

DEATH PENALTY COSTS

A Report Prepared for the
Legislative Finance Committee

By
Greg DeWitt

February 6, 2012

Legislative Fiscal Division



www.leg.mt.gov/css/fiscal

DEATH PENALTY COSTS

INTRODUCTION

The purpose of this study was to examine whether the difference in costs when the death penalty is sought is significantly greater than when it is not sought. After hearing about what information is available specific to Montana and findings from studies in other states, the Legislative Finance Committee directed staff to:

- Evaluate the work done by the Montana American Civil Liberties Union (ACLU) and identify if it could be used and, if so, what would be needed to use it to come to a reasonable cost comparison for Montana
- Determine the validity from studies already done in other states to Montana
- Identify options to collect data for a future study in Montana

EVALUATE MONTANA ACLU WORK

The Montana ACLU had previously testified before the legislature that they attempted to study the costs of Montana death penalty cases but was not able to complete their study due to lack of cost information from some key stakeholders. In the early phases of this death penalty cost study, plans were to use the study the ACLU began to determine:

- What information the ACLU looked at
- What information the ACLU was not able to obtain
- How the legislature could become involved to fill the gaps of the unattainable information
- What of the information could be used to do a cost comparison

No information was received from the ACLU regarding their study. As such, no further efforts were taken to evaluate this study.

STUDIES IN OTHER STATES

At its December 2011 meeting the Legislative Finance Committee directed staff to determine the validity to Montana from studies already done in other states. While researching death penalty cost studies summarized at the December meeting an additional study, conducted by Kansas, was identified that:

- References studies done in other states that were reported in December
- Is relatively current
- Evaluates crimes that are similar to those crimes that are death penalty qualified in Montana
- Addresses aggravating and mitigating factors similar to those in Montana
- Compares costs for death penalty sentencing and the alternative of life in prison
- Was impartial due to being completed by the legislative staff of another state under a performance audit methodology

The committee may wish to concentrate on the results of the Kansas study due to its similarity to Montana. The following summarizes key points and includes the relative costs depending on whether the death penalty is sought and/or given.

Kansas Study

The performance audit of costs incurred for death penalty cases in Kansas was completed by the Kansas Division of Legislative Post Audit¹¹. When undertaking the audit of death penalty costs in Kansas, similar issues of data availability were identified that face Montana. Instead of using actual per case cost data, Kansas used estimates. Estimates were derived from interviews with stakeholders involved with death penalty qualified cases.

¹¹ “Costs Incurred for Death Penalty Cases: A K-GOAL Audit of the Department of Corrections”, State of Kansas Legislative Division of Post Audit, December 2003. (K-GOAL stands for Kansas Government Operations Accountability Law)

The Kansas study included a sampling of 22 cases of each of the following types:

- The death penalty was sought and given (seven cases)
- The death penalty was sought but not given (seven cases)
- The death penalty was not sought (eight cases)

It is important to note that the estimates made in the Kansas report have numerous limitations, such as:

- The judges, attorneys, court staff, and law enforcement officers interviewed don't keep per-case time records so the estimates were based on their memories and are an estimate
- Data from other states were used to estimate the number and costs of future appeals since most Kansas death penalty cases were in the early stages of the appeal cycle
- Like Montana, the number of death penalty cases in Kansas is small and costly or low cost cases could significantly skew the average, so reported cost information was based on the median for each group of cases
- No estimates were provided by the Kansas Supreme Court due to concerns about intruding on the justices' decision-making process, so estimates were based on data found in the Duke University study of North Carolina²

Entity Responsible for Costs

Costs for defending death penalty cases in Kansas are borne by the statewide office responsible for indigent defense. This is similar to Montana, where the defense costs are typically the responsibility of the Office of Public Defender. Kansas is also similar to Montana for the prosecution. The original prosecution costs are the responsibility of either the counties or the state, depending on who assumes the responsibility for the case or if the local prosecutor lacks the staff with expertise to prosecute a death penalty case. When the office under the state's attorney general assumes the prosecution, the state pays the costs.

Cost Comparisons

The Kansas report groups costs into the following categories and breaks out the costs of each of the groups by the government level responsible for funding the costs:

- Investigation
- Prosecution
- Defense
- District Court
- Appeal Related
- Incarceration/Execution

Figure 1 shows how the costs compare between these categories for the three types of cases. The costs are broken out separately for local government and state government. The Kansas report breaks out the costs for district court between local government and state responsibility, but since Montana has assumed the district court costs as a state responsibility Figure 1 combines district court costs as a state responsibility.

The Kansas report found the following total costs for each type of case:

- Death penalty given, \$10.6 million
- Death penalty sought but a lesser sentence given, \$6.4 million
- Death penalty not sought, \$6.3 million

For comparison purposes and because the Kansas study was published in 2003, Figure 1 shows the relative magnitude of the categories and not the costs of the categories. For cases where the death penalty was given, the relative costs of appeals significantly outweigh the costs of appeals for the other two types of cases. When a death penalty is given, the costs of defense are nearly double those for when the death penalty is first sought but

² "The Costs of Processing Murder Cases in North Carolina", Terry Sanford Institute of Public Policy, Duke University, Philip J. Cook, Ph. D., Donna B. Slawson, M.A. J.D., with assistance of Lori A. Gries B.B.A., May 1993.

ultimately reduced to an alternative sentence. Defense costs are significantly lower when the death penalty is not sought.

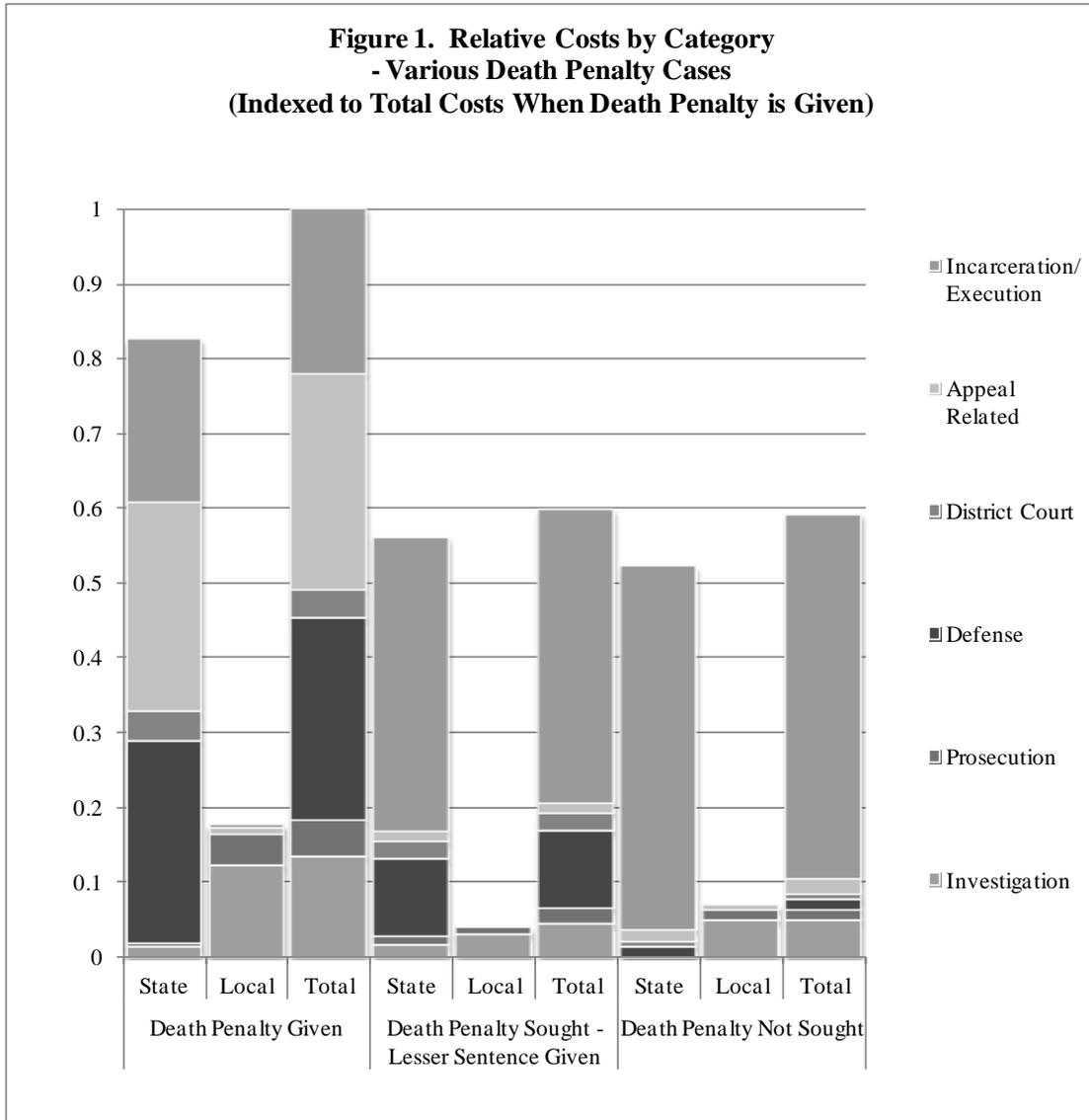
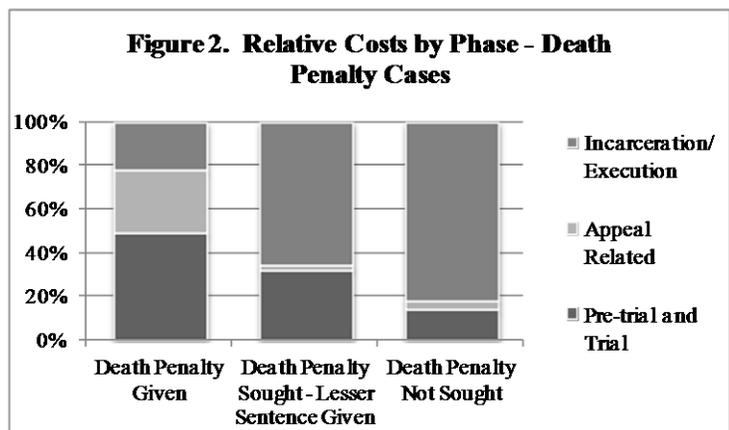


Figure 2 shows the relative costs of the following phase of the process from the crime to completion of the sentence for the three types of cases:

- Pre-trial and trial
- Appeal related
- Incarceration/execution

The figure shows that when a death penalty is sought, whether it is ultimately given or an alternate sentence is given, the costs associated with the pre-trial and trial phases are multiple times those when the death penalty is not sought.



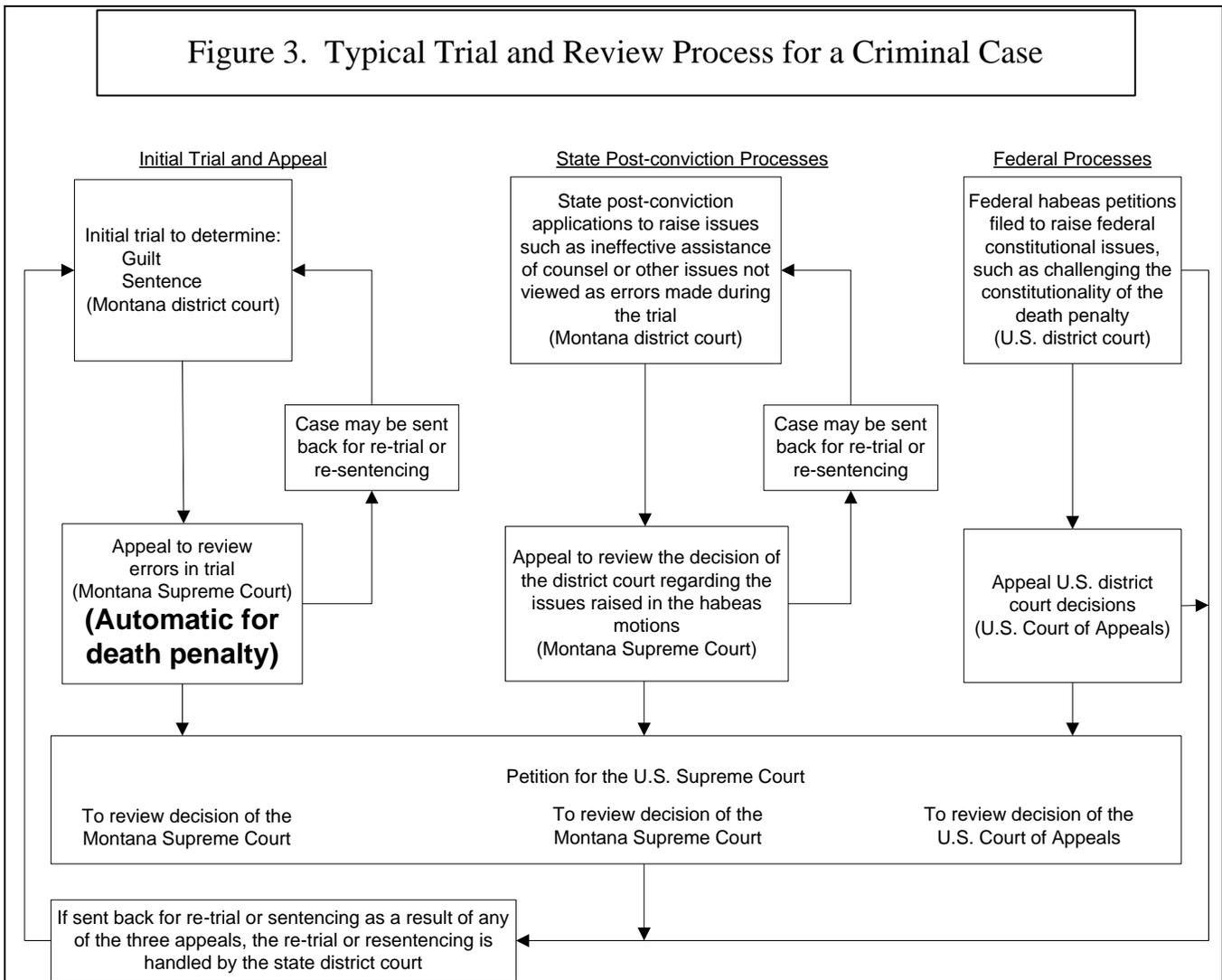
Two major factors for these higher costs are:

- Death penalty trials are bifurcated with separate hearings for guilt determination and sentencing
- Death penalty trials require two specially qualified defense attorneys

These two factors don't apply when the death penalty is not sought. Also, appeals play a much more significant role in the process when a death penalty sentence is given.

Similarities to Montana – Trial Process

Montana is similar to Kansas in that state and federal laws require an automatic review by the Montana Supreme Court of sentences of death penalty handed down by Montana district courts. Automatic sentence reviews for death penalty cases are in addition to direct appeals. Because of the finality of the punishment, a death penalty case will typically see more activity and more complexity in terms of motions and briefs filed. Appeals are also more likely in death penalty cases than in non-death penalty cases, primarily because the U.S. Supreme Court has stated, "death is different". As such, death penalty cases are subjected to a type of "super" due process standard not applied when a sentence of death is not sought. Figure 3 shows the typical trial and review process for such cases.



MONTANA STUDY OF DEATH PENALTY COSTS – SETTING THE STAGE

Montana Per-case Cost Data

Interviews were conducted with the following Montana stakeholders typically involved in the prosecution and defense of persons in death penalty or similar cases, in which the death penalty could potentially apply, in order to determine what cost data is tracked on a per case basis:

- Judicial Branch
- State Office of Public Defender
- Office of Appellate Defender
- Department of Justice
- Flathead County Attorney

Except for time of public defender attorneys, investigators, and administrative staff within the Office of Public Defender and Office of Appellate Defender, no per-case time data is tracked for staff who might be involved in a death penalty or similar case. The only other per-case cost data available is when a payment is made under an invoice for services of an outside entity. All other costs associated with a death penalty or similar case would have to be estimated.

Since limited time and cost data is currently collected on a per case basis, if the legislature wanted to begin tracking data specific to actual cases in Montana it would need to establish requirements for:

- What cases are tracked
- What data is tracked
- How the data is accumulated and used

Montana annually experiences around 40 crimes where the death penalty could potentially apply. Of these cases, the death penalty is rarely sought. The last case where a death penalty was imposed was nearly twenty years ago. Two Montana inmates are currently serving on death row and their proceedings have yet to be fully resolved through the legal system. These inmates have been on death row for several decades with various levels of case activity.

The legislature could establish a requirement to collect per-case time and cost data for all or a set number of cases where the death penalty could be sought. Establishing the requirement in statute would provide the most consistent results over time. However, the legislature should be aware that until all the selected cases are finalized, no comparison can be made using actual costs. It may take several decades for actual per-case cost data to be fully available for comparison. If data is desired sooner, a methodology similar to the Kansas study would need to be used to estimate data. This data would have similar limitations to those experienced in Kansas.

Legislative Options Death Penalty Case Cost Data

Having decided at its December 2011 meeting not to pursue data on old death penalty cases in Montana, the legislature could decide to rely on data utilizing costs of death penalty cases in other states or it could lay the framework and begin collecting costs specific to Montana cases. As such options available are:

- Rely on studies of other states
- Request legislation to establish statutory requirements for collecting Montana per-case data