeal was denied. Later, the U.S. Supreme Court denied certiorari.

Factors Affecting the Amount of Time and Resources Expended

Petitioner # 1 had three sets of attorneys—one at the trial, one at the direct appeal, and one at the federal habeas stage. When attorneys had to “reinvent the wheel” at each stage, costs inevitably increased. Regardless of costs, the appointment of new counsel is considered appropriate in many cases, especially when ineffective assistance of counsel at the trial or appellate level is one of the habeas corpus claims.

The Attorney General’s strategy may have also driven case costs. Attorneys suggested that in most other states, the Attorney General’s Office wants the courts to decide claims expeditiously so that the death sentence can be implemented. According to the case profile attorneys from California, the California Attorney General’s Office often takes action that prolongs the cases. This includes a refusal to waive

exhaustion requirements, leading to extensive procedural litigation.

The zealous litigation strategy adopted by the Office of the Attorney General may cause the case to travel between district and state courts, creating what has been coined a “bouncing effect.” There is no anecdotal evidence that this occurs in other states.

According to the case profile attorneys from California, one possible reason for the “bouncing effect” may be that a petitioner in federal court has a good chance of victory when the California district court rules on the merits of a case. This may have two consequences:

1. Attorneys representing federal capital habeas corpus petitioners request funds or implement zealous litigation strategies, which does not occur in other states; and
2. The California Attorney General’s Office litigates most procedural issues and thus sidesteps the merits of the case. For example, the Office apparently litigates the applicability of the AEDPA in all 150 federal capital habeas corpus cases, rather than allowing there to be a test case and creating a precedent for all others.

In California, as in several other states, the death penalty can be used as a way to gain political office. The case profile attorneys from California stated that many district attorneys are able to pursue the death penalty in almost every murder case, because the special circumstances of capital murder under California statute are extremely broad. Similarly, the case study attorney from Pennsylvania said that in Philadelphia the district attorney prosecutes the death penalty in almost every murder case in order to gain political recognition.

A further issue in California is the lack of development of cases at the state appellate level. Now, there are 500 people on California's death row (increasing at a rate of about 40 a year). Sometimes, the most basic, such as whether the convicted crime merits the punishment is never confronted in state appellate court, possibly because of the State Supreme Court's attempt to shift costs to the federal level. The case profile attorneys from California claimed that if the state post-conviction process were more rigorous, many cases would be eliminated at the state, rather than at the federal level.

The other integral part omitted from Petitioner # 1's state post-conviction proceedings was an evidentiary hearing. According to the California case profile attorneys, only two California cases have included an evidentiary hearing since the Court's composition changed in early 1989. One possible reason why there may be so few evidentiary hearings is that the California Supreme Court is simply not financially equipped for such a large number of state post-conviction appeals. While California state post-conviction appeals are filed in the State Supreme Court, in many other states they are filed in an intermediate court, which has more time to decide on the procedural and material issues of a case. In these states, some cases may be filtered out during state post-conviction proceedings, thus leading to a relatively lighter workload for both the state supreme court and the federal courts.

In addition to the aforementioned factors, the amount of investigation and the size of the record greatly increased the time spent exploring possible claims as well as conducting legal research. The novelty of

the issues in this case also increased the amount of time spent litigating unique matters not typical in an average case. According to Frank Zimring, professor at the University of California's Boalt Law School, the number of issues litigated per case in California is greater than in other states due to the lack of uniformity in the interpretation of various laws by the district, and even circuit courts.

Case Profile #2

Table C-4 : Profile for Petitioner #2

Petitioner Name	Petitioner #2
<i>Case Background</i>	
Circuit, State, and District	Ninth Circuit, California, Northern
Number of Original Charges	3
Number of Murdered Victims	2
Crime Description	Double Homicide/Robbery
Case Disposition	Closed: Granted Habeas Petition (as to penalty)
Number of Habeas Claims in Petition	11-20
Most Recent Stage of Proceeding	Application to United States Supreme Court for Writ of Certiorari

<i>Amount of Time and Money Spent</i>	
Breakdown of Attorney Hours	Number of Hours
Attorney In-Court Hours	58
Attorney Out-of-Court Hours	2,170
Total Attorney Hours	2,228
Breakdown of Attorney Fees	Amount of Money Spent
Attorney In-Court Cost	\$10,218
Attorney Out-of-Court Cost	\$307,459
Total Attorney Costs	\$317,677
Breakdown of All Fees by Stage	Amount of Money Spent
Unknown Stage	\$335,770
Habeas Petition Stage	--
Evidentiary Hearing Stage (District and Circuit)	--
Dispositive Motion	--
Appeal	\$21,821
Application to Supreme Court for Certiorari	\$28,715
Total Case Costs	Amount of Money Spent
Attorney, Expert and Expense Costs in District	\$255,331
Attorney, Expert and Expense Costs in Circuit	\$130,974
Total Case Costs	\$386,306

The State Trials

Petitioner # 2 was tried in two cases simultaneously, both of which involved double homicides. In the first case, the petitioner was eventually sentenced to Life Without The Possibility Of Parole

(LWOP). In the second case, he was sentenced to death. Although he had no prior criminal convictions, he had led a difficult life. His issues included:

1. Drug and alcohol abuse;
2. Problems holding a steady job;
3. Constant transience; and
4. Psychological problems.

In back-to-back trials, Petitioner # 2 was tried and found guilty of both sets of murders.

The Direct Appeal

In the early 1980s, the California Supreme Court appointed Federal Habeas Attorney # 2 to file the automatic appeal in both of Petitioner # 2's cases. Counsel did not have to file a state habeas petition along with a direct appeal; the documents could be filed sequentially. This changed in 1989, when a California law was enacted that required state habeas corpus proceedings to occur simultaneously with a direct appeal.

In the midst of Petitioner # 2's direct appeal, the makeup of the California Supreme Court changed drastically. A few months later, the newly composed court affirmed one case; the other was reversed and remanded to the trial court. In that case, the trial court resentenced Petitioner # 2 to LWOP.

State Post-Conviction Proceedings

During state post-conviction proceedings of the affirmed case, Federal Habeas Attorney # 2 received no funding for investigation, and Petitioner # 2's appeal was denied without either a hearing or a written opinion. Consequently, Federal Habeas Attorney # 2 applied for certiorari to the U.S. Supreme Court, but as is typical, certiorari was denied.

Federal District Court Proceedings

In the late 1980s, Federal Habeas Attorney # 2 filed a federal capital habeas corpus petition expanding on all the issues laid out in the state petition. The new petition consisted of the same core issues, but was more focused and refined. The case was assigned to a district judge who had not previously presided over a death penalty case. A week after the petition was filed and before the state responded, the judge denied relief in a two-page decision. Federal Habeas Attorney # 2 appealed to the Ninth Circuit Court of Appeals.

The Ninth Circuit found the district court's summary decision deficient and reversed the district court's decision. The Circuit Court of Appeals returned the case to district court and ordered the district court to require a written response from the Attorney General.

Subsequently, the Attorney General filed a response, and Federal Habeas Attorney # 2 filed a written reply, as well as a motion for an evidentiary hearing.

In support of the request for an evidentiary hearing, Federal Habeas Attorney # 2 amassed key information to support a claim of ineffective assistance of counsel, including signed affidavits by trial counsel admitting a failure to accumulate information on the petitioner's childhood, family background, and mental history. Federal Habeas Attorney # 2 billed the court for very little of the investigative costs, as CAP performed most of the work to support the ineffective assistance of counsel claim. The district court eliminated many claims because of an insufficient amount of merit-based evidence and denied the federal habeas petition.

Proceedings in the Ninth Circuit Court of Appeals

The Ninth Circuit Court of Appeals reversed the district court's decision, holding that a hearing was required on the ineffective assistance of counsel claim. In its decision, the Court criticized the Attorney General for not conceding that an evidentiary hearing was required.

The presiding district judge passed away. A newly assigned judge required 6 months before the commencement of briefings to read the court record. After reviewing the record of a 6-day-long evidentiary hearing, the successor judge determined that trial counsel had been ineffective at the penalty phase, but not at the guilt phase. Both Petitioner # 2 and the state appealed. The Circuit denied both appeals, and the case was sent back to the trial court for re-sentencing. The Attorney General appealed to the U.S. Supreme Court, but certiorari

was denied. The trial court eventually re-sentenced Petitioner # 2 to LWOP.

Factors Affecting the Amount of Time and Resources Expended

When attorney fees reached \$60,000 at the district level, the presiding judge tried to stop the attorney from billing more hours. The attorney argued, and the judge eventually conceded, allowing him to continue charging time. In other states, attorneys stated that judges often cut their vouchers without debate.

Federal Habeas Attorney # 2 cut his own time on the vouchers by about 15 percent, but except for a disagreement with one judge, did not have any problems being reimbursed. The attorney stated that vouchers are now scrutinized much more closely. Apparently, legislators exert pressure on judges to reduce costs, and as a result, judges press federal capital habeas attorneys to reduce costs. In this particular case, Federal Habeas # 2 believed that actions taken by the Attorney General did not increase costs except for the postponement of the evidentiary hearings.

The two primary factors driving costs in this case included:

1. Three appeals to the Circuit Court of Appeals; and
2. High expert costs: there was one psychologist and one psychiatrist, both from the East Coast.

The experts were brought in from the East Coast, because apparently, the pool of California experts who work in these types of cases is small. One expert was used for the guilt phase claim and the other for

the sentencing phase claim. Before the hearing, Federal Habeas Attorney # 2 devoted substantial time to reviewing and refining both the two experts' and the two trial lawyers' testimony.

Federal Habeas Attorney # 2 commented that certain factors typical of California affected this case's costs:

1. There was no state evidentiary hearing; as in most California cases, most work was not completed at the state, but at the federal level. Federal hearings are more costly, mainly because they happen at a much later date and are more costly to investigate, because of changes that occur in:
 - The law;
 - The participants; and
 - The case itself;
2. The size of records in all California cases, but especially in this case, was extraordinarily low due to the number of hearings and trials. The evidentiary hearing itself lasted 6 days, requiring about 12 hours of work each day and about 200 hours of preparation;
3. Cost of living expenses are higher in California than in other states, making costs difficult to compare;
4. The State Supreme Court denies state habeas petitions without explaining the reasons for its decisions. This does not happen in any other state. This means that not only are more cases in federal court, but also, the judges in the district courts must spend more time trying to interpret rulings at the state level; and
5. Ineffective state trial counsel was one of the claims.

Federal Habeas Attorney # 2 stated that, in contrast to popular perception, many California judges who grant habeas claims are not

liberal, especially in the Northern and Central districts. Independent of political persuasion, many judges become frustrated when cases reach their chambers that do not appear to warrant a death sentence.

One factor that might have decreased costs in this case is that one attorney continued as counsel from the state post-conviction proceedings to the federal level. Continuity of counsel most likely decreases costs, because the initial research does not need to be repeated, as the attorney probably knows the strengths and weaknesses of the issues as the case progresses.

Case Profile #3

Table C-5: Profile for Petitioner # 3

Petitioner Name	Petitioner #3
<i>Case Background</i>	
Circuit, State, and District	Eighth Circuit, Missouri, West
Number of Original Charges	4
Number of Murdered Victims	2
Crime Description	Double homicide, robbery
Case Disposition	Closed: death sentence re-sentenced to LWOP at trial court
Number of Habeas Claims in Petition	More than 60
Most Recent Stage of Proceeding	Granted Relief by Eighth Circuit Court of Appeal

<i>Amount of Time and Money Spent</i>	
Attorney Hours	Number of Hours
Attorney In-Court Hours	2
Attorney Out-of-Court Hours	603
Total Attorney Hours	605
Breakdown of Attorney Fees	Amount of Money Spent
Attorney In-Court Cost	\$250
Attorney Out-of-Court Cost	\$107,291
Total Attorney Costs	\$107,541
Breakdown of All Fees by Stage	Amount of Money Spent
Unknown Stage	\$80,228
Habeas Petition Stage	--
Evidentiary Hearing Stage (District and Circuit)	--
Dispositive Motion	--
Appeal	\$30,166
Application to Supreme Court for Certiorari	\$2,438
Total Case Costs	Amount of Money Spent
Attorney, Expert and Expense Costs in District	\$80,228
Attorney, Expert and Expense Costs in Circuit	\$32,604
Total Case Costs	\$112,822

Background to the Crime

In the mid-1980s, Petitioner # 3 was incarcerated for a drug-related crime involving two first-degree homicides. The state trial began almost 2 years after Petitioner # 3's arrest but lasted only 4 days. Petitioner # 3's habeas appeal was granted 12 years later, and the

Eighth Circuit Court of Appeals reduced his sentence from death to Life Without Parole.

The State Trial

Even though Petitioner # 3 was charged with a capital crime, the public defender representing him did not prepare the trial as a death penalty case, because the case involved one “bad guy” killing “two other bad guys,” which usually does not warrant a sentence of death. In fact, Petitioner # 3 was provided with an opportunity to plea-bargain his sentence down to a term of 20 years, but instead, decided to let the jury decide his verdict and sentence. As a result, Petitioner # 3 was found guilty of both murders, in addition to a robbery committed that same day.

In preparation for trial, Petitioner # 3 underwent a 30-minute mental health evaluation that included no testing, only interviews by a psychologist. Despite sufficient behavior to suggest that Petitioner # 3 might suffer from bipolar manic depression, trial counsel failed to request additional testing to prepare for the sentencing phase. There was very little mitigation evidence presented, and the jury sentenced Petitioner # 3 to Life Without Parole for one of the murders and to death for the other.

The Direct Appeal and *Batson* Review

In the late 1980s, while Petitioner # 3’s case was on direct appeal to the Missouri Supreme Court, the U.S. Supreme Court decided the case *Batson v. Kentucky*. The decision in *Batson* stated that neither

attorneys nor judges can use an individual's race as a factor to disqualify potential jurors from a trial. Another case further held that *Batson* applied retroactively to all cases occurring before it was decided. In light of this development, the Missouri Supreme Court sent Petitioner # 3's case back to the state trial court for a hearing on whether there was cause to believe that the trial prosecutor violated the rules laid out in the *Batson* decision. However, the judge who presided over the original trial found no *Batson* violations, and the Missouri Supreme Court affirmed Petitioner # 3's conviction and death sentence. The following year, the U.S. Supreme Court denied Petitioner # 3's application for the writ of certiorari.

State Post-Conviction Proceedings

Over a year later, new counsel was appointed for the state post-conviction stage of Petitioner # 3's trial. However, Missouri law provided post-conviction review. Once counsel was provided, the petition had to be filed within 30 days, with only one additional extension allowed for up to 30 days thereafter. Petitioner # 3 had already filed a *pro se* petition, meaning that when counsel was appointed, he was not provided with the full 30 days. Nevertheless, the attorney thought that the court would adhere to its behavior under the old rules (with no time limits on filing amended petitions) and filed six amended petitions with additional claims after the deadline had already passed. The court held an evidentiary hearing on the first claim (the others were defaulted) that lasted 8 days, and post-conviction relief was denied. On appeal, the Missouri Supreme Court affirmed the denial of relief, and the U.S. Supreme Court denied

certiorari review. Seven months later, Petitioner # 3 filed his habeas petition in the federal district court.

Proceedings in the Federal District Court

In federal court, Federal Habeas Attorney # 3 was appointed as counsel. The petition for the writ of habeas corpus included the *Batson* claim as well as claims of prosecutorial misconduct, ineffective assistance of counsel in the guilt and sentencing stages, and other claims of improper jury selection.

The filed petition was approximately 150 pages long, and 6 months later the Attorney General filed a 170-page response. Three months later, Federal Habeas Attorney # 3 submitted a 140-page reply. Almost a year later, the district court issued a short order denying both an evidentiary hearing and relief, but did not directly address the habeas issues. Federal Habeas Attorney # 3 responded with a motion to alter, amend, or reconsider the previous decision, but this motion was denied as well.

Proceedings in the Eighth Circuit Court of Appeals

The case continued to the Eighth Circuit Court of Appeals where Petitioner # 3 and Federal Habeas Attorney # 3 found a more sympathetic panel. The Court of Appeals affirmed the convictions but vacated the death sentence on fact-specific grounds of prosecutorial misconduct and ineffective assistance of counsel. The case returned to state court for re-sentencing where eventually, 14 years after his trial,

Petitioner # 3 was sentenced to LWOP. While Federal Habeas Attorney # 3 successfully presented the case, a district court judge significantly reduced the amount of fees he would reimburse.

Factors Affecting the Amount of Time and Resources Expended

Federal Habeas Attorney # 3 was not assigned to this case until about 7 years after the trial verdict. During that time, only mental health status investigation had been undertaken. Because certain facts were underdeveloped or undeveloped during the trial, many new issues had to be investigated thoroughly for the first time during the habeas stage. In order to know what issues to investigate, Federal Habeas Attorney # 3 devoted substantial time to reading the state trial and post-conviction proceeding records, which described everything that had occurred in the case up to that point.

His investigation work was challenging and costly, because it occurred 8 years after the state trial. It was difficult to find the client's family and friends, as well as employment and other records. Research about the client's bipolar manic depression absorbed much of Federal Habeas Attorney # 3's time, because he had to become well versed in a medical diagnosis with which he was unfamiliar, and also, because it was an issue that had been inadequately pursued at trial.

Federal Habeas Attorney # 3 relied on the Resource Center to assist him, because the case involved a type of law to which he had not been previously exposed. In addition, several cutting-edge issues such as *Batson* and the AEDPA surfaced during state and federal proceedings.

Before this case, a capital habeas corpus appeal would linger for 2 or more years in Missouri Western District Court. This case moved very quickly once it reached the circuit level, partly because of the sympathetic panel. Neither the district court nor the attorney general enforced exhaustion requirements, so Federal Habeas Attorney # 3 was able to submit his claims at the federal level without the state post-conviction court ruling on them.

Federal Habeas Attorney # 3 won the case, but his firm went into significant debt, partly due to the high cost of this case. Federal Habeas Attorney # 3 concluded that he would never take a case with the same presiding district court judge because of the judge's refusal to sign Federal Habeas Attorney # 3's vouchers. According to Federal Habeas Attorney # 3, the subtlest factors affecting costs is attorney expectations on how much money judges will approve and at the same time how much money judges expect federal capital habeas corpus attorneys to request. According to Federal Habeas Attorney # 3, the most obvious factor is the presence of underqualified state trial attorneys who make mistakes that require significant resources to correct later in the process. Both of these factors are difficult to quantify.

Case Profile #4

Table C-6 : Profile for Petitioner # 4

Petitioner Name	Petitioner #4
<i>Case Background</i>	
Circuit, State, and District	Fifth Circuit, Texas, Southern
Number of Original Charges	3
Number of Murdered Victims	2
Crime Description	2 murders, burglary, and rape
Case Disposition	Open: Active
Number of Habeas Claims in Petition	11-20
Most Recent Stage of Proceeding	Petition for Writ of Cert

<i>Amount of Time and Money Spent</i>	
Attorney Hours	Number of Hours
Attorney In-Court Hours	1
Attorney Out-of-Court Hours	375
Total Attorney Hours	376
Breakdown of Attorney Fees	Amount of Money Spent
Attorney In-Court Cost	\$88
Attorney Out-of-Court Cost	\$46,813
Total Attorney Costs	\$46,901
Breakdown of All Fees by Stage	
Unknown Stage	\$13,413
Habeas Petition	\$11,154
Evidentiary Hearing (District and Circuit)	--
Dispositive Motion	\$5,232
Appeal	\$18,978
Application to Supreme Court for Certiorari	--
Total Case Costs	
Attorney, Expert and Expense Costs in District	\$29,799
Attorney, Expert and Expense Costs in Circuit	\$18,978
Total Case Costs	\$48,777

Background to the Crime

In the mid-1980s, Petitioner # 4 was convicted of the burglary, aggravated assault, and murder of two women in a Texas suburb. Petitioner # 4 received a sentence of death for one of the murders and pled guilty to the other, which resulted in a sentence of life.

The State Trial

The defense counsel who represented Petitioner # 4 during the state trial were two former District Attorneys defending their first capital case. A key issue at trial was whether a law enforcement official coerced Petitioner # 4's confession. The trial court allowed the jury to hear the confession, and as a result, the guilt phase of the trial lasted 1 week.

At the sentencing phase, which lasted 1 day, the prosecution introduced several aggravating factors, arising from Petitioner # 4's criminal record and acts of violence in other states. Mitigating evidence included testimony that Petitioner # 4 was a good worker, exhibited a change in behavior when intoxicated, was abused as a child, and had been born into a dysfunctional family. The jury sentenced Petitioner # 4 to death for one murder. He pled guilty to the second murder and received a life sentence.

The Direct Appeal

Petitioner # 4's trial counsel also represented him on direct appeal. The Texas Court of Criminal Appeals (CCA), the state's highest criminal court, affirmed Petitioner # 4's conviction and sentence. The CCA denied counsel's motion for a rehearing. The following winter, the U.S. Supreme Court denied counsel's petition for the writ of certiorari. The CCA set the execution date for 2 months later.

State Post-Conviction Proceedings

Three attorneys, including Federal Habeas Attorney # 4, were all members of the Texas Resource Center. They filed Petitioner # 4's state post-conviction petition in the trial court. Four days before his scheduled execution, Petitioner # 4 was granted a temporary stay of execution. Several months later, the trial court denied the petitioner's habeas claims. The court signed the state's proposed findings of fact and conclusions of law, which recommended a denial of relief without change or revision. According to Federal Habeas Attorney # 4, this case was typical of Texas state post-conviction cases in that the court quickly set an execution date, granted a temporary extension of the execution date, and summarily rejected the petitioner's claims. The CCA adopted the trial court's findings and conclusions and denied relief. A new execution date was set for 6 months later.

A couple of weeks before his scheduled execution, Petitioner # 4 filed a second state post-conviction petition to exhaust all remaining claims. Ten days later and 2 days before his execution, Petitioner # 4's state post-conviction petition was denied. On the day of his scheduled execution, Petitioner # 4 filed a federal habeas petition, and his execution was stayed within 5 hours of the execution.

Federal District Court

In district court, Federal Habeas Attorney # 4 continued as counsel. The district court denied funds to investigate, which, according to Federal Habeas Attorney # 4, is not unusual in Texas. Combined with

the setting of the execution date, this meant that the Texas Resource Center's prior work in state court represented most of the evidence available to petitioner's counsel. Because of time and resource limitations, Federal Habeas Attorney # 4 was unable to perform an exhaustive background investigation in various parts of the country where both the petitioner and his family had previously lived. Purportedly, the denial of investigative funds is not unusual in Texas capital cases. The presiding district judge had granted Federal Habeas Attorney # 4 with up to \$7,500 in investigative funds in other cases, but only under special circumstances.

Despite the time constraints, Federal Habeas Attorney # 4 devoted substantial time to reading the 3,000-page trial record. After filing a 100-page federal capital habeas corpus petition on Petitioner # 4's behalf, Federal Habeas Attorney # 4 filed motions for both discovery and an evidentiary hearing.

Although a Texas district judge granted an oral argument on the discovery motion, Federal Habeas Attorney # 4 considered this unusual. The district court ordered a supplemental briefing on the discovery issue, and the hearing demanded a substantial amount of preparation time. At this point, the Attorney General filed a motion for summary judgment. In response, Federal Habeas Attorney # 4 filed a motion to postpone the decision on summary judgment until after the discovery motion was resolved. However, the district court issued an order denying discovery and granting summary judgement. This was done without an opportunity for Federal Habeas Attorney # 4 to respond to the motion for summary judgment. Although the hearing

on the discovery motion was not typical, according to counsel, the final result was highly typical in that the motion for discovery was denied regardless. After the federal habeas corpus petition was denied, Federal Habeas Attorney # 4 filed lengthy motions requesting the court to reconsider its ruling. These motions took about 160 hours to prepare and write, and were subsequently denied.

Proceedings in the Fifth Circuit Court of Appeals

In the briefing to the Fifth Circuit Court of Appeals, there were two relatively standard suppression of evidence claims asserting that:

- The prosecution did not share evidence regarding a claim of self-defense in an alleged prison assault involving Petitioner # 4; and
- The district court incorrectly denied discovery with regard to the law enforcement official's record of civilian complaints.

The Court of Appeals affirmed the district court's decision, and a petition to the U.S. Supreme Court for the writ of Certiorari was filed earlier this year.

Factors Contributing to Costs

Federal Habeas Attorney # 4 stated that he billed for only 20 percent of what he and his colleagues devoted to this case. All told, his firm was compensated \$70,000. The district judge did not cut his vouchers. In another federal capital habeas corpus case, when Federal Habeas Attorney # 4 presented a \$120,000 voucher to another Texas district judge, the judge responded that he had never received a voucher for

such a large amount of money and proceeded to cut the voucher by about 25 percent.

The Texas Attorney General's Office is known for being experienced and administratively united. The Office apparently reduces costs by frequently using boilerplate language in its briefings and by importing it from one case to another. However, this can mean that arguments are made that are inapplicable or out of context. This can also increase costs for petitioner's counsel, who must respond to all of the Attorney General's arguments.

Federal Habeas Attorney # 4 stated that an underlying factor increasing his case costs was the minimal amount of investigation work conducted by trial counsel. A Texas statute at the time of Petitioner # 4's state trial provided only \$500 for investigations in capital cases. Not only was state trial counsel unable to undertake any meaningful investigation, but counsel also failed to present an aggressive cross-examination of witnesses. As a result of these factors, Federal Habeas Attorney # 4 had to develop or expand on information to which the jury could have been exposed during the original trial. By the time that Federal Habeas Attorney # 4 was appointed to this case, a key witness was in failing health, making it difficult for Federal Habeas Attorney # 4 to question him.

According to Federal Habeas Attorney # 4, other factors that drove down the costs of this case include:

1. The setting of execution dates as a form of docket control. For example, Texas courts often set dates that prevent a sentenced

individual to utilize his or her full year for filing a federal habeas petition (established by the AEDPA);

2. The Attorney General did not litigate most motions, but rather, aimed to proceed in the most expeditious manner possible; and
3. Federal Habeas Attorney # 4's heavy caseload which, when combined with the state's aggressive setting of execution dates, compressed the time he could spend on the case. Federal Habeas Attorney # 4 claimed he often worked long hours for a short period of time to meet execution deadlines.

Federal Habeas Attorney # 4 believes that the lack of continuity of counsel from state to federal post-conviction increases the costs of Texas cases. He also mentioned that at present state post-conviction representation in Texas is limited to \$15,000. Because judges cut his vouchers in previous state post-conviction proceedings, Federal Habeas Attorney # 4 no longer accepts appointment to state post-conviction cases.

A court's denial of a request for investigation will usually decrease costs in the federal capital habeas corpus stage, because it limits potential claims. However, the federal court's denial of investigators may have a reverse effect on costs, because attorneys are more costly to compensate than investigators. On the other hand, if the attorney does perform the investigation, he will either have to work more hours to fulfill other commitments (for example, interviewing witnesses, researching, and so forth), or will have less time to spend on other activities. This is an example of how one factor may have an ambiguous impact on costs.

Case Profile # 5

Table C-7: Profile for Petitioner # 5

Petitioner Name	Petitioner #5
<i>Case Background</i>	
Circuit, State, and District	Third Circuit, Pennsylvania, Eastern
Number of Original Charges	1
Number of Murdered Victims	1
Crime Description	1 murder for hire
Case Disposition	Open: Active
Number of Habeas Claims in Petition	11-20
Most Recent Stage of Proceeding	Application to United States Supreme Court for Certiorari

<i>Amount of Time and Money Spent</i>	
Breakdown of Attorney Hours	Number of Hours
Attorney In-Court Hours	8
Attorney Out-of-Court Hours	538
Total Attorney Hours	546
Breakdown of Attorney Fees	Amount of Money Spent
Attorney In-Court Cost	\$925
Attorney Out-of-Court Cost	\$50,550
Total Attorney Costs	\$51,475
Breakdown of All Fees by Stage	Amount of Money Spent
Habeas Petition	\$20,417
Evidentiary Hearing (District and Circuit)	--
Dispositive Motion	\$13,538
Appeal	\$14,088
Application to Supreme Court for Certiorari	\$5,137
Total Case Costs	
Attorney, Expert and Expense Costs in District	\$13,538
Attorney, Expert and Expense Costs in Circuit	\$39,642
Total Case Costs	\$53,180

Case Background

In the late 1970s, Petitioner # 5 arranged a contract killing. Two co-defendants were charged with capital murder but were tried separately. The petitioner initially concocted a false story, but later confessed to

the police. He then recanted his confession during the trial. Only Petitioner # 5 was sentenced to death.

The State Trial

Petitioner # 5 had privately retained trial counsel. His defense was that his co-defendants blackmailed him, but the men ruthlessly killed the victim even though he paid them the money. The jury did not believe this story and convicted the petitioner of first-degree murder. During the penalty phase, the petitioner's family testified to his good character, but little other evidence was offered in mitigation. Petitioner # 5 was sentenced to death.

The Direct Appeal

On direct appeal, Petitioner # 5 was appointed new counsel, as he could no longer afford private counsel. The state provided minimal compensation for Petitioner # 5's representation and his appeal was denied in 1984, 4 years after the state trial was completed. Apparently, the Pennsylvania Supreme Court often takes a long time to process capital cases.

State Post-Conviction Proceedings

During the first of two state post-conviction proceedings, Petitioner # 5's direct appeal attorney represented him and received expert assistance. After the post-conviction petition was denied, new evidence indicated that Petitioner # 5 was coerced to pay a co-defendant. Thus, the state court ordered a second hearing to consider this new evidence and whether trial counsel performed ineffectively.

The Pennsylvania State Supreme Court rejected these claims, and the case proceeded to the federal district court.

Proceedings in Federal District Court

The district court granted habeas relief, finding ineffective assistance of trial counsel. The District Attorney appealed. The Third Circuit Court of Appeals reversed the district court's decision after it determined that Petitioner # 5 was not prejudiced by counsel's ineffectiveness. The court also decided that the petitioner was not denied due process. However, the court remanded the case to the district court for consideration of the remaining issues.

On remand, the district court denied the remaining claims, and Petitioner # 5 appealed. The Circuit Court of Appeals reversed the district court's decision, holding that the penalty phase jury instructions were unconstitutionally misleading. The District Attorney's application to the U.S. Supreme Court for a writ of certiorari was denied.

Factors Affecting the Amount of Time and Resources Expended

The number of briefings increased costs in this case. However, many of the strongest claims, both the penalty phase jury instruction issue and the ineffective assistance of counsel claim, were presented in state post-conviction proceedings. Thus, the investigation was well developed when the case reached the federal level and did not demand substantial federal compensation for investigation. The research into

the jury instruction claim demanded a lot of time, because it involved a cutting-edge issue.

According to Federal Habeas Attorney # 5, the District Attorney's litigation strategy did not increase costs in this case. Enforcement of the exhaustion requirements is not uniform in Pennsylvania. According to Federal Capital Habeas Attorney #5, the state prosecutor's office is not as centralized as California's Attorney General Office. In Pennsylvania, the county district attorney not only represents the state at trial, but also at the direct appeal and at post-conviction proceedings. Pennsylvania's decentralized district attorney system prevents development of a uniform strategy. Therefore, some cases may have more litigation than others. For example, Federal Habeas Attorney # 5 mentioned that in the state of Pennsylvania, only the District Attorney in Philadelphia routinely refuses to waive exhaustion requirements. As a result, there is not the same backlog of cases that originated in Philadelphia as there is in those cases in the rest of the state. Apparently, Philadelphia also has a resourceful public defenders service, so ineffective assistance of counsel claims do not arise as often in cases from this area.

In addition, Federal Habeas Attorney # 5 said that many cases are currently percolating in the Pennsylvania state post-conviction stage, partly because in Pennsylvania, the governor, not the court, signs death warrants. Prior to 1994, the presiding governor rarely signed death warrants. He would carefully read each case before making a decision and often did not feel that the death penalty was warranted. In addition, the Pennsylvania courts rarely enforced the statute of

limitations for state prisoners. As a result of these two factors, Federal Habeas Attorney # 5 stated that during this time, there was no need to submit an appeal and no time pressure if an appeal was made.

Because the current governor, elected in 1994, has signed many death warrants, the number of cases entering or about to enter the federal system has increased. Currently, there are few cases that have reached the circuit court. As a result, total average costs in Pennsylvania (district and circuit) are relatively low. However, the expectation is that costs might increase as cases begin to reach the later stages of capital litigation.

Case Profile # 6

Table C-8: Profile for Petitioner # 6

Petitioner Name	Petitioner # 6
<i>Case Background</i>	
Circuit, State, and District	Eleventh Circuit, Alabama, Northern
Number of Original Charges	3
Number of Murdered Victims	2
Crime Description	Homicide, arson, and burglary
Case Disposition	Closed: Executed
Number of Habeas Claims in Petition	5
Most Recent Stage of Proceeding	Application to United States Supreme Court for Writ of Certiorari

<i>Amount of Time and Money Spent</i>	
Breakdown of Attorney Hours	Number of Hours
Attorney In-Court Hours	8 (Co-Counsel)
Attorney Out-of-Court Hours	676
Total Attorney Hours	684
Breakdown of Attorney Fees	Amount of Money Spent
Attorney In-Court Cost	\$450
Attorney Out-of-Court Cost	\$57,825
Total Attorney Costs	\$58,275
Breakdown of All Fees by Stage	Amount of Money Spent
Habeas Petition	\$37,290
Evidentiary Hearing (District and Circuit)	----
Dispositive Motion	----
Appeal	\$11,057
Application to Supreme Court for Cert.	\$10,920
Total Case Costs	
Attorney, Expert and Expense Costs in District	\$28,200
Attorney, Expert and Expense Costs in Circuit	\$31,067
Total Case Costs	\$59,267

Background to the Crime

Petitioner # 6 accompanied two men in an armed burglary that resulted in the death of the homeowner. The crime generated much anxiety and sorrow within the local community, particularly because the victim was well respected. The petitioner was arrested and held in jail for

about 3 months before the trial began. During this time, Petitioner # 6 confessed in great detail to the murder. Later, he claimed that he confessed only because he was promised a polygraph test that he believed would exonerate him.

The State Trial

The two attorneys assigned to this case were compensated a total of \$1,000. One of the attorneys had recently graduated from law school, and the other had never provided representation in a capital case. The only alibi evidence presented during the guilt phase was testimony by Petitioner # 6's girlfriend that Petitioner # 6 was with her when the crime allegedly occurred. Although the police had little direct evidence linking Petitioner # 6 to the crime, his confession was the only evidence necessary for Petitioner # 6's conviction.

At the penalty phase, the prosecution presented evidence of Petitioner # 6's long criminal record, including a crime committed in prison while he was on trial in this case. The defense attorneys did not present any evidence in mitigation. In defense of their tactics, they argued that Petitioner # 6 did not want to be saved. According to Federal Habeas Attorney # 6, because they had conducted little investigation about the petitioner's background, they were unaware that the petitioner had earlier undergone a serious brain operation.

According to Alabama statute, the jury merely recommends the appropriate sentence, and the judge decides whether or not to accept it.

In this case, the jury and the judge were in agreement that a death sentence was appropriate.

The Direct Appeal

During the direct appeal, Petitioner # 6's counsel submitted a 4-page brief, citing only the *Miranda v. Arizona* case as precedent to justify his appeal. The attorneys also raised the issue of prosecutorial misconduct but did not base their argument on case law. The Court denied Petitioner # 6's direct appeal.

State Post-Conviction Proceedings

For the state post-conviction proceedings, Petitioner # 6 was appointed new counsel from the Southern Poverty Law Center. The new counsel further investigated the innocence claim. He also established a relationship with the petitioner's family and uncovered evidence of childhood psychological and sexual abuse. A psychiatrist for both the defense and prosecution examined the petitioner. A brain surgeon was also deposed regarding the petitioner's injury. The state judge denied post-conviction relief. During the state post-conviction proceedings, the petitioner went on a hunger strike and underwent a religious conversion. From that point onward, the petitioner attended weekly religious meetings and no longer acted violently towards others.

Proceedings in Federal District Court

Petitioner # 6 was assigned new counsel in federal court, a federal public defender who had never before represented a federal capital

habeas corpus petitioner. Because of the scarcity of attorneys with federal capital habeas corpus experience in several states along the Gulf of Mexico, attorneys from other states are frequently appointed to cases in this area as happened in this case. According to Federal Habeas Attorney # 6, the investigation conducted by the Resource Center was virtually complete by the time he received the records. Another local attorney was appointed as co-counsel, but his duties only involved appearing in court. However, there were no district court hearings, so co-counsel's bills were minimal.

Federal Habeas Attorney # 6 visited Petitioner # 6 in Alabama prison and met with the petitioner's family members. As a result of his religious conversion, Petitioner # 6 became a helpful source of information. In addition, Federal Habeas Attorney # 6 met with the trial lawyers who provided him with the trial record. According to Federal Habeas Attorney # 6, the record of the state post-conviction proceedings was much longer than the trial transcripts, because an investigation and several hearings were conducted during the post-conviction phase.

The district judge denied relief without ordering an evidentiary hearing, relying instead on the state court's findings plus various affidavits submitted by both parties. The court denied two of the claims on the merits and the others were deemed procedurally defaulted. The court may deny a petitioner's habeas corpus claim, either on the grounds that it was unjustified (on the merits), or on the grounds that it did not follow federal guidelines (procedural default).

Proceedings in the Eleventh Circuit Court of Appeals

Federal Habeas Attorney # 6 wrote the brief filed in the Eleventh Circuit Court of Appeals but then withdrew from the case. New counsel continued to investigate the innocence claim and sought clemency from the Governor. The governor seriously considered granting clemency to Petitioner # 6, but clemency was denied. After the Eleventh Circuit denied the appeal, the Supreme Court twice denied certiorari. Petitioner was ultimately executed.

Factors Affecting the Amount of Time and Resources Expended

At the time that Federal Habeas Attorney # 6 was working on the case, the Attorney General had a friendly working relationship with the Resource Center. Before 1995, federal capital habeas attorneys representing Alabama petitioners, including Habeas Attorney # 6, were apparently allowed unrestricted time to research and write a petition. The Attorney General never requested a death warrant in this case. On several occasions, Federal Habeas Attorney # 6 requested extensions of time on procedural deadlines, and they were readily granted. For a similar case in Pittsburgh, where this attorney has also practiced, there was more time pressure. The attorney claimed that strict deadlines can cause an attorney to rush and to waste time on a less important issue. The Alabama district court judge ultimately denied relief but never cut vouchers, nor denied funding.

Originally, Federal Habeas Attorney # 6 planned on representing Petitioner # 6 pro bono. When he was granted local co-counsel,

Federal Habeas Attorney # 6 changed his mind, but still did not bill aggressively, because he was working under salary in the Federal Defenders Office. Consequently, he had no overhead costs to consider and thus, decided to cut some hours out of his vouchers.

According to Federal Habeas Attorney # 6, the following factors reduced costs:

1. The Alabama Attorney General waived exhaustion requirements to expedite the case. As a result, Federal Habeas Attorney # 6's case never reentered state court (no bouncing effect);
2. The Alabama Attorney General requested, and the court granted, procedural default. Depending on the case, procedural default generally can either speed up or slow down the federal habeas corpus process. In some cases, procedural default is argued on every issue and usually denied, thus adding many unnecessary hearings. In other cases, like this one, procedural default is immediately granted on the petitioner's claims and the case is shortened;
3. Federal Habeas Attorney # 6 did not perform any substantial investigation, because the state post-conviction proceedings already had held exhaustive hearings, and the Resource Center completed the other necessary investigation work; and
4. Federal Habeas Attorney # 6 worked in a publicly funded office, where he received a salary and paid no overhead.

Federal Habeas Attorney # 6 also mentioned that there was a lack of issues to raise in this particular case. The innocence claim was difficult to prove, because several key witnesses would not cooperate, and

because direct appeal counsel raised so few issues. The district court decided only two claims on the merits. The rest were procedurally defaulted.

Finally, personal characteristics of the petitioner played a role in reducing costs, as Petitioner # 6 was generally easy to work with at the federal level. Federal Habeas Attorney # 6 received additional pro bono legal assistance from law professors at the Columbia University and New York University Law Schools. This use of an outside resource is an instance whereby the AOUSC did not incur all costs.

Case Profile # 7

Table C-9: Profile for Petitioner # 7

Petitioner Name	Petitioner # 7
<i>Case Background</i>	
Circuit, State, and District	Seventh, Illinois, Northern
Number of Original Charges	8
Number of Murdered Victims	2
Crime Description	Double Homicide, Armed Burglary
Case Disposition	Closed: Executed
Number of Habeas Claims in Petition	10
Most Recent Stage of Proceeding	Application to the United States Supreme Court for Writ of Certiorari

<i>Amount of Time and Money Spent</i>	
Attorney Hours	Number of Hours
Attorney In-Court Hours	10
Attorney Out-of-Court Hours	703
Total Attorney Hours	713
Attorney Fees In-Court/Out-Court	Amount of Money Spent
Attorney In-Court Cost	\$790
Attorney Out-of-Court Cost	\$64,761
Total Attorney Costs	\$65,551
Breakdown of Attorney Fees by Stage	Amount of Money Spent
Habeas Petition	\$25,138
Evidentiary Hearing (District and Circuit)	----
Dispositive Motion	\$3,345
Appeal	\$37,171
Application to Supreme Court for Certiorari	----
Total Case Costs	
Attorney, Expert and Expense Costs in District	\$28,483
Attorney, Expert and Expense Costs in Circuit	\$37,171
Total Case Costs	\$65,654

Background to the Crime

In the early 1980s, Petitioner # 7 was involved in two armed robberies in the Chicago area. During the second robbery, three people were shot; two were killed. Petitioner # 7 was immediately apprehended.

While in police custody, a court reporter transcribed the petitioner's 45-page oral confession.

The State Trial

Petitioner # 7 was represented at trial by two county public defenders who worked in the murder task force division. Because this was an early case, trial counsel was hindered by the lack of an organized manual to assist Illinois defense counsel in determining how to best prepare for both the guilt and penalty phases of a death penalty case. Now, however, there are various texts available to defense attorneys who provide representation in Illinois death penalty cases.

The defense had difficulty mustering a powerful argument with respect to Petitioner # 7's guilt in light of his confession and entered a blind guilty plea on the day the case was set for trial. In other words, the defendant changed his plea from not guilty to guilty without any promise of leniency from the prosecution or from the court. Possibly because this was the presiding judge's first death penalty case, he failed to issue admonishments to the defense when they changed their plea. An admonishment is a judge's warning to the defendant to ensure that he understands that he is voluntarily surrendering the prosecution of the guilt phase, and that all promises made by the court or by the state are on the record. There is no record of such promises.

At the penalty phase, the state presented the petitioner's criminal record, but he had no felonies as an adult and had never served a day in the Illinois Department of Corrections. The state also presented the

gruesome details of the crime with little cross-examination by the defense. Four witnesses testified on the petitioner's behalf. Two were family members and two were former employers. The testimony of the employees was eventually used against in the petitioner as aggravating evidence. There was some evidence of a history of drug abuse, which defense counsel never presented. The defense made a motion to perform a psychological study of the petitioner, but the court denied the motion. The defense also argued that the Illinois capital crime statute was unconstitutional. The public defenders' closing argument was about 10 pages long and counsel simply made a plea for compassion from the judge. The trial record was only 500 pages, most of which included the state's presentation of aggravating factors. Federal Habeas Attorney # 7 noted that the record's length was comparable to that of a simple automobile theft case.

The court sentenced Petitioner # 7 to death. After the death sentence was handed down, defense counsel made a motion to withdraw the guilty plea, but the motion was denied.

The Direct Appeal

In Illinois, capital appeals proceed directly to the Illinois State Supreme Court. The state funded Appellate Defenders Office represented the petitioner on direct appeal. The primary issue was the voluntariness of the guilty plea, because the plea was entered haphazardly. The Supreme Court denied the petitioner's appeal by a single vote of 4 to 3.

State Post-Conviction Proceedings

During the state post-conviction proceedings, the Appellate Defenders Office continued representation and repeated the argument that the guilty plea was entered involuntarily. Neither the State court nor the Attorney General was in any hurry for this case to proceed. As a result, there was an extended period of time to file briefs. A new execution date was set during this delay. Even though the U.S. Supreme Court decided that ineffective assistance of counsel during the state trial is a legitimate state and federal habeas corpus claim, ineffective assistance of trial counsel was never raised, and post-conviction relief was denied without a hearing.

Proceedings in Federal District Court

The Appellate Defenders Service withdrew from the case, because they could not claim their own ineffective assistance of counsel for failing to raise on appeal trial counsel's failure to investigate and present any mitigating evidence. As a result, Federal Habeas Attorney # 7 was appointed to represent Petitioner # 7 in federal court. In addition to the ineffective assistance of state trial and post-conviction counsel claims, Federal Habeas Attorney # 7 also raised issues with respect to the constitutionality of the Illinois death penalty statute.

Much of the early litigation in the district court involved the need for an evidentiary hearing. The district judge eventually postponed the execution date until after the completion of federal proceedings. In the early 1990s, the judge finally issued an opinion stating that the trial

court judge should not have accepted Petitioner # 7's guilty plea without first admonishing him properly. The state could have foregone the appeal and accepted a sentence of LWOP, but instead decided to appeal to the Seventh Circuit Court of Appeals.

Proceedings in the Seventh Circuit Court of Appeals

The Seventh Circuit Court of Appeals reversed the district court's decision. In a motion to reconsider the court's decision, Federal Habeas Attorney # 7 mentioned that the district court overlooked several claims. The motion for reconsideration and a subsequent petition to the U.S. Supreme Court for the writ of certiorari were both denied, but the Circuit Court remanded the case and ordered the district court to decide on all remaining claims.

Thereafter, the district court denied relief on the remaining claims, including the ineffective assistance of counsel claim. Federal Habeas Attorney # 7 appealed to the Seventh Circuit Court of Appeals. The Court denied the second appeal expeditiously, and the U.S. Supreme Court subsequently denied the second petition for the writ of certiorari. At the request of the Attorney General, the district court set an execution date for the end of 1997. Federal Habeas Attorney # 7 filed a state post-conviction petition in the state court. The motion was denied.

Federal Habeas Attorney # 7 returned to the federal district court by filing a new petition arguing that the AEDPA's 1-year statute of limitations did not apply to this case. The district court denied relief,

but did grant a Certificate of Appealability (see Life Cycle section).

The Seventh Circuit Court of Appeals denied the Certificate of Appealability after 3 days of review, and Federal Habeas Attorney # 7 filed an emergency petition in the U.S. Supreme Court. The Supreme Court denied the petition, and on the same day, the governor of Illinois denied a petition for clemency. Petitioner # 7 was executed at 12:01 a.m. the next day.

Factors Affecting the Amount of Time and Resources Expended

The district court never reduced Federal Habeas Attorney # 7's vouchers, but counsel was initially compensated at a rate of only \$75 an hour. The judge's rationale behind this relatively low rate was that this case was relatively straightforward. After the first reversal, the Court of Appeals granted Federal Habeas Attorney # 7 the maximum rate of \$125 an hour.

As with many other cases in this study, Federal Habeas Attorney # 7 had several resources available to him, most notably law school students who provided free legal assistance. The Resource Center conducted the investigation for Federal Habeas Attorney # 7, and he therefore did not bill for any investigation work.

If the presentation of aggravating evidence at the penalty phase had not been included in the trial record, it would have totaled only about 50 pages. As a result, Federal Habeas Attorney # 7 did not need to devote much time to learning the case. The brevity of the record raised other challenges, though, such as the need to investigate and pursue other

possible habeas claims. When this case was delayed, there were changes in the law that required new research. Moreover, every time an issue arose or a court date approached, the attorney had to become reacquainted with the case. In addition, this was Federal Habeas Attorney # 7's first federal capital habeas corpus case, so it took some time before he fully understood this type of law. Overall, the bulk of attorney costs was spent drafting the habeas petition. Part of the costs could be attributed to the ineffective assistance of counsel at the state level, because so many facts were left undeveloped in the state proceedings.

The court appointed one expert, a psychologist and a neurologist who examined Petitioner # 7 at the early stages of the federal proceedings. Because there were no evidentiary hearings or research expenses, the bills were relatively low, considering that Habeas Attorney # 7 was in district court twice and circuit court three times. Still, Federal Habeas Attorney # 7 subsidized this case through earnings from his own privately retained clients.

The Attorney General's office did not substantially drive costs up in this case. The Attorney General raised exhaustion questions and filed a response to everything, whether it was merited or not. Federal Habeas Attorney # 7 attributed this frustrating strategy at least partly to the Attorney General's inexperience with federal capital habeas corpus cases. Federal Habeas Attorney # 7 believes that the Attorney General's strategy has become less frustrating, as they have become more experienced in these cases. On the other hand, according to Federal Capital Habeas Attorney # 7, the Attorney General has adopted

a more aggressive strategy to decrease the current backlog of death penalty cases on appeal in Illinois. Unlike Pennsylvania, both Illinois governors have signed death warrants expeditiously, and partly as a result, more cases have reached the federal stage.

In the past, the state did not track cases, but according to Federal Habeas Attorney # 7, the Illinois Attorney General's Office has become much more centralized. According to Federal Capital Habeas Attorney # 7, the primary issue currently litigated by the Illinois Attorney General's Office is the AEDPA and the application of procedures initially intended to expedite cases. Purportedly, the litigation of procedural issues has delayed or prevented many cases from being argued on their merits, and Federal Habeas Attorney # 7 is not sure whether this piece of legislation will, in the end, reduce costs.

Exhibit 13

California Department of Corrections.
*Condemned Inmates Who Have Died
Since 1978*, March 4, 2014 (available at
[http://www.cdcr.ca.gov/
Capital_Punishment/docs/CONDEMNEDINMATESWHOHAVEDIEDSINCE1978.pdf](http://www.cdcr.ca.gov/Capital_Punishment/docs/CONDEMNEDINMATESWHOHAVEDIEDSINCE1978.pdf))

CONDEMNED INMATES WHO HAVE DIED SINCE 1978

NAME:	DATE DIED:	CAUSE:
1. David Moore	November 29, 1980	Suicide
2. Richard Chase	December 26, 1980	Suicide
3. Ronald Hawkins	January 17, 1983	Suicide
4. George Carpenter	January 30, 1984	Suicide
5. Mose Willis	June 26, 1988	Natural Causes
6. Joselito Cinco	December 26, 1988	Suicide
7. Ronald Fuller	March 24, 1989	Suicide
8. Lewis Crain	November 3, 1989	Natural Causes
9. Joseph Poggi	March 22, 1990	Natural Causes
10. Martin Gonzalez	March 30, 1990	Natural Causes
11. Gary Guzman	February 7, 1991	Natural Causes
12. Donrell Thomas	March 31, 1992	Suicide
13. Robert Alton Harris	April 21, 1992	*Executed*
14. Jay Kaurish	November 6, 1992	Natural Causes
15. David Mason	August 24, 1993	*Executed*
16. Corvin Emdy	September 18, 1993	Suicide
17. Robert McDonald	December 31, 1993	Natural Causes
18. Christopher Day	January 29, 1994	Suicide
19. Roland Comtois	May 6, 1994	Natural Causes
20. Timothy Pride	September 30, 1994	Shot on Exercise Yard
21. Robert Danielson	September 7, 1995	Suicide
22. William Bonin	February 23, 1996	*Executed*
23. Keith Williams	May 3, 1996	*Executed*
24. Jeffrey Kolmetz	August 16, 1996	Natural Causes
25. Jeffrey Wash	September 12, 1996	Suicide
26. Michael Wader	May 11, 1997	Natural Causes
27. Sammy Marshall	June 15, 1997	Heart attack after pepper spray exposure
28. Jimmy Palma	October 13, 1997	Stabbed on exercise yard
29. Thomas Walker	November 18, 1997	Suicide
30. Jessie Ray Moffat	May 2, 1998	Natural Causes
31. Thomas Thompson	July 14, 1998	*Executed*
32. Andrew Robertson	August 22, 1998	Natural Causes
33. William Poynor	October 19, 1998	Natural Causes
34. Jerry Bailey	December 25, 1998	Natural Causes

*California Department of Corrections and Rehabilitation
Office of Public and Employee Communications*

March 4, 2014

35. Kelvin Malone	January 13, 1999	*Executed in MO*
36. Jaturun Siripongs	February 9, 1999	*Executed*
37. Manuel Babbit	May 4, 1999	*Executed*
38. Bronte Wright	February 5, 2000	Natural Causes
39. Darrell Rich	March 15, 2000	*Executed*
40. Robert Lee Massie	March 27, 2001	*Executed*
41. Frank Dean Carter	August 21, 2001	Natural Causes
42. James Warren Bland	August 30, 2001	Natural Causes
43. Theodore F. Frank	September 5, 2001	Natural Causes
44. George Marshall	October 14, 2001	Natural Causes
45. Stephen Anderson	January 29, 2002	*Executed*
46. Stephen DeSantis	March 2, 2002	Natural Causes
47. Gerald Gallego	July 18, 2002	Natural Causes (Died in Nevada)
48. Robert Nicolaus	April 12, 2003	Natural Causes
49. Robert E. Stansbury	December 12, 2003	Natural Causes
50. Raymond Johns	March 28, 2004	Natural Causes
51. Paul Brown	April 10, 2004	Natural Causes
52. Charles Whitt	November 7, 2004	Natural Causes
53. Robert F. Garceau	December 29, 2004	Natural Causes
54. Donald J. Beardslee	January 19, 2005	*Executed*
55. Nicholas Rodriguez	July 10, 2005	Drug Overdose
56. Larry Davis Jr.	September 2, 2005	Acute drug toxicity
57. Caroline Young	September 16, 2005	Natural Causes
58. Drax Quartermain	September 22, 2005	Natural Causes
59. Michael Ihde	October 9, 2005	Natural Causes
60. Donald Miller	October 14, 2005	Natural Causes
61. Stanley Williams	December 13, 2005	*Executed*
62. Stuart Alexander	December 27, 2005	Natural Causes
63. Clarence Ray Allen	January 17, 2006	*Executed*
64. Earl Preston Jones	February 3, 2006	Natural Causes
65. Robert Thompson	October 1, 2006	Natural Causes
66. James Tulk	November 30, 2006	Suicide
67. Alejandro G. Ruiz	January 4, 2007	Natural Causes
68. Marcelino Ramos	January 22, 2007	Natural Causes
69. Raymond Gurule	February 3, 2007	Natural Causes
70. Herb Koontz	May 5, 2007	Natural Causes
71. Tony Lee Reynolds	June 10, 2007	Suicide
72. Billy Ray Hamilton	October 22, 2007	Natural Causes
73. Bill Bradford	March 10, 2008	Natural Causes

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74. Alfredo Padilla	July 25, 2008	Natural Causes
75. Edward Bridges	October 9, 2008	Suicide
76. Terrance C. Page	December 5, 2008	Suicide
77. Isaac Gutierrez, Jr.	December 7, 2008	Natural Causes
78. Thomas Edwards	February 14, 2009	Natural Causes
79. Larry Graham	June 16, 2009	Suicide
80. Lawrence Bergman	June 26, 2009	Natural Causes
81. Michael Mattison	July 17, 2009	Natural Causes
82. Fred Freeman	July 25, 2009	Natural Causes
83. Miguel Martinez	July 26, 2009	Natural Causes
84. Albert Howard	August 13, 2009	Natural Causes
85. David Arisman	September 5, 2009	Natural Causes
86. Cedric Harrison	November 19, 2009	Natural Causes
87. Joseph Musselwhite	February 2, 2010	Natural Causes
88. Robert Rubane Diaz	August 11, 2010	Natural Causes
89. George Hatton Smithey	August 28, 2010	Suicide
90. John Levae Post	December 20, 2010	Other
91. Richard Parson	February 28, 2011	Natural Causes
92. James Glenn VanPelt	March 6, 2011	Natural Causes
93. Brandon Wilson	November 17, 2011	Suicide
94. David Murtishaw	November 22, 2011	Natural Causes
95. Dennis H. Lawley	March 11, 2012	Natural Causes
96. Frank Abilez	April 3, 2012	Natural Causes
97. James Lee Crummel	May 27, 2012	Suicide
98. Kenneth Friedman	August 26, 2012	Suicide
99. James Karis	January 31, 2013	Natural Causes
100. Justin Helzer	April 14, 2013	Suicide
101. Mario Gray	May 4, 2013	Natural Causes
102. Timothy Rodriguez	June 2, 2013	Natural Causes
103. Richard Ramirez	June 7, 2013	Natural Causes
104. Timothy Russell	October 5, 2013	Pending
105. Albert Ruiz	December 29, 2013	Natural Causes
106. Wilbur Lee Jennings	February 11, 2014	Natural Causes
107. Ralph Michael Yeoman	March 4, 2014	Pending

*California Department of Corrections and Rehabilitation
Office of Public and Employee Communications*

March 4, 2014

SUMMARY OF CONDEMNED INMATES WHO HAVE DIED SINCE 1978

Executed in California: 13

Executed in Missouri: 1

Total Executions: 14

Natural Causes: 63

Suicide: 22

Other: 6

Pending: 2

Total Non-Execution Deaths: 93

Total Deaths: 107

Exhibit 14

Howard Mintz, *State U.S. Courts at Odds
on Sentences - Different Standards Lead
to Reversals*, San Jose Mercury News,
April 15, 2002

STATE, U.S. COURTS AT ODDS ON SENTENCES - DIFFERENT STANDARDS LEAD TO REVERSALS

San Jose Mercury News (CA) - Monday, April 15, 2002

Author: HOWARD MINTZ, *Mercury News*

When it comes to death sentences, the California Supreme Court and federal courts seldom agree. The state's highest court upholds them. Federal judges overturn them.

The conflict between these two powerful institutions can be seen in cases like that of James Richard Odle, who was convicted in 1983 of murdering a Contra Costa County woman and then killing a police officer in a shootout.

Odle's guilt has never been in doubt. But last year, a federal appeals court reversed the death sentence based on evidence that had been disregarded by the state courts throughout Odle's 18-year legal odyssey.

Long before the slayings, doctors treating Odle for injuries suffered in a car accident had removed part of his brain. The state Supreme Court, in rejecting his appeals on four occasions, never considered the brain injury relevant to whether Odle was mentally competent to stand trial.

The federal judges not only considered the injury important but also found that the state's failure to evaluate its impact on Odle may entitle him to a new trial.

As Odle's case illustrates, federal judges and the state Supreme Court have developed very different legal standards for evaluating death sentences -- such different standards that nowhere in the country is there a more pronounced divide in the way a state high court and the federal courts administer death-penalty justice.

A comprehensive Mercury News review of death-penalty appeals found 36 cases in which the California Supreme Court noted problems in a trial and decided they were not important enough to reverse a death sentence -- and a federal court later overturned the sentence because of those same problems.

The review found that federal courts, by reversing six out of 10 California death sentences, are overturning a higher percentage of capital cases than those from any other state. But it is the California Supreme Court that has moved further from the national norm in ruling on these life-and-death cases, affirming nine of every 10 it reviews.

Studies show that the California Supreme Court is less likely to overturn a death sentence than just about any of the 38 state high courts that review capital appeals.

"Maybe the reality is that state courts aren't looking at things they should be," said Judge Alex Kozinski of the 9th U.S. Circuit Court of Appeals, a President Reagan appointee who has voted to affirm and reverse death sentences, and who wrote the ruling overturning Odle's sentence.

"I've been amazed and sometimes appalled at some of the things I've seen come out of the state system," he said.

For California, the consequences of this conflict are enormous, with more than 600 inmates on death row waiting for their appeals to make their way through the system.

Legacy of 1986
Death penalty seen
as political must

The review indicates that the federal courts have become a formidable counterweight to the conservative California Supreme Court that grew out of the 1986 election in which voters removed Chief Justice Rose Bird and two liberal colleagues who consistently voted to reverse death sentences.

That is particularly true of the San Francisco-based 9th Circuit, the nation's largest appeals court. The court, which covers California and eight other states, has voted eight times since November to reverse a California death sentence.

California's seven-member high court includes six justices appointed by the tough-on-crime Republican Govs. George Deukmejian and Pete Wilson. And the death penalty remains such a political must in California that Gov. Gray Davis, a Democrat, demands support for it from his judicial nominees, including his recent choice for the Supreme Court, Carlos Moreno.

Even some federal judges who review the California Supreme Court's work wonder whether the ghosts of the 1986 election still haunt the state's justices. Federal judges are appointed for life.

"It may well be they are saying, 'What the hell, the 9th Circuit or the district courts will take care of it if there is a problem,' " said one 9th Circuit judge, insisting on anonymity. "We're free from political pressure."

California Supreme Court Chief Justice Ronald George strongly denied that political considerations have anything to do with the court's record in death-penalty cases. His court takes a hard look at every death sentence, he said.

But George also acknowledged the conflict with his federal counterparts: "It may just be we have different standards on prejudicial error than the federal courts," he said.

"The bulk of the cases in which they granted relief, we recognize some error," he said. "But in the context of evaluating all the evidence and the law, we found" the errors not prejudicial.

Critics speak out
Prosecutors decry
federal reversals

Death-penalty supporters say the problem is with the federal courts, which have been accused of blocking California's death penalty since at least 1992. That year, California executed its first inmate since the reinstatement of capital punishment, Robert Alton Harris, only after the U.S. Supreme Court issued an unprecedented order forbidding any more federal delays.

Supporters say the federal courts are interfering with a death-penalty law that the state's voters strongly support, and that the state Supreme Court affirms most death sentences because California's capital trials are fundamentally fair. Prosecutors such as Gary Yancey, the former Contra Costa County district attorney who tried James Odle, call the federal court reversals "nonsense."

Prosecutors are particularly frustrated because Congress enacted a law in 1996 intended to make it tougher for federal judges to second-guess the state courts in death-penalty cases. The U.S. Supreme Court has adopted a strict reading of the law, but even that hasn't mattered in California cases.

"The U.S. District Courts and the 9th Circuit are vehemently opposed to the death penalty," said Alameda County prosecutor James Anderson, who has sent more murderers to death row than anyone else in California. "We're at their mercy."

To prevail in federal court, the last stop in the appellate process, death row inmates must show that their constitutional rights were violated at trial. And federal judges in California do appear to reverse a higher percentage of death sentences than their counterparts elsewhere.

The Mercury News found that federal judges have overturned 36 of 58 cases in the state -- 62 percent -- since California restored capital punishment in 1978. Nationally, a Columbia University study found that all federal courts reversed about 40 percent of cases from 1973 to 1995. Because of California's long delays, few of its cases had reached the federal level by 1995.

Only the Atlanta-based 11th Circuit, which covers Florida and other states, came close to the 9th Circuit, reversing 50 percent of its death sentences. At the other extreme, the conservative 4th Circuit reversed about 15 percent of death sentences in Virginia, Maryland and the Carolinas.

A league of its own
California reverses
fewest capital cases

The state Supreme Court, however, stands alone at the opposite end: the Mercury News found that since 1997 it has reversed seven of the 67 death sentences for which it has produced full rulings, or 10 percent. By comparison, the Columbia study found that other state high courts reversed about 40 percent.

Even in Texas, which leads the country in executions, state courts reversed 31 percent, triple California's rate.

"The fact there are federal court reversals in California doesn't mean jack because there are no state court reversals," said Maria Stratton, the chief federal public defender in Los Angeles who has supervised dozens of death-penalty appeals.

In fact, there is evidence that the 9th Circuit is more willing to uphold death sentences when state courts are more aggressive in weeding out flaws. Consider the case of Arizona, where the high court reverses two out of every five sentences it reviews, four times California's rate.

When Arizona affirms a death sentence, the 9th Circuit tends to agree, reversing 42 percent of them, in line with the national average. One result is that Arizona has executed 22 people since 1992, compared with 10 in California, even though its death row is one-fifth the size.

A second fact that stands at odds with the critics' portrayal of liberal bias in the 9th Circuit is this: The court has many conservatives among its current and former judges, and the Mercury News review shows that those conservatives have voted dozens of times to overturn death sentences.

While Democratic appointees do vote more often to reverse sentences, Republican appointees voted to reverse in about a third of the cases.

"It's not a secret to anybody that the 9th Circuit views the death penalty different than some other places," said Idaho-based 9th Circuit Judge Stephen Trott, a Reagan appointee who usually votes to affirm death sentences. "But we just call them the way we see them. I think the 9th Circuit as a court attacks these things very objectively."

Faulty defense
Court downplays poor lawyering

The central difference between the California court and the federal courts in capital cases is how they regard trial mistakes. And the review of reversed death sentences shows that the main example of this conflict is how judges view the issue of inadequate legal representation.

Incompetent lawyering -- which can often be the difference between a defendant being sentenced to death and being sentenced to life in prison -- is the biggest reason for reversals in the federal courts.

Federal judges have overturned 19 death sentences because of constitutionally defective representation -- half of all the cases they have reversed.

In the state Supreme Court, by comparison, incompetent representation is the third-most-common reason for reversals. Of the hundreds of cases the state court has heard (most have not yet reached the federal level), it has reversed seven for bad lawyering.

The result can be seen in cases like that of Steven Ainsworth, who was convicted in 1980 of murdering a woman near Sacramento in the Sacramento area. The jury sentenced him to death after his lawyer put on four witnesses in the penalty phase of the trial during a one-hour defense.

The California Supreme Court, without comment, rejected Ainsworth's claims that the verdict was unfair because his lawyer had failed to prepare for the penalty phase.

But federal judges took a different view. In 1999, U.S. District Judge Lawrence Karlton reversed the death sentence, saying Ainsworth's legal defense "amounted to no representation at all." Last fall the 9th Circuit agreed, affirming Karlton's decision.

Twenty-one years after trial, the appeals court concluded that Ainsworth's lawyer "failed to investigate, develop or present the wealth of evidence available."

Caption: Photo, Charts (2)

PHOTO: CALIFORNIA DEPARTMENT OF CORRECTIONS

Although California leads the nation in death row inmates, only 10 people have been executed

since 1978. Most death sentences upheld by the state's high court are ultimately overturned in federal court.

Memo: RELATED STORIES: page 12A

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[STATE, U.S. COURTS AT ODDS ON SENTENCES - DIFFERENT STANDARDS LEAD TO REVERSALS](#)

Exhibit 15
Declaration of Michael Laurence,
June 9, 2014

DECLARATION OF MICHAEL LAURENCE

I, Michael Laurence, declare as follows:

1. I am an attorney at law admitted to practice by the State of California and before this Court. I am the Executive Director of the Habeas Corpus Resource Center (HCRC).

2. On October 20, 2000, the California Supreme Court appointed the HCRC to represent Ernest Jones in habeas corpus proceedings stemming from his convictions and judgment of death. Mr. Jones filed a petition for writ of habeas corpus in the California Supreme Court on October 21, 2002. On April 14, 2009, this Court appointed the HCRC to represent Mr. Jones in his federal habeas corpus proceedings. I was designated lead counsel in both proceedings.

3. In 2008, the Commission on the Fair Administration of Justice recommended a five-fold increase in the HCRC's budget, phased in over a five-year period, to address the severe shortage of counsel willing and able to accept habeas corpus appointments. Since the publication of the Commission's Report, the HCRC has submitted Budget Change Proposals to expand the HCRC's ability to accept appointment in every budget cycle. To date, none of these proposals have been funded.

4. Pursuant to its legislative mandate as a resource center for California capital postconviction attorneys (Cal. Gov't Code § 68661), the HCRC collects and analyzes information concerning the California death penalty process and California Supreme Court's disposition of state habeas petitions. The information contained in this Declaration and the

accompanying Tables/Figures was collected as part of the HCRC's information-gathering function.

5. There are 493 capital inmates in California whose judgment was imposed before June 9, 1994, and 318 whose judgment was imposed before June 9, 1989.

6. At the time that Mr. Jones was appointed habeas corpus counsel in 2000, there were approximately 215 inmates on California's death row without habeas corpus counsel.

7. There currently are 70 condemned prisoners without counsel for the automatic appeal in the California Supreme Court and 352 condemned prisoners who are awaiting appointment of postconviction counsel. Table/Figure 1 attached to this Declaration contains the number of California death row inmates without habeas corpus counsel as of June 30 (the end of the state fiscal year) for the years between 1999 and 2013 and as of June 6, 2014.

8. On average, the 77 inmates whose direct appeals are concluded and who lack habeas corpus counsel have waited 15.81 years after their sentencing; 160 inmates have been without a habeas corpus attorney for more than ten years, and one lacks counsel despite being sentenced in 1992.

9. Between January 1, 2009 and December 31, 2013, the state has averaged 22 death judgments per year, while over the same time period, there has been an average of 10 annual appointments to represent death-row inmates in their habeas corpus proceedings.

10. Since 2003, of the 192 cases in which habeas corpus petitions have been filed, 40 capital habeas corpus petitioners lost their initially appointed private counsel and required replacement counsel – a replacement rate of 21 percent.

11. Since 2006, the HCRC has accepted approximately forty percent of the capital habeas appointments made by the California Supreme Court, and in the past five years has filed approximately forty percent of the first habeas corpus petitions.

12. For first state habeas corpus petitions filed in 2004 in capital cases, the respondent took an average of .53 years to file the informal response and petitioners took an average of .69 years to file the reply. Following the submission of the informal briefing in these cases, the California Supreme Court took an average of 3.78 years to issue an order denying the petition. In one case, *In re Kenneth Gay*, Case No. S130263, the California Supreme Court issued an order to show cause, and the case is still pending.

13. The California Supreme Court currently has 176 pending capital habeas cases. This number excludes initial petitions that the California Supreme Court permits to be filed to toll the federal statute of limitation period while the court locates counsel willing to accept an appointment, counsel files an amended petition within the court's timeliness policies, and the court resolves the amended petition in accordance with *In re Morgan*, 50 Cal. 4th 932, 237 P.3d 993 (2010). The average pending time of these 176 cases is 4.07 years. Of the 176 cases, 107 have been fully briefed awaiting decision for an average of 4.16 years (or 50 months) since the reply to the informal response was filed.

Table/Figure 2 attached to this Declaration depicts the length of time that the fully briefed case have been pending.

14. For the 68 first capital habeas corpus petitions that the California Supreme Court has resolved from 2008 through the filing of this Brief, the average time between the completion of briefing and the California Supreme Court's decision is 3.98 years, or 47.8 months.

15. For those capital habeas corpus proceedings in which the California Supreme Court has issued a final decision between 2008 and the filing of this Declaration, the average time between sentencing and the final decision was 17.2 years.

16. Since 1978, condemned inmates have filed 267 exhaustion petitions in the California Supreme Court, and the average time that the inmate remains in state court following the filing of the exhaustion is 3.19 years.

17. Since 1978, the court has resolved the merits of 729 of the 1003 habeas corpus petitions filed by condemned inmates. Of the 729 cases, the court has issued orders to show cause in 99 cases (13.6%), and ordered evidentiary hearings in 45 cases (6.2%). Of these cases, the California Supreme Court has granted some form of relief in capital habeas corpus proceedings only eighteen times or in 2.5% of the cases it has resolved.

18. Using figures publicly available from the California Department of Justice and the California Department of Corrections and Rehabilitation, I calculated the average suicide rate on California's death row between 1980 and 2010 to be 299.5 per 100,000. In comparison, the

average suicide rate in the general population of California and in the United States in the same time period were 11.6 per 100,000, and 11.7 per 100,000, respectively. Table/Figure 3 attached to this Declaration compares the average suicide rates for California death row inmates to other relevant populations.

19. To conduct an initial assessment of the length of time it takes the state court to resolve non-capital habeas corpus petitions, my staff searched for federal recommendations, orders, and opinions resolving federal habeas corpus petitions filed under 28 U.S.C. section 2254 that included the date a state petitioner was sentenced and the date the state court completed review of his or her state habeas corpus claims. The time from sentencing to completion of state habeas corpus review in number of months and averaged the time across the cases that comprise the sample. The search was to homicide and attempted homicide cases and primarily searched for cases that subsequently obtained relief in federal court, though three cases in which the federal habeas corpus petition was denied were included. There was not a significant difference in the length of the state court process for non-capital petitions based on whether or not they received relief in federal court.

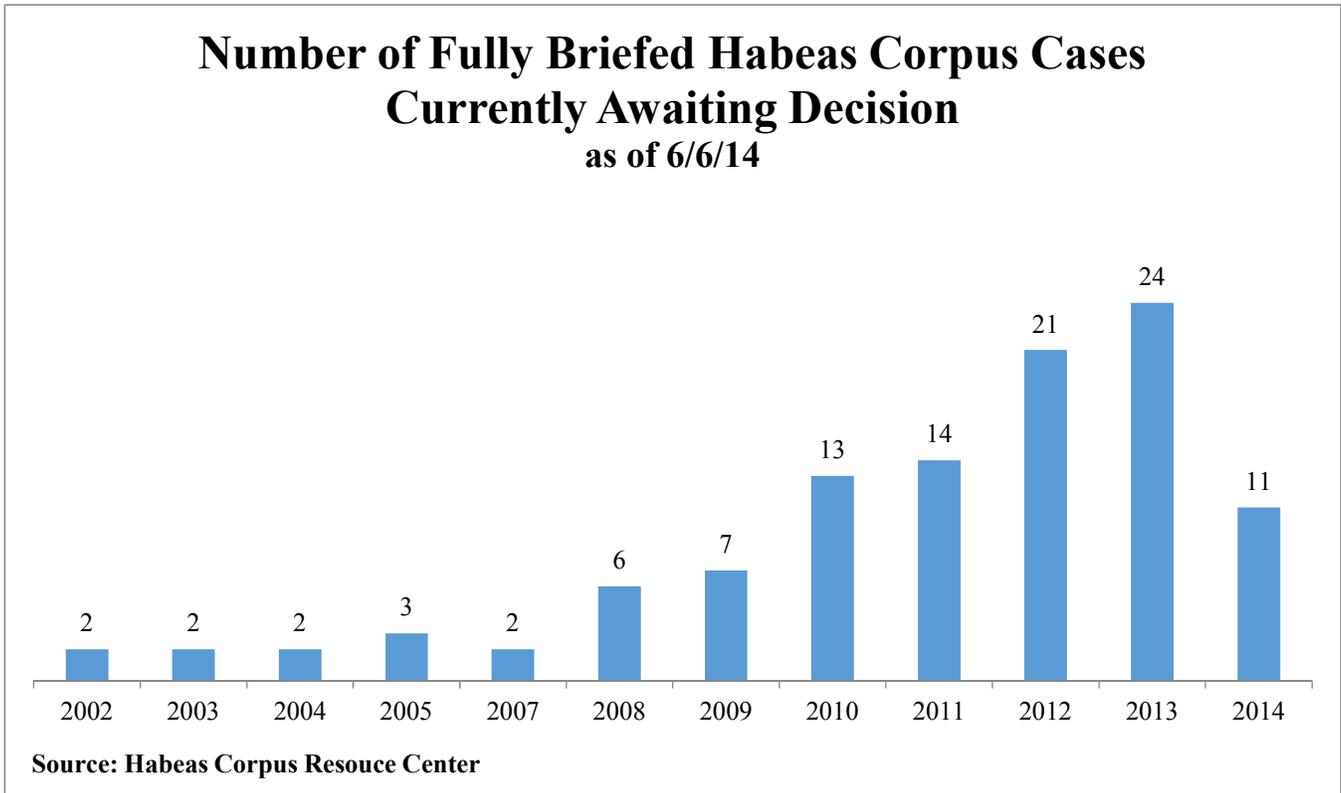
The foregoing is true and correct and executed under penalty of perjury under the laws of the United States and the State of California on June 9, 2014.

/s/ Michael Laurence
Michael Laurence

TABLE/FIGURE 1

Fiscal year end	Number of inmates needing habeas counsel
6/30/1999	160
6/30/2000	215
6/30/2001	220
6/30/2002	260
6/30/2003	248
6/30/2004	263
6/30/2005	266
6/30/2006	271
6/30/2007	279
6/30/2008	284
6/30/2009	303
6/30/2010	315
6/30/2011	324
6/30/2012	332
6/30/2013	341
6/06/2014	352
Source: California Supreme Court Automatic Appeals Monitor and Habeas Corpus Resource Center	

TABLE/FIGURE 2



TABLE/FIGURE 3

