

**FISCAL ESTIMATE**

DOA-2048 N(R10/98)

- ORIGINAL       UPDATED  
 CORRECTED       SUPPLEMENTAL

LRB or Bill No./Adm. Rule No.

**SB 153 (LRB-0452/1)**

Amendment No. if Applicable

**Subject**

Death penalty or life imprisonment for certain homicide crimes

**Fiscal Effect**

State:  No State Fiscal Effect

Check columns below only if bill makes a direct appropriation or affects a sum sufficient appropriation.

- Increase Existing Appropriation       Increase Existing Revenues  
 Decrease Existing Appropriation       Decrease Existing Revenues  
 Create New Appropriation

Increase Costs - May be possible to Absorb Within Agency's Budget  Yes  No

Decrease Costs

Local:  No local government costs

1.  Increase Costs  
      Permissive       Mandatory  
 2.  Decrease Costs  
      Permissive       Mandatory

3.  Increase Revenues  
      Permissive       Mandatory  
 4.  Decrease Revenues  
      Permissive       Mandatory

5. Types of Local Governmental Units Affected:  
 Towns       Villages       Cities  
 Counties       Others \_\_\_\_\_  
 School Districts       WTCS Districts

**Fund Sources Affected**

- GPR     FED     PRO     PRS     SEG     SEG-S

**Affected Ch. 20 Appropriations**

s. 20.550 (1)(d)

**Assumptions Used in Arriving at Fiscal Estimate**

**INTRODUCTION**

This bill provides for either a death penalty or life imprisonment for any first-degree intentional homicide committed by a person who is 16 years old or older against a child younger than 16 years old.

The Office of the State Public Defender (SPD) represents indigent persons charged with crimes whether or not the death penalty is an option. However, the imposition of a death penalty substantially increases the amount of time a defense attorney must spend on a case. Therefore, for both staff attorneys and private bar attorneys assigned by the SPD, the passage of this bill is likely to create significant increased workloads.

The SPD estimates that the total cost per capital case is \$375,916. It further estimates that up to 36 cases annually could be subject to capital proceedings. Therefore, the total cost to the SPD for cases under this bill could rise to \$13,532,976 for the time period that the cases are being litigated (see analysis below).

**NUMBER OF ANTICIPATED CASES**

According to statistics compiled by the Wisconsin Office of Justice Assistance (OJA) for 1992-1998, the annual number of offenders 16 years old or older accused of first-degree intentional homicide against a child who is younger than 16 years old has ranged from 20-35. (See table below.)

**Long-Range Fiscal Implications**

The SPD estimates that the total cost per capital case is \$375,916. It further estimates that up to 36 cases annually could be subject to capital proceedings. Therefore, the total cost to the SPD for cases under the bill is \$13,532,976 for the time period that the cases are being litigated.

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4-8560

Date  
6/28/99

<i>Year</i>	<i># of victims</i>	<i># of offenders</i>	<i># of cases where offender unknown</i>
1992	30	35	3
1993	28	31	2
1994	23	24	1
1995	21	20	2
1996	19	21	0
1997	26	27	1
1998	25	25	2

The statistical classifications used by OJA are based on the Uniform Crime Reporting (UCR) Program's classification criteria. UCR classifications/crime counts are based on law enforcement investigations. Subsequent prosecutorial decisions or trial outcomes do not affect UCR classifications/crime counts.

Under the OJA/UCR classification system, a homicide victim is a person whose death a law enforcement investigation has determined to be the result of "the willful (non-negligent) killing of one human being by another." The offender is the person (or persons) identified by the law enforcement investigation as the alleged perpetrator of the crime. Once a UCR homicide report is filed, the offender's inclusion in the OJA/UCR count is fixed, regardless of subsequent events. For instance, a plea bargain to a lesser offense or "not guilty" verdict does not alter the offender count.

The OJA/UCR count of offenders 16 years old or older accused of first-degree intentional homicide against a child who is younger than 16 years old is close to the upper limit of the number of possible death penalty cases that might arise in a year. If we assume there is one offender 16 years old or older for each of the cases where the offender is unknown (i.e. uncleared cases), the maximum count of offenders 16 years old or older accused of first-degree intentional homicide against a child who is younger than 16 years old for any of the years 1992-1998 would be 38.

We assume that in the next several years, the number of offenders 16 years old or older accused of first-degree intentional homicide against a child who is younger than 16 years old would continue to fall within a range similar to that for 1992-1998. If we assume that all of these 20-38 offenders were prosecuted on charges of first-degree intentional homicide, based on the experience in states that have already enacted the death penalty, the SPD would probably defend 95% or more of the cases subject to the death penalty (either directly or through private bar appointment). Therefore, based on a range of 20-38 offenders, the SPD would probably represent 19-36 cases per year of first-degree intentional homicide committed by a person who is 16 years old or older against a child who is younger than 16 years old.

### **TRIAL LEVEL REPRESENTATION**

A survey of attorneys handling capital cases and attorneys working on death penalty projects for the National Legal Aid and Defender Association, the American Bar Association, and National Association for the Advancement of Colored People indicates that an attorney at the trial level spends at least 700 hours on a capital case. Studies done in Kansas, Iowa, and North Carolina indicate that the defense of capital cases may involve even more time. Given the complexity of these cases and the irreversibility of the consequences, the national norm is that at least two attorneys be assigned to each case at both the trial and appellate levels.

Death penalty cases are often bifurcated procedures. That is, there is a first phase procedure requiring a jury to determine guilt or innocence, and then a second sentencing phase to decide punishment. Such a bifurcated procedure is specified in this bill. Thus, even in the unusual case

where a defendant pleads guilty, there will still be the expense of impaneling a jury for the sentencing phase.

*Trial Level Private Bar Representation-First Phase*

For the first phase of the bifurcated procedure, it is estimated that 925 hours of casework for two private bar attorneys appointed by the agency would cost per case (at the \$40/hour in-court and \$40/hour out-of-court reimbursement rates):

775 hours out-of-court	\$31,000	x2=	\$ 62,000
150 hours in-court	\$6,000	x2=	\$ 12,000
300 investigator hours (\$20/hour)			\$ 6,000
200 hours attorney travel time (\$25/hour)			\$ 5,000
Expert witness costs			<u>\$ 40,000</u>
	<b>TOTAL</b>		<b>\$125,000</b>

*Trial Level Staff Attorney Representation-First Phase*

We assume that SPD staff attorneys would handle approximately 2 cases per year. The cost of SPD staff attorney representation per case is similar to the private bar costs outlined in the above section on private bar representation.

*Second Phase Trial Level Representation*

For the second phase (sentencing) of the bifurcated procedure, it is important to note that in *Lockett v. Ohio*, the United States Supreme Court held that a statute cannot constitutionally limit the scope of mitigating evidence that the defendant is permitted to offer at the sentencing portion of the penalty trial. Two nationally recognized mitigation specialists have estimated that their services for this second phase usually cost between \$15,000-\$18,000. In addition, SPD staff estimate that at least 2-3 other experts would be called to testify. Such experts bill at \$100/hour or more. If they are not locally based, their billable time may be in the range of 20-30 hours per case.

For the second phase of the bifurcated procedure, it is estimated that an additional 925 hours of casework by two private bar attorneys appointed by the agency would be necessary. The cost per case (at the \$40/hour in-court and \$40/hour out-of-court reimbursement rates) for the second phase of the bifurcated procedure is estimated as follows:

775 hours out-of-court	\$31,000	x2=	\$ 62,000
150 hours in-court	\$6,000	x2=	\$ 12,000
100 investigator hours (\$20/hour)			\$ 2,000
60 hours expert witness time (2 at 30 hours each)			\$ 6,000
Mitigation specialist			<u>\$ 18,000</u>
	<b>TOTAL</b>		<b>\$100,000</b>

**APPELLATE LEVEL REPRESENTATION**

At the appellate level, there are several formal studies that have been done in death penalty states. Two studies review Florida cases, one reviews case costs in Texas and another reviews North Carolina. The studies analyzed the time spent on capital cases by private bar attorneys at post-conviction levels. In addition, Iowa estimates that appellate level representation would cost \$500,000 per case.

*Appellate Level Private Bar Representation*

Based on the studies, the median number of hours required by capital cases at the appellate level is 1,634. In addition, the Florida study included information concerning the number of support hours required in capital cases on the appellate level. The median number of support hours is 661, but this number does not include a separate estimate for the number of investigative hours required. Assuming that at least 20%, or 132 hours, of investigative work is required, then \$2,640 is added to the post-conviction costs of a capital case. We assume that the remaining 529 hours are clerical time, for which we do not directly reimburse. The study also examined the expenses in capital cases. The amount of expenses that was documented in a sample of cases was \$13,556 per case on the appellate level. Based on the above figures, the average cost for private bar representation per appellate case would be as follows (at the \$40/hour in-court and \$40/hour out-of-court reimbursement rate):

1,634 hours out-of-court	\$65,360	x2=	\$130,720
50 hours in-court	\$2,000	x2=	\$ 4,000
132 investigator hours			\$ 2,640
Expenses (experts and others)			<u>\$ 13,556</u>
	<b>TOTAL</b>		<b>\$150,916</b>

*Appellate Level Staff Attorney Representation*

We assume that SPD staff attorneys would handle approximately 2 cases per year. The cost of SPD staff attorney representation per case is similar to the private bar costs outlined in the above section on private bar representation.

**CASE COST SUMMARY**

Using the above data, the SPD estimates that the per case cost of a capital proceeding would be as follows:

First phase of bifurcated trial	\$125,000
Second phase of bifurcated trial	\$100,000
Appeals	<u>\$150,916</u>
	<b>\$375,916</b>

The SPD therefore estimates that the total cost per capital case is \$375,916. The SPD assumes that it would handle up to 36 capital cases annually. Thus, the total cost to the SPD for cases under this bill could rise to \$13,532,976 for the time period that the cases are being litigated.

**SPD TRAINING**

In order to fully train staff and private bar attorneys who would litigate death penalty cases, the SPD would need to conduct a week-long symposium on trial and appellate death penalty case proceedings. The symposium would be for approximately 50-100 attorneys and would include several national trainers. The estimated one-time cost for the symposium would be \$65,000-\$75,000.