

ARTICLES

REFORM OF DEFENSE REPRESENTATION IN CAPITAL CASES: THE INDIANA EXPERIENCE AND ITS IMPLICATIONS FOR THE NATION

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INTRODUCTION

In order to achieve just results in criminal cases, we expect well-trained and adequately-supported professional prosecutors, equally talented and well-financed defense lawyers, and impartial judges and juries. This adversary system is supposed to protect not only O.J. Simpson, but also the thousands of indigent defendants in the United States who lack Simpson's resources. There is convincing evidence, however, that in the most serious criminal prosecutions—cases in which the death penalty is sought—the defendant's legal representation at trial is oftentimes woefully inadequate and that the quality of counsel can make a difference in the outcome of the case.

Although the American Bar Association has urged that states adopt rules or standards for the delivery of defense services in capital cases,¹ only a few states have actually done so.² Indiana, by virtue of a new Supreme Court rule that

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1. See GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES (American Bar Ass'n 1989).

2. In addition to Indiana, Ohio and Virginia have approved rules for the defense of death penalty cases. See OHIO C.P. SUP. R. 65 and VA. CODE ANN. § 19.2-163.7 (Michie 1995). Also, the Oklahoma Indigent System Board has adopted, on an interim basis, the American Bar Association Guidelines for the Appointment of Counsel in Death Penalty Cases. See Robert D. Ganstine, Executive Director, Oklahoma Indigent Defense System, Questionnaire for Qualification of Appointment of Counsel in Capital Cases (Oct. 1993) (on file with author) [hereinafter

became effective January 1, 1992,³ is one of the few states that has made a significant effort to improve the quality of representation in death penalty cases. The Indiana rule, moreover, appears to do a better job of securing the right of the indigent capital defendant to an effective lawyer than any other such rule in the country.

After discussing the status of capital defense representation nationwide, this Article explains the content of Indiana's new rule and its development. The Article then reviews the rule's surprising impact on the prosecution and defense of Indiana death penalty cases and its cost. In addition, the Article compares the Indiana rule with similar rules adopted in other states, particularly the Ohio rule, which preceded the Indiana rule by several years. In a concluding section, the Article suggests that Indiana's experience has important implications for the constitutional foundations on which the death penalty rests.

I. A BRIEF OVERVIEW: REPRESENTATION IN DEATH PENALTY CASES

On June 30, 1994, in one of his last opinions as a member of the United States Supreme Court, Justice Blackmun summarized the situation confronting defendants in death penalty prosecutions as follows:

The unique, bifurcated nature of capital trials and the special investigation into a defendant's personal history and background that may be required, the complexity and fluidity of the law, and the high, emotional stakes involved all make capital cases more costly and difficult to litigate than ordinary criminal trials. Yet, the attorneys assigned to represent indigent capital defendants at times are less qualified than those appointed in ordinary criminal cases. . . .

Two factors contribute to the general unavailability of qualified attorneys to represent capital defendants. The absence of standards governing court-appointed capital-defense counsel means that unqualified lawyers often are appointed, and the absence of funds to compensate lawyers prevents even qualified lawyers from being able to present an adequate defense. Many States that regularly impose the death penalty have few, if any, standards governing the qualifications required of court-appointed capital defense counsel. . . .

In addition to the lack of standards, compensation for attorneys representing indigent capital defendants often is perversely low. Although a properly conducted capital trial can involve hundreds of hours of investigation, preparation, and lengthy trial proceedings, many States severely limit the compensation paid for capital defense. . . .

Questionnaire]. See also *infra* notes 58-61 and accompanying text.

3. IND. R. CRIM. P. 24. The rule was originally effective January 1, 1990, and the amendments became effective on January 1, 1992 and February 1, 1993.

Court-awarded funds for the appointment of investigators and experts often are either unavailable, severely limited, or not provided by state courts. As a result, attorneys appointed to represent capital defendants at the trial level frequently are unable to recoup even their overhead costs and out-of-pocket expenses, and effectively may be required to work at minimum wage or below while funding from their own pockets their client's defense The prospect that hours spent in trial preparation or funds expended hiring psychiatrists or ballistics experts will be uncompensated unquestionably chills even a qualified attorney's zealous representation of his client.⁴

Justice Blackmun's description of capital defense representation is not new; there have been numerous articles and reports that have documented the horrendous problems confronted by defendants in securing adequate representation in death penalty cases. His is only one of the more recent and most respected voices to call for reform.

For example, in 1990 *The National Law Journal* published a special report on death penalty representation in the southern states of Alabama, Florida, Georgia, Louisiana, Mississippi, and Texas. The report identified all of the problems discussed by Justice Blackmun, including inexperienced lawyers, no standards for the selection of counsel, grossly inadequate fee structures, the unavailability of funds for investigators and experts, and often minimal evidence presented to the jury in mitigation during the penalty phase.⁵

The problems incident to defense representation in death penalty cases are not confined to the Deep South. A 1992 report of the Death Penalty Information Center describes capital defense representation in Philadelphia as lacking any "organized defense system to provide training or support to defend capital cases—neither a public defender system nor a capital resource center, leaving ill-trained, often ill-prepared, and inexperienced lawyers to handle the most demanding criminal cases of all"⁶ Further, the report notes that very little money is available for experts and, consequently, "many of the most qualified and respected in those professions[,] [psychologists, psychiatrists, social history investigators,] refuse to provide their services under those circumstances."⁷

A 1993 report of the American Bar Association noted: "Insufficient compensation has its most profound consequences in capital cases. A recent study prepared for the Virginia General Assembly and the Virginia State Bar concluded that, after taking into account attorneys' overhead expenses, the effective annual hourly rate paid to Virginia counsel representing indigent capital defendants was

4. *McFarland v. Scott*, 114 S. Ct. 2785, 2785-87 (1994) (Blackmun, J., dissenting).

5. *Special Report*, NAT'L L.J., June 11, 1990, at 1.

6. MICHAEL KROLL, *Introduction to DEATH PENALTY INFORMATION CENTER, JUSTICE ON THE CHEAP: THE PHILADELPHIA STORY* (1992).

7. *Id.* See also Andrew Blum, *Defense of Indigents: Crisis Spurs Lawsuits*, NAT'L L.J., May 15, 1995, at A1, A26 (discussing the problem that the lack of funding can have on an indigent's legal representation).

\$13.”⁸

In Indiana, prior to the reforms for providing counsel in death penalty cases discussed in this Article, there was considerable evidence of significant problems in capital representation. For example, in 1984 the Seventh Circuit Court of Appeals reversed an Indiana death penalty case, noting defense counsel’s lack of preparation, unfamiliarity with the case, and inexperience.⁹ As the court observed, “[defense counsel’s] almost nonexistent effort to avoid the death penalty once [the defendant’s] guilt was established is incomprehensible and was extremely prejudicial to [the defendant].”¹⁰

In a subsequent case, the Indiana Supreme Court reversed a capital murder conviction due to ineffective assistance of counsel.¹¹ Defense counsel’s final argument was characterized by the Supreme Court as “reprehensible” because it seemed primarily to suggest to the jury that it would be “personally inconvenient” for defense counsel if a guilty verdict were returned:¹²

Now, there are several things you can do. You can find him guilty of murder. And then we all get to come back, don’t we, for that other hearing that we talked about earlier. So you can do that. Ruin my afternoon, possibly even all day tomorrow. I don’t know. That’s one of your possibilities. The other possibility you have . . . would be to find him guilty of something other than that. . . . And I don’t have to tell you that you don’t have to be geniuses to figure out that you can do that.¹³

At another point defense counsel referred to his client as a “street person” whom “I don’t even like”¹⁴

The most exhaustive review of the problems incident to providing defense representation in capital cases is contained in a 1994 article published in the *Yale Law Journal*.¹⁵ After describing outrageous examples of deficient defense representation reminiscent of those from Indiana cases described above, the author—a nationally known capital defense litigator—suggests the following conclusions:

In these examples, imposition of the death penalty was not so much the result of the heinousness of the crime or the incorrigibility of the defendant—the factors upon which the imposition of capital punishment

8. AMERICAN BAR ASS’N, *THE INDIGENT DEFENSE CRISIS* 7 (1993). See also THE SPANGENBERG GROUP, *A STUDY OF REPRESENTATION IN CAPITAL CASES IN VIRGINIA* (1993).

9. *Dillon v. Duckworth*, 751 F.2d 895, 900-01 (7th Cir. 1984).

10. *Id.* at 901.

11. *Burris v. State*, 558 N.E.2d 1067 (Ind. 1990).

12. *Id.* at 1073.

13. *Id.*

14. *Id.*

15. Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 *YALE L.J.* 1835 (1994). The article’s author is the Director of the Southern Center for Human Rights and has been an active death penalty litigator since 1979.

supposedly is to turn—but rather of how bad the lawyers were

There are several interrelated reasons for the poor quality of representation in these important cases. Most fundamental is the wholly inadequate funding for the defense of indigents. As a result, there is simply no functioning adversary system in many states. Public defender programs have never been created or properly funded in many jurisdictions. The compensation provided to individual court-appointed lawyers is so minimal that few accomplished lawyers can be enticed to defend capital cases. Those who do take a capital case cannot afford to devote the time required to defend it properly. As a result, the accused are usually represented by lawyers who lack the experience, expertise, and resources of their adversaries on the prosecution side

Although it is widely acknowledged that at least two lawyers, supported by investigative and expert assistance, are required to defend a capital case, some of the jurisdictions with the largest number of death sentences still assign only one lawyer to defend a capital case.

In contrast to the prosecution's virtually unlimited access to experts and investigative assistance, the lawyer defending the indigent accused in a capital case may not have any investigative or expert assistance to prepare for trial and present a defense.¹⁶

Because of the deficiencies in capital defense representation, the risk of wrongful conviction in death penalty cases is real. While some of the mistakes of capital trials undoubtedly have been discovered on appeal or during postconviction proceedings, there is no way of knowing whether innocent persons have been executed or whether innocent persons are currently on death row.

What we do know is that an unusually large number of capital defendants have been released from death row because of their innocence. As reported by the Subcommittee on Civil and Constitutional Rights of the U.S. House of Representatives Committee on the Judiciary:

At least 52 people have been released from prison after serving time on death row since 1973 with significant evidence of their innocence. In 47 of these cases, the defendant was subsequently acquitted, pardoned, or charges were dropped. In three of the cases, a compromise was reached and the defendants were immediately released upon pleading to a lesser offense. In the remaining two cases, one defendant was released when the parole board became convinced of his innocence, and the other was acquitted at a retrial of the capital charge but convicted of lesser related charges.¹⁷

16. *Id.* at 1840, 1843-44, 1846.

17. STAFF OF HOUSE SUBCOMM. ON CIVIL AND CONSTITUTIONAL RIGHTS, COMMITTEE ON THE JUDICIARY, 103D CONG., 2D SESS., INNOCENCE AND THE DEATH PENALTY: ASSESSING THE DANGER

It is also known that an exceptionally large number of prisoners sentenced to death in state courts have been successful in habeas corpus challenges to their convictions in the federal courts. Between July 1976 and May 1991, 186 of 407 capital convictions were reversed on constitutional grounds, which is a forty-six percent rate of reversal. The error rate in noncapital cases is less than five percent.¹⁸

II. INDIANA CRIMINAL RULE 24 AND RULES IN OTHER STATES

The Indiana Supreme Court adopted Criminal Rule 24 in its current form, effective February 1, 1993. The Rule addresses the most important problems of capital defense representation discussed in the preceding section, including the qualifications and compensation of counsel, the number of counsel to be appointed, and the availability of investigative, expert, and other services necessary for an adequate defense.¹⁹ However, the Rule might never have been approved by the Indiana Supreme Court—and almost certainly not in its current form—but for the establishment by statute in 1989 of the Indiana Public Defender Commission.²⁰

Pursuant to the statute, the Commission is authorized to reimburse Indiana counties fifty percent of their costs for defense services in death cases if there is compliance with the Commission's "guidelines" pertaining to defense representation in such cases.²¹ The Commission is also directed to make recommendations to the Supreme Court concerning standards for defense services in capital cases.²² In order to reimburse Indiana counties for defense expenditures in death penalty cases (as well as non-capital cases), the Commission receives annually from the state, by statute, the sum of \$650,000.²³ Until the creation of the Commission and its reimbursement funding scheme, Indiana counties were solely responsible for all costs incident to death penalty prosecutions.

After almost one year of meetings and study, in November 1990, the Commission submitted a proposed criminal rule to the Indiana Supreme Court for

OF MISTAKEN EXECUTIONS 3 (Comm. Print 1994).

18. Memorandum from James S. Liebman, Vice Dean and Professor of Law, Columbia University School of Law, to Representative Jack Brooks, Chairman, Committee on the Judiciary, U.S. House of Representatives 16 (October 10, 1991). Since 1988, the primary coordinators of indigent death penalty representation were federally funded Post-Conviction Defender Organizations (PCDOs). Congress defunded the PCDOs in 1995, chiefly due to the perception that they were used as "vehicles for delaying the judicial process"; many are attempting to continue operations as private non-profit organizations. *See Month by Month: The Year That Was*, NAT'L L.J., Jan. 1, 1996, at C2, C3; Marcia Coyle, *Death Resource Centers Reborn as Private Groups*, NAT'L L.J., Jan. 15, 1996, at A9.

19. IND. R. CRIM. P. 24(B)-(C).

20. IND. CODE §§ 33-9-13-1 to -4; §§ 33-9-14-1 to -6 (1993).

21. *Id.* §§ 33-9-14-4, -5.

22. *Id.* § 33-9-13-3(a)(1).

23. *Id.* § 33-19-7-5(c).

appointing and compensating defense counsel in capital cases.²⁴ In its submission to the Supreme Court the Commission explained:

[that it was] authorized to set guidelines under which counties are eligible for state reimbursement of 50% of the county's certified expenditures for defense services provided in capital cases. . . . If the Court adopts the proposed rule, the Commission will make compliance with the rule a guideline that must be met in order for a county to be eligible for reimbursement from the public defense fund²⁵

In other words, although the Commission could have adopted its own set of guidelines as a precondition for county reimbursement of defense costs in capital cases, it decided that it was preferable to make compliance with a Supreme Court rule the basis for determining county eligibility for reimbursement.

Indiana Criminal Rule 24 ("Rule 24") is based substantially upon the rule proposed by the Commission. While there are differences between the Commission's proposed rule and the rule adopted by the Indiana Supreme Court, the Commission's study of the issue and submission to the Court provides an excellent example of how lawyers with expertise in a specific area can assist a state supreme court in its rule-making function. Except as otherwise indicated, the significant features of the rule, recommended by the Commission, were as follows:

(1) The rule requires that two "qualified" attorneys be appointed in all death penalty proceedings.²⁶

(2) The rule establishes qualifications for lead and co-counsel. Lead counsel must "be an experienced and active trial practitioner with at least five (5) years of criminal litigation experience."²⁷ Also, lead counsel must have had prior experience as lead or co-counsel in at least five felony jury trials which were tried to completion²⁸ and have had prior experience in at least one case in which the death penalty was sought.²⁹ (The Commission had recommended that lead trial counsel have had at least nine prior felony jury trials.³⁰)

24. Indiana Public Defender Comm'n, Proposed Criminal Rule 25: Appointment and Compensation of Counsel in Capital Cases (November 1990) (unpublished document, on file with author) [hereinafter Proposed Criminal Rule]. The Commission's proposed rule was sent only to the Indiana Supreme Court and not released for public comment or discussion. The Commission suggested that the Court promulgate a new rule, to be called Criminal Rule 25. The Court decided, however, to rewrite then existing Criminal Rule 24 and to incorporate the Commission's recommendations and other provisions.

25. *Id.* at 1-2.

26. IND. R. CRIM. P. 24(B).

27. *Id.* 24(B)(1)(a).

28. *Id.* 24(B)(1)(b).

29. *Id.* 24(B)(1)(c).

30. Proposed Criminal Rule, *supra* note 24, at 13.

(3) Co-counsel must “be an experienced and active trial practitioner with at least three (3) years of criminal litigation experience.”³¹ In addition, co-counsel must have had experience as lead or co-counsel in at least three felony jury trials that were tried to completion.³² (The Commission had recommended that two of the prior felony jury trials have been trials in which the charge was murder or a class A felony under Indiana law.³³)

(4) Additionally, no lawyer is qualified to serve as lead or co-counsel unless they “have completed within two (2) years prior to appointment at least twelve (12) hours of training in the defense of capital cases in a course approved by the Indiana Public Defender Commission.”³⁴

(5) The rule addresses the workload of counsel by informing judges that in making appointments they are to consider “the nature and volume of [counsel’s] . . . workload . . . to assure that counsel can direct sufficient attention to the defense of a capital case.”³⁵ In addition, the rule directs judges “not [to] make an appointment of counsel . . . without assessing the impact of the appointment on the attorney’s workload.”³⁶ Further, the rule instructs lawyers that their goal must be to “provide each client with quality representation in accordance with constitutional and professional standards,”³⁷ and that excessive workloads that would interfere with “quality representation or lead to a breach of professional obligations” must be avoided.³⁸

(6) In order to implement the foregoing workload objectives, the rule directs judges not to appoint “salaried or contractual public defenders” to capital cases if their caseload will exceed 20 open felony cases while the death penalty case is pending in the trial court.³⁹ Also, no new cases may be assigned to a public defender within thirty days of the trial date for a capital case⁴⁰ (the Commission recommended sixty days⁴¹) and none of the cases of a public defender may be set for trial within fifteen days of a capital trial⁴² (the Commission recommended sixty days⁴³).

31. IND. R. CRIM. P. 24(B)(2)(a).

32. *Id.* 24(B)(2)(b).

33. Proposed Criminal Rule, *supra* note 24, at 14.

34. IND. R. CRIM. P. 24(B)(1)(d), 24(B)(2)(c).

35. *Id.* 24(B)(3).

36. *Id.* 24(B)(3)(b).

37. *Id.* 24(B)(3)(a).

38. *Id.*

39. *Id.* 24(B)(3)(c)(i).

40. *Id.* 24(B)(3)(c)(ii).

41. Proposed Criminal Rule, *supra* note 24, at 26.

42. IND. R. CRIM. P. 24(B)(3)(c)(iii).

43. Proposed Criminal Rule, *supra* note 24, at 26.

(7) The Commission recommended that attorneys appointed to a capital case be compensated at \$75 an hour.⁴⁴ The rule adopted by the Supreme Court reduced the hourly rate of compensation to \$70 an hour and added that payment to the attorneys should be made “upon determination by the trial judge that such time and services are reasonable and necessary for the defense of the defendant.”⁴⁵ Also, in an approach not recommended by the Commission, the rule provides that if “the appointing judge determines that the rate of compensation is not representative of practice in the community, the appointing judge may request the Executive Director of the Division of State Court Administration to authorize payment of a different hourly rate of compensation in a specific case.”⁴⁶

(8) Finally, in language adopted verbatim from the Commission’s recommendation,⁴⁷ the rule provides that “[c]ounsel appointed in a capital case shall be provided with adequate funds for investigative, expert, and other services necessary to prepare and present an adequate defense at every stage of the proceeding, including the sentencing phase.”⁴⁸

There was only one major Commission recommendation that the Supreme Court did not adopt. The Commission recommended that it be granted authority to create and maintain rosters of qualified attorneys eligible for appointments in capital cases and that judges be authorized to appoint only attorneys whose names appeared on the Commission’s rosters.⁴⁹ Further, the Commission proposed that it be authorized to remove an attorney from one of its rosters, after written notice and an opportunity for the attorney to be heard, if there was “compelling evidence that an attorney has inexcusably ignored basic responsibilities.”⁵⁰

44. *Id.* at 32.

45. IND. R. CRIM. P. 24(C)(1).

46. *Id.* The Commission’s records reflect only one case in which this provision of Rule 24 has been invoked. In *State v. Stevens*, No. 67S00-9308-DP-844 (Tippecanoe County, 1995 term), the trial court asked the attorneys to accept \$65 as their hourly fee and the attorneys agreed to do so. There was no finding, however, “that the rate of compensation [\$70] [was] not representative of practice in the community” IND. R. CRIM. P. 24(C)(1). In fact, it would be exceedingly difficult to find that \$70 per hour is too high a rate for the defense of a death penalty case because hourly rates of lawyers are invariably more than \$70 per hour. Moreover, retained cases for the defense of a death case in Indiana (as in states everywhere) are virtually non-existent, and if an attorney were to be retained in such a case the fee charged undoubtedly would be much more than \$70 per hour. *See infra* notes 92-101 and accompanying text. Accordingly, pursuant to the Rule, it could be argued that the \$70 per hour compensation should be increased in all death penalty cases because the rate is “not representative of practice in the community” IND. R. CRIM. P. 24(C)(1).

47. Proposed Criminal Rule, *supra* note 24, at 30.

48. IND. R. CRIM. P. 24 (C)(2).

49. Proposed Criminal Rule, *supra* note 24, at 9-10.

50. *Id.* at 21.

Rule 24 is similar to the first such rule in the country on capital defense representation—Rule 65, adopted in 1987 by the Ohio Supreme Court.⁵¹ Like the Indiana rule, Rule 65 establishes experiential requirements for appointment of counsel⁵² including a specialized training requirement.⁵³ Furthermore, the Ohio Public Defender Commission (the statewide defense agency) may deny reimbursement to counties for defense fees and expenses if an attorney appointed to a capital case is ineligible for assignment under Rule 65.⁵⁴ The Ohio rule also contains a provision on “support services” that is similar to the Indiana rule.⁵⁵ However, the Ohio rule does not address the issue of compensation for appointed lawyers; rather, the payments for defense lawyers in Ohio death penalty cases are set by each county and vary throughout the state.⁵⁶ Moreover, as discussed later, the rule does not appear to have had the same impact in Ohio as Rule 24 has had in Indiana.⁵⁷

Some efforts at reform concerning the appointment of counsel in death penalty cases are underway in other states as well. For example, the Public Defender Commission in Virginia adopted experiential standards for the assignment of counsel in capital cases in that state, effective July 1, 1992.⁵⁸ In 1993, the Oklahoma Indigent Defense System Board adopted, on an interim basis, the *American Bar Association's Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*.⁵⁹ In July 1994, the Louisiana Supreme Court created the Louisiana Indigent Defender Board, which will be responsible for preparing qualification standards for the appointment of counsel in death penalty cases and for drawing up recommended rates of compensation for appointed counsel in such cases.⁶⁰ Finally, in August 1994, the Tennessee Supreme Court issued an order creating the Indigent Defense Commission, which will be responsible for preparing standards for capital cases, including rates of compensation.⁶¹

51. OHIO C.P. SUP. R. 65.

52. *Id.* 65(II)(A)(2)-(3).

53. *Id.* 65(II)(A)(2)(c), 65(II)(A)(3)(c).

54. OHIO ADMIN. CODE § 120-1-13 (1995).

55. OHIO C.P. SUP. R. 65(IV)(D).

56. *See infra* notes 128-133 and accompanying text.

57. *See infra* Part V for a discussion of the “Comparisons Between Ohio and Indiana.”

58. VA. CODE ANN. § 19.2-163.7 (Michie Supp. 1994) (describing the appointment of counsel when an indigent defendant is charged with a capital offense); *see also id.* § 19.2-163.8 (noting criteria to be considered by the Public Defender Commission and the Virginia State Bar when adopting standards for appointment of counsel in capital cases).

59. *See supra* note 1 and accompanying text. *See also* Questionnaire, *supra* note 2.

60. LA. REV. STAT. ANN. § 15:144 (West Supp. 1995).

61. *In re* The Indigent Criminal Justice System, 883 S.W.2d 133 (Tenn. 1994). In addition to creating the Indigent Defense Commission, the Supreme Court of Tennessee set forth guidelines for the Commission in developing a plan for the delivery of legal services to indigent defendants in criminal cases.

III. IMPACT OF RULE 24

The overriding goal of Rule 24 was to assure that defendants in capital cases would receive "quality representation in accordance with constitutional and professional standards," as stated in the Rule.⁶² Although it is impossible to assess whether that has actually occurred, there is evidence that the Rule has made a difference in the performance of defense counsel and that it has influenced prosecutors in deciding whether to seek the death penalty.

Tables one and two below show requests for the death penalty and the dispositions of cases in Indiana from January 1, 1990 through December 31, 1994.⁶³

TABLE ONE
DEATH PENALTY REQUESTS

	1990	1991	1992	1993	1994
Number of Persons for Whom Death Penalty was Requested	24	22	11	9	15
Number of Different Cases	17	17	9	9	13
Number of Different Counties	11	14	6	6	9
Number of Different Cases in Marion County in which Death Penalty was Requested	3	4	2	4	2
Number of Different Cases in Lake County in which Death Penalty was Requested	4	1	2	1	1

62. IND. R. CRIM. P. 24(B)(3)(a).

63. The data for these tables were assembled through a joint effort by the author and Paula Sites, a staff member of the Indiana Public Defender Council, who assists defense lawyers assigned to represent defendants in capital cases. At least as far back as January 1990, Ms. Sites has maintained information on all death penalty cases in Indiana, keeping track of the counties in which the cases were filed, the lawyers assigned to the cases, and case outcomes. Except for the information compiled by Ms. Sites, there does not appear to be a statewide database pertaining to death penalty cases. IND. R. CRIM. P. 24(A) requires prosecuting attorneys to notify the Court Administrator of the Indiana Supreme Court when a death penalty case is filed. There is no requirement, however, that case outcomes be reported to the Court Administrator. The Indiana Public Defender Council, which employs Ms. Sites, provides backup services for attorneys who represent indigent defendants in all types of criminal cases. The Council is an agency of Indiana state government. See IND. CODE § 33-9-12-1 (1993 & Supp. 1995).

As this Article was being finalized, the author and Ms. Sites tabulated the number of death penalty requests filed by prosecutors during 1995. From January 1 through August 15, 1995, Indiana prosecutors sought the death penalty for nine persons, representing seven different cases and four different counties. One of the seven cases was from Marion County and one was from Lake County. While these data for 1995 are incomplete, they suggest that 1995 will be similar to the period from 1992 to 1994 regarding the number of Indiana death penalty requests; thus, once again, the number of such requests will likely be fewer than in 1990 and 1991, i.e., prior to the adoption of Rule 24.

TABLE TWO
DISPOSITIONS OF DEATH PENALTY CASES
BASED ON YEAR OF DEATH PENALTY REQUEST

	1990	1991	1992	1993	1994
Guilty/Death Sentence Imposed by Jury	1	4	--	--	--
Guilty/Jury Recommended Against Death Penalty/Death Imposed by Judge	--	1	1	--	--
Hung Jury on Death/Death Imposed by Judge	2	--	1	--	--
Guilty/Jury Recommended Death/Death Not Imposed by Judge	--	2	--	--	--
Guilty/Jury Recommended Against Death	2	1	3	1	--
Death Request Dismissed Pursuant to Plea Arrangement/Defendant Pled Guilty/Term of Years Imposed	12	11	4	1	2
Death Request Dismissed but not in return for Request of Plea of Guilty /Defendant Pled or Went to Trial	3	4	2	2	--
Plea of Guilty/No Plea Arrangement/Death Imposed by Court	--	--	--	1	--
Plea of Guilty/No Plea Arrangement/Death not Imposed	1	--	--	--	--
Death Request Dismissed/Pending Trial	--	--	--	--	--
Death Request Pending/Case Pending Trial	--	--	--	3	12
All Charges Dismissed	1	1	--	1	1
Acquittal	2	1	--	--	--
Total	24	25	11	9	15

Rule 24 became effective January 1, 1992, and was made applicable to all subsequent cases in which a death penalty request was filed by an Indiana prosecutor.⁶⁴ Accordingly, it is possible to compare the above death-penalty data for the two years prior to the Rule's effective date with the three years after the Rule went into effect. Table One reveals that during 1990 and 1991 Indiana prosecutors requested the death penalty against forty-six persons in thirty-four different cases, whereas during 1992 and 1993 the prosecutors sought the death

64. See *supra* note 3 for the effective date of IND. R. CRIM. P. 24 and its amendments.

penalty against only twenty persons in eighteen different cases. If the data from 1994 are added to the data for 1992 and 1993, the number of persons against whom the death penalty was sought jumps to thirty-five, involving a total of thirty-one different cases.

Table Two shows, as of March 1995, the outcomes of Indiana death penalty prosecutions during the five years of 1990 through 1994. Perhaps most noteworthy is that for three consecutive years, 1992 through 1994, there was not a single death penalty case governed by the requirements of Rule 24 (i.e., cases in which the death penalty was filed after January 1, 1992) in which a jury returned a death penalty verdict;⁶⁵ however, there were five such verdicts involving cases in which the death penalty was requested during 1990 and 1991. Of the post-1992 death penalty cases concluded during 1992 through 1994, there were three in which the death penalty was imposed, but in each instance the trial court rendered the verdict. In one case, the jury recommended against death but the court imposed it;⁶⁶ in a second case, the jury hung on the question of the death penalty, and the court imposed it.⁶⁷ In the third case the defendant waived a jury trial on the penalty issue, pled guilty, and the court imposed a death sentence.⁶⁸

To what extent can it be said that the reduction in the number of death penalty filings revealed in Table One, and the outcome differences revealed in Table Two, are attributable to Rule 24? Admittedly, the relatively small number of Indiana death penalty cases detracts from the reliability of any suggestion that Rule 24, independent of other variables, is responsible for differences in the number of death penalty filings and outcomes.⁶⁹ On the other hand, as discussed below, the

65. The record of "no Indiana death penalty verdicts" could not reasonably have been expected to last forever. Just as this Article was being completed in 1995, there were three death cases, all of which were filed after January 1, 1992, in which juries recommended the death penalty. *See* State v. Stevens, No. 67S00-9308-DP-844 (Tippecanoe County, 1995 term) (defendant sentenced on March 14, 1995); State v. Wrinkles, No. 82C01-9407-CF-447 (Vanderburg County, 1995 term) (defendant sentenced on June 14, 1995); State v. Timberlake, No. 49G02-9302-CF-01491 (Marion County, 1995 term) (defendant sentenced on August 11, 1995).

66. State v. Saylor, No. 48S00-DP-6 (Madison County, 1994 term). The death penalty request was filed June 15, 1992; Saylor was sentenced to death February 17, 1994.

67. State v. Williams, No. 45G02-9207-CF-00182 (Lake County, 1994 term). The death penalty request was filed Sept. 25, 1992; Williams was sentenced to death March 2, 1993.

68. State v. Prowell, No. 82C01-9305-CF-313 (Vanderburg County, 1994 term). The death penalty request was filed July 7, 1993; Prowell was sentenced to death May 5, 1994.

69. "It is widely recognized . . . that small samples provide a less reliable basis for making an inference about the true behavior of a decision process than do larger samples of decisions." DAVID C. BALDUS & JAMES W. L. COLE, *STATISTICAL PROOF OF DISCRIMINATION* § 9.12, at 177 (Supp. 1987). *See also* International Bd. of Teamsters v. United States, 431 U.S. 324, 340 n.20 (1977) ("Considerations such as small sample size may, of course, detract from the value of such evidence. . ."). If outcomes in Indiana death penalty cases do not markedly change during the next several years and the number of death penalty filings remain about the same as they were during 1992-1994, greater statistical reliability can be attached to the data from the first several years of experience with Rule 24. *See, e.g.,* BALDUS & COLE, *supra*, § 9.221, at 309 (1980) ("Test statistics

statements of prosecutors and defense lawyers interviewed for this Article strongly suggest that Rule 24 has had an impact on prosecution requests for the death penalty and on case outcomes.

Moreover, during 1992 to 1993, while the number of death penalty prosecutions in Indiana declined, the number of murders and non-negligent manslaughters increased.⁷⁰

TABLE THREE
MURDERS AND NON-NEGLIGENT MANSLAUGHTERS IN INDIANA

	Murders and Non- Neg. Manslaughters	Rate per 100,000 Population
1989	353	6.3
1990	344	6.2
1991	423	7.5
1992	464	8.2

In view of these data, an increase in the number of death penalty requests during 1992 might have been expected; yet just the opposite occurred. Admittedly, these data are not entirely compelling because they combine both murders and non-negligent manslaughters, and do not deal at all with the seriousness of the murders committed.

To better understand the impact of Rule 24, I conducted six lengthy interviews with prosecutors, defense lawyers, and one person quite familiar with criminal prosecutions in Indiana. All of the interviewees had practiced in either one or both of the state's two largest counties, and were selected based upon the recommendations of persons knowledgeable about Indiana death penalty prosecutions. All of the interviewees (with one exception) have had extensive experience in either prosecuting or defending death penalty cases. Two of the persons interviewed were prosecutors who have not served as defense lawyers. Two are currently defense lawyers and former prosecutors who have handled death

are also positively related to sample size. All other things being equal, the test statistic and level of significance rise as the sample size increases.”).

70. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1990, at 357 [hereinafter SOURCEBOOK—1990]; BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1991, at 376; BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1992, at 361; BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1993, at 356.

penalty cases as both prosecutors and defense lawyers. One of the persons was a defense lawyer who has not served as a prosecutor. In order to encourage interviewees to be completely candid in their responses to questions, all were promised that their names would not be disclosed. The interviews took place between January and August 1994, and each lasted approximately one to one and one-half hours. At the end of each interview (with the exception of one that was tape recorded), I promptly dictated my notes, which were then typed.

Originally, I had planned to conduct additional interviews, but the remarkable similarity of interviewee responses about Rule 24 indicated to me that additional interviews were unlikely to be productive. As outlined in the following summary of their comments, all of the persons interviewed believed that the Rule had a major impact on the prosecution and defense of death penalty cases.⁷¹

The interviewees agreed that Rule 24 had led to improved representation by defense lawyers in capital cases. As one of the prosecutors put it, defense lawyers are doing a "better job now" than before the Rule, especially because they are much more likely to retain experts for the mitigation stage of the death penalty prosecution. This same prosecutor also said that the work of defense lawyers has "likely" led to more careful and thorough preparation by prosecutors. He noted that a death penalty verdict returned now would be more likely to be sustained on appeal, as the appellate court would be less apt to find that defense counsel was ineffective.

The defense lawyers were much more emphatic in describing the impact of Rule 24 on the quality of defense services. As one defense lawyer put it, the Rule has "made a helluva difference" because the defense can now "put together a defense team" consisting of two lawyers, investigators, and experts. Further, he said that two defense attorneys were not always appointed to defend death penalty prosecutions prior to Rule 24. Another defense attorney, experienced in both capital trials and death penalty postconviction and appellate litigation, characterized the situation as "drastically different now" compared to before the Rule. This lawyer recalled one capital case that he handled at the postconviction stage in which the trial attorney had no prior felony defense experience, let alone in capital trials, and the attorney had never received any specific training in the defense of death penalty cases. The trial attorney was appointed because he had tried three or four felony jury cases as a deputy prosecutor.

This same lawyer also pointed to the mitigation stage of a death penalty prosecution, noting that defense attorneys in the past did little or no preparation for the mitigation hearing but now concentrate on the area. He attributed the change to the training that defense lawyers now are required to receive, which has raised their "consciousness" about the role that experts can play in the defense of death cases, and to the fact that trial judges will now appoint experts for the defense. Another defense lawyer explained that prior to the adoption of Rule 24, defense attorneys "didn't ask for much in the way of experts and investigators, and

71. In reporting the comments of persons interviewed, material placed in quotation marks are the actual words spoken by the interviewees. Where quotation marks are not used, comments are summarized in words similar to those used by interviewees.

they couldn't get them if they did ask." Further, trial courts did not appoint "mitigation specialists" for the defense and "if you sought approval from the court for much beyond a psychiatric evaluation, you were not going to get it." Yet another defense lawyer cited the retention of experts as invaluable, recalling that in one of his cases the information dug up about the defendant by a psychologist and toxicologist, which was turned over to the prosecutor, convinced the prosecutor to dismiss the death penalty request. Both prosecutors and defense attorneys agreed that trial judges usually granted defense requests for experts, and that this was due both to the language of Rule 24⁷² and to Indiana case law.⁷³

The fees paid pursuant to Rule 24—\$70 per hour for each lawyer—were also deemed to be very important by the defense attorneys in persuading lawyers to accept death penalty cases and to work diligently on them. As one of the defense lawyers explained, "there are now defense attorneys willing to take death cases whereas they would not have done so a few years ago." Further, he said that attorneys are "willing to work hard on the cases because they know they will be paid." Another defense attorney called the rate of \$70 per hour "reasonable for government work." He especially thought it was important that there was no cap on the amount of fees paid to defense counsel because this meant lawyers could devote themselves to a death penalty case without worrying about whether they were putting in too many hours. Moreover, trial courts almost never reduce the fee claims of defense counsel, perhaps, as one defense lawyer speculated, because the "judges don't want to have any problems with the Commission" when it comes to the reimbursement of the county for defense costs.

On the other hand, prosecutors were unenthusiastic about the fees paid to defense counsel in capital cases. One of the prosecutors said he "wished prosecutors were paid the same as defense lawyers." The other prosecutor who was interviewed said that he did not quarrel with defense attorneys being paid \$70 per hour, but he believed that there should be a ceiling on the amount of their compensation, perhaps with an escape clause, so that judges could occasionally authorize more than the maximum compensation. In the absence of a cap on fees, this prosecutor believed that "defense lawyers run us around."

As noted earlier, the data clearly indicate that fewer death penalty requests

72. See *supra* text accompanying notes 47-48.

73.

We are persuaded . . . that the trial court did abuse its discretion in denying Castor's application for a defense psychologist to assist him in defending himself during the penalty phase of the trial. . . . One of the statutory mitigators which both the jury and the trial judge must weigh during the penalty phase of the trial is whether the defendant "was under the influence of extreme mental or emotional disturbance when he committed the murder." In view of the showing made . . . it was incumbent upon the trial court to allow Castor appropriate resources to develop the opinion of this expert witness concerning this statutory mitigator. The failure of the trial court to approve the expenditure of the funds necessary to further develop this opinion was erroneous and requires reversal of the death penalty.

Castor v. State, 587 N.E.2d 1281, 1288 (Ind. 1992) (citation omitted).

have been filed by Indiana prosecutors since Rule 24 became effective on January 1, 1992.⁷⁴ At the time of my interviews, however, these data had not yet been published and none of the persons whom I interviewed could, therefore, be certain that fewer death penalty requests had been filed statewide. Nevertheless, all of my interviewees were convinced that death penalty requests in Indiana had declined, although they conceded that they had never seen any actual statistics to this effect. While I did not reveal in my interviews what the data showed, I inquired of everyone why they thought prosecutors were now filing fewer death penalty requests. Everyone agreed that it was because of Rule 24.

As one prosecutor explained, Rule 24 has “put some economic judgment” into the decision-making about whether to seek the death penalty. Another prosecutor put it more bluntly, stating that Rule 24 has “definitely put a damper on asking for the death penalty” because the cases cost the counties more than they used to and the prosecutor must, therefore, “think two or three times” before filing a death penalty request. In addition to the cost consideration, this prosecutor claimed that there were two other effects of Rule 24 that had contributed to a decline in death penalty filings. He noted that defense lawyers now devote much more time to the cases and have more resources (e.g., expert witnesses) at their disposal; this, in turn, puts pressure on a prosecutor’s office to devote more of its scarce resources to death penalty cases, thereby making the cases more costly from a personnel standpoint and hence less attractive to prosecute. This prosecutor also conceded that because of Rule 24 it is now more difficult to obtain death penalty verdicts and that it is not “good politics” for prosecutors to lose death penalty cases. According to this prosecutor, one of his fellow prosecutors had told him that he does not intend ever to ask for the death penalty because the cases are just too costly and difficult to prosecute.

The defense lawyers offered exactly the same reasons in explaining why they believed prosecutors were seeking the death penalty less frequently. For example, one of the defense lawyers who had substantial prior experience as a prosecutor in death penalty cases, told me that “prosecutors have gotten much more careful in filing for the death penalty” because the cases are now more costly for the counties and take more of the prosecutor’s staff time and resources.

This former prosecutor also discussed political considerations involved in the prosecution of criminal cases. In his opinion, prosecutors do not really want “a system that is fair and equal,” they want a system in which they can win. Ours is “an adversarial system and winning is quite important to the prosecutor.” As for the death penalty, a prosecutor does not want to risk losing because that generates negative publicity and is seen as “a knock on the prosecutor.” Furthermore, when a prosecutor is unsuccessful in obtaining the death penalty in one case, it discourages the prosecutor from seeking the death penalty in other cases. Because Rule 24 has enabled the defense to “level the playing field” in death penalty prosecutions, it’s understandable if prosecutors seek the penalty less often.

Finally, this former prosecutor, now defense lawyer, explained that the ability and qualifications of defense counsel are important considerations for the

74. See *supra* Table One immediately following note 63.

prosecutor in deciding whether to seek the death penalty. He doubted that many prosecutors would admit that the capabilities of defense counsel were important, but he insisted that they are quite significant. If the defendant is represented by "super lawyer" who is going to keep the prosecutor "hopping," the prosecutor will be less likely to ask for the death penalty. Conversely, if the defender is a "weak lawyer," the prosecutor will be more inclined to proceed with a death penalty request.

One of the prosecutors summed up his feelings about Rule 24 by observing that it had enabled defense lawyers "to accomplish indirectly what they could not accomplish directly," by which he meant either elimination of the death penalty or at least a significant reduction in the number of cases in which it is sought. At the same time, this prosecutor conceded that he would still sometimes seek the death penalty if it was an especially "bad case."

Undoubtedly one of the most significant indirect consequences of Rule 24 was the successful effort of Indiana prosecutors to persuade the Indiana legislature to amend the state's life without parole statute. Effective July 1, 1994, Indiana's death penalty statute was amended so that now "[t]he state may seek either a death sentence or a sentence of life imprisonment without parole for murder by alleging . . . at least one (1) of the aggravating circumstances listed in subsection (b)."⁷⁵ Because Rule 24 applies only if the state asks for the death penalty, a request solely for life without parole does not trigger any of the requirements of Rule 24; thus, for example, there is no requirement in a life without parole prosecution that the defendant be furnished two lawyers, that they have any special prior experience, or that the lawyers be compensated at \$70 per hour. Prosecutors acknowledged that they purposely lobbied for the life without parole option, separate and apart from the death penalty, in order to get around Rule 24.

IV. THE COST OF RULE 24

As noted previously, the Indiana Public Defender Commission is authorized by statute to establish guidelines for reimbursing counties fifty percent of their costs for defense services in capital cases.⁷⁶ Since its establishment in 1990, the Commission has twice issued guidelines governing reimbursements to counties. The Commission's first guidelines were effective September 1, 1990, and provided that counties were eligible for fifty percent reimbursement of expenditures for defense services in capital cases, as follows: (1) for attorney services provided after September 1, 1990, provided two attorneys were appointed and each was compensated at a rate of \$75 per hour; and (2) for non-attorney defense expenses incurred after July 1, 1989.⁷⁷

The Commission's second set of guidelines superseded those issued in 1990 and were effective January 1, 1992, the date that Rule 24 went into effect. Essentially, pursuant to these guidelines counties were eligible for fifty percent

75. IND. CODE § 35-50-2-9 (Supp. 1995).

76. See *supra* text accompanying note 21.

77. See INDIANA PUBLIC DEFENDER COMMISSION ANNUAL REPORT app. A (1989-1990).

reimbursement for defense services in capital cases, provided the services were rendered in compliance with Rule 24.⁷⁸ From a fiscal standpoint, the only significant difference between the Commission's two sets of guidelines related to the hourly compensation rate for attorneys. The Commission originally had required that counties compensate counsel \$75 per hour, whereas Rule 24 provides that counsel be paid \$70 per hour for their services.⁷⁹

Prior to 1990, each Indiana county paid for all of its defense expenses in death penalty cases and no statewide expense data on the cost of such cases were collected.⁸⁰ Thus, there is no statewide data available on the cost of defense services in death cases in Indiana before 1990, although it is generally conceded that defense counsel were not paid as much as \$70 per hour and expert and other defense expenses were often not approved by the courts and thus were not paid by the counties.⁸¹ Since 1990, however, because of the Commission's statewide duty to reimburse counties for fifty percent of their defense expenditures in death cases, the Commission has assembled specific cost data on most Indiana capital cases.

Through December 31, 1994, the Commission processed county claims for defense expenditure reimbursements in sixty death penalty cases that fell within its guidelines. The table below depicts the cost of these sixty cases, broken down by expense category, and shows the average defense cost of a death penalty case in Indiana.⁸²

78. See INDIANA PUBLIC DEFENDER COMMISSION ANNUAL REPORT app. A (1991-1992).

79. See *supra* text accompanying notes 44-45.

80. Interview with Larry A. Landis, Director of the Indiana Public Defender Council, in Indianapolis, Ind. (March 20, 1995). The Council is a state agency that provides backup support services to defense counsel in indigent criminal cases in Indiana. Mr. Landis has served as director of the Council since 1980. See also *supra* note 63.

81. Interview with Larry A. Landis, Director of the Indiana Public Defender Council, in Indianapolis, Ind. (March 20, 1995). Further, Mr. Landis reports that prior to establishment of the Indiana Public Defender Commission and Rule 24, defense counsel in Indiana death penalty cases were typically paid \$40 per hour for their out-of-court time and \$50 per hour for in-court time. Part-time public defenders assigned to death penalty cases received no additional compensation.

82. The data contained in Tables Four, Five, and Six have not previously been reported by the Indiana Public Defender Commission. The data reported here were compiled by placing detailed financial information from all sixty of the Commission's cases into a computerized data base.

TABLE FOUR
DEFENSE SERVICE EXPENSES IN CAPITAL CASES (1990-1994)

	Amount	Average Cost Per Case
Attorney Fees	\$2,163,227	\$36,053
Experts	233,129	3,885
Investigators	213,526	3,559
Paralegals/Law Clerks	56,625	944
Transcripts/Depositions	93,827	1,564
Other Expenses	57,731	962
Total: Non Attorney Expenses	654,838	10,914
Total Expenditures	\$2,818,065	\$46,967

The average amount of attorneys' fees paid to counsel shown in the above table—\$36,053—and the average cost of defense services per case—\$46,967—is almost surely somewhat less than the actual costs today of defense services in Indiana capital cases. This is because seven of the sixty cases did not include costs for attorneys' fees since the death penalty request was filed prior to September 1, 1990; and, additionally, fifteen of the sixty cases were still pending as of December 31, 1994, which means that not all of the defense costs for these cases had been reported. Further, counsel in forty-five of the sixty cases were appointed prior to the effective date of Rule 24 and may not have been as diligent in representing their clients as the lawyers appointed after the Rule took effect.

A more accurate reflection of the defense costs of Indiana death penalty cases is probably derived from examining the cost data of the twelve completed death penalty cases filed by prosecutors after Rule 24 went into effect and in which all claims for reimbursement of defense costs had been filed with the Commission as of December 31, 1994. The data for these cases is reflected in Table Five:

TABLE FIVE
DEFENSE SERVICE EXPENSES IN TWELVE COMPLETED CAPITAL CASES

	Amount	Average Cost Per Case
Attorney Fees	\$610,869	\$50,905
Experts	55,101	4,591
Investigators	56,324	4,693
Paralegal/Law Clerks	10,154	846
Transcripts/Depositions	30,974	2,581
Other Expenses	7,462	621
Total: Non Attorney Expenses	160,017	13,334
Total Expenditures	\$770,887	\$64,240

The 60 cases summarized in Table Four show an average expenditure for defense services of \$46,967, whereas the cost of the twelve closed cases shown in Table Five averaged \$64,240, or \$17,273 more. The difference is attributable mostly to payments for attorneys' fees. For both groups of cases the average cost of non-attorney expenses was similar (\$10,914 for the sixty cases and \$13,334 for the twelve closed cases), whereas the cost of attorneys' fees averaged \$36,053 for all sixty cases and \$50,905 for the twelve completed capital cases.

The cost of death penalty defense representation is further illuminated by examining the cost of the twelve completed cases based upon whether the cases resulted in a jury trial or were resolved in some other fashion. Of the twelve cases, five were tried to juries. Although none of the juries recommended the death penalty, in the one case that resulted in a hung jury the judge imposed the death penalty.⁸³ Table Six shows the cost of death penalty cases that proceeded to jury trial compared to those that did not:

83. State v. Williams, No. 45G02-9207-CF-00182 (Lake County, 1993 term) (defendant sentenced on March 2, 1993).

TABLE SIX
 COST OF TWELVE COMPLETED CASES BASED ON WHETHER JURY TRIAL HELD

	Amount	Average Cost
5 Jury Trial Cases		
Attorney Fees	\$367,993	\$73,598
Other expenses	80,485	16,097
Total Expenditures	\$448,478	\$89,695
7 Non-Jury Trial Cases		
Attorney Fees	\$242,864	\$34,694
Other Expenses	79,524	11,360
Total Expenditures	\$322,388	\$46,055

As might be expected, the defense costs of the five cases that went to trial were considerably more than the seven cases that did not. The average cost of attorneys' fees for the jury trial cases was \$73,598 compared to \$34,694 for the cases that were disposed of without a jury trial (an average difference of almost \$39,000). Average expenditures for the jury trial cases were \$89,695 compared to \$46,055 for the non-jury cases (an average difference of \$43,640).

From Tables Four, Five, and Six, an analysis can be made of the number of hours that two attorneys appointed to death penalty prosecutions in Indiana typically spend on the cases during the pretrial and trial stages. Table Four, which shows an average attorney fee cost of \$36,053 in the sixty cases from 1990 through 1994, means that the average number of hours devoted to these cases was 515 (i.e., \$36,053 divided by the hourly rate of \$70 = 515 hours or 257.5 hours per each attorney). Table Five, which shows an average attorney fee cost of \$50,905 in twelve completed cases, means that the average number of hours devoted to these cases was 727 (i.e., \$50,905 divided by the hourly rate of \$70 = 727 hours or 363.5 hours per each attorney). Table Six, which shows an average attorney fee cost of \$73,598 in the five cases that resulted in jury trials, means that the average number of hours devoted to these cases was 1,051 (i.e., \$73,598 divided by the hourly rate of \$70 = 1,051 hours or 525 hours per each attorney).

The number of hours devoted by attorneys to the defense of death penalty cases at trial in Indiana appears to be comparable to the number of hours that attorneys in other jurisdictions have found to be necessary. The Spangenberg Group, which has performed numerous investigations nationwide in the area of indigent defense, including studies of capital defense representation, has reported that "the amount of attorney hours spent on . . . [death penalty] cases at the trial

phase . . . [ranges] from 100 to well over 1,500—with most falling into the 300-500 hour range.”⁸⁴ Further, the Spangenberg Group noted that the Maryland Public Defender estimated that “staff attorney hours spent on death penalty cases at the trial level range between 100 and 1,250 (median 600 hours; average 535 hours).”⁸⁵ A 1987 study of the Kansas Legislative Research Department, also reported by the Spangenberg Group, estimated that defense attorneys normally must spend 800-1,000 hours on the trial phase of death penalty cases.⁸⁶

In financial terms, Indiana likely spends more for defense representation in capital cases than is spent in many states.⁸⁷ However, as discussed earlier, numerous articles and studies have documented that the compensation paid to defense counsel in death penalty cases is often woefully inadequate,⁸⁸ so that payments to counsel elsewhere ought not to be the standard. Although the several prosecutors interviewed for this Article complained that defense counsel were being paid too much, the inescapable conclusion is that defense counsel in Indiana capital cases are not being overpaid and that, if anything, the rate of compensation ought to be increased.

More than twenty-five years ago the President’s Crime Commission recommended that in indigent criminal cases defense counsel should be paid “a fee comparable to that which an average lawyer would receive from a paying client for performing similar services.”⁸⁹ The *American Bar Association Standards for Criminal Justice* recommend that assigned counsel be reimbursed “at a reasonable hourly rate . . . for all hours necessary to provide quality legal representation.”⁹⁰

84. THE SPANGENBERG GROUP, *STUDY OF REPRESENTATION IN CAPITAL CASES IN VIRGINIA* 22 (1988).

85. *Id.* at 23.

86. *Id.*

87. It is difficult to learn the exact amount spent on defense representation in each of the states that has capital punishment. Often the data are not maintained on a statewide basis or reports are not prepared detailing the expenditures. In states where all of the expenditures for indigent defense are borne by the county, it is especially difficult to obtain cost information. To illustrate the problem, consider Oklahoma, in which indigent defense representation in capital cases is the responsibility of the Indigent Defense System, a state agency created by statute in 1992. OKLA. STAT. tit. 22, §§ 1355-69 (1994). The statute provides that compensation for non-system attorneys in capital cases shall not exceed \$20,000 and that no more than \$5,000 of this sum may be paid to non-system co-counsel. However, the statutory maximum fee may be exceeded if the Executive Director of the agency, with the approval of the agency’s board, determines that the case “was an exceptional one which required an extraordinary amount of time” *Id.* § 1355.13. The Executive Director, Robert D. Ganstine, advised the author in a phone conversation on November 2, 1994, that the statutory maximum fee was often exceeded with his and the board’s approval, but specific financial data was said to be unavailable. Similarly, until the publication of this Article, financial information for Indiana on defense costs in death penalty cases was not available.

88. *See supra* text accompanying notes 5-8.

89. PRESIDENT’S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *TASK FORCE REPORT: THE COURTS* 61 (1967).

90. AMERICAN BAR ASS’N, *ABA STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE*

The commentary to this black-letter standard explains why counsel in indigent criminal cases should be adequately compensated:

First, it is simply unfair to ask those lawyers who happen to have the skill in trial practice and familiarity with criminal law and procedure to donate time to defense representation. It is worth remembering that the judge, prosecutor, and other officials in the criminal courtroom are not expected to do work for compensation that is patently inadequate. Lawyers do, of course, have a public service responsibility, but the dimension of the national need and constitutional importance of counsel is so great that it cannot be discharged by unpaid or inadequately compensated attorneys. Indeed, where payments for counsel are deficient, it is exceedingly difficult to attract able lawyers into criminal practice and to enhance the quality of the defense bar. But most important, the quality of the representation often suffers when adequate compensation for counsel is not available.⁹¹

Although it may be debated whether the fees paid to counsel in Indiana death penalty cases are sufficient to assure that quality legal representation is provided, clearly the fees in Indiana (let alone in other death penalty states) are not "comparable" to the fees paid to "average lawyers" by paying clients, as recommended by the President's Crime Commission. Most attorneys in private practice will not accept serious and protracted criminal or civil cases for the fees paid for representing indigents in criminal cases.

During early 1995, I interviewed private criminal defense attorneys in Indianapolis and confirmed that they would not accept the defense of a death penalty case unless they were assured of fees substantially greater than \$70 per hour.⁹² One attorney said that the hourly rates for himself and his partner to handle a retained capital case would be between \$150-\$200 and \$175-\$225 respectively. The firm also would require a \$100,000 retainer fee to be applied against hourly billing charges and \$50,000 to be applied against charges for investigators, experts, and other defense expenses. A second attorney said that his firm would require \$75,000-\$100,000 as a retainer, and that hourly billing rates would be \$200 for the senior attorney and between \$75-\$100 for the junior member of the firm. A third attorney estimated that his fee for a death case (which would include himself and another attorney from his office) would be between \$250,000 and \$300,000, to be paid at the start of the case. In addition, he would require the client to deposit at least \$100,000 into a fund to be used for defense expenses. These attorneys emphasized that these sums were reasonable, in light of the emotional pressures and time demands of a death penalty case, the need to decline

SERVICES, Standard 5-2.4, at 39 (3rd ed. 1992).

91. *Id.* at 41-42.

92. I adhered to my practice in these interviews of promising the lawyers that I would not reveal their names. I wanted their candid statements about what they would charge for providing representation in retained capital cases. If anonymity was not promised, I was concerned that the lawyers might be tempted to understate their charges in order not to appear unduly expensive.

other legal business while the death penalty case was pending, and the costs of office overhead.

Indeed, the overhead cost involved in operating a modern law office is exceedingly high. A 1987 study reported that the annual average operating expense per attorney, in law firms with one to fifty lawyers, was \$65,000, comprising \$46,000 for support staff, \$16,000 for occupancy expense, and \$3,000 for technology.⁹³ Thus, it is not surprising that the average hourly rates charged by most lawyers in private practice almost always exceed \$70 per hour.

In a 1995 Tennessee case, a trial court found that “[t]he average hourly cost of office overhead for the attorneys surveyed is \$46.81 for the TBA [Tennessee Bar Association] respondents and \$47.26 for the TACDL [Tennessee Association of Criminal Defense Lawyers] respondents.”⁹⁴ The court also concluded that “the level of compensation affects the quality of representation.”⁹⁵ Similarly, a recently completed study of the Massachusetts Bar Advocate Program, conducted by the National Legal Aid and Defender Association, found that “there is a direct relationship between the inadequate compensation of Bar Advocates [i.e., lawyers who provide public defense] and the low quality of representation received by many indigent defendants.” When surveyed through a mail questionnaire, thirty-six percent of 344 Bar Advocate respondents conceded that in approximately twenty percent of their cases they did not perform some otherwise appropriate defense activities due to insufficient compensation. These findings are consistent with research in other job areas that has sought to measure the impact of compensation on job performance.⁹⁶

A 1993 *National Law Journal* study of law firms with more than 70 attorneys reported hourly rates as high as \$500 per hour for partners and \$280 for associates.⁹⁷ The three Indianapolis law firms listed in this survey reported the following billing ranges:⁹⁸

Baker & Daniels

Partners	\$155 - \$250
Associates	\$ 90 - \$150

93. James F. Robenborst & S.S. Samuelson, *Expanding? Consider Overhead*, NAT’L L.J., July 10, 1989, at 15, 16.

94. Tennessee v. Matthews, slip op. at 1 (Crim. Ct. Montgomery County Tenn. Order of March 28, 1995). In this case, the court ordered that the defense attorney in the pending capital case be paid \$100 per hour for time spent both in court and out of court.

95. *Id.* at 3.

96. See, e.g., EDWARD E. LAWLER III, PAY AND ORGANIZATIONAL EFFECTIVENESS 124 (1971) (discussing the relationship between job performance and compensation).

97. Kenneth Rutman, *Hourly Rates for Partners and Associates*, NAT’L L.J., December 20, 1993, at S6. This article is based on survey data collected from law firms across the country. The firms’ principal city locations and the billing rates for partners and associates are given.

98. *Id.*

Ice Miller Donadio & Ryan

Partners	\$160 - \$240
Associates	\$ 90 - \$145

Locke Reynolds Boyd & Weisell

Partners	\$100 - \$225
Associates	\$ 85 - \$140

In other words, in these three law firms, when human lives are *not* at stake, private clients are charged at least \$85 or \$90 per hour for the time of the least experienced associates. These associates, of course, are recent law graduates who lack the experience and skill to handle a complex civil or criminal case.

The fees charged by these Indianapolis law firms, moreover, are quite typical of private practice. An article dealing with billing practices among law firms in Illinois reports that in small firms the maximum and minimum hourly billing rates for partners are \$350 and \$85 per hour.⁹⁹ Similarly, a Michigan report indicates that the median hourly billing rate for attorneys in that state is \$125. This represents a 19% increase since 1991, when the rate was \$105, and a 67% increase since 1984 when the rate was \$75.¹⁰⁰ Surely lawyers are not being overcompensated when paid \$70 per hour to defend a person on trial for his or her life! Even in federal death penalty prosecutions, defense counsel are routinely paid \$125 per hour and sometimes more.¹⁰¹

Indiana's hourly compensation rate of \$70 is especially modest when compared to the fees typically paid to counsel in civil rights cases in which attorneys' fees are awarded.¹⁰² For example, in a federal civil rights action

99. Kelly Fox, *Who's the Largest of Them All*, ILL. LEGAL TIMES, July 1994, at 1.

100. Traci R. Gentilozzi, *Results of 1994 Law Practice Economics Survey Released*, MICH. L. WKLY., Sept. 26, 1994, at 3.

101. Pursuant to 21 U.S.C. § 848 (8) (1994), the federal judiciary recommends that attorney compensation in federal capital prosecutions be between \$75 and \$125 per hour for in-court and out-of-court time. See 7 GUIDELINES TO JUDICIARY POLICIES AND PROCEDURE § 6.02 A (2d ed. 1991). In addition, according to Kevin McNally, who has served as Federal Death Penalty Resource Counsel, "the prevailing rate for counsel appointed in federal capital cases . . . is at least \$125.00 per hour." Affidavit of Kevin McNally, *United States v. Vest*, No. 94-00037-01-04/07-17-19-23/25-CR-W-3 (W.D. Mo. 1994). Mr. McNally cites cases from numerous federal jurisdictions in which the rate was fixed at \$125 per hour and notes that in a capital case in Detroit the federal district court set an hourly rate of \$150. *Id.*

102. See 42 U.S.C. § 1988(b) (1994):

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, 1986 of this title, title IX of Public Law 92-318 (20 U.S.C. § 1681 *et seq.*), the Religious Freedom Restoration Act of 1993 (42 U.S.C. § 2000d *et seq.*) or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

involving discrimination in public higher education in Alabama, the lead attorney in the case was awarded his hourly rate of \$275 and the other lawyers in the case received awards based upon hourly rates ranging from \$100 to \$200 per hour.¹⁰³ In approving the amount of fees for counsel, the court considered relevant the hourly rates charged by private lawyers in the Northern District of Alabama.¹⁰⁴

V. COMPARISONS BETWEEN OHIO AND INDIANA

As noted earlier, prosecutors and defense lawyers agree that Rule 24 has made a difference in the handling of Indiana capital cases, and the data suggest that prosecutors are now seeking the death penalty less frequently and that juries are less likely to vote for the death penalty.¹⁰⁵ These findings led me to investigate whether there have been similar developments in Ohio, which was the first state to adopt a rule similar to Indiana's Rule 24. While the inquiry concerning Ohio has been considerably less extensive than the investigation of Indiana, it seems clear that the Ohio rule has not had the same impact in that state. There are some important reasons, however, that probably account for the differences in the two states.

Rule 65 of the Supreme Court of Ohio Rules of Superintendence for Courts of Common Pleas, which became effective October 1, 1987, concerns the defense of death penalty cases.¹⁰⁶ Like Indiana's Rule 24, Ohio Rule 65 establishes experiential requirements for the appointment of lead and co-counsel in death penalty cases. In order to serve as lead counsel, an attorney must have had three years of criminal or civil litigation experience, have been lead counsel in the jury trial of at least one capital case or co-counsel in at least two capital cases, and meet one or more additional requirements.¹⁰⁷ In general, the requirements are similar to those of Indiana's Rule 24, except that Rule 24 requires at least five years of prior criminal litigation experience.¹⁰⁸

The Indiana and Ohio rules are identical in requiring that attorneys, in order to qualify for appointments as either lead or co-counsel, attend training programs

103. See *Knight v. Alabama*, 824 F. Supp. 1022, 1031 (N.D. Ala. 1993). See also *Zampino v. Supermarkets Gen. Corp.*, No. Civ. A. 90-7234, 1994 WL 470338, at *1-*2 (E.D. Pa. Aug. 31, 1994) (reasonable rates are \$150 per hour for an attorney with ten years experience, \$100 per hour for attorney with three to five years experience, and \$40 per hour for a law clerk); *Moore v. Secretary of Health & Human Servs.*, No. 90-2259V, 1992 U.S. Cl. Ct. LEXIS 181, at *5 n.2 (Apr. 10, 1992) (\$150 per hour is reasonable attorneys' fee in dispute involving the National Vaccine Injury Compensation Program); *Muchnick v. Secretary of Health & Human Servs.*, No. 90-703V, 1992 U.S. Cl. Ct. LEXIS 148, at *7 (March 25, 1992) (reasonable hourly rates are \$175 per hour for partners, \$95 per hour for associates, and \$50 per hour for law clerks).

104. *Knight*, 824 F. Supp. at 1040.

105. See *supra* text accompanying notes 63-68.

106. OHIO C.P. SUP. R. 65. See also COMMITTEE ON THE APPOINTMENT OF COUNSEL FOR INDIGENT DEFENDANTS IN CAPITAL CASES, REPORT (1990).

107. OHIO C.P. SUP. R. 65(II)(A)(2).

108. See *supra* text accompanying note 27.

in the defense of capital cases. Indiana's Rule 24 requires that attorneys receive 12 hours of training every two years.¹⁰⁹ Rule 65 requires that eligible attorneys "[h]ave specialized training in the defense of persons accused of capital crimes as defined by the Committee."¹¹⁰ The "Committee" refers to the Ohio Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases (the "Rule 65 Committee"), which oversees the implementation of Rule 65. By regulation, the Committee requires that attorneys receive 12 hours of training every two years.¹¹¹

The Indiana and Ohio rules reflect one other important similarity. In both jurisdictions, counties are reimbursed for defense expenditures upon compliance with applicable rules. In Indiana, following compliance with Rule 24, the Indiana Public Defender Commission reimburses counties 50% of their expenditures for death penalty cases.¹¹² In Ohio, the Ohio Public Defender Commission reimburses counties for defense expenditures upon compliance with Rule 65.¹¹³ The percentage of reimbursement to counties fluctuates, however, because it depends upon the budget of the Ohio Public Defender Commission. As of October 1994, the Commission was reimbursing Ohio counties thirty-nine percent of their death penalty defense costs.¹¹⁴

A 1990 report of the Rule 65 Committee noted that the "response to the introduction of Rule 65 was dramatic,"¹¹⁵ as hundreds of attorneys sought to become certified to provide representation in death penalty cases. As of July 1, 1990, 854 attorneys were certified under Rule 65.¹¹⁶ The report also stated that Rule 65 "is widely believed to have improved the general level of representation in capital cases."¹¹⁷ However, according to the available data, no change has occurred either in the number of Ohio capital indictments or in the number of defendants being sentenced to death since Rule 65 went into effect.

While there does not appear to be reliable data in Ohio on the number of capital indictments after 1990, the information has been compiled for the calendar

109. See IND. R. CRIM. P. 24(B)(1)(d) & 24(B)(2)(c).

110. OHIO C.P. SUP. R. 65(A)(2)(c).

111. See addendum to OHIO C.P. SUP. R. 65, *Standards for Retention on Appointed Counsel Lists*. The Ohio rule differs from Indiana's Rule 24 in that the Rule 65 Committee is required to maintain rosters of qualified attorneys; the Committee also has the power to investigate and remove attorneys from rosters who have not received the required training.

112. See *supra* note 21 and accompanying text.

113. See OHIO ADMIN. CODE § 120-1-13 (1995).

114. Letter from Gregory L. Ayers, Senior Assistant Public Defender, Office of the Ohio Public Defender, to Norman Lefstein, Dean, Indiana University School of Law—Indianapolis (Oct. 24, 1994) (on file with author).

115. COMMITTEE ON THE APPOINTMENT OF COUNSEL FOR INDIGENT DEFENDANTS IN CAPITAL CASES, *supra* note 106, at 9.

116. *Id.* Of the 854 "qualified" attorneys, 139 were for lead trial counsel and appeal, 237 were for lead trial counsel only, 56 were for trial co-counsel and appeal, 420 were for trial co-counsel, and 2 were for appeal only. *Id.* at app. C.

117. *Id.* at 9.

years 1983 through 1990, as reflected in the following table:¹¹⁸

TABLE SEVEN

Year	Number of Capital Indictments
1983	116
1984	133
1985	111
1986	89
1987	126
1988	114
1989	121
1990	113

Because Ohio Rule 65 went into effect on October 1, 1987, and its first full year of operation was 1988,¹¹⁹ it is possible to compare the number of Ohio capital indictments in the five years before the rule's adoption with the three years immediately following. As revealed in the above table, there were 575 capital indictments in Ohio between 1983-1987, yielding an annual average capital indictment rate of 115. During 1988-1990 (the three years following the adoption of Ohio Rule 65), there were 348 capital indictments, yielding an annual average capital indictment rate of 116.

Similarly, the average number of persons added to death row each year in Ohio before and after the adoption of Rule 65 seems to have changed only slightly. The table below shows the number of persons in Ohio sentenced to death from 1983-1993:¹²⁰

118. DAVID C. STEBBINS & JANE A. CORE, THE OHIO PUBLIC DEFENDER COMMISSION, DEATH PENALTY REPORT 8-9 (1991).

119. COMMITTEE ON THE APPOINTMENT OF COUNSEL FOR INDIGENT DEFENDANTS IN CAPITAL CASES, *supra* note 106, at 1.

120. OHIO PUBLIC DEFENDER COMMISSION, REPORT TO THE HONORABLE GEORGE V. VOINOVICH, THE OHIO SUPREME COURT, AND HONORABLE MEMBERS OF THE GENERAL ASSEMBLY OF 1993, at 15-17 (1993).

TABLE EIGHT

Year	New Death Row Inmates
1983	11
1984	13
1985	18
1986	14
1987	10
1988	14
1989	11
1990	9
1991	13
1992	11
1993	12

Thus, between 1983 and 1987 (the five years preceding the adoption of Ohio Rule 65), 66 persons were sentenced to death in Ohio—an average of 13 persons annually. During 1988-1993 (the six years following the adoption of Ohio Rule 65), 70 persons were sentenced to death in Ohio—an average of 11.7 persons annually.

Because the adoption of Rule 24 seems clearly to have discouraged Indiana prosecutors from seeking the death penalty, and a similar Ohio rule appears not to have had any discernible effect on the number of capital prosecutions, some of the possible explanations for the differences were examined. Two discoveries were that attorneys in Indiana are much better compensated for their efforts in death penalty cases than are lawyers in Ohio¹²¹ and that expert witnesses and mitigation specialists are far more likely to be appointed by Indiana trial courts to assist in the defense of capital cases.¹²² Although these differences, discussed below, are quite likely the most significant factors contributing to different outcomes in the two states, it is difficult to be certain without additional investigation.

As noted earlier, Indiana Rule 24 requires that both lawyers in death cases be compensated at \$70 per hour, without regard to whether the time was spent in-court or out-of-court,¹²³ and the average cost of completed death cases is \$46,967.¹²⁴ In contrast, in Ohio the average cost for the defense of death penalty cases is less than half of what it is in Indiana. In fiscal year 1987, the average payments for the defense of capital cases in Ohio was \$9,553.¹²⁵ By fiscal year

121. See *infra* notes 123-126 and accompanying text.

122. See *supra* note 73 and accompanying text.

123. See *supra* notes 44-45 and accompanying text and text accompanying note 79.

124. See *supra* Table Four at note 82 and accompanying text.

125. COMMITTEE ON THE APPOINTMENT OF COUNSEL FOR INDIGENT DEFENDANTS IN CAPITAL CASES, *supra* note 106, at 10.

1989, the cost had risen to \$13,090 per case,¹²⁶ and in fiscal year 1994 it was \$17,470 per case.¹²⁷

The relatively low payments in Ohio for the defense of capital cases is ultimately attributable to a lack of adequate funding. The Ohio Public Defender Commission reimburses counties, as noted earlier, for thirty-nine percent of their costs for the defense of capital cases,¹²⁸ but its reimbursements are limited to \$40,000 for two attorneys.¹²⁹ Moreover, reimbursements are based on a maximum of \$40 per hour for in-court time and \$50 per hour for out-of-court time.¹³⁰ While most Ohio counties, therefore, pay attorneys \$50 and \$40 per hour for in-court and out-of-court time, some pay even less.¹³¹ In addition, contrary to practice in Indiana, vouchers of attorneys in Ohio death penalty cases are sometimes reduced by trial judges.¹³² The chart below shows the hourly reimbursement rates adopted by Ohio counties for defense attorneys in capital cases.¹³³

<u>In-Court Rates</u>	<u>Out-of-Court Rates</u>
\$55—1 county	\$50—3 counties
\$50—46 counties	\$45—1 county
\$45—5 counties	\$40—50 counties
\$40—27 counties	\$35—5 counties
\$35—3 counties	\$30—25 counties
\$30—6 counties	\$20—4 counties

Although Ohio's Rule 65 Committee believes that the rule has led to improved representation in capital cases, the Committee is quite dissatisfied with the level of compensation provided to counsel. In its 1993 report on capital defense representation in Ohio, the Committee complained "that attorneys are not particularly well-compensated"¹³⁴ and that "the fees that are paid to appointed counsel in death penalty cases are still too low to attract all of the best defense

126. *Id.*

127. Letter from Gregory L. Ayers, Senior Assistant Public Defender, Officer of the Ohio Public Defender, to Norman Lefstein, Dean, Indiana University School of Law—Indianapolis (Oct. 24, 1994) (on file with author).

128. *Id.*

129. Telephone interview with Gregory L. Ayers, Chief Deputy Public Defender, Office of the Ohio Public Defender (Oct. 18, 1994).

130. Letter from Gregory L. Ayers, Chief Deputy Public Defender, Office of the Ohio Public Defender, to the Honorable Nicholas Holmes, Jr., Ross County Court of Common Pleas (Apr. 25, 1994) (on file with author).

131. *Id.*

132. Telephone interview with Gregory L. Ayers, Chief Deputy Public Defender, Office of the Ohio Public Defender (May 25, 1994).

133. Letter from Gregory L. Ayers, Chief Deputy Public Defender, Officer of the Ohio Public Defender, to the Honorable Nicholas Holmes, Jr., Ross County Court of Common Pleas (Apr. 25, 1994) (on file with author).

134. COMMITTEE ON THE APPOINTMENT OF COUNSEL FOR INDIGENT DEFENDANTS IN CAPITAL CASES, SECOND REPORT 11 (1993).

attorneys from around the state."¹³⁵ Further, the Committee noted that "[o]ften the fees are so low that attorneys cannot afford to provide representation and therefore do not become certified under Rule 65."¹³⁶

The 1993 report of the Rule 65 Committee also complained that the "[t]he amount of funding for expert witnesses and investigation also varies from county to county and case to case."¹³⁷ In addition, defense attorneys claimed that requests for the appointment of expert witnesses and mitigation specialists were sometimes denied by trial judges,¹³⁸ which contrasts sharply with the statements of defense attorneys in Indiana capital cases.¹³⁹ Moreover, Ohio case law regarding the duty of the trial court to appoint experts for the defense was described as "not good,"¹⁴⁰ a proposition that seems well supported because there does not appear to be a decision of the Ohio Supreme Court reversing a capital conviction because of a trial court's refusal to appoint a requested defense expert witness or mitigation specialist.¹⁴¹

VI. INDIANA'S DATA, PROSECUTORIAL DISCRETION, AND THE CONSTITUTIONALITY OF THE DEATH PENALTY

If, as suggested in this Article, the quality of defense representation in Indiana has improved due to Rule 24 and prosecutors have become more selective in seeking the death penalty, there should be fewer concerns than ever about the state's scheme for capital punishment. If other states follow the lead of Indiana and improve their systems for providing counsel in capital cases, will they not also dispel concerns about their state's death penalty statute? Regrettably, the answer is no. Improved defense representation will reduce the risk of conviction of persons genuinely innocent and of persons who, though guilty of the offense, deserve to be spared the death penalty because of mitigating circumstances. Improved defense services, however, will not remove the inherent arbitrariness of capital punishment, and objections to the death penalty on constitutional grounds will continue.¹⁴²

135. *Id.* at 13.

136. *Id.*

137. *Id.*

138. Telephone interview with Gregory L. Ayers, Chief Deputy Public Defender, Office of the Ohio Public Defender (Oct. 18, 1994).

139. *See supra* note 73 and accompanying text.

140. Telephone interview with Gregory L. Ayers, Chief Deputy Public Defender, Office of the Ohio Public Defender (May 25, 1994).

141. A review of Ohio cases does not reveal any decisions of the Ohio Supreme Court in which a capital conviction was reversed because a trial court refused to appoint an expert witness or mitigation specialist requested by the defense. For cases in which the trial court's refusal to appoint an expert for the penalty stage was held not to be reversible error, see *State v. Powell*, 552 N.E.2d 191 (Ohio 1990) and *State v. Esparaza*, 529 N.E.2d 192 (Ohio 1988).

142. One form of arbitrariness in capital prosecutions relates to the system for providing legal representation to the accused. Where, in a given state or in comparisons from state to state, there

Opponents of the death penalty have long argued that it should be held unconstitutional because prosecutors have unlimited and unreviewable discretion to select the persons exposed to its sanction.¹⁴³ Because the Supreme Court has made it clear that the death penalty cannot constitutionally be imposed in an arbitrary and capricious manner, the contention is that even if statutes guide the jury in its discretion, the prosecutor's unbridled discretion should render the death penalty a violation of the Eighth Amendment.¹⁴⁴ The data from Indiana discussed in this Article lend support to the position of death penalty opponents.

The argument against the death penalty, based upon the broad discretion of prosecutors, was addressed by Justice White in 1976 in his plurality opinion in *Gregg v. Georgia*:¹⁴⁵

Petitioner simply asserts that since prosecutors have the power not to charge capital felonies they will exercise that power in a standardless fashion. This is untenable. Absent facts to the contrary it cannot be assumed that prosecutors will be motivated in their charging decision by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts. . . . [T]he standards by which they decide whether to charge a capital felony will be the same as those by which the jury will decide the questions of guilt and sentence. Thus defendants will escape the death penalty through prosecutorial charging decisions only because the offense is not sufficiently serious; or because the proof is insufficiently strong. . . . If the cases really were "similar" in relevant respects it is unlikely that prosecutors would fail to prosecute them as capital cases; and I am unwilling to assume the contrary.¹⁴⁶

The concerns dealt with in Justice White's opinion in *Gregg* also were discussed by Justice Brennan in a dissenting opinion in *DeGarmo v. Texas*,¹⁴⁷ decided in 1985. In *DeGarmo*, one of two co-defendants was convicted of capital murder and sentenced to death whereas the other co-defendant, who was equally subject to prosecution for capital murder, received a sentence of 10 years deferred probation. Justice Brennan observed that this "gross disparity in treatment" was

are significant differences in the qualifications, experience, training, support services, and compensation for the attorneys who provide representation for accused persons charged with capital murder, decisions about who should be executed will turn as much on counsel's performance as on the appropriateness of the death penalty for a particular person.

143. There are countless cases throughout the country in which defense lawyers have contended that the death penalty should be declared unconstitutional because of the prosecutor's unlimited and unreviewable discretion. See, e.g., *Jurek v. Texas*, 428 U.S. 262, 274 (1976); *Resnover v. State*, 460 N.E.2d 922, 929 (Ind. 1984). See also BARRY NAKELL & KENNETH A. HARDY, *THE ARBITRARINESS OF THE DEATH PENALTY* 151-61 (1987).

144. See *Gregg v. Georgia*, 428 U.S. 153, 225 (1976) (White, J., concurring).

145. *Id.*

146. *Id.*

147. 474 U.S. 973 (1985) (Brennan, J., dissenting).

“solely the product of the prosecutor’s unfettered discretion to choose who will be put in jeopardy of life and who will not.”¹⁴⁸ Further, Justice Brennan explained that *Gregg* and its companion cases were intended to eliminate “the arbitrary infliction of death,”¹⁴⁹ but that this had not occurred:

The selection process for the imposition of the death penalty does not begin at trial; it begins in the prosecutor’s office. His decision whether or not to seek capital punishment is no less important than the jury’s. Just like the jury, then, where death is the consequence, the prosecutor’s “discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.”

Instead, the decisions whether to prosecute, what offense to prosecute, whether to plea bargain or not to negotiate at all are made at the unbridled discretion of individual prosecutors. The prosecutor’s choices are subject to no standards, no supervision, no controls whatever.¹⁵⁰

While Justice White in *Gregg* believed that prosecutors would decide about the death penalty based upon the same kinds of factors that guide juries in their deliberations, Justice Brennan in *DeGarmo* was convinced that standardless prosecutorial discretion opened the door to arbitrary decision making. Clearly, Justice Brennan was correct in expressing concern about a lack of specific standards governing prosecutors in deciding upon persons for whom to seek the death penalty. Capital punishment statutes typically do not contain any standards to guide the prosecutor in making the momentous decision whether to seek the death penalty. Indiana’s statute, for example, simply states that “[t]he state *may* seek . . . a death sentence . . . for murder”¹⁵¹ Similarly, neither the prosecution standards of the National District Attorneys Association¹⁵² nor the criminal justice standards of the American Bar Association deal with the charging function of prosecutors in capital cases.¹⁵³

Justice White, moreover, was mistaken in believing that prosecutors would make their decisions in capital cases based solely upon the standards that guide juries in deciding whether to impose the death penalty. The data from Indiana

148. *Id.* at 974.

149. *Id.* at 974-75.

150. *Id.* at 975 (citation omitted).

151. IND. CODE § 35-50-2-9 (Supp. 1994).

152. See NATIONAL DISTRICT ATTORNEYS ASS’N, NATIONAL PROSECUTION STANDARDS § 43.1 (2d ed. 1991).

153. See AMERICAN BAR ASS’N, ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION Standard 3-3.9 (3d ed. 1993). One writer has suggested that “the absence of legislative standards or definitions leaves county prosecutors free to legislate their own death penalty schemes A legislative delegation of such enormous power, without guiding standards, permits intolerable variances between capital punishment practices from one county to the next.” James E. Lobsenz, *Unbridled Prosecutorial Discretion and Standardless Death Penalty Policies: The Unconstitutionality of the Washington Capital Punishment Statutory Scheme*, 7 U. PUGET SOUND L. REV. 299, 353 (1984).

presented in this Article indicate that decisions of prosecutors about whether to seek the death penalty are sometimes influenced by factors that are quite different from any that juries are ever asked to consider.¹⁵⁴ The reduction since 1992 in the number of Indiana death penalty prosecutions seems clearly related to the changes that have occurred in the way capital cases are defended. All of the persons interviewed, as noted before, attributed the reduction of death penalty filings to Rule 24. One former prosecutor, for example, was quite explicit in stating that the quality of defense counsel is an important factor that prosecutors consider in deciding whether to seek the death penalty. In addition, prosecutors referred to the "economic judgment" that Rule 24 introduced into death penalty decision making, the burden on prosecutor staffs caused by improved defense representation, and the risk of adverse publicity resulting from unsuccessful death penalty prosecutions. In fact, one Indiana prosecutor has apparently declared privately that he doesn't plan to ask for the death penalty in any case.

The observation that prosecutors are influenced by defense counsel's ability in dealing with death penalty cases has been noted before. In a Florida study, the experience of defense counsel was cited by respondents as an important consideration in determining the prosecutor's strategy in plea bargaining capital cases.¹⁵⁵ One question in the study asked about the factors that influence prosecutors in taking first degree murder cases to trial, to which a respondent replied, "[f]acts of the case plus how well the attorneys know each other and how closely they worked together. You pay more attention to a good attorney than one you know is a lightweight, when he communicates with you about the case"¹⁵⁶

Moreover, the ability of defense counsel is only one of the extra-legal factors that influence prosecutors in deciding whether to seek the death penalty and how to deal with a death case once it has been charged. The Florida study, which included replies from 16 judges, 16 prosecutors, and 38 defense attorneys, identified numerous extra-legal factors as influencing the decisions of prosecutors. These included the prosecutor's orientation toward punishment, the judge's reputation, the prosecutor's caseload, pressure from the police, media coverage, public opinion, and the political and racial climate.¹⁵⁷

Given the variety of factors that influence a prosecutor's decision about death penalty cases, it is hardly surprising that studies have found disparities in the way capital cases are treated among jurisdictions within a state. Thus, the Florida study found that the region of the state in which the crime occurred made a difference:

The analysis shows a significantly higher level of first degree murder indictments in the central region of Florida [than in the southern region] . . . when other legally relevant factors have been controlled. Moreover,

154. See *supra* text following note 74.

155. William J. Bowers, *The Pervasiveness of Arbitrariness and Discrimination under Post-Furman Capital Statutes*, 74 J. CRIM. L. & CRIMINOLOGY 1067, 1075-77 (1983).

156. *Id.* at 1075-76.

157. *Id.* at 1076-77.

the disparity is even greater if we compare this region with the rest of Florida. . . . In other words, the chances of a first degree murder indictment for otherwise comparable cases were significantly greater in the central region than elsewhere in Florida.¹⁵⁸

Two other studies—one in New Jersey and the other in North Carolina—found similar sorts of disparities in the charging of capital murder.¹⁵⁹ In the New Jersey study, which analyzed 703 cases eligible for capital prosecution, the researchers concluded that “individual prosecutors are engaging in decision-making which varies greatly across counties and results in an overall capital case processing system which is impermissibly arbitrary. . . .”¹⁶⁰ In the North Carolina study, which involved 661 homicides in that state, the researchers found that the differences in the rates of indictment among the state’s judicial districts “cannot be explained by the quality of the evidence in the cases.”¹⁶¹

That the decision whether to seek the death penalty is dependent upon extra-legal factors, sometimes quite different factors from those envisioned by Justice White in *Gregg*, is perhaps best illustrated by events in Texas. In Harris County, Texas (population about 2.8 million),¹⁶² where Houston is located, death penalty cases have been pursued with great zeal for many years. During 1992-1994, 64 death penalty jury cases were tried, whereas during the same three-year period only five such jury cases were tried in Dallas County (population about 1.8 million).¹⁶³ From 1984 through 1993, there were 174 death penalty jury trials in Harris County compared to 35 in Dallas County.¹⁶⁴ Of persons on death row in Texas, Harris County is responsible for 108 compared to 31 from Dallas County.¹⁶⁵ According to District Judge Doug Shaver, “[m]any places share the level of violence [in Houston] . . . but only Harris County has had the popular John B. Holmes as its chief prosecutor since 1979.”¹⁶⁶

Thus, even if defense representation in death penalty cases is improved, counsel’s ability and the extra-legal factors cited in other studies will continue to influence the decisions of prosecutors in capital cases, resulting in treatment disparities of eligible defendants. However, both the United States Supreme Court

158. *Id.* at 1074.

159. See Leigh B. Bienen et al., *The Reimposition of Capital Punishment in New Jersey: The Role of Prosecutorial Discretion*, 41 RUTGERS L. REV. 27 (1988); NAKELL & HARDY, *supra* note 143.

160. Bienen et al., *supra* note 159, at 327.

161. NAKELL & HARDY, *supra* note 143, at 125-29.

162. See THE WORLD ALMANAC & BOOK OF FACTS 433 (1995) (listing the population of Harris County as 2,818,101).

163. *Id.* (listing the population of Dallas County as 1,852,810). See also Gordy Taylor, *Death Works Double-Time in the Lone Star State*, NAT’L L.J., Oct. 3, 1994, at A7.

164. John Makeig, *Capital Justice Takes a Lot of County Capital*, HOUS. CHRON., Aug. 15, 1994, at 1A, 8A.

165. *Id.*

166. Taylor, *supra* note 163, at A7.

and the Indiana Supreme Court have dealt, at least by implication, with disparate treatment of capital defendants. In his concurring opinion in *Gregg*, Justice Stewart rejected the argument that the prosecutor's unfettered decision to seek the death penalty and to plea bargain made any constitutional difference.¹⁶⁷ Justice Stewart acknowledged that a prosecutor could choose to "remove a defendant from consideration as a candidate for the death penalty. [However, n]othing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution."¹⁶⁸ Similarly, the Indiana Supreme Court has routinely rejected claims that the death penalty is unconstitutional because of the prosecutor's broad discretionary power, emphasizing that the jury's subsequent consideration of the case prevents the death penalty from being imposed arbitrarily and capriciously.¹⁶⁹

Perhaps the most compelling reply to these arguments was suggested by Justice Brennan in *DeGarmo*, in which he noted that the jury's decision about the death penalty is insufficient protection for the scheme of capital punishment because "discrimination and arbitrariness [by the prosecutor] at an earlier point in the selection process nullify the value of later controls on the jury."¹⁷⁰ In other words, a state's system of capital prosecutions is fundamentally unfair when some persons eligible for capital murder, due to extra-legal reasons, receive mercy, whereas others eligible for capital murder, due to extra-legal reasons, are denied mercy. The authors of the previously cited North Carolina study have stated the proposition well:

Arbitrary favoritism of a degree that undermines the standards as they appear on the statute books cheats those denied such favoritism even if they may be equally undeserving of the leniency improperly afforded others. A capital punishment system that provides arbitrary leniency for some defendants by definition is responsible for arbitrary executions of others.¹⁷¹

Arbitrary and inconsistent decisions in the charging of criminal cases may be

167. *Gregg v. Georgia*, 428 U.S. 153, 199 (1976).

168. *Id.*

169. In *Miller v. State*, 623 N.E.2d 403 (Ind. 1993), the Indiana Supreme Court explained that

Indiana has chosen by statute to place the responsibility of criminal prosecution on the elected prosecuting attorney of a given county. Of course, it is the prosecuting attorney's decision to prosecute whether it be for the death penalty or some lesser penalty. His decision does not determine the final outcome. His decision merely places the person on trial. A determination of guilty and the imposition of a penalty lies with the jury and the judge. We repeatedly have held that this type of procedure is not constitutionally impaired.

Id. at 412 (citation omitted). See also *Fleener v. State*, 514 N.E.2d 80, 90 (Ind. 1987); *Spranger v. State*, 498 N.E.2d 931, 946 (Ind. 1986); *Resnover v. State*, 460 N.E.2d 922, 928 (Ind. 1984).

170. *DeGarmo v. Texas*, 474 U.S. 973, 975 (1985) (Brennan, J., dissenting).

171. NAKELL & HARDY, *supra* note 143, at 161.

an inevitable facet of our criminal justice system, but the stakes are higher in the capital punishment area because, as the Supreme Court has recognized, "death as a punishment is unique in its severity and irrevocability"¹⁷² and "different in kind from any other punishment imposed . . ."¹⁷³ Procedures for separating defendants for prosecution in other areas of the criminal justice system ought not to be deemed tolerable where the penalty is death.

In theory, a solution to arbitrary decision making by the prosecutor in death penalty cases would be a system of judicial review of prosecutorial actions. However, courts are not well positioned or accustomed to reviewing such matters. As the Supreme Court has noted, the decision whether "to prosecute is particularly ill-suited to judicial review."¹⁷⁴ Further, prosecutors undoubtedly are capable of making plausible arguments, based upon the facts of a particular case, about the appropriateness of the death penalty. Accordingly, procedures for reviewing decisions of prosecutors in individual cases will not necessarily assure that the death penalty is administered without "arbitrariness, discrimination, caprice, and mistake."¹⁷⁵

CONCLUSION

Developments in Indiana during the past several years demonstrate that the quality of defense representation in capital cases can be improved. What is required are rules dealing with the qualifications and workloads of counsel, adequate compensation for defense lawyers, and the availability at government expense of expert witnesses and mitigation specialists to assist the defense. The adoption of Rule 24 by the Indiana Supreme Court¹⁷⁶ shows what can be done if the state's highest court is committed to reform. Similar developments in Ohio¹⁷⁷ and other states¹⁷⁸ suggest that the criminal justice systems in at least several of the nation's death penalty states are beginning to move in the right direction, but overall the pace of improvement is painfully slow and has far to go.

Of all the problems involved in achieving reform, probably none is more difficult than convincing legislators and other government officials that adequate funding should be provided for the defense of capital cases. However, full coverage of defense costs in capital cases is essential, lest the risk of wrongful conviction¹⁷⁹ be enhanced and undue reliance be placed on appeals and postconviction proceedings to correct errors at trial. It also is undoubtedly cost effective if it means that fewer defendants are sentenced to death and lengthy and

172. *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (citing *Furman v. Georgia*, 408 U.S. 238, 286-91 (1972) (Brennan, J., concurring)).

173. *Id.* at 188.

174. *Wayte v. United States*, 470 U.S. 598, 607 (1985).

175. *Callins v. Collins*, 114 S. Ct. 1127, 1129 (1994).

176. *See supra* notes 3, 26-48 and accompanying text.

177. *See supra* notes 51-57 and accompanying text.

178. *See supra* notes 58-61 and accompanying text.

179. *See supra* note 17 and accompanying text.

expensive appellate and postconviction proceedings are avoided.¹⁸⁰

Improvement in the quality of defense representation, however, may serve to highlight other issues incident to death penalty prosecutions, just as it has done in Indiana. By improving the quality of defense services in Indiana capital cases, some of the factors that influence prosecutors in exercising their unfettered discretion to seek or not to seek the death penalty have become more evident. Both the objective and interview data presented in this Article strongly suggest that in deciding upon the death penalty prosecutors evaluate more than just the aggravating and mitigating factors specified for the jury's consideration.¹⁸¹ The ability of defense counsel, the cost of the prosecution, and the burden on the prosecutor's staff, are among the extra-legal factors that prosecutors take into account.¹⁸² These findings, in turn, raise significant and enduring questions about the basic fairness of the scheme for capital punishment in Indiana and other states.

180. There appears to be agreement that the cost to the public of a successful death penalty prosecution is greater than a non-capital prosecution that results in long-term incarceration. *See, e.g.*, PHILLIP J. COOK & DONNA B. SLAWSON, *THE COSTS OF PROCESSING MURDER CASES IN NORTH CAROLINA* 97 (1993). *See also* Robert Spangenberg & Elizabeth R. Walsh, *Capital Punishment or Life Imprisonment? Some Cost Considerations*, 23 *LOY. L.A. L. REV.* 45, 48 (1989); Dave Von Drehle, *Bottom Line: Life in Prison One Sixth as Expensive*, *MIAMI HERALD*, July 10, 1988, at 12A ("the true cost of an execution is closer to \$3.2 million" or approximately six times the cost to keep that person in prison for his or her natural life); Jeremy G. Epstein, *Death Penalty Adds to Our Tax Burdens*, *NAT'L L.J.*, Jan. 16, 1995, at A23, A24 (extensive process and costs involved in postconviction appeals involving death sentences).

181. *See supra* text following note 73.

182. *See supra* text following note 73.

