Legislative Research Services

Alaska State Legislature
Legislative Affairs Agency
Division of Legal & Research Services

State Capitol, Room 3
Juneau, Alaska 99801
Phone: (907) 465-3991

January 15, 1997

MEMORANDUM

TO: Representative Al Vezey

FROM: Patricia Young
Legislative Analyst

RE: **History of Capital Punishment in Alaska**
Research Request 97.029

You asked for a legislative history of capital punishment in Alaska, both before and since statehood. You requested information on bills introduced to reestablish capital punishment within the state as well as votes by the pubic in regard to the death penalty.

Summary

Although records are incomplete, it appears that capital punishment was condoned, if not legal, in Alaska from the time of its purchase from Russia in 1867. The available historical records suggest that seven persons were hanged by the army or miners' courts between 1869 and 1899. Another eight persons were hanged for crimes deemed to warrant death after criminal and civil codes had been established for Alaska. In 1957, the Territorial Legislature abolished capital punishment, citing concern that innocent persons could be executed. Since that time, nine Alaska Legislatures have considered 17 bills pertaining to the issue. Of the 17, two original bills and the final version of a third focused only on placing an advisory vote before the public regarding whether the legislature should enact a death penalty law. None of the bills, including those for advisory votes, passed. In 1985 the division of elections certified a ballot initiative, but it did not appear on the ballot because of insufficient public support.

The Death Penalty in Alaska

After its purchase from Russia in 1867, Alaska was administered by the U.S. Army and later by the U.S. Navy until passage of the Organic Act of 1884, by which Congress extended the mining laws of the United States and the Oregon Code of Laws, "so far as they may be applicable" to the district of Alaska.[1] According to Carter's Annotated Alaska Codes published in 1907, the laws regarding death warrants and designating the

[1]Information from Robert DeArmond's, "Alaska: 1867-1959," found in *Alaska: Blue Book 1973*, first edition, 141-154.

procedures for execution came from the laws of Oregon--presumably by virtue of the Organic Act. The Organic Act also provided for a governor and a court system. However, the more pertinent death penalty laws--those providing that an individual found guilty of murder in the first degree, or murder occasioned by obstruction of, or damage to, a railroad would be put to death unless the jury returned a verdict specifically qualifying that the sentence should be "without capital punishment"-- appear to have been derived from laws in Ohio, and the exact date of their incorporation is uncertain.[2] We know, however, that Congress made provisions for the rights-of-way for railroads in Alaska in 1898; in 1899, a criminal code was established; and in 1900, a civil code.

Regardless of the exact source or date of inception, the death penalty was used early in Alaska's history. Although records are sketchy and informal, it appears that capital punishment was condoned, if not legal, in Alaska from the time of its purchase from Russia in 1867. The available historical records suggest that seven persons were hanged by the army or miners' courts between 1869 and 1899.[3] Another eight persons were hanged for crimes deemed to warrant death between the advent of criminal and civil codes in Alaska and the abolition of capital punishment in 1957.[4]

Although the Legislative Library has no record of the debate on the elimination of the death penalty, an Associated Press article published following the bill's passage in the House in 1957 suggests that Warren Taylor, the bill's primary sponsor, was concerned about the possibility of individuals being unjustly executed. According to a more recent news article, a "significant basis" for the bill was the uneven application of the penalty--"three-fourths of the people hanged in Alaska this century were members of racial minorities, even though minorities accounted for only about one-fourth of the murders."[5]

The following table represents a compilation of the historical information available on executions in Alaska. The information has been derived from documents provided by the Historical Collections within the Alaska State Library and from information found in *Glacier Bay: The Land and the Silence*, published by the Alaska National Parks and Monuments Association.

---

[2]See Attachment A, which includes pertinent sections from the following sources: Compilation of the Acts of Congress and Treaties Relating to Alaska from March 30, 1867 to March 3, 1905 (known as the Charlton Code), published in 1906; Carter's Annotated Alaska Codes (known as the Carter Code), published in 1907; Compiled Laws of Alaska (CLA) 1913; Compiled Laws of Alaska, 1933; the Alaska Compiled Laws Annotated (ACLA), 1949; and Chapter 132 Session Laws of Alaska, 1957.

[3]Attachment B contains two items compiled by the Historical Collections of the Alaska State Library and an excerpt describing and documenting the hanging of Michael Dennin in 1899 from Dave Bohn's *Glacier Bay: The Land and the Silence* published by the Alaska National Parks and Monuments Association.. Library documents include what appears to be a letter from Alaska Superior Court Judge Gerald Williams to "Karen," dated May 23, 1977, regarding hangings prior to 1900, and a list of hangings in Alaska by date, source unknown.

[4]Attachment C contains two items compiled by the Historical Collections of the Alaska State Library: a letter from Charles J. Zibulka to the curator of the Alaska State Museum and Historical Library, dated August 10, 1965, and a table listing executed persons from 1902 forward, source unknown.

[5]Attachment D contains an Associated Press news article entitled "House Votes to Abolish Alaska Death Penalty," published February 22, 1957; a transcript of that article; and Averil Lerman's," Death's Double Standard: Territorial Alaska's Experience with Capital Punishment Showed Race and Money Mattered," published May 1, 1994, in the *Anchorage Daily News*.

EXECUTIONS IN ALASKA				
Name	**Race**	**Sex**	**Location of Hanging**	**Date of Hanging**
Scutdoo	Indian	male	Wrangell	December 29,1869
unknown	Indian	male	Wrangell	1869
Boyd	Caucasian	male	Wrangell	Fall, 1877
Sad Kajun (?)	Indian	male	Juneau	July, 1882
Kakusakuch Kajun (?)	Indian	male	Juneau	July, 1882
unknown	unknown	male	Valdez	1898
Michael Dennin	Caucasian	male	Lituya Bay	1899
Fred Hardy	Caucasian	male	Nome	September 9, 1902
Homer Bird	Caucasian	male	Sitka	March 6, 1903
Mailo P. Segura	Immigrated from Montenegro; presumed Caucasian	male	Fairbanks	April 15, 1921
Hamilton	Indian	male	Fairbanks	October 7, 1921
Constantine Beaver	Indian	male	Fairbanks	September 7, 1929
Nelson Charles	Indian	male	Juneau	November 10, 1939
Austin A. Nelson	African-American	male	Juneau	March 1, 1948
Eugene LaMoore	African-American	male	Juneau	April 14, 1950

Prepared by Legislative Research Services, January 1997 (97.029).

Source: Documents provided by the Historical Collections of the Alaska State Library, and information in *Glacier Bay: The Land and the Silence*, published by the Alaska National Parks and Monuments Association.

Efforts to Reinstitute the Death Penalty in Alaska

Since 1957, nine Alaska Legislatures have considered 17 bills pertaining to the issue. The first attempt to reinstate capital punishment came in 1974, the most recent was in 1996. Of the 17, two original bills--House Bill (HB) 235 introduced in 1983, and Senate Bill (SB) 13 introduced in 1991--and the final version of a third (SB 52 introduced in 1995) focused only on placing advisory votes before the public regarding whether the legislature should enact death penalty laws. The other 14 bills set guidelines for the imposition of the death penalty.[6]

None of the bills passed. Of the 17 bills introduced, 13 died in committee without a floor vote of the originating body (eight died in the first committee; five in the second committee). Of the four bills to progress to a floor vote, one failed (HB 675 in 1974) and three passed the originating body but failed to reach the floor of the other body [HB 235 in 1983, CSSB 17 (Jud)(ct rules & efds fld), and CSSSSB 52 (Jud) in 1996]. Two of the bills that passed one chamber proposed only that advisory votes be placed before the voters.

The attached table, "Alaska Legislation Pertaining to Capital Punishment (1959-1996)," lists the measures introduced and includes a brief synopsis and the major provisions of each bill. As you will see, identical bills introduced in 1981 (HB 458 and SB 73) formed the basis for most of the subsequent proposals.

One additional attempt to bring the issue before the voters began on September 16, 1985, when the division of elections certified a ballot initiative proposed by Representative Fritz Pettyjohn, former Representative Sam Pestinger, and William Moffatt. In order to have the initiative appear on the 1988 primary ballot, supporters needed 21,317 signatures on file by October 9, 1986. Because only 14,245 signatures were collected, the initiative did not appear on the ballot.

I hope this information is helpful. If you have questions, need further information, or would like copies of the various bills, please let me know.

Attachments

[6]Several of the other bills contained provisions for advisory votes, but in those, the advisory vote concerned the effective date of the reinstitution of capital punishment.

ALASKA LEGISLATION PERTAINING TO CAPITAL PUNISHMENT (1959-1996)

1974 - Eighth Legislature

House Bill 675

Prime Sponsor: A.M. Saylors
Referred to House Judiciary; committee substitute passed Judiciary; failed to pass House.
(CS made minor text changes).

- Mandated the death penalty for first degree murder if the murder was 1) intentional and carried out under an agreement; 2) the victim was a peace officer intentionally killed in the course of duty; 3) the murder was committed during the commission or attempted commission of robbery under AS 11.15.240, kidnapping under AS 11.15.260, rape, or burglary under 11.20.080-130; 4) the convicted person was, at the time of the murder, confined in prison or had escaped from prison; or 5) the victim was a witness to a crime who was murdered for the purpose of preventing his or her testimony in a criminal proceeding.
- Changed Rule 35, Rules of Criminal Procedure, to eliminate the power of the court to reduce sentences in the case of certain murder convictions.

1981 - Twelfth Legislature

Senate Bill 73

Prime Sponsor: Brad Bradley
Referred to Senate State Affairs and Judiciary; did not pass out of State Affairs.

- Classifed murder in the first degree as a capital felony punishable by a prison term of 20-99 yrs or death.
- Set procedure for automatic review by the supreme court for capital punishment sentences and listed determinations to be made by the court, including whether sentence was imposed under the influence of passion, prejudice or other arbitrary factor; the evidence supported the finding of an aggravating factor; and the sentence was excessive or disproportionate to the penalty imposed in similar cases. If the judgment of conviction and death sentence was upheld, the court would specify the time, place, and manner of execution.
- Set out the sentencing procedure for a capital felony, which included a separate proceeding before a jury including any evidence presented to the jury as to mitigating or aggravating factors the court considered to have probative value, followed by an advisory sentence by a jury which would include findings as to whether aggravating factors existed to justify the death sentence, mitigating factors existed which outweighed the aggravating factors and whether the sentence should be imprisonment or death. The court, after considering evidence and the advisory sentence would impose sentence. If it was death, the court would make written findings of aggravating and/or mitigating factors considered.
- Defined the following as aggravating factors: defendant's conduct manifested deliberate cruelty in that it involved torture or aggravated battery; the conduct created a risk of imminent physical injury to three or more persons, other than accomplices; defendant had a prior felony conviction involving the use of violence; defendant committed the offense pursuant to an agreement for gain; defendant was on release for another felony charge or conviction having assault as an element; defendant knowingly directed the offense at an active or former officer of the court, judicial officer, prosecuting attorney, law enforcement officer, correctional employee, or fireman because of or during official duty; or defendant was a member of an organized group and the offense was committed to further the group's criminal objectives.
- Defined the following as mitigating factors: defendant committed the offense under some degree of duress, coercion, threat or complusion insufficient to constitute a defense, but which affected his conduct; the conduct of a youthful defendant was influenced by a more mature person; defendant had provocation from the victim; or defendant assisted authorities detect or apprehend other persons who committed the offense.

House Bill 458 *Text was the same as Senate Bill 73.*

Prime Sponsor: Vern Hurlbert
Referred to House Judiciary; did not pass out of committee.

ALASKA LEGISLATION PERTAINING TO CAPITAL PUNISHMENT (1959-1996)

1983 - Thirteenth Legislature

Senate Bill 121 *Text was the same as Senate Bill 73, 1981, with the exception listed below.*

Prime Sponsor: Fritz Pettyjohn
Co-Sponsors: Tim Kelly, Paul Fischer, and Jan Faiks
Referred to Senate Judiciary and Finance; did not pass out of Judiciary.

The jury imposed sentence rather than issuing an advisory sentence for the court's imposition of sentence.

House Bill 140 *Text was the same as SB 73, 1981.*

Prime Sponsor: Sam Pestinger
Co-Sponsors: Jerry Ward, Joe Flood, John Liska, Dick Shultz
Referred to House Judiciary and Finance; committee substitute passed Judiciary; did not pass out of Finance.

CSHB 140(Jud) *Added the following provisions:*

- A person convicted of a capital offense may not be released on bail before sentencing or pending appeal.
- Transferred responsibility for issuing the time, place and manner of execution from the supreme court to the commissioner of corrections.
- Gave defendant a choice of execution by lethal injection or by firing squad.
- Stated an execution by firing squad would be carried out at a state prison by a firing squad of six peace officers.
- Stated that the commissioner of corrections in consultation with a physician would select a method of injection and a drug or combination of drugs for use in an execution by lethal injection.
- Stated that the commissioner could invite up to 9 citizens 19 years of age or older to attend the execution, including the prosecuting and defense attorney, relatives, friends or religious representatives designated by the defendant. No more than 6 media members could attend and were to serve as a pool for other members of the media; and that photographic or recording equipment would not be allowed until the site was restored to an orderly condition.
- Stated that if, after sentence was imposed, the defendant was found to be incompetent or pregnant, the court and attorneys would be notified and the execution of sentence would be stayed pending further order of the court. If pregnant, the death sentence would be stayed until the defendant was no longer pregnant. At that time the court would issue another warrant specifying a date of execution not less than 30 days nor more than 60 days after the date of the warrant. If found to be incompetent, an order for commitment as provided under AS 12.47.110 would be issued. If competent, the supreme court would issue another warrant specifying the date of execution not less than 30 days nor more than 60 days after the date of the warrant.

House Bill 235

Prime Sponsor: Charlie Bussell
Co-Sponsors: Rick Uehling, John Liska, Dick Shultz
Passed the House; referred to Senate State Affiars and Judiciary; did not pass out of Senate State Affairs.

Provided for an advisory vote at the next election on whether the legislature should enact a law providing for capital punishment for murder in the first degree.

ALASKA LEGISLATION PERTAINING TO CAPITAL PUNISHMENT (1959-1996)

1985 - Fourteenth Legislature

Senate Bill 119 *Text was the same as CS HB 140 (Jud), 1983, with the provision below added.*

Prime Sponsor: Paul Fischer
Co-Sponsors: Tim Kelly, Ann DeVries, Jack Coghill, Jan Faiks, and Mitch Abood
Referred to Health, Education, and Social Services, Judiciary and Finance; did not pass out of Health, Education, and Social Services.

Added a provision for an advisory vote at the next election on whether or not capital punishment for murder in the first degree should go into effect 08/15/87.

House Bill 163 *Text was the same as Senate Bill 73, 1981, with the three exceptions listed below.*

Prime Sponsor: Fritz Pettyjohn
Co-Sponsors: Roger Jenkins, Dick Shultz, Robin Taylor, Andre Marrou, Max Gruenberg
Referred to House Health, Education, and Social Services, Judiciary and Finance; did not pass out of Health Education, and Social Services.

- The jury imposed sentence rather than issuing an advisory sentence for the court's imposition of sentence.
- If the death penalty was imposed, the defendant was considered to have applied for modification of the verdict or findings under Criminal Rule 35.
- The execution would be carried out at a state correctional facility by either hanging or by continuous, intravenous administration of a lethal dose of sodium thiopental.

1987 - Fifteenth Legislature

Senate Bill 7 *Text was practically the same as CS HB 140(Jud), 1983, with the exceptions listed below.*

Prime Sponsor: Mitch Abood
Co-Sponsors: Tim Kelly, Jan Faiks, Paul Fischer
Referred to Senate Health, Education, and Social Services, Judiciary, and Finance; did not pass out of Judiciary.

- Stated that death warrant was to specify date of execution which was to be no less than 30 nor more than 60 days after the date of the warrant.
- Omitted the guidelines by which the firing squad would be selected and the form of lethal injection would be determined. Simply stated that regulations were to be adopted.
- Omitted the guidelines concerning attendance at executions. Simply stated that regulations were to be adopted.
- Changed the aggravating factors to be considered to the following: defendant's conduct manifested deliberate cruelty in that it involved sexual assault in the first degree, kidnapping or assault in the first degree; defendant's conduct caused the death of two or more persons, other than accomplices; defendant had a prior conviction for murder; defendant knowingly directed the conduct at the President of the U.S. or governor of the state; defendant knowingly directed the conduct at a law enforcement, judicial officer, or correctional officer during or because of official duties; defendant killed a child 9 years of age or younger during the commission of the offense; defendant committed the offense under an agreement for gain; defendant committed the offense while avoiding lawful arrest or escaping from lawful confinement; or defendant committed the offense after escaping from the lawful custody of a peace officer or place of lawful confinement.

1987 - Fifteenth Legislature (continued)

CSSB 7(HESS) *Added the following provisions.*

- Amended AS 11.31.100(d) and AS 11.31.110(c) to include capital felonies in the definition of class A felonies
- Inserted the guidelines from CSHB 140 (Jud) by which the firing squad would be selected and the form of lethal injection would be determined.
- Inserted the guidelines from CSHB 140(Jud) concerning attendance at executions.
- Made the following revisions to the list of aggravating factors: 1) added torture and aggravated battery to the list of actions manifesting deliberate cruelty; 2) added a prior conviction for a felony involving the use of violence to the factor citing prior murder convictions; 3) added prosecuting attorneys and firemen to the list of people the defendant may have knowingly directed the offense at; 4) added defendant's conduct created a risk of imminent physical injury to 3 or more persons other than accomplices; 5) deleted the factor citing the killing of a child of 9 years of age or younger; and 6) revised the factors concerning the committing the offense while avoiding arrest or escaping from confinement to say that the defendant was on release for another felony charge or conviction having assault as a necessary element. All these revisions made the list of aggravating factors practically the same as those in CS HB 140 (Jud).
- Added a provision for an advisory vote at the next election on whether or not capital punishment for murder in the first degree should go into effect 08/15/89

Senate Bill 31 *Text was the same as CSHB 140(Jud), 1983, with the following addition.*

Prime Sponsor: Paul Fischer
Co-Sponsors: Tim Kelly and Jan Faiks
Referred to Senate Health, Education, and Social Services, Judiciary and Finance; did not pass out of Health, Education, and Social Services.

Added a provision for an advisory vote at the next election on whether or not capital punishment for murder in the first degree should go into effect 08/15/89

1989 - Sixteenth Legislature

Senate Bill 17 *Although arranged differently, text of the original version was practically the same as CSSB 7 (HESS) 1987, with the following additions.*

Prime Sponsor: Paul Fischer
Co-Sponsors: Tim Kelly, Drue Pearce, Rick Halford and Jan Faiks
CSSB 17 (Jud) (ct rules & efds fld) passed the Senate; referred to House Judiciary and Finance; failed to pass Judiciary.

- Amended AS 12.30.020(a) to exclude a capital felony from the requirement of bail and release.
- Amended AS 12.30.020(a) to exclude persons charged with a capital felony from the provision prohibiting new charges against a defendant who remains incompetent for five years after the charges have been dismissed under the subsection.
- In the section regarding the review of judgment of conviction, added to the issues the court shall determine "any other issue the defendant may raise as a point on appeal."
- Added sections regarding the applicability of various sections of the bill to criminal and appellate rules.

CSSB 17 (Jud)

- Added a section of Legislative Findings
- Added a section stating that it was up to the prosecuting attorney to determine whether or not to seek the death penalty. If the death penalty was to be sought, the court, defendant and defendant's counsel were to be notified within 10 days of arraignment.
- Deleted the section providing for execution by firing squad.

ALASKA LEGISLATION PERTAINING TO CAPITAL PUNISHMENT (1959-1996)

1989 - Sixteenth Legislature (continued)

CSSB 17 (Jud)(ct rules & efds fld)

- Deleted the sections regarding the applicability of the bill to criminal and appellate rules.
- Deleted the sections regarding the effective dates.

1991 - Seventeenth Legislature

Senate Bill 13

Prime Sponsor: Paul Fischer
Co-Sponsors: Steve Frank, Drue Pearce and Rick Halford
Referred to Senate Judiciary and Finance; did not pass out of Finance.

Provided for an advisory vote at the next general election on whether the legislature should enact a law providing for capital punishment for murder in the first degree.

1993 - Eighteenth Legislature

House Bill 162 *Text was practically the same as CSSB 17 (JUD) (ct rules & efds fld), 1989, with the following changes.*

Prime Sponsor: Jerry Sanders
Co-Sponsor: Harley Olberg
Referred to House Judiciary and Finance; did not pass out of Finance.

- Omitted sections amending AS 11.31.100(d) to replace "murder in the first degree" with "capital felony" and omitted amending AS 11.31.110(c).
- Added amendment to AS 12.55.025(i) to "include determining if a sentence of death should be imposed under AS 12.58."
- Required a 99-year sentence for defendants convicted of murder in the 1st degree but not sentenced to death if 1) the conviction was for the murder of a peace officer, firefighter or correctional official engaged in the performance of official duties; 2) the defendant had previous convictions for 1st or 2nd degree murder or homocide with elements of 1st or 2nd degree murder; or 3) the court finds the defendant subjected the victim to substantial physical torture.
- Prohibited a sentence of death from being suspended.
- Required that aggravating factors be found "unanimously beyond a reasonable doubt" and that aggravating factors outweigh mitigating factors unanimously by a preponderance of evidence."
- Removed sexual assault in the first degree, kidnapping, and assault in the 1st degree from the list of aggravating factors. Added being a member of an organized group of 5 or more and committing the offense to further the criminal objectives of the group to the list of aggravating factors.
- Added hanging as a method of execution and specified sodium thiopental as the substance to be used in lethal injection.
- Omitted sections pertaining to witnesses and invitees to and news media coverage of an execution.
- Reinserted sections regarding the applicability of sections of the bill to criminal and appellate rules. Reinserted the sections regarding the effective dates.

ALASKA LEGISLATION PERTAINING TO CAPITAL PUNISHMENT (1959-1996)

1993 - Eighteenth Legislature (continued)

Senate Bill 127 *Text was similar to HB 162 with the following exceptions.*

Prime Sponsor: Senate Judiciary Committee
Referred to Senate Judiciary and Finance; did not pass out of Judiciary.

- Eliminated section on Legislative Findings.
- Eliminated the provision that the prosecuting attorney determines whether to seek the death penalty.
- Eliminated sections on applicibility of the bill to criminal and appellate court rules.

1995 - Nineteenth Legislature

House Bill 45 *Text was similar to SB 127 with the following exceptions.*

Prime Sponsor: Jerry Sanders
Co-Sponsor: Vic Kohring
Referred to House State Affairs, Judiciary, and Finance; did not pass out of State Affairs.

- Added a section including capital felonies among violations required to be reported in applications for permits under AS 05.15.140(b).
- Amended AS 11.31 to incorporate capital offenses into attempt, solicitation, and conspiracy to commit a crime.
- Eliminated hanging as the preferred manner of execution.
- Amended AS 47.10 to include capital felony among the charges for which minors of 16 or more must be charged, prosecuted, and sentenced as adults unless they prove themselves amenable to treatment

Senate Bill 52 *Text was the same as HB 45 with the following exceptions.*

Prime Sponsor: Robin Taylor
Co-Sponsor: Drew Pearce
Referred to Judiciary and Finance; committee subsitute for sponsor substitute passed Senate; referred to House Judiciary and Finance; did not pass out of Finance.

- Eliminated sections amending AS 11.31 (attempt, solicitation, and conspiracy to commit a crime).
- Reinserted the provision that death would be inflicted by hanging unless the defendant elected a lethal dose of sodium thiopental.
- Eliminated provision that minors 16 and over committing capital offenses would be charged, prosecuted and sentenced as adults.

SSSB 52 *Text became identical to HB 45.*

CSSSSB 52 (Jud) *Eliminated all previous provisions; provided for an advisory vote at the next election on whether the legislature should enact a law providing for capital puishment for murder in the first degree.*

ALASKA LEGISLATION PERTAINING TO CAPITAL PUNISHMENT (1959-1996)

1995 - Nineteenth Legislature (continued)

House Bill 481 *Text was similar to HB 45 with the following exceptions.*

Prime Sponsor: Beverly Masek
Co-Sponsors: Vic Kohring and Scott Ogan
Referred to House State Affairs and Judiciary; did not pass out of Judiciary.

- Aggravating factors were limited to the defendant's having caused the death of a child under the age of 18, the defendant's being at least two years older than the child, and the defendant had or was attempting to kidnap, assault, or sexually assault the child.
- Eliminated the advisory vote provision regarding whether the law as passed should go into effect on a certain date.
- Reinserted sections regarding the applicability of the bill to criminal and appellate rules of court.

Source: Individual legislation, bill histories, and final status of bills and resolutions for the respective years.

Legislative Research Services

Alaska State Legislature
Legislative Affairs Agency
Division of Legal & Research Services

State Capitol, Room 3
Juneau, Alaska 99801
Phone: (907) 465-3991

January 15, 1997

MEMORANDUM

TO: Representative Al Vezey

FROM: Patricia Young
Legislative Analyst

RE: **History of Capital Punishment in Alaska**
Research Request 97.029

You asked for a legislative history of capital punishment in Alaska, both before and since statehood. You requested information on bills introduced to reestablish capital punishment within the state as well as votes by the pubic in regard to the death penalty.

Summary

Although records are incomplete, it appears that capital punishment was condoned, if not legal, in Alaska from the time of its purchase from Russia in 1867. The available historical records suggest that seven persons were hanged by the army or miners' courts between 1869 and 1899. Another eight persons were hanged for crimes deemed to warrant death after criminal and civil codes had been established for Alaska. In 1957, the Territorial Legislature abolished capital punishment, citing concern that innocent persons could be executed. Since that time, nine Alaska Legislatures have considered 17 bills pertaining to the issue. Of the 17, two original bills and the final version of a third focused only on placing an advisory vote before the public regarding whether the legislature should enact a death penalty law. None of the bills, including those for advisory votes, passed. In 1985 the division of elections certified a ballot initiative, but it did not appear on the ballot because of insufficient public support.

The Death Penalty in Alaska

After its purchase from Russia in 1867, Alaska was administered by the U.S. Army and later by the U.S. Navy until passage of the Organic Act of 1884, by which Congress extended the mining laws of the United States and the Oregon Code of Laws, "so far as they may be applicable" to the district of Alaska.[1] According to Carter's Annotated Alaska Codes published in 1907, the laws regarding death warrants and designating the

[1]Information from Robert DeArmond's, "Alaska: 1867-1959," found in *Alaska: Blue Book 1973*, first edition, 141-154.

procedures for execution came from the laws of Oregon--presumably by virtue of the Organic Act. The Organic Act also provided for a governor and a court system. However, the more pertinent death penalty laws--those providing that an individual found guilty of murder in the first degree, or murder occasioned by obstruction of, or damage to, a railroad would be put to death unless the jury returned a verdict specifically qualifying that the sentence should be "without capital punishment"-- appear to have been derived from laws in Ohio, and the exact date of their incorporation is uncertain.[2] We know, however, that Congress made provisions for the rights-of-way for railroads in Alaska in 1898; in 1899, a criminal code was established; and in 1900, a civil code.

Regardless of the exact source or date of inception, the death penalty was used early in Alaska's history. Although records are sketchy and informal, it appears that capital punishment was condoned, if not legal, in Alaska from the time of its purchase from Russia in 1867. The available historical records suggest that seven persons were hanged by the army or miners' courts between 1869 and 1899.[3] Another eight persons were hanged for crimes deemed to warrant death between the advent of criminal and civil codes in Alaska and the abolition of capital punishment in 1957.[4]

Although the Legislative Library has no record of the debate on the elimination of the death penalty, an Associated Press article published following the bill's passage in the House in 1957 suggests that Warren Taylor, the bill's primary sponsor, was concerned about the possibility of individuals being unjustly executed. According to a more recent news article, a "significant basis" for the bill was the uneven application of the penalty--"three-fourths of the people hanged in Alaska this century were members of racial minorities, even though minorities accounted for only about one-fourth of the murders."[5]

The following table represents a compilation of the historical information available on executions in Alaska. The information has been derived from documents provided by the Historical Collections within the Alaska State Library and from information found in *Glacier Bay: The Land and the Silence*, published by the Alaska National Parks and Monuments Association.

---

[2]See Attachment A, which includes pertinent sections from the following sources: Compilation of the Acts of Congress and Treaties Relating to Alaska from March 30, 1867 to March 3, 1905 (known as the Charlton Code), published in 1906; Carter's Annotated Alaska Codes (known as the Carter Code), published in 1907; Compiled Laws of Alaska (CLA) 1913; Compiled Laws of Alaska, 1933; the Alaska Compiled Laws Annotated (ACLA), 1949; and Chapter 132 Session Laws of Alaska, 1957.

[3]Attachment B contains two items compiled by the Historical Collections of the Alaska State Library and an excerpt describing and documenting the hanging of Michael Dennin in 1899 from Dave Bohn's *Glacier Bay: The Land and the Silence* published by the Alaska National Parks and Monuments Association.. Library documents include what appears to be a letter from Alaska Superior Court Judge Gerald Williams to "Karen," dated May 23, 1977, regarding hangings prior to 1900, and a list of hangings in Alaska by date, source unknown.

[4]Attachment C contains two items compiled by the Historical Collections of the Alaska State Library: a letter from Charles J. Zibulka to the curator of the Alaska State Museum and Historical Library, dated August 10, 1965, and a table listing executed persons from 1902 forward, source unknown.

[5]Attachment D contains an Associated Press news article entitled "House Votes to Abolish Alaska Death Penalty," published February 22, 1957; a transcript of that article; and Averil Lerman's," Death's Double Standard: Territorial Alaska's Experience with Capital Punishment Showed Race and Money Mattered," published May 1, 1994, in the *Anchorage Daily News*.

EXECUTIONS IN ALASKA

Name	Race	Sex	Location of Hanging	Date of Hanging
Scutdoo	Indian	male	Wrangell	December 29,1869
unknown	Indian	male	Wrangell	1869
Boyd	Caucasian	male	Wrangell	Fall, 1877
Sad Kajun (?)	Indian	male	Juneau	July, 1882
Kakusakuch Kajun (?)	Indian	male	Juneau	July, 1882
unknown	unknown	male	Valdez	1898
Michael Dennin	Caucasian	male	Lituya Bay	1899
Fred Hardy	Caucasian	male	Nome	September 9, 1902
Homer Bird	Caucasian	male	Sitka	March 6, 1903
Mailo P. Segura	Immigrated from Montenegro; presumed Caucasian	male	Fairbanks	April 15, 1921
Hamilton	Indian	male	Fairbanks	October 7, 1921
Constantine Beaver	Indian	male	Fairbanks	September 7, 1929
Nelson Charles	Indian	male	Juneau	November 10, 1939
Austin A. Nelson	African-American	male	Juneau	March 1, 1948
Eugene LaMoore	African-American	male	Juneau	April 14, 1950

Prepared by Legislative Research Services, January 1997 (97.029).

Source: Documents provided by the Historical Collections of the Alaska State Library, and information in *Glacier Bay: The Land and the Silence*, published by the Alaska National Parks and Monuments Association.

Efforts to Reinstitute the Death Penalty in Alaska

Since 1957, nine Alaska Legislatures have considered 17 bills pertaining to the issue. The first attempt to reinstate capital punishment came in 1974, the most recent was in 1996. Of the 17, two original bills--House Bill (HB) 235 introduced in 1983, and Senate Bill (SB) 13 introduced in 1991--and the final version of a third (SB 52 introduced in 1995) focused only on placing advisory votes before the public regarding whether the legislature should enact death penalty laws. The other 14 bills set guidelines for the imposition of the death penalty.[6]

None of the bills passed. Of the 17 bills introduced, 13 died in committee without a floor vote of the originating body (eight died in the first committee; five in the second committee). Of the four bills to progress to a floor vote, one failed (HB 675 in 1974) and three passed the originating body but failed to reach the floor of the other body [HB 235 in 1983, CSSB 17 (Jud)(ct rules & efds fld), and CSSSSB 52 (Jud) in 1996]. Two of the bills that passed one chamber proposed only that advisory votes be placed before the voters.

The attached table, "Alaska Legislation Pertaining to Capital Punishment (1959-1996)," lists the measures introduced and includes a brief synopsis and the major provisions of each bill. As you will see, identical bills introduced in 1981 (HB 458 and SB 73) formed the basis for most of the subsequent proposals.

One additional attempt to bring the issue before the voters began on September 16, 1985, when the division of elections certified a ballot initiative proposed by Representative Fritz Pettyjohn, former Representative Sam Pestinger, and William Moffatt. In order to have the initiative appear on the 1988 primary ballot, supporters needed 21,317 signatures on file by October 9, 1986. Because only 14,245 signatures were collected, the initiative did not appear on the ballot.

I hope this information is helpful. If you have questions, need further information, or would like copies of the various bills, please let me know.

Attachments

[6]Several of the other bills contained provisions for advisory votes, but in those, the advisory vote concerned the effective date of the reinstitution of capital punishment.

ALASKA LEGISLATION PERTAINING TO CAPITAL PUNISHMENT (1959-1996)

1974 - Eighth Legislature

House Bill 675

Prime Sponsor: A.M. Saylors
Referred to House Judiciary; committee substitute passed Judiciary; failed to pass House.
(CS made minor text changes).

- Mandated the death penalty for first degree murder if the murder was 1) intentional and carried out under an agreement; 2) the victim was a peace officer intentionally killed in the course of duty; 3) the murder was committed during the commission or attempted commission of robbery under AS 11.15.240, kidnapping under AS 11.15.260, rape, or burglary under 11.20.080-130; 4) the convicted person was, at the time of the murder, confined in prison or had escaped from prison; or 5) the victim was a witness to a crime who was murdered for the purpose of preventing his or her testimony in a criminal proceeding.
- Changed Rule 35, Rules of Criminal Procedure, to eliminate the power of the court to reduce sentences in the case of certain murder convictions.

1981 - Twelfth Legislature

Senate Bill 73

Prime Sponsor: Brad Bradley
Referred to Senate State Affairs and Judiciary; did not pass out of State Affairs.

- Classifed murder in the first degree as a capital felony punishable by a prison term of 20-99 yrs or death.
- Set procedure for automatic review by the supreme court for capital punishment sentences and listed determinations to be made by the court, including whether sentence was imposed under the influence of passion, prejudice or other arbitrary factor; the evidence supported the finding of an aggravating factor; and the sentence was excessive or disproportionate to the penalty imposed in similar cases. If the judgment of conviction and death sentence was upheld, the court would specify the time, place, and manner of execution.
- Set out the sentencing procedure for a capital felony, which included a separate proceeding before a jury including any evidence presented to the jury as to mitigating or aggravating factors the court considered to have probative value, followed by an advisory sentence by a jury which would include findings as to whether aggravating factors existed to justify the death sentence, mitigating factors existed which outweighed the aggravating factors and whether the sentence should be imprisonment or death. The court, after considering evidence and the advisory sentence would impose sentence. If it was death, the court would make written findings of aggravating and/or mitigating factors considered.
- Defined the following as aggravating factors: defendant's conduct manifested deliberate cruelty in that it involved torture or aggravated battery; the conduct created a risk of imminent physical injury to three or more persons, other than accomplices; defendant had a prior felony conviction involving the use of violence; defendant committed the offense pursuant to an agreement for gain; defendant was on release for another felony charge or conviction having assault as an element; defendant knowingly directed the offense at an active or former officer of the court, judicial officer, prosecuting attorney, law enforcement officer, correctional employee, or fireman because of or during official duty; or defendant was a member of an organized group and the offense was committed to further the group's criminal objectives.
- Defined the following as mitigating factors: defendant committed the offense under some degree of duress, coercion, threat or complusion insufficient to constitute a defense, but which affected his conduct; the conduct of a youthful defendant was influenced by a more mature person; defendant had provocation from the victim; or defendant assisted authorities detect or apprehend other persons who committed the offense.

House Bill 458 *Text was the same as Senate Bill 73.*

Prime Sponsor: Vern Hurlbert
Referred to House Judiciary; did not pass out of committee.

1983 - Thirteenth Legislature

Senate Bill 121 *Text was the same as Senate Bill 73, 1981, with the exception listed below.*

Prime Sponsor: Fritz Pettyjohn
Co-Sponsors: Tim Kelly, Paul Fischer, and Jan Faiks
Referred to Senate Judiciary and Finance; did not pass out of Judiciary.

The jury imposed sentence rather than issuing an advisory sentence for the court's imposition of sentence.

House Bill 140 *Text was the same as SB 73, 1981.*

Prime Sponsor: Sam Pestinger
Co-Sponsors: Jerry Ward, Joe Flood, John Liska, Dick Shultz
Referred to House Judiciary and Finance; committee substitute passed Judiciary; did not pass out of Finance.

CSHB 140(Jud) *Added the following provisions:*

- A person convicted of a capital offense may not be released on bail before sentencing or pending appeal.
- Transferred responsibility for issuing the time, place and manner of execution from the supreme court to the commissioner of corrections.
- Gave defendant a choice of execution by lethal injection or by firing squad.
- Stated an execution by firing squad would be carried out at a state prison by a firing squad of six peace officers.
- Stated that the commissioner of corrections in consultation with a physician would select a method of injection and a drug or combination of drugs for use in an execution by lethal injection.
- Stated that the commissioner could invite up to 9 citizens 19 years of age or older to attend the execution, including the prosecuting and defense attorney, relatives, friends or religious representatives designated by the defendant. No more than 6 media members could attend and were to serve as a pool for other members of the media; and that photographic or recording equipment would not be allowed until the site was restored to an orderly condition.
- Stated that if, after sentence was imposed, the defendant was found to be incompetent or pregnant, the court and attorneys would be notified and the execution of sentence would be stayed pending further order of the court. If pregnant, the death sentence would be stayed until the defendant was no longer pregnant. At that time the court would issue another warrant specifying a date of execution not less than 30 days nor more than 60 days after the date of the warrant. If found to be incompetent, an order for commitment as provided under AS 12.47.110 would be issued. If competent, the supreme court would issue another warrant specifying the date of execution not less than 30 days nor more than 60 days after the date of the warrant.

House Bill 235

Prime Sponsor: Charlie Bussell
Co-Sponsors: Rick Uehling, John Liska, Dick Shultz
Passed the House; referred to Senate State Affiars and Judiciary; did not pass out of Senate State Affairs.

Provided for an advisory vote at the next election on whether the legislature should enact a law providing for capital punishment for murder in the first degree.

ALASKA LEGISLATION PERTAINING TO CAPITAL PUNISHMENT (1959-1996)

1985 - Fourteenth Legislature

Senate Bill 119 *Text was the same as CS HB 140 (Jud), 1983, with the provision below added.*

Prime Sponsor: Paul Fischer
Co-Sponsors: Tim Kelly, Ann DeVries, Jack Coghill, Jan Faiks, and Mitch Abood
Referred to Health, Education, and Social Services, Judiciary and Finance; did not pass out of Health, Education, and Social Services.

Added a provision for an advisory vote at the next election on whether or not capital punishment for murder in the first degree should go into effect 08/15/87.

House Bill 163 *Text was the same as Senate Bill 73, 1981, with the three exceptions listed below.*

Prime Sponsor: Fritz Pettyjohn
Co-Sponsors: Roger Jenkins, Dick Shultz, Robin Taylor, Andre Marrou, Max Gruenberg
Referred to House Health, Education, and Social Services, Judiciary and Finance; did not pass out of Health Education, and Social Services.

- The jury imposed sentence rather than issuing an advisory sentence for the court's imposition of sentence.
- If the death penalty was imposed, the defendant was considered to have applied for modification of the verdict or findings under Criminal Rule 35.
- The execution would be carried out at a state correctional facility by either hanging or by continuous, intravenous administration of a lethal dose of sodium thiopental.

1987 - Fifteenth Legislature

Senate Bill 7 *Text was practically the same as CS HB 140(Jud), 1983, with the exceptions listed below.*

Prime Sponsor: Mitch Abood
Co-Sponsors: Tim Kelly, Jan Faiks, Paul Fischer
Referred to Senate Health, Education, and Social Services, Judiciary, and Finance; did not pass out of Judiciary.

- Stated that death warrant was to specify date of execution which was to be no less than 30 nor more than 60 days after the date of the warrant.
- Omitted the guidelines by which the firing squad would be selected and the form of lethal injection would be determined. Simply stated that regulations were to be adopted.
- Omitted the guidelines concerning attendance at executions. Simply stated that regulations were to be adopted.
- Changed the aggravating factors to be considered to the following: defendant's conduct manifested deliberate cruelty in that it involved sexual assault in the first degree, kidnapping or assault in the first degree; defendant's conduct caused the death of two or more persons, other than accomplices; defendant had a prior conviction for murder; defendant knowingly directed the conduct at the President of the U.S. or governor of the state; defendant knowingly directed the conduct at a law enforcement, judicial officer, or correctional officer during or because of official duties; defendant killed a child 9 years of age or younger during the commission of the offense; defendant committed the offense under an agreement for gain; defendant committed the offense while avoiding lawful arrest or escaping from lawful confinement; or defendant committed the offense after escaping from the lawful custody of a peace officer or place of lawful confinement.

1987 - Fifteenth Legislature (continued)

CSSB 7(HESS) *Added the following provisions.*

- Amended AS 11.31.100(d) and AS 11.31.110(c) to include capital felonies in the definition of class A felonies
- Inserted the guidelines from CSHB 140 (Jud) by which the firing squad would be selected and the form of lethal injection would be determined.
- Inserted the guidelines from CSHB 140(Jud) concerning attendance at executions.
- Made the following revisions to the list of aggravating factors: 1) added torture and aggravated battery to the list of actions manifesting deliberate cruelty; 2) added a prior conviction for a felony involving the use of violence to the factor citing prior murder convictions; 3) added prosecuting attorneys and firemen to the list of people the defendant may have knowingly directed the offense at; 4) added defendant's conduct created a risk of imminent physical injury to 3 or more persons other than accomplices; 5) deleted the factor citing the killing of a child of 9 years of age or younger; and 6) revised the factors concerning the committing the offense while avoiding arrest or escaping from confinement to say that the defendant was on release for another felony charge or conviction having assault as a necessary element. All these revisions made the list of aggravating factors practically the same as those in CS HB 140 (Jud).
- Added a provision for an advisory vote at the next election on whether or not capital punishment for murder in the first degree should go into effect 08/15/89

Senate Bill 31 *Text was the same as CSHB 140(Jud), 1983, with the following addition.*

Prime Sponsor: Paul Fischer
Co-Sponsors: Tim Kelly and Jan Faiks
Referred to Senate Health, Education, and Social Services, Judiciary and Finance; did not pass out of Health, Education, and Social Services.

Added a provision for an advisory vote at the next election on whether or not capital punishment for murder in the first degree should go into effect 08/15/89

1989 - Sixteenth Legislature

Senate Bill 17 *Although arranged differently, text of the original version was practically the same as CSSB 7 (HESS) 1987, with the following additions.*

Prime Sponsor: Paul Fischer
Co-Sponsors: Tim Kelly, Drue Pearce, Rick Halford and Jan Faiks
CSSB 17 (Jud) (ct rules & efds fld) passed the Senate; referred to House Judiciary and Finance; failed to pass Judiciary.

- Amended AS 12.30.020(a) to exclude a capital felony from the requirement of bail and release.
- Amended AS 12.30.020(a) to exclude persons charged with a capital felony from the provision prohibiting new charges against a defendant who remains incompetent for five years after the charges have been dismissed under the subsection.
- In the section regarding the review of judgment of conviction, added to the issues the court shall determine "any other issue the defendant may raise as a point on appeal."
- Added sections regarding the applicability of various sections of the bill to criminal and appellate rules.

CSSB 17 (Jud)

- Added a section of Legislative Findings
- Added a section stating that it was up to the prosecuting attorney to determine whether or not to seek the death penalty. If the death penalty was to be sought, the court, defendant and defendant's counsel were to be notified within 10 days of arraignment.
- Deleted the section providing for execution by firing squad.

ALASKA LEGISLATION PERTAINING TO CAPITAL PUNISHMENT (1959-1996)

1989 - Sixteenth Legislature (continued)

CSSB 17 (Jud)(ct rules & efds fld)

- Deleted the sections regarding the applicability of the bill to criminal and appellate rules.
- Deleted the sections regarding the effective dates.

1991 - Seventeenth Legislature

Senate Bill 13

Prime Sponsor: Paul Fischer
Co-Sponsors: Steve Frank, Drue Pearce and Rick Halford
Referred to Senate Judiciary and Finance; did not pass out of Finance.

Provided for an advisory vote at the next general election on whether the legislature should enact a law providing for capital punishment for murder in the first degree.

1993 - Eighteenth Legislature

House Bill 162 *Text was practically the same as CSSB 17 (JUD) (ct rules & efds fld), 1989, with the following changes.*

Prime Sponsor: Jerry Sanders
Co-Sponsor: Harley Olberg
Referred to House Judiciary and Finance; did not pass out of Finance.

- Omitted sections amending AS 11.31.100(d) to replace "murder in the first degree" with "capital felony" and omitted amending AS 11.31.110(c).
- Added amendment to AS 12.55.025(i) to "include determining if a sentence of death should be imposed under AS 12.58."
- Required a 99-year sentence for defendants convicted of murder in the 1st degree but not sentenced to death if 1) the conviction was for the murder of a peace officer, firefighter or correctional official engaged in the performance of official duties; 2) the defendant had previous convictions for 1st or 2nd degree murder or homocide with elements of 1st or 2nd degree murder; or 3) the court finds the defendant subjected the victim to substantial physical torture.
- Prohibited a sentence of death from being suspended.
- Required that aggravating factors be found "unanimously beyond a reasonable doubt" and that aggravating factors outweigh mitigating factors unanimously by a preponderance of evidence."
- Removed sexual assault in the first degree, kidnapping, and assault in the 1st degree from the list of aggravating factors. Added being a member of an organized group of 5 or more and committing the offense to further the criminal objectives of the group to the list of aggravating factors.
- Added hanging as a method of execution and specified sodium thiopental as the substance to be used in lethal injection.
- Omitted sections pertaining to witnesses and invitees to and news media coverage of an execution.
- Reinserted sections regarding the applicability of sections of the bill to criminal and appellate rules. Reinserted the sections regarding the effective dates.

ALASKA LEGISLATION PERTAINING TO CAPITAL PUNISHMENT (1959-1996)

1993 - Eighteenth Legislature (continued)

Senate Bill 127 *Text was similar to HB 162 with the following exceptions.*

Prime Sponsor: Senate Judiciary Committee
Referred to Senate Judiciary and Finance; did not pass out of Judiciary.

- Eliminated section on Legislative Findings.
- Eliminated the provision that the prosecuting attorney determines whether to seek the death penalty.
- Eliminated sections on applicibility of the bill to criminal and appellate court rules.

1995 - Nineteenth Legislature

House Bill 45 *Text was similar to SB 127 with the following exceptions.*

Prime Sponsor: Jerry Sanders
Co-Sponsor: Vic Kohring
Referred to House State Affairs, Judiciary, and Finance; did not pass out of State Affairs.

- Added a section including capital felonies among violations required to be reported in applications for permits under AS 05.15.140(b).
- Amended AS 11.31 to incorporate capital offenses into attempt, solicitation, and conspiracy to commit a crime.
- Eliminated hanging as the preferred manner of execution.
- Amended AS 47.10 to include capital felony among the charges for which minors of 16 or more must be charged, prosecuted, and sentenced as adults unless they prove themselves amenable to treatment

Senate Bill 52 *Text was the same as HB 45 with the following exceptions.*

Prime Sponsor: Robin Taylor
Co-Sponsor: Drew Pearce
Referred to Judiciary and Finance; committee subsitute for sponsor substitute passed Senate; referred to House Judiciary and Finance; did not pass out of Finance.

- Eliminated sections amending AS 11.31 (attempt, solicitation, and conspiracy to commit a crime).
- Reinserted the provision that death would be inflicted by hanging unless the defendant elected a lethal dose of sodium thiopental.
- Eliminated provision that minors 16 and over committing capital offenses would be charged, prosecuted and sentenced as adults.

SSSB 52 *Text became identical to HB 45.*

CSSSSB 52 (Jud) *Eliminated all previous provisions; provided for an advisory vote at the next election on whether the legislature should enact a law providing for capital puishment for murder in the first degree.*

ALASKA LEGISLATION PERTAINING TO CAPITAL PUNISHMENT (1959-1996)

1995 - Nineteenth Legislature (continued)

House Bill 481 *Text was similar to HB 45 with the following exceptions.*

Prime Sponsor: Beverly Masek
Co-Sponsors: Vic Kohring and Scott Ogan
Referred to House State Affairs and Judiciary; did not pass out of Judiciary.

- Aggravating factors were limited to the defendant's having caused the death of a child under the age of 18, the defendant's being at least two years older than the child, and the defendant had or was attempting to kidnap, assault, or sexually assault the child.
- Eliminated the advisory vote provision regarding whether the law as passed should go into effect on a certain date.
- Reinserted sections regarding the applicability of the bill to criminal and appellate rules of court.

Source: Individual legislation, bill histories, and final status of bills and resolutions for the respective years.

NATIONAL CONFERENCE *of* STATE LEGISLATURES

The Forum for America's Ideas

Capital Case Sentencing Procedure

A unanimous jury must sentence to death in 24 states: Arkansas, California, Connecticut, Illinois, Kansas, Louisiana, Maryland, Mississippi, Nevada, New Hampshire, New Jersey, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wyoming.

In Missouri, a jury sentences to death unless a defendant waives trial by jury, and then the judge determines guilt and assesses the death penalty. Similarly in New Mexico, the jury that found a defendant guilty determines in a separate court proceeding whether the defendant should be sentenced to death or life imprisonment. In a nonjury trial, the trial judge makes that determination, also in a sentencing proceeding.

A judge with jury recommendation hands down a death sentence in six states: Alabama, Delaware, Florida, Georgia, Indiana, Kentucky. In Alabama, Georgia, Indiana, Kentucky and Ohio, the jury recommendation must be unanimous.

A judge sentences to death in four states: Arizona, Idaho, Montana, Nebraska

Colorado has three-judge panels that determine a death sentence.

Thirty-six states have a death penalty.

Date: June 2008

Source: Conference of State Court Administrators and the National Center for State Courts.

Clemency Process By State

Governor Has Sole Authority (14)

Alabama	New Jersey	South Carolina
California	New Mexico	Virginia
Colorado	New York	Washington
Kansas	North Carolina	Wyoming
Kentucky	Oregon	

Governor: Must Have Recommendation of Clemency from Board or Advisory Group (9)

Arizona	Indiana	Oklahoma
Delaware	Louisiana	Pennsylvania
Florida*	Montana	Texas

Governor: After Non-binding Recommendation of Clemency from Board or Advisory Group (9)

Arkansas	Mississippi	Ohio
Illinois	Missouri	South Dakota
Maryland	New Hampshire	Tennessee

Board or Advisory Group Makes Determination (3)

Connecticut

Georgia

Idaho

Governor Sits on Clemency Board Which Makes the Determination (3)

Nebraska

Nevada
Utah

Notes:
*Florida's Governor must have recommendation of Board, on which s/he sits.

For Federal Death Row inmates, the President alone has pardon power.

Source: "Executive Clemency Process and Execution Warrant Procedure In Death Penalty Cases," National Coalition to Abolish the Death Penalty (1993), with updates by DPIC.

2008 enactments:

IDAHO SB 1246 Provides that a judge is not required to sequester a jury in first degree murder cases when the state has not filed a notice of intent to seek the death penalty or has withdrawn such notice.

IDAHO SB1422 Extends the time limitation for filing notice of intent to seek the death penalty in capital cases, allows the state and defense to stipulate or agree to a different time limitation as deemed reasonable by the court.

Illinois SB 2657 Amends the Capital Punishment Reform Study Committee Act. Amends the date by which the Capital Punishment Reform Study Committee must submit its final report to the General Assembly.

MARYLAND HB 1111 Establishes a State Commission on Capital Punishment, provides for the membership of the Commission, authorizes the Commission to hold public hearings, provides for the staffing of the Commission, requires specified entities to cooperate with the Commission.

MARYLAND SB 614 Establishes a State Commission on Capital Punishment, provides for the membership of the Commission, provides for the chair of the Commission, authorizes the Commission to hold public hearings, provides for the staffing of the Commission, requires specified entities to cooperate with the Commission, provides for the funding of the Commission, provides that a member of the Commission may not receive compensation but is entitled to specified reimbursement.

TENNESSEE SB 2718 Extends the reporting period for the Special Committee to Study the Administration of the Death Penalty and provides that upon submitting its report the committee shall cease to exist.

TENNESSEE SB 4154 Concerns sentencing, relates to first degree murder, adds as a statutory aggravating circumstance for a sentence of death or imprisonment for life without parole, the fact that the murder was committed against a probation and parole officer.

UTAH SB 150 Provides an attempt to commit a felony punishable by imprisonment for life without parole is a first degree felony, provides that a person who is convicted of aggravated murder, based on an aggravating circumstance that also constitutes a separate offense, may also be convicted of, and punished for, the separate offense, provides a person who is convicted of murder, based on a predicate offense that also constitutes a separate offense, may also be convicted of, and punished for, the separate offense.

UTAH SB 187 Modifies the Code of Criminal Procedure regarding bail in aggravated murder cases, provides that a charge of aggravated murder is considered a capital felony and not subject to bail unless the prosecutor files a notice that the death penalty will not be sought, or the time for filing the notice has passed.

6) 2007 enactments:

Illinois SB 1023 – Creates the Capital Crimes Database to collect and retain all information on the prosecution, pendency, and disposition of capital and capital eligible cases. Provides that a defendant may request Integrated Ballistic Identification System testing on evidence not previously requested because the technology was not available. Requires any new fingerprint evidence that does not match the defendant or

victim to be submitted to the FBI's Integrated Automated Fingerprint Identification System. Requires the creation of guidelines for all mandated recordings of custodial interrogations in homicide investigations. Prohibits the classification of "armed violence" to attach with any offense that makes the possession or use of a dangerous weapon either an element of the base offense, an aggravated or enhanced version of the offense, or a mandatory sentencing factor that increases the sentencing range. Removes the criminal sexual assault from the list of crimes for which the sentence for armed violence may run consecutively.

Louisiana SB 147 Provides a district attorney with the option to not seek a capital verdict, provides that if the district attorney seeks a capital verdict, the offender shall be punished by death or by life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence, in accordance with the determination of the jury, relates to cases of capital punishment.

Missouri HB 820
Requires the selection of an execution team by the Director of the Department of Corrections that will consist of medical support personnel and individuals who administer lethal gas or chemicals, provides the identities of the team members must be kept confidential, provides that the department's records of such personnel is confidential, prohibits any licensing board or department from sanctioning a professional license of a team member due to his or her lawful participation in an execution.

Nevada AB 58: Expands the list of first degree murder acts committed in the perpetration or attempted perpetration of specified crimes to provide that murder of the first degree also includes murder committed in the perpetration or attempted perpetration of abuse of an older person or vulnerable person.

North Carolina HB 784 Increases from 17 years old to 18 the minimum eligible age for the death penalty.

South Dakota HB 1175 Provides for substances used in the execution of a sentence of death and to allow the choice of the substances used in an execution under certain circumstances.

Texas HB 1545 Relates to competency to be executed in a capital case.

Texas SB 705 Relates to an annual report by the Office of Court Administration of the Judicial System about jury charges and sentences in capital cases.

Utah HB 93 Provides that the commission or attempt to commit specified offenses, including sexual offenses, against a child as part of the commission of the homicide constitutes aggravated murder, if committed with reckless indifferences to human life, modifies an element of aggravated murder regarding acting for pecuniary gain, modifies an element of murder to specify knowing as the level of intent when the defendant acts with depraved indifference.

Utah HB 228 Relates to penalty for homicide of a child, provides that murder of a child younger than 14 years of age is a capital felony, amends the definition of aggravated murder, which is a capital offense, to include the intentional or knowing murder of a child younger than 14 years of age.

Utah SB 114 Provides that aggravated murder is a capital felony if the prosecutor elects to file notice of intent to seek the death penalty within 60 days after the arraignment, provides the court may not receive a plea to a noncapital first degree aggravated homicide offense during the filing period unless agreed to by the prosecution, provides that a person who has been convicted of or has pled to a noncapital aggravated homicide offices shall be sentenced to life in prison without parole.

Virginia HB 2418 Relates to prisoner transfer to a facility housing a death chamber, provides that the identities of persons designated to carry out an execution are confidential and not subject to discovery or introduction as evidence in any proceeding, removes the specific time constraints on when a prisoner condemned to die must be transferred to the correctional center wherein the death chamber is housed and when the prisoner must elect to execution by a method other than lethal injection.

Virginia SB 1295 Relates to the transfer of a prisoner to a facility housing death chamber, concerns confidentiality of execution records.

7) 2006 enactments:

Arizona SB 1376 Establishes the State Capital Postconviction Public Defender Office to represent persons who are not financially able to employ counsel in postconviction relief proceedings in state court after a judgment of death has been rendered.

Goergia HB 57 Protects physicians and medical professionals involved in state ordered executions from challenges to their licensure soley on the basis of their participation in such executions.

Idaho HB 533 Adds sexual abuse in conjunction with murder of a minor to the list of agrravating circumstances for the death penalty.

Idaho SB 1302 Provides in a death penalty case that a trial judge does not have to prepare and submit to the state supreme court a report unless the jury has been waved for sentencing. Eliminates the term "excessive" due to the Idaho Supreme Court ruling in State v. Fields, 1995.

Indiana SB 160 Reduces from ten to five the number of family members of a convicted person that may be present at the execution. Allows eight adult family members of the victim to be present at the execution. Instructs the department of corrections to create procedures for determining which family members may attend an execution if there is more than one vicitm or more than eight immediate family members. Establishes a support room for the use of family members of a victim and support persons who will not be present at the execution.

Louisiana HB 635 Adds 2nd degree robbery, cruelty to juveniles, 2nd degree cruelty to juveniles, and terrorism to the list of aggravating circumstances that should be considered in imposing the death sentence.

Oklahoma SB 1807 Prohibits a sentence of death for defendants who experienced an onset of mental retardation before the age of eighteen. Provides the burden of proof is on the defendant. If the courts deems the defendant mentally sound, it does not prohibit the defendant from raising the issue during the sentencing trial or during the appeals process.

South Carolina SB 1138 Creates the crime of criminal sexual conduct with a minor. Provides if the victim is under 11 years of age the mandatory sentence is twenty-five years to life imprisonment. Provides if the defendant has a previous conviction for sexual conduct involving sexual or anal intercourse with a minor who is less than 11 years the sentence will be death or life imprisonment. Provides at least one aggravating circumstance must be found to implement the death penalty. Provides for trial procudure when the prosecuting attorney is seeking the death peanlty and provides for an appeals process.

Virginia HB 45 Raises the age limit of the death penalty from 16 years of age to 18 or older at the time of the capital offense.

8) 2005 enactments:

Mississippi H 63
Appropriates funds and budgets the Office of Capital Post-Conviction Counsel.

Nevada AB 6
Amends the minimum age for death penalty to 18 years old in order to comply with Supreme Court decision *Roper v. Simmons*.

North Carolina H 1436
Directs the sentencing commission to study and make a recommendation on whether murder committed in violation of a valid domestic violence order of protection should be an aggravating factor in capital sentencing.

Oklahoma S. 329
Provides compensation for state assigned lead counsels or co-counsels, other than a county indigent defender, serving a defendant who is subject to the death penalty shall be compensated at levels established for ordinary state appointed counsel. Allows the fee maximum to be exceeded only when counsel establishes that the case is an exceptional one which requires an extraordinary amount of time to litigate and that the request for extraordinary attorney fees is reasonable.

Texas S 1791
Includes among capital crimes the act of murdering another person in retaliation for or on account of the person's status as a judge.

NATIONAL CONFERENCE OF STATE LEGISLATURES
7700 East First Place Denver, CO 80230 303/364-7700

Death Penalty and the Mentally Retarded
Updated January 2007

Currently, 26 of the 36 states prescribing capital punishment prohibit the imposition of death on defendants determined to be mentally retarded. Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Missouri, Nebraska, Nevada, New Mexico, New York, North Carolina, South Dakota, Tennessee, Utah, Virginia, Washington disallow sentencing mentally retarded defendants to death.

Of the 26 states listed above, Arizona, Arkansas, Delaware, Idaho, Illinois, Kentucky, Maryland, Nebraska, New Mexico, North Carolina, South Dakota, Tennessee and Washington include an I.Q. level either as part of the definition of mental retardation or as a basis in creating a presumption of mental retardation. In creating presumptions, Arizona and Arkansas use the lowest level of 65 while Nebraska, New Mexico and South Dakota employ a level of 70. Illinois uses an IQ of 75. Delaware, Idaho, Kentucky, Maryland, Tennessee and Washington incorporate an I.Q. level of 70 into the definition of mental retardation.

A few of the states provide general guidelines in helping courts determine if the defendant is mentally retarded. Arizona, Colorado, Florida, Georgia, Indiana, Kansas, Louisiana, Virginia and Washington require court ordered psychiatric evaluations of defendants. Alternatively, Connecticut, Maryland, Nebraska, New Mexico, South Dakota and Washington either require an "individually administered" or a "reliable" form of testing when determining a defendant's I.Q. level or general intellectual functioning.

As for retroactive application, Nebraska's statute specifically delineates the process an inmate, sentenced prior to the effective date, must use in motioning for a hearing on mental retardation. Similarly, Arizona, Florida, Kentucky, Missouri and South Dakota's texts only apply to offenses committed after the effective dates. Additionally, the historical notes and references listed after the statutory texts in Colorado, New York and Tennessee clearly prohibit any retroactive application. Courts in Georgia and Indiana have interpreted their respective statutes as to retroactive application. The Georgia Supreme Court ruled that "when a defendant who was tried before the effective date ... alleges in a petition for habeas corpus that he or she is mentally retarded, the habeas corpus court must first determine whether the petitioner has presented sufficient credible evidence to create a genuine issue regarding petitioner's retardation." *Fleming v. Zant*, 259 Ga. 687, 286 S.E.2d 339 (Ga. 1989). In contrast, the Indiana Supreme Court held that the Mental Retardation Statute does not apply retroactively. *Rhodes v. State*, 698 N.E.2d 304, (Ind. 1998).

Statutory Definitions:

- ARIZ. REV. STAT. §13-703 and §13-703.02
  Defines mental retardation as a condition based on a mental deficit that involves significantly subaverage general intellectual functioning. Existing concurrently with significant impairment in adaptive behavior, where the onset of the foregoing conditions occurred before the defendant reached the age of eighteen. Creates a rebuttable presumption when the defendant has an IQ of 65 or less. Defendant has the burden of proving by clear and convincing evidence. The court determines whether the defendant is mentally retarded prior to trial, however the defendant may present evidence of mental retardation during the sentencing proceeding, even if deemed not mentally retarded prior to trial.

- ARK. CODE ANN. §5-4-618
  Defines mental retardation as significantly subaverage general intellectual functioning accompanied by significant deficits or impairments in adaptive functioning manifest in the development period, but no later than age 18; and deficits in adaptive behavior. Creates a rebuttable presumption when a defendant has an I.Q. of 65 or below. Defendant has the burden of proving by a preponderance of the evidence. Prior to trial, the court determines whether the defendant is mentally retarded, but the defendant may bring the issue up again during the sentencing phase if the court determined prior to trial that the defendant was not mentally retarded.

- CALIFORNIA PENAL CODE 1376
  Defines mental retardation as significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before the age of 18.

- COLO. REV. STAT. ANN. §16-9-401 through 405
  Defines "mentally retarded defendant" as one with significantly subaverage general intellectual functioning existing concurrently with substantial deficits in adaptive behavior and manifested and documented during the developmental period. Allows documentation excused if court finds extraordinary circumstances. Requires the defendant prove by clear and convincing evidence and that the court enter its findings on the defendant's pre-trial motion. Mandates the court to order evaluations of defendant when defendant's pre-trial motion is filed. Permits the use of defendant's statements and medical history in determining whether the defendant is mentally retarded.

- CONN. GEN. STAT. §1-1g and §53a-46a
  Defines "mentally retarded" as having significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period which is between birth and age 18.

- DEL. SB 450
  Defines "serious mental retardation" as having significantly subaverage intellectual functioning that exists concurrently with substantial deficits in adaptive behavior that were both manifested before the individual became 18 years of age.

- FLA. STAT. ANN. §921.137
  Defines "mentally retarded" as having significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to 18. Defendant must notify the court of intent to raise mental retardation bar to execution. After being convicted and sentenced to death, defendant may then file motion to determine whether mental retardation exists. Court then appoints two experts to evaluate the defendant. Court must find by clear and convincing evidence that defendant is mentally retarded. State may appeal a determination of mental retardation.

- GA. CODE ANN. §17-7-131
  Defines mentally retarded as having significantly subaverage general intellectual functioning resulting in or associated with impairments in adaptive behavior which manifested during the developmental period. Requires the defendant be examined by a licensed psychologist or psychiatrist prior to acceptance of defendant's guilty by mentally retarded plea. Specifically states that trials commencing on or after July 1, 1988 cannot impose the death penalty on mentally retarded defendants.

- IDAHO STATUTES §19-2515A
  "Mentally retarded" means significantly subaverage general intellectual functioning that is accompanied by significant limitations in adaptive functioning in a least two of the following skill areas: communication, self-care, home living, social or interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety. The onset of significant limitations in adaptive functioning must occur before the age of 18. "Significant subaverage general intellectual functioning" means an intelligence quotient of 70 or below.

- ILLINOIS COMPILED STATUTES §725 ILCS 5/114-15
  The mental retardation must have manifested itself by the age of 18. AN intelligence quotient (IQ) of 75 or below is presumptive evidence of mental retardation. IQ tests and psychometric tests administered by the defendant must be the kind and type recognized by experts in the field of mental retardation. In order for the defendant to be considered mentally retarded, a low IQ must be accompanied by significant deficits in adaptive behavior in at least 2 of the following skill areas: communication, self-care, social or interpersonal skills, home living, self-direction, academics, health and safety, use of community resources, and work.

- IND. CODE ANN. §35-36-9 through 9-7
  Defines mental retardation as significantly subaverage intellectual functioning and substantial impairment of adaptive behavior prior to becoming 22 years of age that is documented in a court ordered evaluative report. Requires the court to order an evaluation and the defendant must prove by clear and convincing evidence.

- KAN. STAT. ANN. §76-12b01, §21-4623 & 4634
  Defines mental retardation as significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from birth to age 18. Requires an examination of the defendant.

- KY. REV. STAT. ANN. §532-130, 135 & 140
  Defines mental retardation as significant subaverage intellectual functioning existing concurrently with substantial deficits in adaptive behavior and manifested during the developmental period. Defines significantly subaverage as an I.Q. of 70 or below. Applies to trials commenced after the effective date.

- LA. ACTS 698, CODE OF CRIMINAL PROCEDURE, ARTICLE 905.5.1
  Defines mental retardation as a disability characterized by significant limitations in both intellectual functioning and adaptive behavior as expressed in conceptual, social, and practical adaptive skills. Onset must have occurred before the age of 18.

- MD. CODE ANN. §27-412
  Defines mentally retarded as significantly subaverage intellectual functioning as evidenced by an I.Q. of 70 or below on an individually administered I.Q. test and impairment in adaptive behavior, and the mental retardation is manifested prior to the age of 22. Requires the defendant prove by a preponderance of the evidence.

- MO. REV. STAT. §565.030
  Defines mental retardation as significantly subaverage intellectual functioning with continual extensive related deficits and limitations in two or more adaptive behaviors .... which conditions are manifested and documented before 18 years of age. Issue of mental retardation can be decided prior to trial or can be submitted later to the trier of fact.

- NEB. REV. STAT. §28-105.01
  Defines mental retardation as significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and an I.Q. of 70 or below on a reliable test is presumptive evidence. The court must find by a preponderance of the evidence. Allows defendants sentenced prior to the

effective date to motion for a hearing on the determination of mental retardation. Defendants were given 120 days after the effective date to file a motion.

- NEVADA - NRS 174
  Defines mental retardation as significant subaverage general intellectual functioning which exists concurrently with deficits in adaptive behavior and manifested during the developmental period.

- N.M. STAT. ANN. §31-20A-2.1
  Defines mental retardation as significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and an I.Q. of 70 or below on a reliable test is presumptive evidence. The court must find by a preponderance of the evidence.

- N.Y. CPL LAW §400.27
  Defines mental retardation as significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior existing prior to age 18. The court must find by a preponderance of the evidence. Allows the use of psychiatric evidence.

- NC SB 173
  Defines mental retardation as significantly subaverage general intellectual functioning (IQ of 70 or below), existing concurrently with significant limitations in adaptive functioning (having significant limitations in two or more of the following adaptive skill areas: communications, self-care, home, living, social skills, community use, self-direction, health and safety, functional academics, leisure skills and work skills), both of which were manifested before the age of 18. Allows for post-conviction determination of mental retardation.

- S.D. CODIFIED LAWS §23A-27A-26.1 and 26.2
  Defines mental retardation as significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive skill areas existing prior to age 18. An I.Q. exceeding 70 on a reliably standardized measure is presumptive evidence that defendant is not mentally retarded. The court must find by a preponderance of the evidence. Applies to trials commenced after the effective date.

- TENN. CODE ANN. §39-13-203
  Defines mental retardation as significantly subaverage general intellectual functioning as evidenced by a functional I.Q. of 70 prior to the age of 18 and deficits in adaptive behavior. Requires the defendant prove by a preponderance of the evidence.

- UTAH CODE §77-15A-101
  Defines mental retardation as significant subaverage general intellectual functioning hat results in and exists concurrently with significant deficiencies in adaptive

functioning that exists primarily in the areas of reasoning or impulse control, or in both of these areas; and the subaverage general intellectual functioning and the significant deficiencies in adaptive functioning are both manifested prior to age 22.

- VIRGINIA CODE §19.2-264.3
  Defines "mentally retarded" as a disability, originating before the age of 18, characterized by (i) significantly subaverage intellectual functioning as demonstrated by performance on a standardized measure of intellectual functioning administered in conformity with accepted professional practice, that is at least two standard deviations below the mean and (ii) significant limitations in adaptive behavior as expressed in conceptual, social and practical adaptive skills.

- WASH. REV. CODE §10.95.030
  Requires a psychologist or psychiatrist to diagnose the defendant. The defendant must establish by a preponderance of the evidence. Defines mental retardation as significant subaverage intellectual functioning existing concurrently with substantial deficits in adaptive behavior and manifested during the developmental period. Defines general intellectual functioning as the results obtained by assessment with one or more of the individually administered general intelligence tests. Defines significant subaverage intellectual functioning as an I.Q. of 70 or below. Adaptive behavior means the effectiveness or degree with which individuals meet the standards of personal independence and social responsibility expected for his or her age. Developmental period is the time between conception and age 18.

Source for how many and which states prohibit execution of the mentally retarded: Death Penalty Information Center: deathpenaltyinfo.org

For more information contact Sarah Hammond at sarah.hammond@ncsl.org