

SB

17

FILE 1

Alaska State Legislature

Senator Paul Fischer
Senate District D
Box 784
Soldotna, Alaska 99669
(907) 262-9420 W
262-9269 H



State Senate

While in Juneau
P.O. Box V
Juneau, Alaska 99811
(907) 465-3791

RECEIVED

JAN 10 1989

JAN FAIKS
SENATE OFFICE

MEMORANDUM

TO: Senator Jan Faiks, Chairman
Senate Judiciary Committee

FROM: Senator Paul Fischer *PF*

SUBJECT: Senate Bill 17
(relating to capital punishment)

DATE: January 10, 1988

I would appreciate your scheduling the above referenced bill before the Senate Judiciary Committee at your earliest possible convenience.

As you are aware, this legislation is similar to Senate Bill 7 introduced during the Fifteenth Alaska Legislature.

Your consideration would be greatly appreciated.

PAF/sgn

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: "An Act authorizing capital punishment."
Sponsor: Sen. Fisher, Kelly and Pearce
Requestor: _____

Agency Affected: Department of Corrections
BRU: Statewide Operations
Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES			1009.5	1060.0	1113.0	1168.6
TRAVEL			8.0	8.0	8.0	8.0
CONTRACTUAL						
SUPPLIES			8.0	8.0	8.0	8.0
EQUIPMENT			6.0	6.0	6.0	6.0
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	1031.5	1082.0	1135.0	1190.6

CAPITAL	0	2683.5	0	0	0	0
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REVENUE	0	0	0	0	0	0
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FUNDING: (Thousands of Dollars)

GENERAL FUND	0	2683.5	1031.5	1082.0	1135.0	1190.6
FEDERAL FUNDS						
OTHER						
TOTAL	0	2683.5	1031.5	1082.0	1135.0	1190.6

POSITIONS:

FULL-TIME	0	0	20	20	20	20
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

See attached analysis.

Susan E. Knighton

Prepared by: Susan E. Knighton, Director
Division: Administrative Services

Phone: 465-3376
Date: 1-23-89

Approved by: Commissioner
Agency: Department of Corrections

Date: 1-23-89

Distribution (by preparer):

Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

ANALYSIS

A. Assumptions:

Enactment of Senate Bill 17 would change the State law to permit capital punishment for a capital felony. Current estimates indicate three convictions per year for this offense would involve executing the death penalty. Because of the lengthy appeal process in cases where the death penalty has been imposed, it is anticipated that a significant number of persons would have to be confined in a separate confinement area. The national average length of time between sentencing and execution of the death penalty is 5 or 6 years. The fact that the sentence is subject to review within 60 days by the State Supreme Court is not expected to appreciably affect the average length of time spent on death row since most cases proceed immediately to the federal courts. Therefore, we are predicting the need for a maximum of 20 death row beds.

1. Capital expenditures required to provide specialized space not currently available in existing State correctional centers. Details follow in B-1.
2. The new space will be adjacent to an existing facility, but isolated. Existing authorized staff could not provide for the necessary security of inmates housed in the area designated for prisoners sentenced to execution.
3. Two fixed guard posts will be required plus one post for roving patrol, and one post for shift supervisor due to the high security and high risk nature of the unit. To man one post 24 hours per day, 7 days per week requires 5 personnel. Details follow in B-2.
4. Inflation is estimated at 5% per year.
5. The unit will be available for occupancy August 1991.

B. Estimated Costs:

1. Capital Expenditures

- a. Functions and square footage allocations are derived from accepted space standards and are adjusted to an existing design for a 20-cell complex.
- b. Assumes this structure will be an addition to an existing institution with all activity for prisoners sentenced for execution to be limited to this maximum security unit.

FISCAL NOTE
Senate Bill 17
Page 3

- c. Assumes only the usual 6% equipment factor and does not include costs for whatever type of equipment would be appropriate for the specified method of execution.
- d. It is estimated that the cost will be \$300 per square foot, considering the fact that this unit must be more secure than other facilities under construction and the relatively small size of the building. No indoor recreation room has been projected.

<u>e. Area Identification</u>	<u>Square Footage</u>
Core Area (44' x 44')	1936
-Control Room, Sallyport	
-Visitation (Attorney, Secure)	
-General Movement	
-Storage	
-Mechanical Room	
Housing Wings	3678
(2 @ 37' x 47' + 200 sq. ft.)	
-20 Cells @ 80 sq. ft. gross each	
-Three Shower Areas	
-Two Movement/Indoor Recreation Area	
Execution Area	1000
Total (Gross)	6614/sq. ft.
	x \$300/sq. ft.
	\$1,984,200
Cost of Structure	
Secure Outdoor Recreation	
(2 @ 16' x 20')	
-640 sq. foot @ \$125/sq. ft.	80,000
Total Building Cost	\$2,064,200
-30% Administration/Overhead	619,260
TOTAL PROJECTED COST	\$2,683,460

2. Salaries and related costs are detailed below. It is estimated that Operating Costs would not begin until July of 1991.
- a. This facility, even though attached to an existing institution, would require two additional fixed guard posts and one post for roving patrol, due to the high security and high risk nature of the unit.

To man one post 24 hours per day, 7 days per week requires at least 5 Correctional Officers II. Three additional posts will require a minimum of 15 Correctional Officers II.

The cost for FY91 for each CO II is as follows:

\$33,293	Salaries (13A)
<u>14,756</u>	Benefits
\$48,049	
\$ 400	Travel (training)
400	Standard Supplies (\$400 per year)
<u>300</u>	Equipment
\$ 1,100	
<u>\$ 49,149</u>	Total yearly cost/CO II
<u>\$737,235</u>	Total yearly cost for 15 CO IIs
\$720,735	Total Salaries & Benefits
6,000	Total Travel
6,000	Total Supplies
<u>4,500</u>	Total Equipment
\$737,235	Total FY91 Cost for CO IIs

- b. Five supervisory Correctional Officers III will be required to fill the complement for the three added posts in addition to the fifteen CO IIs.

The cost for FY91 for each CO III is as follows:

\$ 40,867	Salaries (15B)
<u>16,890</u>	Benefits
\$ 57,757	
\$ 400	Travel (training)
400	Standard Supplies (\$400 per year)
<u>300</u>	Equipment
\$ 1,100	
<u>\$ 58,857</u>	Total yearly cost/CO III
<u>\$294,285</u>	Total yearly cost for 5 CO IIIs
\$288,785	Total Salaries & Benefits
2,000	Total Travel
2,000	Total Supplies
<u>1,500</u>	Total Equipment
\$294,285	Total FY91 Cost for CO IIIs

**STATE OF ALASKA 1989 LEGISLATIVE SESSION
FISCAL NOTE**

REQUEST:**Bill Version:**

SB 17

Publish Date:

Revision Date: 2/16/89
Title: An act related capital
 punishment
Sponsor: Fischer
Requestor:

Agency Affected: Alaska Court System
BRU: Trial Courts

Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)						
OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
Personal Services	• • • •	• • • •	• • • •	87.6	87.6	87.6
Travel	• • • •	• • • •	• • • •	112.5	112.5	112.5
Contractual	• • • •	• • • •	• • • •	166.0	166.0	166.0
Supplies	• • • •	• • • •	• • • •	• • • •	• • • •	• • • •
Equipment	• • • •	• • • •	• • • •	18.7	• • • •	• • • •
Land & Structures	• • • •	• • • •	• • • •	• • • •	• • • •	• • • •
Grants & Claims	• • • •	• • • •	• • • •	• • • •	• • • •	• • • •
TOTAL OPERATING	0.0	0.0	0.0	381.8	366.1	366.1
CAPITAL	• • • •	• • • •	• • • •	• • • •	• • • •	• • • •
REVENUE	• • • •	• • • •	• • • •	• • • •	• • • •	• • • •
FUNDING: (Thousands of Dollars)						
General Funds	0.0	0.0	0.0	381.8	366.1	366.1
Federal Funds	• • • •	• • • •	• • • •	• • • •	• • • •	• • • •
Other	• • • •	• • • •	• • • •	• • • •	• • • •	• • • •
TOTAL	0.0	0.0	0.0	381.8	366.1	366.1
POSITIONS:						
Full-time	• • • •	• • • •	• • • •	2.0	2.0	2.0
Part-time	• • • •	• • • •	• • • •	• • • •	• • • •	• • • •
Temporary	• • • •	• • • •	• • • •	• • • •	• • • •	• • • •
ANALYSIS: (Attach a separate page if necessary)						

See attached information

Prepared by: Jan Strandberg, General Counsel
Division: Alaska Court System

Phone: 264-8228
Date: 02/16/89

Approved by: *Stephanie Cole, for -* Arthur H. Snowden, II, Administrative Director
Agency: Alaska Court System

Date: 02/16/89

Distribution (by preparer):

Legislative Finance
 Legislative Sponsor
 Requestor
 Office of Management & Budget
 Impacted Agency(ies)
 Senate Secretary

ALASKA COURT SYSTEMSB 17 - CAPITAL PUNISHMENTFISCAL IMPACT

Voter approval of capital punishment will result in an estimated 10 capital punishment trials each year. These trials will result in additional costs for the following reasons:

1. Personnel Costs and Related Costs. Extensive legal research is required for capital offenses. Additional law clerks will be needed to research motions and other judicial questions. Courtroom security will have to be strengthened for these cases. Contractual funds for security services in other courts will be needed.

2. Travel Costs. Since death penalty cases are often subject to intense media exposure, expenses associated with jury sequestration and with change of venue can be expected.

3. Juror Selection. Jurors must be questioned individually in capital cases and some courts have required questioning in private. More jurors must be called and the process takes longer, with more challenges for cause, all of which results in higher jury fee expenditures. Similarly, additional bailiff costs can be expected.

4. Transcription Costs. Preparation of the voluminous record which accompanies a death penalty case will result in additional transcribing costs.

5. Equipment. Courtroom security requirements will necessitate the installation metal detectors in major court locations and the use of hand-held detectors in smaller courts to screen trial spectators.

The estimated annual costs associated with these items are summarized in the attached schedule.

ALASKA COURT SYSTEMSB 17 - Capital Punishment
Fiscal Impact

<u>Personal Services:</u>	<u>Salary</u>	<u>Benefits</u>	<u>Total</u>
Law Clerk I, Range 13D, Anchorage, PFT - 12 Months	\$29,340	\$11,730	\$41,070
Law Clerk I, Range 13D, Fairbanks, PFT - 12 Months	33,816	12,710	46,526 -----
Total Personal Services			87,596 -----
 <u>Travel:</u>			
Jury sequestration - meals and lodging			112,500
 <u>Contractual:</u>			
Security guard services for courts outside Anchorage			10,000
Jury fees			96,000
Bailiff costs			10,000
Transcription			50,000 -----
Total Contractual			166,000 -----
 <u>Equipment: (one-time items)</u>			
Standard office equipment and reference materials for law clerks			3,249
Walk-through metal detectors for Anchorage, Fairbanks, Juneau, and Ketchikan and hand-held metal detectors for other superior courts			12,450 -----
Total Equipment			15,699 -----
Total First Year Cost			\$381,795 =====

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: "An Act authorizing capital
punishment..."
Sponsor: Senator Fischer, Kelly, Pearce
Requestor: Senate Judiciary and Finance

Agency Affected: Dept. of Administration
BRU: Public Defender Agency

Components: Third Judicial District

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES		740.8	770.4	801.2	833.2	866.5
TRAVEL		225.0	234.0	243.4	253.1	263.2
CONTRACTUAL		450.0	468.0	486.7	506.2	526.4
SUPPLIES		27.0	28.1	29.2	30.4	31.6
EQUIPMENT		60.0	-0-	-0-	-0-	-0-
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	1502.8	1500.5	1560.5	1622.9	1687.7
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	1502.8	1500.5	1560.5	1622.9	1687.7
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	1502.8	1500.5	1560.5	1622.9	1687.7

POSITIONS:

FULL-TIME	-0-	12.0	12.0	12.0	12.0	12.0
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

(See attached)

Prepared by: John B. Salemi, Acting Public Defender
Division: Public Defender Agency

Phone: 279-7541
Date: 1/18/89

Approved by Commissioner: John Andrews
Agency: Department of Administration

Date: 1/20/89

Distribution (by preparer):

Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. SB 17

If this death penalty bill is enacted, representation of the poor in death cases must be adequate. The United States Supreme Court has recognized that death penalty cases require greater due process procedural safeguards than do non-capital cases. This is due to the severity and finality of a death sentence as well as the potential for killing an innocent person by mistake. Some degree of mistake is of course a potential problem in all criminal cases. In non-death cases, the system stands ready to correct those mistakes where they become known. An execution can never be corrected.

Due to these considerations, the processing of a death case is much more complex and expensive than other criminal cases. Not only are extraordinary amounts of attorney time and substantial expert fees necessary in the guilt phase of a trial, but the penalty phase, in which a jury determines whether or not to put a person to death, takes on tremendous significance. This penalty phase requires extensive preparation, the use of psychiatric experts and family and friends from out-of-state, as well as other necessary expenditures.

Finally, even after the death penalty has been imposed, the appeal procedures in death penalty cases are lengthy and time consuming. After guilt and penalty phases of a case, the following procedures would be routinely necessary:

1. Motion to modify before trial judge.
2. Appeal of conviction and sentence to Alaska Supreme Court.
3. Writ of certiorari to the United States Supreme Court.
4. Post-conviction relief proceedings in state court.
5. Appeal of post-conviction relief proceedings in the Court of Appeals.
6. Petition for hearing of post-conviction relief proceedings to the Alaska Supreme Court.
7. Petition for Writ of Habeas Corpus in the Federal District Court.
8. Appeal to the United States Court of Appeals.
9. Rehearing in the United States Court of Appeals.
10. Writ of certiorari to the United States Court of Appeals.
11. Commutation applications to executive branch.
12. Emergency stays to the United States Supreme Court.

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. SB 17

The figures in this fiscal note are based on an estimation of the number of cases which would have qualified under the bill as capital cases. This agency handles approximately 30 first degree murder cases each year. On the assumption that one third or 10 of these cases would qualify as capital cases under this bill, the specific figures were arrived at as follows:

1. Personal Services

Given the complexity and intensity of effort involved in each death penalty trial and penalty phase, many states recommend or require by statute that a minimum of two attorneys handle each death penalty case. Based on an estimated 10 cases per year, this agency would need two death penalty teams of two attorneys each to handle the trial and penalty phases of these cases. Two appellate attorneys would be necessary to handle the appeals of these cases. In addition, each team of attorneys would require an investigator and legal secretary.

Use of this death penalty team concept will be needed to adequately represent a client who faces the death penalty. Substantially more attorney time is required in a death penalty case than in a non-capital case. Extensive pre-trial motion practice would be required in each case. Given the lack of plea bargaining in Alaska, jury trials will be conducted in all capital murder cases. These jury trials will be longer and more complex than in non-capital cases. The penalty phase of each case will require tremendous expenditures of attorney time in preparing for sentencing and coordinating professional and lay witnesses to testify. Finally, appeals of death penalty cases require extraordinary amounts of attorney time. The New York Defender Association estimates that preparation and argument before the United States Supreme Court alone would be equivalent to 883 hours attorney time.

2. Travel and Contractual Fees.

The New York State Defender Association has estimated that a minimum figure for expert witness fees and travel must be \$30,000 for the penalty phase per case. Experts in forensics, ballistics, blood analysis, hair analysis, eyewitness identification, psychiatry, and psychology could be necessary during the trial phase in each case, and many of these would be traveling from out-of-state. During the penalty phase friends and family members of the defendant as well as psychiatrists, psychologists and social workers would be involved. Thus the contractual and travel costs for expert witnesses has been calculated at \$60,000 per case. This figure does not include any expert fees which might be necessary at the appellate stages. The amount of contractual fees estimated in this fiscal note is based on an estimated 10 cases per year.

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. SB 17

3. Equipment and Supplies.

Other costs include expanded office space as well as equipment and supply money for additional personnel.

BUDGET SUMMARY

Personal Services:

Guilt and Penalty Team-Anchorage			
Attorney V	79.6		
Attorney IV	74.8		
Investigator III	51.9		
Legal Secretary I	32.8		
Appellate Team - Anchorage			
Attorney V	79.6		
Attorney IV	74.8		
Investigator III	51.9		
Legal Secretary I	32.8		
Guilty and Penalty Team-Fairbanks			
Attorney V	90.2		
Attorney IV	84.7		
Investigator III	53.8		
Legal Secretary I	<u>33.9</u>	TOTAL	740.8

Travel:

Based on 10 Capital cases per year	225.0
Employee and non-employee (experts)	

Contractual:

Based on 10 Capital cases per year		
Experts	400.0	
Office space		
Anchorage, Fairbanks	40.0	
Printing	5.0	
Communications	<u>5.0</u>	TOTAL 450.0

Supplies:

Office, law library	27.0
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Equipment:

Office furniture and machines	<u>60.0</u>
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TOTAL 1502.8

Position Title Attorney V		No. of Positions 1	Range/Step 25A	Barg. Unit PX																										
Time Status PFT	Staff Months 12.0	Location Anchorage		Election District 92																										
<table border="1"> <thead> <tr> <th>Type of Expenditure</th> <th>Amount</th> </tr> </thead> <tbody> <tr> <td>1</td> <td>2</td> </tr> <tr> <td>Salary \$5021/mo.</td> <td>60,252</td> </tr> <tr> <td>Benefits</td> <td>19,331</td> </tr> <tr> <td>Premium Pay</td> <td></td> </tr> <tr> <td>Other</td> <td></td> </tr> <tr> <td>Total Personal Services</td> <td>79,583</td> </tr> <tr> <td>Travel</td> <td>50,000</td> </tr> <tr> <td>Contractual</td> <td>110,000</td> </tr> <tr> <td>Commodities</td> <td>3,000</td> </tr> <tr> <td>Equipment</td> <td>2,500</td> </tr> <tr> <td>Other</td> <td></td> </tr> <tr> <td>Total Cost</td> <td>245,083</td> </tr> </tbody> </table>		Type of Expenditure	Amount	1	2	Salary \$5021/mo.	60,252	Benefits	19,331	Premium Pay		Other		Total Personal Services	79,583	Travel	50,000	Contractual	110,000	Commodities	3,000	Equipment	2,500	Other		Total Cost	245,083	Justification This Attorney V will serve as a death penalty team leader in the guilt and penalty phases of capital cases in Anchorage and other parts of the state. Such a team will consist of an Attorney V, an Attorney IV, an Investigator III, and a Legal Secretary I. Five capital cases per year are projected for each team and each case will require 20.0 for travel and 40.0 contractual for experts, etc. for a total 300.0 per team. Pro rating these amounts for each team attorney allows 50.0 for travel and 100.0 contractual plus office space and other necessities.		
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**Request For
New Position**

Agency Department of Administration
 BRU Public Defender Agency
 Component Third Judicial District

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 Revised Date

FY 90

Position Title Attorney IV			No. of Positions 1	Range/Step 24A	Barg. Unit PX																																																												
Time Status PFT	Staff Months 12.0		Location Anchorage		Election District 92																																																												
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**Request For
New Position**

Agency Department of Administration
 BRU Public Defender Agency
 Component Third Judicial District

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 Revised Date

FY 90

Position Title Investigator III			No. of Positions 1	Range/Step 18A	Barg. Unit GG																																													
Time Status PFT	Staff Months 12.0		Location Anchorage	Election District 92																																														
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**Request For
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FY 90

Position Title Legal Secretary I			No. of Positions 1	Range/Step 10A	Barg. Unit GG
Time Status PFT	Staff Months 12.0		Location Anchorage	Election District 92	
			Justification This Legal Secretary I will provide support services to a death penalty team in Anchorage and other parts of the state. Necessary travel is included in the requests for attorneys. The equipment request includes 10.0 for a word processor.		
Type of Expenditure		Amount			
1	2	3			
Salary \$1835/mo.	22,020				
Benefits	10,802				
Premium Pay					
Other					
Total Personal Services		32,822			
Travel		-0-			
Contractual		-0-			
Commodities		3,000			
Equipment		12,500			
Other					
Total Cost		48,322			
Funding Source for Total Cost					
Federal Receipts	1002				
G. F. Match	1003				
General Fund	1004	48,322			
GF Program Receipts	1005				
Other					

**Request For
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Agency Department of Administration
 BRU Public Defender Agency
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Position Title Attorney V		No. of Positions 1	Range/Step 25A	Barg. Unit PX	
Time Status PFT	Staff Months 12.0	Location Anchorage		Election District 92	
		Justification This Attorney V will serve as a death penalty team leader in the appellate phases of capital cases for all parts of the state. Such a team will consist of an Attorney V, an Attorney IV, an Investigator III and a Legal Secretary I. It is projected that this appellate team will handle ten capital cases per year. Travel will be to Seattle for the Ninth Circuit Court of Appeals and to Washington, D.C. for the United States Supreme Court. Contractual is to cover printing costs for motions and briefs to the Federal Appellate Courts.			
Type of Expenditure					Amount
1	2				3
Salary \$5021/mo.	60,252				
Benefits	19,331				
Premium Pay					
Other					
Total Personal Services					79,583
Travel					10,000
Contractual					5,000
Commodities					3,000
Equipment					2,500
Other					
Total Cost					100,083
Funding Source for Total Cost					
Federal Receipts 1002					
G. F. Match 1003					
General Fund 1004		100,083			
GF Program Receipts 1005					
Other					

**Request For
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 BRU Public Defender Agency
 Component Third Judicial District

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Position Title Attorney IV		No. of Positions 1	Range/Step 24A	Barg. Unit PX
Time Status PFT	Staff Months 12.0	Location Anchorage		Election District 92
Type of Expenditure		Justification This Attorney IV will serve as a death penalty team member in the appellate phases of capital cases for all parts of the state. Such a team will consist of an Attorney V, an Attorney IV, an Investigator III and a Legal Secretary I. It is projected that this appellate team will handle ten capital cases per year. Travel will be to Seattle for the Ninth Circuit Court of Appeals and to Washington, D.C. for the United States Supreme Court. Contractual is to cover printing costs for motions and briefs to the Federal Appellate Courts.		
1	2			
Salary \$4687.mo.	56,244			
Benefits	18,601			
Premium Pay				
Other				
Total Personal Services	74,845			
Travel	10,000			
Contractual	5,000			
Commodities	3,000			
Equipment	2,500			
Other				
Total Cost	95,345			
Funding Source for Total Cost				
Federal Receipts 1002				
G. F. Match 1003				
General Fund 1004	95,345			
GF Program Receipts 1005				
Other				

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 BRU Public Defender Agency
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FY 90

Position Title Investigator III		No. of Positions 1	Range/Step 18A	Barg. Unit GG																										
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Position Title Legal Secretary I		No. of Positions 1	Range/Step 10A	Barg. Unit GG	
Time Status PFT	Staff Months 12.0	Location Anchorage		Election District 92	
		Justification This Legal Secretary I will provide support services to the appellate death penalty team in all parts of the state. Necessary travel is included in the requests for attorneys. The equipment request includes 10.0 for a word processor.			
Type of Expenditure					Amount
1	2				3
Salary \$1835/mo.	22,020				
Benefits	10,802				
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Total Personal Services					32,822
Travel					-0-
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Equipment					12,500
Other					
Total Cost					48,322
Funding Source for Total Cost					
Federal Receipts 1002					
G. F. Match 1003					
General Fund 1004		48,322			
GF Program Receipts 1005					
Other					

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Position Title Attorney V		No. of Positions 1	Range/Step 25A	Barg. Unit PX																										
Time Status PFT	Staff Months 12.0	Location Fairbanks		Election District 94																										
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Position Title Attorney IV		No. of Positions 1	Range/Step 24A	Barg. Unit PX																										
Time Status PFT	Staff Months 12.0	Location Fairbanks		Election District 94																										
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Position Title Investigator III		No. of Positions 1	Range/Step 18A	Barg. Unit GG																										
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Position Title Legal Secretary I			No. of Positions 1	Range/Step 10A	Barg. Unit GG																										
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FISCAL NOTE

REQUEST:

Revision Date: 1/18/89

Title: "An Act authorizing capital
punishment,..."

Sponsor: Fischer

Requestor: Judiciary

Agency Affected: Administration

BRU: Office of Public Advocacy

Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES	-0-	239.2	248.8	258.8	269.2	280.0
TRAVEL		35.0	36.4	37.9	39.4	40.1
CONTRACTUAL		546.2	568.0	590.7	614.3	638.9
SUPPLIES		4.0	4.2	4.4	4.6	4.8
EQUIPMENT		18.3	0	0	0	0
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	842.7	857.4	891.8	927.5	963.8

CAPITAL						
---------	--	--	--	--	--	--

REVENUE						
---------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	842.7	857.4	891.8	927.5	963.8
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	842.7	857.4	891.8	927.5	963.8

POSITIONS:

FULL-TIME	-0-	4.0	4.0	4.0	4.0	4.0
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

See Attached

Prepared by: Brant McGee, Public Advocate

Division: Office of Public Advocacy

Phone: 274-1684

Date: 1/18/89

Approved by Commissioner: John Andrews

Agency: Administration

Date: 1/20/89

Distribution (by preparer):

Legislative Finance

Legislative Sponsor

Requestor

Office of Management and Budget

Impacted Agency(ies)

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. SB 17

The passage of death penalty legislation would have a dramatic fiscal impact on the Office of Public Advocacy. The OPA is purely a reactive agency and must provide legal representation when appointed by the court. The OPA is responsible for providing representation to indigent criminal defendants in cases where the Alaska Public Defender Agency has a conflict of interest.

This office's estimate that it will be responsible for three capital cases in FY90 is dependent upon the following two assumptions: (1) a slight numerical increase in the number of first degree murder cases which fall within the OPA statutory mandate, and (2) the Department of Law will request the death penalty in only one-third of all First Degree Murder cases.

The Office of Public Advocacy would assign at least two experienced attorneys to each capital case in accordance with the policy of numerous states in which the death penalty has become law. Each case will necessitate an exhaustive pretrial investigation, contracts with numerous expert witnesses, and extensive litigation of legal issues during pretrial proceedings, trial, and numerous appellate stages.

The New York Defender Association estimated expert witness fees at \$60,000 per case. Further, travel costs will be extraordinarily high because this Anchorage-based death penalty team must provide statewide representation.

It is anticipated that the Office of Public Advocacy will have to contract for representation in at least one death penalty case per year. Such a case would arise when OPA has a conflict of interest. The New York Defender Association has estimated the cost of defense services in each case to be \$350,000.

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. SB 17

SB17 continued:

Personal Services

Anchorage

Attorney V Salary & Benefits	=	\$ 79.6
---------------------------------	---	---------

Attorney IV Salary & Benefits	=	74.8
----------------------------------	---	------

Investigator III Salary & Benefits	=	52.0
---------------------------------------	---	------

Legal Secretary I	=	<u>32.8</u>
-------------------	---	-------------

Subtotal Personal Services		\$239.2
----------------------------	--	---------

Travel

Necessary travel for court hearings, investigation, expert witnesses, etc.		35.0
---	--	------

Contractual

Additional office for four positions in Anchorage = \$16,200		16.2
---	--	------

Expert witness fees based on three cases per year at \$60,000 per case		180.0
---	--	-------

Contract representation for one case per year where OPA has a conflict of interest at \$350,000 per case		<u>350.0</u>
--	--	--------------

Subtotal Contractual		\$546.2
----------------------	--	---------

Supplies

Stationary, library and office supplies for four new positions at \$1,000 per position = \$4,000		4.0
--	--	-----

Equipment

Office furniture and equipment for three professional positions at \$3,635 each and one legal secretary at \$7,369		<u>18.3</u>
--	--	-------------

TOTAL:		\$842.7
--------	--	---------

Position Title Attorney V		No. of Positions 1	Range/Step 25/A	Barg. Unit X
Time Status PFT	Staff Months 12	Location EBA-Anchorage		Election District 8
		Justification		
Type of Expenditure		Amount		
1	2	3		
Salary	60,252			
Benefits	19,342			
Premium Pay				
Other				
Total Personal Services		79,594		
Travel				
Contractual				
Commodities				
Equipment				
Other				
Total Cost		79,594		
Funding Source for Total Cost				
Federal Receipts	1002			
G. F. Match	1003			
General Fund	1004	79,594		
GF Program Receipts	1005			
Other				

This position would be the lead attorney of the death penalty team consisting of an additional lawyer, an investigator, and a legal secretary. The position is required to supplement the current attorney staff which falls short of LEAA national caseload standards.

This position would be responsible for supervising the investigator, the preparation of all pretrial and trial motions, and the filing of appeals in state and federal court. The requirement of extensive court hearings and a lengthy trial in each case will necessitate that this position be assigned exclusively to death penalty cases.

**Request For
New Position**

Agency Administration
 BRU Office of Public Advocacy
 Component _____

Page 4 of 7
 Revised Date _____

FY 89

Position Title Attorney IV		No. of Positions 1	Range/Step 24/A	Barg. Unit X																										
Time Status PFT	Staff Months 12	Location EBA-Anchorage		Election District 8																										
<table border="1"> <thead> <tr> <th>Type of Expenditure</th> <th>Amount</th> </tr> <tr> <th>1</th> <th>2</th> </tr> </thead> <tbody> <tr> <td>Salary</td> <td>56,244</td> </tr> <tr> <td>Benefits</td> <td>18,612</td> </tr> <tr> <td>Premium Pay</td> <td></td> </tr> <tr> <td>Other</td> <td></td> </tr> <tr> <td>Total Personal Services</td> <td>74,856</td> </tr> <tr> <td>Travel</td> <td></td> </tr> <tr> <td>Contractual</td> <td></td> </tr> <tr> <td>Commodities</td> <td></td> </tr> <tr> <td>Equipment</td> <td></td> </tr> <tr> <td>Other</td> <td></td> </tr> <tr> <td>Total Cost</td> <td>74,856</td> </tr> </tbody> </table>		Type of Expenditure	Amount	1	2	Salary	56,244	Benefits	18,612	Premium Pay		Other		Total Personal Services	74,856	Travel		Contractual		Commodities		Equipment		Other		Total Cost	74,856	Justification This position will act as co-counsel to the Attorney V position in all death penalty cases. As part of the death penalty team, this position will prepare motions, interview witnesses, write appellate briefs and assist the lead attorney in conducting the guilt and penalty phases of all death penalty cases. Two attorneys are required for each case in order to share the enormous workload and to assure effective representation of the accused.		
Type of Expenditure	Amount																													
1	2																													
Salary	56,244																													
Benefits	18,612																													
Premium Pay																														
Other																														
Total Personal Services	74,856																													
Travel																														
Contractual																														
Commodities																														
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Other																														
Total Cost	74,856																													
<table border="1"> <thead> <tr> <th colspan="2">Funding Source for Total Cost</th> </tr> </thead> <tbody> <tr> <td>Federal Receipts 1002</td> <td></td> </tr> <tr> <td>G. F. Match 1003</td> <td></td> </tr> <tr> <td>General Fund 1004</td> <td>74,856</td> </tr> <tr> <td>GF Program Receipts 1005</td> <td></td> </tr> <tr> <td>Other</td> <td></td> </tr> </tbody> </table>		Funding Source for Total Cost		Federal Receipts 1002		G. F. Match 1003		General Fund 1004	74,856	GF Program Receipts 1005		Other																		
Funding Source for Total Cost																														
Federal Receipts 1002																														
G. F. Match 1003																														
General Fund 1004	74,856																													
GF Program Receipts 1005																														
Other																														

**Request For
New Position**

Agency Administration
BRU Office of Public Advocacy
Component _____

Page 5 of 7
Revised Date _____

FY 89

Position Title Investigator III		No. of Positions 1	Range/Step 18/A	Barg. Unit G
Time Status PFT	Staff Months 12	Location EBA-Anchorage		Election District 8
		Justification		
Type of Expenditure		Amount		
1	2	3		
Salary	37,356			
Benefits	14,601			
Premium Pay				
Other				
Total Personal Services		51,957		
Travel				
Contractual				
Commodities				
Equipment				
Other				
Total Cost		51,957		
Funding Source for Total Cost				
Federal Receipts	1002			
G. F. Match	1003			
General Fund	1004	51,957		
GF Program Receipts	1005			
Other				
		This position will perform all investigative duties in death penalty cases. Extensive experience in all areas of criminal investigation will be required to assure that defendants facing execution receive a thorough and effective investigation. This position will interview witnesses, examine the crime scene and all physical evidence, arrange transportation, serve subpoenas, followup and review the prosecution investigation and coordinate witness testimony. The OPA currently has no investigator positions. It is anticipated that the position will work full time on death penalty cases.		

**Request For
New Position**

Agency Administration
 BRU Office of Public Advocacy
 Component _____

Page 6 of 7
 Revised Date _____

FY 89

Position Title Legal Secretary I		No. of Positions 1	Range/Step 10/A	Barg. Unit G
Time Status PFT	Staff Months 12	Location EBA-Anchorage		Election District 8
		Justification		
Type of Expenditure		Amount		
1	2	3		
Salary	22,020			
Benefits	10,813			
Premium Pay				
Other				
Total Personal Services		32,833		
Travel				
Contractual				
Commodities				
Equipment				
Other				
Total Cost		32,833		
Funding Source for Total Cost				
Federal Receipts	1002			
G. F. Match	1003			
General Fund	1004	32,833		
GF Program Receipts	1005			
Other				

The Anchorage office of OPA is presently staffed with 3 legal secretaries who provide clerical support to 12 professional positions. The addition of 2 attorneys and 1 investigator will increase the Anchorage clerical workload dramatically. The complex issues involved in death penalty cases and the length of each case through sentencing and appeal necessitates the addition of a legal secretary to handle the increased workload.

**Request For
New Position**

Agency Administration
 BRU Office of Public Advocacy
 Component _____

Page 7 of 7
 Revised Date _____

FY 90

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: "An Act authorizing capital
punishment."
Sponsor: Sen. Fischer, Kelly and
Requestor: Pearce

Agency Affected: Department of Corrections
BRU: Statewide Operations

Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0

CAPITAL	0	0	0	300.0	0	0
---------	---	---	---	-------	---	---

REVENUE	0	0	0	0	0	0
---------	---	---	---	---	---	---

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	300.0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Capital Construction Cost for execution area and attendee waiting area.
Total of 1000 square feet at \$300 per square foot. This fiscal note

Prepared by: Susan E. Knighton, Director
Division: Administrative Services

Phone: 465-3376
Date: 2-15-89

Approved by: Susan Humphrey-Barnett
Agency: Department of Corrections

Date: 2-15-89

Distribution (by preparer):

Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

FISCAL NOTE
Senate Bill 17
Page 2

reflects the housing of persons condemned to death at the Spring Creek Correctional Center. The previous fiscal note was written prior to its construction and subsequent opening.

6-0343E
Chenoweth
1/24/89

Original sponsors: Fischer, Kelly,
Pearce, et al.

IN THE SENATE

CS FOR SENATE BILL NO. 17 ()

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act authorizing capital punishment, amending the definition of the crime of murder in the first degree, classifying murder in the first degree as a capital felony, and establishing sentencing procedures for capital felonies; amending Rules 32, 32.1, and 32.3, Alaska Rules of Criminal Procedure, and Rules 204, 210, and 212, Alaska Rules of Appellate Procedure; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 11.31.100(d) is amended to read:

(d) An attempt is

(1) an unclassified felony if the crime attempted is a capital felony [MURDER IN THE FIRST DEGREE];

(2) a class A felony if the crime attempted is an unclassified felony other than a capital felony [MURDER IN THE FIRST DEGREE];

(3) a class B felony if the crime attempted is a class A felony;

(4) a class C felony if the crime attempted is a class B felony;

(5) a class A misdemeanor if the crime attempted is a class C felony;

(6) a class B misdemeanor if the crime attempted is a class A or class B misdemeanor.

* Sec. 2. AS 11.31.110(c) is amended to read:

(c) Solicitation is a

(1) class A felony if the crime solicited is an unclassified or capital felony;

(2) class B felony if the crime solicited is a class A felony;

(3) class C felony if the crime solicited is a class B felony;

(4) class A misdemeanor if the crime solicited is a class C felony;

(5) class B misdemeanor if the crime solicited is a class A or class B misdemeanor.

* Sec. 3. AS 11.41.100 is amended to read:

Sec. 11.41.100. MURDER IN THE FIRST DEGREE. (a) A person commits the crime of murder in the first degree if

(1) with intent to cause the death of another person, the person

(A) causes the death of any person; or

(B) compels or induces any person to commit suicide through duress or deception; [OR]

(2) the person knowingly engages, under circumstances manifesting extreme indifference to the value of human life, in a pattern or practice of assault or torture of a child under the age of 16, and one of the acts of assault or torture results in the death of the child; for purposes of this paragraph, a person "engages in a pattern or practice of assault or torture" if the person inflicts serious physical injury to the child by at least two separate acts, and one of the acts results in the death of the child; or

(3) delivers any amount of a schedule IA or IIA controlled

1 substance to another person and, as a direct result of the other
2 person's use of the schedule IA or schedule IIA controlled substance,
3 that person dies.

4 (b) Murder in the first degree is a capital [AN UNCLASSIFIED]
5 felony and is punishable as provided in AS 12.55.125(a) [AS 12.55].

6 * Sec. 4. AS 11.41.100 is amended by adding a new subsection to read:

7 (c) In this section, "schedule IA controlled substance" and
8 "schedule IIA controlled substance" have the meanings given in AS 11.-
9 71.900.

10 * Sec. 5. AS 12.30.02J(a) is amended to read:

11 (a) A person charged with an offense shall, at that person's
12 first appearance before a judicial officer, be ordered released pend-
13 ing trial on the person's personal recognizance or upon the execution
14 of an unsecured appearance bond in an amount specified by the judicial
15 officer unless the offense is a capital felony, an unclassified felo-
16 ny, or a class A felony or unless the officer determines that the
17 release of the person will not reasonably assure the appearance of the
18 person as required, or will pose a danger to other persons and the
19 community. If the offense with which a person is charged is a felony,
20 on motion of the prosecuting attorney, the judicial officer may allow
21 the prosecuting attorney up to 48 hours to demonstrate that release of
22 the person on the person's personal recognizance or upon the execution
23 of an unsecured appearance bond will not reasonably assure the appear-
24 ance of the person, or will pose a danger to other persons and the
25 community.

26 * Sec. 6. AS 12.30.040(b) is amended to read:

27 (b) Notwithstanding the provisions of (a) of this section, if a
28 person has been convicted of an offense that [WHICH] is a capital
29 felony, an unclassified felony, or a class A felony, the person may

not be released on bail either before sentencing or pending appeal.

* Sec. 7. AS 12.47.110(b) is amended to read:

(b) On or before the expiration of the initial 90-day period of commitment the court shall conduct a hearing to determine whether or not the defendant remains incompetent. If the court finds by a preponderance of the evidence that the defendant remains incompetent, the court may recommit the defendant for a second period of 90 days. The court shall determine at the expiration of the second 90-day period whether the defendant has become competent. If at the expiration of the second 90-day period the court determines that the defendant continues to be incompetent to stand trial, the charges against the defendant shall be dismissed without prejudice and continued commitment of the defendant shall be governed by the provisions relating to civil commitments under AS 47.30.700 - 47.30.915 unless the defendant is charged with a crime involving force against a person and the court finds that the defendant presents a substantial danger of physical injury to other persons and that there is a substantial probability that the defendant will regain competency within a reasonable period of time, in which case the court may extend the period of commitment for an additional six months. If the defendant remains incompetent at the expiration of the additional six-month period, the charges shall be dismissed without prejudice and either civil commitment proceedings shall be instituted or the court shall order the release of the defendant. If the defendant remains incompetent for five years after the charges have been dismissed under this subsection, the defendant may not be charged again for an offense arising out of the facts alleged in the original charges, except if the original charge is a class A felony, [OR] unclassified felony, or capital felony.

* Sec. 8. AS 12.55 is amended by adding a new section to read:

1 Sec. 12.55.117. REVIEW OF JUDGMENT OF CONVICTION OF A CAPITAL
2 FELONY. (a) A judgment of conviction of a capital felony for which a
3 sentence of death is imposed shall automatically be reviewed by the
4 supreme court within 60 days after imposition of the sentence. This
5 time limit may be extended by the supreme court for good cause.

6 (b) A review under this section has priority over all other
7 cases and the case shall be heard in accordance with rules adopted by
8 the supreme court. On review, the court shall determine whether

9 (1) the sentence was imposed under the influence of pas-
10 sion, prejudice, or other arbitrary factor;

11 (2) the evidence supports the finding of an aggravating
12 factor under AS 12.55.179 and whether the court has properly consider-
13 ed mitigating factors under AS 12.55.180;

14 (3) the sentence is excessive or disproportionate to the
15 penalty imposed in similar cases, considering both the crime and the
16 defendant; and

17 (4) any other issue that the defendant may raise as a point
18 on appeal.

19 (c) In its consideration of an automatic appeal under (a) and
20 (b) of this section, the supreme court

21 (1) may not require the defendant to file a notice of
22 appeal, unless the defendant raises an issue as a point on appeal
23 under (b)(4) of this section;

24 (2) may not require the defendant to pay a fee;

25 (3) shall designate the entire record of the proceedings
26 before the sentencing court as the record on appeal;

27 (4) shall prepare the transcript of the proceedings for the
28 record on appeal at public expense; and

29 (5) may not require the defendant to submit and file a

1 brief, unless the defendant raises an issue as a point on appeal under
2 (b) (4) of this section.

3 (d) If the supreme court upholds a judgment of conviction and
4 sentence of death, the court shall issue a death warrant that spec-
5 ifies a date of execution. The specified date of execution must be
6 not less than 30 days nor more than 60 days after the date of the
7 warrant. The death warrant shall be delivered to the commissioner of
8 corrections.

9 * Sec. 9. AS 12.55.125(a) is amended to read:

10 (a) A defendant convicted of a capital felony [MURDER IN THE
11 FIRST DEGREE] shall be sentenced to a definite term of imprisonment of
12 at least 20 years but not more than 99 years, or shall be sentenced to
13 death.

14 * Sec. 10. AS 12.55 is amended by adding new sections to read:

15 Sec. 12.55.177. SENTENCING PROCEDURE FOR A CAPITAL FELONY. (a)
16 If, after trial by jury, the defendant is convicted of a capital
17 felony, the court shall conduct a separate sentencing proceeding
18 before the trial jury as soon as practicable. If a jury trial has
19 been waived or if the defendant pleads guilty, the sentencing proceed-
20 ing shall be held before a jury impaneled for the purpose.

21 (b) During the sentencing proceeding, evidence may be presented
22 as to any matter relevant to the nature of the crime, the character of
23 the defendant, or any aggravating or mitigating factor that the court
24 considers to have probative value, regardless of the admissibility of
25 the evidence under the rules of evidence. The defendant shall have an
26 opportunity to rebut hearsay evidence that is admitted. The state and
27 the defendant or the defendant's counsel shall be permitted to present
28 oral statements. This subsection does not authorize the introduction
29 of evidence secured in violation of the Constitution of the State of

Alaska or the Constitution of the United States.

(c) After hearing the evidence, the jury shall deliberate and recommend a sentence to the court. The recommended sentence must include written findings of whether

(1) aggravating factors exist to justify the death sentence;

(2) mitigating factors exist that outweigh the aggravating factors; and

(3) the defendant should be sentenced to death.

Sec. 12.55.178. SENTENCE IMPOSITION FOR CAPITAL FELONY. (a) After considering the evidence and the recommended sentence, the court shall enter a sentence of death or a term of imprisonment in accordance with AS 12.55.125(a).

(b) The court may not impose the death sentence unless the jury

(1) finds at least one aggravating factor that is not outweighed by the mitigating factors; and

(2) recommends that the defendant be sentenced to death.

(c) The court may not impose the death sentence if the jury

(1) findings do not include an aggravating factor, or include an aggravating factor that is not outweighed by the mitigating factors; or

(2) does not recommend a sentence of death.

(d) If the court enters a sentence of death, it shall make written findings of

(1) aggravating factors that exist to justify the sentence; and

(2) mitigating factors considered by the court.

(e) A judgment of conviction for which a sentence of death is imposed is subject to automatic review under AS 12.55.117.

1 Sec. 12.55.179. AGGRAVATING FACTORS. In determining whether to
2 impose a sentence of death, the following aggravating factors may be
3 considered:

4 (1) the defendant's conduct during the commission of the
5 offense manifested deliberate cruelty to another person in that it
6 involved sexual assault in the first degree, kidnapping, assault in
7 the first degree, torture, or an aggravated battery;

8 (2) the defendant's conduct caused the death of two or more
9 persons, other than accomplices;

10 (3) the defendant's conduct created a risk of imminent
11 physical injury to three or more persons, other than accomplices;

12 (4) the defendant has a prior conviction for a felony that
13 involved the use of violence against a person or for murder under
14 AS 11.41.100 - 11.41.110, former AS 11.15.010 or 11.15.030, or the law
15 of another jurisdiction with substantially similar elements;

16 (5) the defendant knowingly directed the conduct constitut-
17 ing the offense at the President of the United States or the governor
18 of this state;

19 (6) the defendant knowingly directed the conduct constitut-
20 ing the offense at an active or former law enforcement officer, pros-
21 ecuting attorney, fireman, judicial officer, or correctional officer
22 during or because of the exercise of official duties;

23 (7) the defendant committed the offense under an agreement
24 that the defendant either pay or be paid for the commission of the
25 offense, or for other pecuniary gain;

26 (8) the defendant was on release under AS 12.30.020 -
27 12.30.040 for another felony charge or conviction having assault as a
28 necessary element.

29 Sec. 12.55.180. MITIGATING FACTORS. In determining whether to

1 impose the death sentence, all mitigating factors shall be considered,
2 including, but not limited to, the following:

3 (1) the defendant committed the offense under a degree of
4 duress, coercion, threat, or compulsion that was insufficient to
5 constitute a defense but that significantly affected the defendant's
6 conduct;

7 (2) the conduct of a youthful defendant was substantially
8 influenced by a person more mature than the defendant;

9 (3) the defendant acted with serious provocation from the
10 victim;

11 (4) the defendant assisted authorities to detect or appre-
12 hend other persons who committed the offense with the defendant.

13 * Sec. 11. AS 12 is amended by adding a new chapter to read:

14 CHAPTER 58. IMPOSITION OF DEATH PENALTY.

15 ARTICLE 1. EXECUTION.

16 Sec. 12.58.010. EXECUTION UNDER SUPREME COURT DEATH WARRANT.
17 The commissioner shall specify the time and place of execution.

18 Sec. 12.58.020. EXECUTION BY LETHAL INJECTION. After consulting
19 a licensed physician, the commissioner shall select a method of in-
20 jection and a drug or combination of drugs to be used for an execution
21 by lethal injection.

22 Sec. 12.58.030. WITNESSES. The commissioner and a licensed
23 physician chosen by the commissioner shall be present at an execution
24 under this chapter.

25 Sec. 12.58.040. INVITEES. The commissioner may invite not more
26 than nine citizens, who are 19 years of age or older, to be present at
27 an execution, including the prosecuting attorney, the defense attor-
28 ney, relatives and friends of the defendant, or religious representa-
29 tives designated by the defendant. A person who is invited by the

commissioner may not attend an execution as a matter of right.

1 Sec. 12.58.050. COVERAGE BY NEWS MEDIA. (a) The commissioner
2 shall permit at an execution the attendance of not more than six
3 members of the print and broadcast news media selected by the commis-
4 sioner in accordance with regulations adopted by the department. The
5 selected news media members shall serve as a pool for other members of
6 the news media as a condition of attendance.

7 (b) The use of photographic or recording equipment may not be
8 permitted at the execution site until the execution is completed, the
9 body is removed and the site has been restored to an orderly condi-
10 tion. The physical arrangements for the execution may not be dis-
11 turbed.

12 (c) A person who violates (b) of this section is guilty of a
13 class B misdemeanor.

14 Sec. 12.58.060. PROVISIONS GOVERNING ATTENDANCE AT EXECUTION.

15 (a) Persons attending an execution are subject to a reasonable search
16 as a condition of attendance.

17 (b) Persons other than the necessary staff designated by the
18 commissioner and others permitted under AS 12.58.040 - 12.58.050 may
19 not be permitted to attend an execution, nor may any person under the
20 age of 19 attend.

21 (c) The department shall adopt regulations governing the atten-
22 dance of persons at an execution.

23 Sec. 12.58.070. RETURN OF DEATH WARRANT. After the execution
24 the commissioner shall make a return upon the death warrant, showing
25 the time, place, and manner in which the defendant was executed.

26 ARTICLE 2. STAY OF EXECUTION.

27 Sec. 12.58.200. INCOMPETENCY OR PREGNANCY OF PERSON SENTENCED TO
28 DEATH. If, after a sentence of death is imposed, the commissioner has
29

1 reason to believe that the defendant has become incompetent to proceed
2 with the execution or that the defendant is pregnant, the commissioner
3 shall immediately give written notice to the court in which the sen-
4 tence of death was imposed, the prosecuting attorney, and counsel for
5 the defendant. The execution of sentence shall be stayed pending
6 further order of the court.

7 Sec. 12.58.210. EXAMINATION INTO COMPETENCY. (a) On receipt of
8 notice under AS 12.58.200 that the defendant is believed to be incom-
9 petent, the sentencing court shall examine the mental condition of the
10 defendant in the same manner as provided for examining persons for
11 competency to stand trial under AS 12.47.070.

12 (b) If the sentencing court finds that the defendant is incompe-
13 tent, the court shall immediately certify that finding to the supreme
14 court and the commissioner, and shall enter an order for commitment in
15 the same manner as provided for commitment under AS 12.47.110.

16 (c) If the sentencing court finds that the defendant is compe-
17 tent, the court shall immediately certify the finding to the supreme
18 court and the commissioner. The supreme court shall issue and deliver
19 another warrant to the commissioner under AS 12.55.117, together with
20 a copy of the certified finding. Unless the sentencing court's find-
21 ing is appealed in accordance with applicable court rule, the warrant
22 shall specify a date of execution that is not less than 30 days nor
23 more than 60 days after the date of the warrant.

24 Sec. 12.58.220. DISPOSITION PENDING PREGNANCY. (a) If the
25 defendant is pregnant, the sentencing court shall immediately certify
26 that finding to the supreme court and the commissioner. The supreme
27 court shall issue an order staying the execution of the sentence of
28 death during the pregnancy.

29 (b) When the defendant is no longer pregnant, the sentencing

1 court shall immediately certify the finding to the supreme court and
2 the commissioner. The supreme court shall issue and deliver another
3 warrant under AS 12.55.117, together with a copy of the certified
4 finding. Unless the sentencing court's finding is appealed under
5 applicable court rule, the warrant shall specify a date of execution
6 not less than 30 days nor more than 60 days after the date of the
7 warrant.

8 ARTICLE 3. GENERAL PROVISIONS.

9 Sec. 12.58.900. DEFINITIONS. In this chapter,

10 (1) "commissioner" means the commissioner of corrections;

11 (2) "department" means the Department of Corrections.

12 * Sec. 12. AS 22.07.020(a) is amended to read:

13 (a) The court of appeals has appellate jurisdiction in actions
14 and proceedings commenced in the superior court involving:

15 (1) criminal prosecution, except prosecution for a capital
16 felony for which a death sentence is imposed;

17 (2) post-conviction relief;

18 (3) children's court matters under AS 47.10.010(a)(1),
19 including waiver of children's court jurisdiction over a minor under
20 AS 47.10;

21 (4) extradition;

22 (5) habeas corpus;

23 (6) probation and parole; and

24 (7) bail.

25 * Sec. 13. AS 22.07.020(b) is amended to read:

26 (b) Except for appeals of a death sentence, the [THE] court of
27 appeals has jurisdiction to hear appeals of sentences of imprisonment
28 imposed by the superior court on the grounds that the sentence is
29 excessive or too lenient and, in the exercise of this jurisdiction,

may modify the sentence as provided by law and the state constitution.

* Sec. 14. APPLICABILITY TO CRIMINAL RULES. The amendments to AS 12.55 made by secs. 8 and 10 of this Act, and AS 12.58, added by sec. 11 of this Act, have the effect of modifying the sentencing provisions of Rules 32, 32.1, and 32.3, Alaska Rules of Criminal Procedure, by establishing exclusive procedures for imposition of death sentence by trial court and by authorizing automatic appeal of those sentences to the Alaska Supreme Court.

* Sec. 15. APPLICABILITY TO APPELLATE RULES. AS 12.55.117(c), added by sec. 8 of this Act, has the effect of amending Rules 204, 210, and 212, Alaska Rules of Appellate Procedure, by establishing procedures and limitations on procedures relating to the filing and disposition of appeals of sentences in cases in which the death penalty is imposed.

* Sec. 16. This Act applies to crimes committed after the effective date of this Act.

* Sec. 17. This Act takes effect immediately under AS 01.10.070(c).

1 IN THE SENATE

BY FISCHER, KELLY AND
PEARCE

2

SENATE BILL NO. 17

3

IN THE LEGISLATURE OF THE STATE OF ALASKA

4

SIXTEENTH LEGISLATURE - FIRST SESSION

5

A BILL

6 For an Act entitled: "An Act authorizing capital punishment, classifying
7 murder in the first degree as a capital felony, and
8 establishing sentencing procedures for capital felo-
9 nies; directing an advisory vote on whether the
10 capital punishment law should take effect; amending
11 Rules 32, 32.1, and 32.3, Alaska Rules of Criminal
12 Procedure, and Rules 204, 210, and 212, Alaska Rules
13 of Appellate Procedure; and providing for an effec-
14 tive date."

15 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

16 * Section 1. AS 11.31.100(d) is amended to read:

17 (d) An attempt is

18 (1) an unclassified felony if the crime attempted is a
19 capital felony [MURDER IN THE FIRST DEGREE];

20 (2) a class A felony if the crime attempted is an unclas-
21 sified felony other than a capital felony [MURDER IN THE FIRST DE-
22 GREE];

23 (3) a class B felony if the crime attempted is a class A
24 felony;

25 (4) a class C felony if the crime attempted is a class B
26 felony;

27 (5) a class A misdemeanor if the crime attempted is a class
28 C felony;

29 (6) a class B misdemeanor if the crime attempted is a class

1 A or class B misdemeanor.

2 * Sec. 2. AS 11.31.110(c) is amended to read:

3 (c) Solicitation is a

4 (1) class A felony if the crime solicited is an unclas-
5 sified or capital felony;

6 (2) class B felony if the crime solicited is a class A
7 felony;

8 (3) class C felony if the crime solicited is a class B
9 felony;

10 (4) class A misdemeanor if the crime solicited is a class C
11 felony;

12 (5) class B misdemeanor if the crime solicited is a class A
13 or class B misdemeanor.

14 * Sec. 3. AS 11.41.100(b) is amended to read:

15 (b) Murder in the first degree is a capital [AN UNCLASSIFIED]
16 felony and is punishable as provided in AS 12.55.125(a) [AS 12.55].

17 * Sec. 4. AS 12.30.020(a) is amended to read:

18 (a) A person charged with an offense shall, at that person's
19 first appearance before a judicial officer, be ordered released pend-
20 ing trial on the person's personal recognizance or upon the execution
21 of an unsecured appearance bond in an amount specified by the judicial
22 officer unless the offense is a capital felony, an unclassified
23 felony, or a class A felony or unless the officer determines that the
24 release of the person will not reasonably assure the appearance of the
25 person as required, or will pose a danger to other persons and the
26 community. If the offense with which a person is charged is a felony,
27 on motion of the prosecuting attorney, the judicial officer may allow
28 the prosecuting attorney up to 48 hours to demonstrate that release of
29 the person on the person's personal recognizance or upon the execution

1 of an unsecured appearance bond will not reasonably assure the appear-
2 ance of the person, or will pose a danger to other persons and the
3 community.

4 * Sec. 5. AS 12.30.040(b) is amended to read:

5 (b) Notwithstanding the provisions of (a) of this section, if a
6 person has been convicted of an offense that [WHICH] is a capital
7 felony, an unclassified felony, or a class A felony, the person may
8 not be released on bail either before sentencing or pending appeal.

9 * Sec. 6. AS 12.47.110(b) is amended to read:

10 (b) On or before the expiration of the initial 90-day period of
11 commitment the court shall conduct a hearing to determine whether or
12 not the defendant remains incompetent. If the court finds by a pre-
13 ponderance of the evidence that the defendant remains incompetent, the
14 court may recommit the defendant for a second period of 90 days. The
15 court shall determine at the expiration of the second 90-day period
16 whether the defendant has become competent. If at the expiration of
17 the second 90-day period the court determines that the defendant
18 continues to be incompetent to stand trial, the charges against the
19 defendant shall be dismissed without prejudice and continued commit-
20 ment of the defendant shall be governed by the provisions relating to
21 civil commitments under AS 47.30.700 - 47.30.915 unless the defendant
22 is charged with a crime involving force against a person and the court
23 finds that the defendant presents a substantial danger of physical
24 injury to other persons and that there is a substantial probability
25 that the defendant will regain competency within a reasonable period
26 of time, in which case the court may extend the period of commitment
27 for an additional six months. If the defendant remains incompetent at
28 the expiration of the additional six-month period, the charges shall
29 be dismissed without prejudice and either civil commitment proceedings

1 shall be instituted or the court shall order the release of the defen-
2 dant. If the defendant remains incompetent for five years after the
3 charges have been dismissed under this subsection, the defendant may
4 not be charged again for an offense arising out of the facts alleged
5 in the original charges, except if the original charge is a class A
6 felony, [OR] unclassified felony, or capital felony.

7 * Sec. 7. AS 12.55 is amended by adding a new section to read:

8 Sec. 12.55.117. REVIEW OF JUDGMENT OF CONVICTION OF A CAPITAL
9 FELONY. (a) A judgment of conviction of a capital felony for which a
10 sentence of death is imposed shall automatically be reviewed by the
11 supreme court within 60 days after imposition of the sentence. This
12 time limit may be extended by the supreme court for good cause.

13 (b) A review under this section has priority over all other
14 cases and the case shall be heard in accordance with rules adopted by
15 the supreme court. On review, the court shall determine whether

16 (1) the sentence was imposed under the influence of pas-
17 sion, prejudice, or other arbitrary factor;

18 (2) the evidence supports the finding of an aggravating
19 factor under AS 12.55.179 and whether the court has properly consider-
20 ed mitigating factors under AS 12.55.180;

21 (3) the sentence is excessive or disproportionate to the
22 penalty imposed in similar cases, considering both the crime and the
23 defendant; and

24 (4) any other issue that the defendant may raise as a point
25 on appeal.

26 (c) In its consideration of an automatic appeal under (a) and
27 (b) of this section, the supreme court

28 (1) may not require the defendant to file a notice of
29 appeal, unless the defendant raises an issue as a point on appeal

1 under (b)(4) of this section;

2 (2) may not require the defendant to pay a fee;

3 (3) shall designate the entire record of the proceedings
4 before the sentencing court as the record on appeal;

5 (4) shall prepare the transcript of the proceedings for the
6 record on appeal at public expense; and

7 (5) may not require the defendant to submit and file a
8 brief, unless the defendant raises an issue as a point on appeal under
9 (b)(4) of this section.

10 (d) If the supreme court upholds a judgment of conviction and
11 sentence of death, the court shall issue a death warrant that spec-
12 ifies a date of execution. The specified date of execution must be
13 not less than 30 days nor more than 60 days after the date of the
14 warrant. The death warrant shall be delivered to the commissioner of
15 corrections.

16 * Sec. 8. AS 12.55.125(a) is amended to read:

17 (a) A defendant convicted of a capital felony [MURDER IN THE
18 FIRST DEGREE] shall be sentenced to a definite term of imprisonment of
19 at least 20 years but not more than 99 years, or shall be sentenced to
20 death.

21 * Sec. 9. AS 12.55 is amended by adding new sections to read:

22 Sec. 12.55.177. SENTENCING PROCEDURE FOR A CAPITAL FELONY. (a)
23 If, after trial by jury, the defendant is convicted of a capital
24 felony, the court shall conduct a separate sentencing proceeding
25 before the trial jury as soon as practicable. If a jury trial has
26 been waived or if the defendant pleads guilty, the sentencing proceed-
27 ing shall be held before a jury impaneled for the purpose.

28 (b) During the sentencing proceeding, evidence may be presented
29 as to any matter relevant to the nature of the crime, the character of

1 the defendant, or any aggravating or mitigating factor that the court
2 considers to have probative value, regardless of the admissibility of
3 the evidence under the rules of evidence. The defendant shall have an
4 opportunity to rebut hearsay evidence that is admitted. The state and
5 the defendant or the defendant's counsel shall be permitted to present
6 oral statements. This subsection does not authorize the introduction
7 of evidence secured in violation of the Constitution of the State of
8 Alaska or the Constitution of the United States.

9 (c) After hearing the evidence, the jury shall deliberate and
10 recommend a sentence to the court. The recommended sentence must
11 include written findings of whether

12 (1) aggravating factors exist to justify the death sen-
13 tence;

14 (2) mitigating factors exist that outweigh the aggravating
15 factors; and

16 (3) the defendant should be sentenced to death.

17 Sec. 12.55.178. SENTENCE IMPOSITION FOR CAPITAL FELONY. (a)

18 After considering the evidence and the recommended sentence, the court
19 shall enter a sentence of death or a term of imprisonment in accor-
20 dance with AS 12.55.125(a).

21 (b) The court may not impose the death sentence unless the jury

22 (1) finds at least one aggravating factor that is not
23 outweighed by the mitigating factors; and

24 (2) recommends that the defendant be sentenced to death.

25 (c) The court may not impose the death sentence if the jury

26 (1) findings do not include an aggravating factor, or
27 include an aggravating factor that is not outweighed by the mitigating
28 factors; or

29 (2) does not recommend a sentence of death.

1 (d) If the court enters a sentence of death, it shall make
2 written findings of

3 (1) aggravating factors that exist to justify the sentence;
4 and

5 (2) mitigating factors considered by the court.

6 (e) A judgment of conviction for which a sentence of death is
7 imposed is subject to automatic review under AS 12.55.117.

8 Sec. 12.55.179. AGGRAVATING FACTORS. In determining whether to
9 impose a sentence of death, the following aggravating factors may be
10 considered:

11 (1) the defendant's conduct during the commission of the
12 offense manifested deliberate cruelty to another person in that it
13 involved sexual assault in the first degree, kidnapping, assault in
14 the first degree, torture, or an aggravated battery;

15 (2) the defendant's conduct caused the death of two or more
16 persons, other than accomplices;

17 (3) the defendant's conduct created a risk of imminent
18 physical injury to three or more persons, other than accomplices;

19 (4) the defendant has a prior conviction for a felony that
20 involved the use of violence against a person or for murder under
21 AS 11.41.100 - 11.41.110, former AS 11.15.010 or 11.15.030, or the law
22 of another jurisdiction with substantially similar elements;

23 (5) the defendant knowingly directed the conduct constitut-
24 ing the offense at the President of the United States or the governor
25 of this state;

26 (6) the defendant knowingly directed the conduct constitut-
27 ing the offense at an active or former law enforcement officer, pros-
28 ecuting attorney, fireman, judicial officer, or correctional officer
29 during or because of the exercise of official duties;

1 (7) the defendant committed the offense under an agreement
2 that the defendant either pay or be paid for the commission of the
3 offense, or for other pecuniary gain;

4 (8) the defendant was on release under AS 12.30.020 -
5 12.30.040 for another felony charge or conviction having assault as a
6 necessary element.

7 Sec. 12.55.180. MITIGATING FACTORS. In determining whether to
8 impose the death sentence, all mitigating factors shall be considered,
9 including, but not limited to, the following:

10 (1) the defendant committed the offense under a degree of
11 duress, coercion, threat, or compulsion that was insufficient to
12 constitute a defense but that significantly affected the defendant's
13 conduct;

14 (2) the conduct of a youthful defendant was substantially
15 influenced by a person more mature than the defendant;

16 (3) the defendant acted with serious provocation from the
17 victim;

18 (4) the defendant assisted authorities to detect or appre-
19 hend other persons who committed the offense with the defendant.

20 * Sec. 10. AS 12 is amended by adding a new chapter to read:

21 CHAPTER 58. IMPOSITION OF DEATH PENALTY.

22 ARTICLE 1. EXECUTION.

23 Sec. 12.58.010. EXECUTION UNDER SUPREME COURT DEATH WARRANT.
24 After providing a person who has been sentenced to death by a supreme
25 court warrant issued under AS 12.55.117 an opportunity to choose to be
26 executed by lethal injection ~~or by firing squad~~, the commissioner
27 shall specify the time, place, ^{or} ~~and manner~~ of execution. ~~If the person~~
28 ~~fails or refuses to make a choice~~, the commissioner shall determine
29 the ~~manner of~~ execution.

1 Sec. 12.58.020. EXECUTION BY FIRING SQUAD. An execution by
2 firing squad shall be carried out at a state prison designated by the
3 commissioner. The commissioner shall select a firing squad of six
4 peace officers. They shall be compensated in an amount determined by
5 the commissioner.

6 Sec. 12.58.030. EXECUTION BY LETHAL INJECTION. After consulting
7 a licensed physician, the commissioner shall select a method of in-
8 jection and a drug or combination of drugs to be used for an execution
9 by lethal injection.

10 Sec. 12.58.040. WITNESSES. The commissioner and a licensed
11 physician chosen by the commissioner shall be present at an execution
12 under this chapter.

13 Sec. 12.58.050. INVITEES. The commissioner may invite not more
14 than nine citizens, who are 19 years of age or older, to be present at
15 an execution, including the prosecuting attorney, the defense attor-
16 ney, relatives and friends of the defendant, or religious representa-
17 tives designated by the defendant. A person who is invited by the
18 commissioner may not attend an execution as a matter of right.

19 Sec. 12.58.060. COVERAGE BY NEWS MEDIA. (a) The commissioner
20 shall permit at an execution the attendance of not more than six
21 members of the print and broadcast news media selected by the commis-
22 sioner in accordance with regulations adopted by the department. The
23 selected news media members shall serve as a pool for other members of
24 the news media as a condition of attendance.

25 (b) The use of photographic or recording equipment may not be
26 permitted at the execution site until the execution is completed, the
27 body is removed and the site has been restored to an orderly condi-
28 tion. The physical arrangements for the execution may not be dis-
29 turbed.

1 (c) A person who violates (b) of this section is guilty of a
2 class B misdemeanor.

3 Sec. 12.58.070. PROVISIONS GOVERNING ATTENDANCE AT EXECUTION.

4 (a) Persons attending an execution are subject to a reasonable search
5 as a condition of attendance.

6 (b) Persons other than the necessary staff designated by the
7 commissioner and others permitted under AS 12.58.050 - 12.58.060 may
8 not be permitted to attend an execution, nor may an, person under the
9 age of 19 attend.

10 (c) The department shall adopt regulations governing the atten-
11 dance of persons at an execution.

12 Sec. 12.58.080. RETURN OF DEATH WARRANT. After the execution
13 the commissioner shall make a return upon the death warrant, showing
14 the time, place, and manner in which the defendant was executed.

15 ARTICLE 2. STAY OF EXECUTION.

16 Sec. 12.58.200. INCOMPETENCY OR PREGNANCY OF PERSON SENTENCED TO
17 DEATH. If, after a sentence of death is imposed, the commissioner has
18 reason to believe that the defendant has become incompetent to proceed
19 with the execution or that the defendant is pregnant, the commissioner
20 shall immediately give written notice to the court in which the sen-
21 tence of death was imposed, the prosecuting attorney, and counsel for
22 the defendant. The execution of sentence shall be stayed pending
23 further order of the court.

24 Sec. 12.58.210. EXAMINATION INTO COMPETENCY. (a) On receipt of
25 notice under AS 12.58.200 that the defendant is believed to be incom-
26 petent, the sentencing court shall examine the mental condition of the
27 defendant in the same manner as provided for examining persons for
28 competency to stand trial under AS 12.47.070.

29 (b) If the sentencing court finds that the defendant is

1 incompetent, the court shall immediately certify that finding to the
2 supreme court and the commissioner, and shall enter an order for
3 commitment in the same manner as provided for commitment under AS
4 12.47.110.

5 (c) If the sentencing court finds that the defendant is compe-
6 tent, the court shall immediately certify the finding to the supreme
7 court and the commissioner. The supreme court shall issue and deliver
8 another warrant to the commissioner under AS 12.55.117, together with
9 a copy of the certified finding. Unless the sentencing court's find-
10 ing is appealed in accordance with applicable court rule, the warrant
11 shall specify a date of execution that is not less than 30 days nor
12 more than 60 days after the date of the warrant.

13 Sec. 12.58.220. DISPOSITION PENDING PREGNANCY. (a) If the
14 defendant is pregnant, the sentencing court shall immediately certify
15 that finding to the supreme court and the commissioner. The supreme
16 court shall issue an order staying the execution of the sentence of
17 death during the pregnancy.

18 (b) When the defendant is no longer pregnant, the sentencing
19 court shall immediately certify the finding to the supreme court and
20 the commissioner. The supreme court shall issue and deliver another
21 warrant under AS 12.55.117, together with a copy of the certified
22 finding. Unless the sentencing court's finding is appealed under
23 applicable court rule, the warrant shall specify a date of execution
24 not less than 30 days nor more than 60 days after the date of the
25 warrant.

26 ARTICLE 3. GENERAL PROVISIONS.

27 Sec. 12.58.900. DEFINITIONS. In this chapter,

- 28 (1) "commissioner" means the commissioner of corrections;
29 (2) "department" means the Department of Corrections.

1 * Sec. 14. APPLICABILITY TO CRIMINAL RULES. The amendments to AS 12.55
2 made by secs. 7 and 9 of this Act, and AS 12.58, added by sec. 10 of this
3 Act, have the effect of modifying the sentencing provisions of Rules 32,
4 32.1, and 32.3, Alaska Rules of Criminal Procedure, by establishing exclu-
5 sive procedures for imposition of death sentence by trial court and by
6 authorizing automatic appeal of those sentences to the Alaska Supreme
7 Court.

8 * Sec. 15. APPLICABILITY TO APPELLATE RULES. AS 12.55.117(c), added by
9 sec. 7 of this Act, has the effect of amending Rules 204, 210, and 212,
10 Alaska Rules of Appellate Procedure, by establishing procedures and limita-
11 tions on procedures relating to the filing and disposition of appeals of
12 sentences in cases in which the death penalty is imposed.

13 * Sec. 16. Except for sec. 13 of this Act, this Act takes effect
14 August 15, 1991.

15 * Sec. 17. Section 13 of this Act takes effect immediately under
16 AS 01.10.070(c).

STATE OF ALASKA THE LEGISLATURE

POUCH Y STATE CAPITOL
JUNEAU ALASKA 99811
207 465 1800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

February 17, 1989

SUBJECT: Death penalty: provision for election
(CSSB 17)

TO: Senator Jan Faiks, Chair
Senate Judiciary Committee
ATTN: Chris Christensen

FROM: Jack Chenoweth
Legislative Counsel 

The operative change requested by the committee is to be found in AS 12.58.010, at page 5 of the enclosed draft. Within ten days of receiving a plea on arraignment, the prosecutor is to indicate whether he or she will seek the death penalty and so advise the court and the defendant and defendant's counsel. Some states apparently use a "waiver" approach in which the death penalty may be sought unless the prosecutor expressly waives it. The approach in this draft reverses that presumption and places a burden on the prosecutor to indicate an intention to seek the death penalty. I used this approach as more nearly approximating what the committee indicated it wanted.

The addition of this provision did not easily "fit" anywhere into the existing body of criminal procedure. I spoke with Assistant Attorney General Laurie Otto who suggested that it did relate to other provisions in the bill specific to trial and sentencing aspects of capital punishment cases. Accordingly, as a partial response to that suggestion, all provisions applicable to trial of a capital offense have been pulled together, into one bill section, section 9. Section numbers and cross-reference provisions have been altered but, except for the material added in AS 12.58.010, the substance of the bill is not altered from the last draft.

JBC:kb
wkk2/020

Enclosure

6-0343J
Chenoweth
2/17/89

Original sponsors: Fischer, Kelly,
Pearce, et al.

IN THE SENATE

BY THE JUDICIARY COMMITTEE

CS FOR SENATE BILL NO. 17 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act authorizing capital punishment, classifying murder in the first degree as a capital felony, and establishing sentencing procedures for capital felonies; directing an advisory vote on whether the capital punishment law should take effect; amending Rules 32, 32.1, and 32.3, Alaska Rules of Criminal Procedure, and Rules 204, 210, and 212, Alaska Rules of Appellate Procedure; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. FINDINGS. The legislature finds that imposition of the death penalty for the crime of murder in the first degree

(1) is consistent with the criminal sentencing goal of deterrence in that, by the example of its imposition, a member of the community who calculates a murder would rationally consider the harsh consequences of that act;

(2) is consistent with the criminal sentencing goal of community condemnation in that, by its use, the state affirms society's norms and condemns most severely the premeditative taking of human life or the taking of life under circumstances manifesting extreme indifference to its value;

(3) does not violate state constitutional guarantees against the imposition of cruel and unusual punishment, but rather is fully consistent with those guarantees;

(4) conforms to contemporary standards of decency in that there

1 is no evidence that Alaska's tradition and history suggest a significantly
2 different attitude toward capital punishment in this state from those that
3 prevail nationwide, and there is a widely held belief in the society that
4 capital punishment is an appropriate penalty for murder in the first
5 degree;

6 (5) serves the state's interest in justice by punishing the
7 person who is guilty according to what is deserved for the most morally
8 offensive conduct with a sentence more stringent than an extended term of
9 life imprisonment;

10 (6) serves the state's interest in public protection by assuring
11 that the most serious offenders will never again pose a threat to the
12 public; and

13 (7) is consistent with due process requirements in that the
14 circumstances in which the death penalty may be imposed provide guidance to
15 the court and jury that safeguard against the elements of arbitrariness and
16 capriciousness condemned by the United States Supreme Court in cases con-
17 cerning the death penalty statutes of other states.

18 * Sec. 2. AS 11.31.100(d) is amended to read:

19 (d) An attempt is

20 (1) an unclassified felony if the crime attempted is a
21 capital felony [MURDER IN THE FIRST DEGREE];

22 (2) a class A felony if the crime attempted is an unclas-
23 sified felony other than a capital felony [MURDER IN THE FIRST DE-
24 GREE];

25 (3) a class B felony if the crime attempted is a class A
26 felony;

27 (4) a class C felony if the crime attempted is a class B
28 felony;

29 (5) a class A misdemeanor if the crime attempted is a class

C felony;

(6) a class B misdemeanor if the crime attempted is a class A or class B misdemeanor.

* Sec. 3. AS 11.31.110(c) is amended to read:

(c) Solicitation is a

(1) class A felony if the crime solicited is an unclassified or capital felony;

(2) class B felony if the crime solicited is a class A felony;

(3) class C felony if the crime solicited is a class B felony;

(4) class A misdemeanor if the crime solicited is a class C felony;

(5) class B misdemeanor if the crime solicited is a class A or class B misdemeanor.

* Sec. 4. AS 11.41.100(b) is amended to read:

(b) Murder in the first degree is a capital [AN UNCLASSIFIED] felony and is punishable as provided in AS 12.55.125(a) [AS 12.55].

* Sec. 5. AS 12.30.020(a) is amended to read:

(a) A person charged with an offense shall, at that person's first appearance before a judicial officer, be ordered released pending trial on the person's personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer unless the offense is a capital felony, an unclassified felony, or a class A felony or unless the officer determines that the release of the person will not reasonably assure the appearance of the person as required, or will pose a danger to other persons and the community. If the offense with which a person is charged is a felony, on motion of the prosecuting attorney, the judicial officer may allow

1 the prosecuting attorney up to 48 hours to demonstrate that release of
2 the person on the person's personal recognizance or upon the execution
3 of an unsecured appearance bond will not reasonably assure the appear-
4 ance of the person, or will pose a danger to other persons and the
5 community.

6 * Sec. 6. AS 12.30.040(b) is amended to read:

7 (b) Notwithstanding the provisions of (a) of this section, if a
8 person has been convicted of an offense that [WHICH] is a capital
9 felony, an unclassified felony, or a class A felony, the person may
10 not be released on bail either before sentencing or pending appeal.

11 * Sec. 7. AS 12.47.110(b) is amended to read:

12 (b) On or before the expiration of the initial 90-day period of
13 commitment the court shall conduct a hearing to determine whether or
14 not the defendant remains incompetent. If the court finds by a pre-
15 ponderance of the evidence that the defendant remains incompetent, the
16 court may recommit the defendant for a second period of 90 days. The
17 court shall determine at the expiration of the second 90-day period
18 whether the defendant has become competent. If at the expiration of
19 the second 90-day period the court determines that the defendant
20 continues to be incompetent to stand trial, the charges against the
21 defendant shall be dismissed without prejudice and continued commit-
22 ment of the defendant shall be governed by the provisions relating to
23 civil commitments under AS 47.30.700 - 47.30.915 unless the defendant
24 is charged with a crime involving force against a person and the court
25 finds that the defendant presents a substantial danger of physical
26 injury to other persons and that there is a substantial probability
27 that the defendant will regain competency within a reasonable period
28 of time, in which case the court may extend the period of commitment
29 for an additional six months. If the defendant remains incompetent at

1 the expiration of the additional six-month period, the charges shall
2 be dismissed without prejudice and either civil commitment proceedings
3 shall be instituted or the court shall order the release of the defen-
4 dant. If the defendant remains incompetent for five years after the
5 charges have been dismissed under this subsection, the defendant may
6 not be charged again for an offense arising out of the facts alleged
7 in the original charges, except if the original charge is a class A
8 felony, [OR] unclassified felony, or capital felony.

* Sec. 8. AS 12.55.125(a) is amended to read:

9 (a) A defendant convicted of a capital felony [MURDER IN THE
10 FIRST DEGREE] shall be sentenced to a definite term of imprisonment of
11 at least 20 years but not more than 99 years, or shall be sentenced to
12 death.

* Sec. 9. AS 12 is amended by adding a new chapter to read:

14 CHAPTER 58. CAPITAL PUNISHMENT.

15 ARTICLE 1. ELECTION TO SEEK DEATH PENALTY.

16 Sec. 12.58.010. PROSECUTOR'S ELECTION TO SEEK DEATH PENALTY.
17 The district attorney assigned to the prosecution of a capital felony
18 shall determine whether to seek the death penalty against the defen-
19 dant. If the prosecutor elects to seek the death penalty, the pros-
20 ecutor shall give notice of election to the court, the defendant, and
21 the defendant's attorney within 10 days of arraignment of the defen-
22 dant on the capital felony indictment, or within 10 days of arraign-
23 ment of the defendant if indictment has been waived.

24 ARTICLE 2. IMPOSITION OF SENTENCE.

25 Sec. 12.58.100. SENTENCING PROCEDURE FOR A CAPITAL FELONY. (a)
26 If, after trial by jury, the defendant is convicted of a capital
27 felony in which the district attorney has elected under AS 12.58.010
28 to seek the death penalty, the court shall conduct a separate
29

1 sentencing proceeding before the trial jury as soon as practicable.
2 If a jury trial has been waived or if the defendant pleads guilty, the
3 sentencing proceeding shall be held before a jury impaneled for the
4 purpose.

5 (b) During the sentencing proceeding, evidence may be presented
6 as to any matter relevant to the nature of the crime, the character of
7 the defendant, or any aggravating or mitigating factor that the court
8 considers to have probative value, regardless of the admissibility of
9 the evidence under the rules of evidence. The defendant shall have an
10 opportunity to rebut hearsay evidence that is admitted. The state and
11 the defendant or the defendant's counsel shall be permitted to present
12 oral statements. This subsection does not authorize the introduction
13 of evidence secured in violation of the Constitution of the State of
14 Alaska or the Constitution of the United States.

15 (c) After hearing the evidence, the jury shall deliberate and
16 recommend a sentence to the court. The recommended sentence must
17 include written findings of whether

18 (1) aggravating factors exist to justify the death sen-
19 tence;

20 (2) mitigating factors exist that outweigh the aggravating
21 factors; and

22 (3) the defendant should be sentenced to death.

23 Sec. 12.58.110. SENTENCE IMPOSITION FOR CAPITAL FELONY. (a) In
24 a case in which the district attorney has elected under AS 12.58.010
25 to seek the death penalty, after considering the evidence and the
26 recommended sentence, the court shall enter a sentence of death or a
27 term of imprisonment in accordance with AS 12.55.125(a).

28 (b) The court may not impose the death sentence unless the jury

29 (1) finds at least one aggravating factor that is not

outweighed by the mitigating factors; and

(2) recommends that the defendant be sentenced to death.

(c) The court may not impose the death sentence

(1) if the jury findings do not include an aggravating factor;

(2) if the jury findings include an aggravating factor that is outweighed by one or more of the mitigating factors; or

(3) if the jury does not recommend a sentence of death.

(d) If the court enters a sentence of death, it shall make written findings of

(1) aggravating factors that exist to justify the sentence; and

(2) mitigating factors considered by the court.

(e) A judgment of conviction for which a sentence of death is imposed is subject to automatic review under AS 12.58.200.

Sec. 12.58.120. AGGRAVATING FACTORS. In determining whether to impose a sentence of death, the following aggravating factors may be considered:

(1) the defendant's conduct during the commission of the offense manifested deliberate cruelty to another person in that it involved sexual assault in the first degree, kidnapping, assault in the first degree, torture, or an aggravated battery;

(2) the defendant's conduct caused the death of two or more persons, other than accomplices;

(3) the defendant's conduct created a risk of imminent physical injury to three or more persons, other than accomplices;

(4) the defendant has a prior conviction for a felony that involved the use of violence against a person or for murder under AS 11.41.100 - 11.41.110, former AS 11.15.010 or 11.15.030, or the law

of another jurisdiction with substantially similar elements;

(5) the defendant knowingly directed the conduct constituting the offense at the President of the United States or the governor of this state;

(6) the defendant knowingly directed the conduct constituting the offense at an active or former law enforcement officer, prosecuting attorney, fireman, judicial officer, or correctional officer during or because of the exercise of official duties;

(7) the defendant committed the offense under an agreement that the defendant either pay or be paid for the commission of the offense, or for other pecuniary gain;

(8) the defendant was on release under AS 12.30.020 - 12.30.040 for another felony charge or conviction having assault as a necessary element.

Sec. 12.58.130. MITIGATING FACTORS. In determining whether to impose the death sentence, all mitigating factors shall be considered, including, but not limited to, the following:

(1) the defendant committed the offense under a degree of duress, coercion, threat, or compulsion that was insufficient to constitute a defense but that significantly affected the defendant's conduct;

(2) the conduct of a youthful defendant was substantially influenced by a person more mature than the defendant;

(3) the defendant acted with serious provocation from the victim;

(4) the defendant assisted authorities to detect or apprehend other persons who committed the offense with the defendant.

ARTICLE 3. SENTENCE REVIEW.

Sec. 12.58.200. REVIEW OF JUDGMENT OF CONVICTION OF A CAPITAL

1 FELONY. (a) A judgment of conviction of a capital felony for which a
2 sentence of death is imposed shall automatically be reviewed by the
3 supreme court within 60 days after imposition of the sentence. This
4 time limit may be extended by the supreme court for good cause.

5 (b) A review under this section has priority over all other
6 cases and the case shall be heard in accordance with rules adopted by
7 the supreme court. On review, the court shall determine whether

8 (1) the sentence was imposed under the influence of pas-
9 sion, prejudice, or other arbitrary factor;

10 (2) the evidence supports the finding of an aggravating
11 factor under AS 12.58.120 and whether the court has properly consider-
12 ed mitigating factors under AS 12.58.130;

13 (3) the sentence is excessive or disproportionate to the
14 penalty imposed in similar cases, considering both the crime and the
15 defendant; and

16 (4) any other issue that the defendant may raise as a point
17 on appeal.

18 (c) In its consideration of an automatic appeal under (a) and
19 (b) of this section, the supreme court

20 (1) may not require the defendant to file a notice of
21 appeal, unless the defendant raises an issue as a point on appeal
22 under (b)(4) of this section;

23 (2) may not require the defendant to pay a fee;

24 (3) shall designate the entire record of the proceedings
25 before the sentencing court as the record on appeal;

26 (4) shall prepare the transcript of the proceedings for the
27 record on appeal at public expense; and

28 (5) may not require the defendant to submit and file a
29 brief, unless the defendant raises an issue as a point on appeal under

(b)(4) of this section.

Sec. 12.58.210. ISSUANCE OF DEATH WARRANT. If the supreme court upholds a judgment of conviction and sentence of death, the court shall issue a death warrant that specifies a date of execution. The specified date of execution must be not less than 30 days nor more than 60 days after the date of the warrant. The death warrant shall be delivered to the commissioner of corrections.

ARTICLE 4. EXECUTION.

Sec. 12.58.300. EXECUTION UNDER SUPREME COURT DEATH WARRANT. After receiving a supreme court warrant issued under AS 12.58.210, the commissioner shall specify the time and place of execution.

Sec. 12.58.310. EXECUTION BY LETHAL INJECTION. After consulting a licensed physician, the commissioner shall select a method of injection and a drug or combination of drugs to be used for an execution by lethal injection.

Sec. 12.58.320. WITNESSES. The commissioner and a licensed physician chosen by the commissioner shall be present at an execution under this chapter.

Sec. 12.58.330. INVITEES. The commissioner may invite not more than nine citizens, who are 19 years of age or older, to be present at an execution, including the prosecuting attorney, the defense attorney, relatives and friends of the defendant, or religious representatives designated by the defendant. A person who is invited by the commissioner may not attend an execution as a matter of right.

Sec. 12.58.340. COVERAGE BY NEWS MEDIA. (a) The commissioner shall permit at an execution the attendance of not more than six members of the print and broadcast news media selected by the commissioner in accordance with regulations adopted by the department. The selected news media members shall serve as a pool for other members of

the news media as a condition of attendance.

(b) The use of photographic or recording equipment may not be permitted at the execution site until the execution is completed, the body is removed and the site has been restored to an orderly condition. The physical arrangements for the execution may not be disturbed.

(c) A person who violates (b) of this section is guilty of a class B misdemeanor.

Sec. 12.58.350. PROVISIONS GOVERNING ATTENDANCE AT EXECUTION.

(a) Persons attending an execution are subject to a reasonable search as a condition of attendance.

(b) Persons other than the physician and necessary staff designated by the commissioner and others permitted under AS 12.58.330 - 12.58.340 may not be permitted to attend an execution, nor may any person under the age of 19 attend.

(c) The department shall adopt regulations governing the attendance of persons at an execution.

Sec. 12.58.360. RETURN OF DEATH WARRANT. After the execution the commissioner shall make a return upon the death warrant, showing the time and place in which the defendant was executed.

ARTICLE 5. STAY OF EXECUTION.

Sec. 12.58.400. INCOMPETENCY OR PREGNANCY OF PERSON SENTENCED TO DEATH. If, after a sentence of death is imposed, the commissioner has reason to believe that the defendant has become incompetent to proceed with the execution or that the defendant is pregnant, the commissioner shall immediately give written notice to the court in which the sentence of death was imposed, the prosecuting attorney, and counsel for the defendant. The execution of sentence shall be stayed pending further order of the court.

1 Sec. 12.58.410. EXAMINATION INTO COMPETENCY. (a) On receipt of
2 notice under AS 12.58.400 that the defendant is believed to be incom-
3 petent, the sentencing court shall examine the mental condition of the
4 defendant in the same manner as provided for examining persons for
5 competency to stand trial under AS 12.47.070.

6 (b) If the sentencing court finds that the defendant is incompe-
7 tent, the court shall immediately certify that finding to the supreme
8 court and the commissioner, and shall enter an order for commitment in
9 the same manner as provided for commitment under AS 12.47.110.

10 (c) If the sentencing court finds that the defendant is compe-
11 tent, the court shall immediately certify the finding to the supreme
12 court and the commissioner. The supreme court shall issue and deliver
13 another warrant to the commissioner under AS 12.58.210, together with
14 a copy of the certified finding. Unless the sentencing court's find-
15 ing is appealed in accordance with applicable court rule, the warrant
16 shall specify a date of execution that is not less than 30 days nor
17 more than 60 days after the date of the warrant.

18 Sec. 12.58.420. DISPOSITION PENDING PREGNANCY. (a) If the
19 defendant is pregnant, the sentencing court shall immediately certify
20 that finding to the supreme court and the commissioner. The supreme
21 court shall issue an order staying the execution of the sentence of
22 death during the pregnancy.

23 (b) When the defendant is no longer pregnant, the sentencing
24 court shall immediately certify the finding to the supreme court and
25 the commissioner. The supreme court shall issue and deliver another
26 warrant under AS 12.58.210, together with a copy of the certified
27 finding. Unless the sentencing court's finding is appealed under
28 applicable court rule, the warrant shall specify a date of execution
29 not less than 30 days nor more than 60 days after the date of the

warrant.

ARTICLE 6. GENERAL PROVISIONS.

Sec. 12.58.900. DEFINITIONS. In this chapter,

- (1) "commissioner" means the commissioner of corrections;
- (2) "department" means the Department of Corrections.

* Sec. 10. AS 22.07.020(a) is amended to read:

(a) The court of appeals has appellate jurisdiction in actions and proceedings commenced in the superior court involving:

(1) criminal prosecution, except prosecution for a capital felony for which a death sentence is imposed;

(2) post-conviction relief;

(3) children's court matters under AS 47.10.010(a)(1), including waiver of children's court jurisdiction over a minor under AS 47.10;

(4) extradition;

(5) habeas corpus;

(6) probation and parole; and

(7) bail.

* Sec. 11. AS 22.07.020(b) is amended to read:

(b) Except for appeals of a death sentence, the [THE] court of appeals has jurisdiction to hear appeals of sentences of imprisonment imposed by the superior court on the grounds that the sentence is excessive or too lenient and, in the exercise of this jurisdiction, may modify the sentence as provided by law and the state constitution.

* Sec. 12. ADVISORY VOTE AUTHORIZED. The lieutenant governor shall place before the qualified voters of the state at the next statewide general election the question advisory to the legislature of whether capital punishment for murder in the first degree as now authorized by law should go into effect on August 15, 1991. The question shall appear on the ballot

1 in substantially the following form:

2 Q U E S T I O N

3 Shall capital punishment for murder in the first degree
4 as now authorized by law go into effect on August 15, 1991?

5 Yes []

No []

6 * Sec. 13. APPLICABILITY TO CRIMINAL RULES. AS 12.58, added by sec. 9
7 of this Act, has the effect of modifying the sentencing provisions of Rules
8 32, 32.1, and 32.3, Alaska Rules of Criminal Procedure, by establishing
9 exclusive procedures for imposition of death sentence by a trial court and
10 by authorizing automatic appeal of those sentences to the Alaska Supreme
11 Court.

12 * Sec. 14. APPLICABILITY TO APPELLATE RULES. AS 12.58.200, added by
13 sec. 9 of this Act, has the effect of amending Rules 204, 210, and 212,
14 Alaska Rules of Appellate Procedure, by establishing procedures and limita-
15 tions on procedures relating to the filing and disposition of appeals of
16 sentences in cases in which the death penalty is imposed.

17 * Sec. 15. Except for sec. 12 of this Act, this Act takes effect
18 August 15, 1991.

19 * Sec. 16. Section 12 of this Act takes effect immediately under
20 AS 01.10.070(c).

6-0343H✓
Chenoweth
2/13/89

Original sponsors: Fischer, Kelly,
Pearce, et al.

1 IN THE SENATE

BY THE JUDICIARY COMMITTEE

2 CS FOR SENATE BILL NO. 17 (Judiciary)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 SIXTEENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act authorizing capital punishment, classifying
7 murder in the first degree as a capital felony, and
8 establishing sentencing procedures for capital felo-
9 nies; directing an advisory vote on whether the
10 capital punishment law should take effect; amending
11 Rules 32, 32.1, and 32.3, Alaska Rules of Criminal
12 Procedure, and Rules 204, 210, and 212, Alaska Rules
13 of Appellate Procedure; and providing for an effec-
14 tive date."

15 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

16 * Section 1. FINDINGS. The legislature finds that imposition of the
17 death penalty for the crime of murder in the first degree

18 (1) is consistent with the criminal sentencing goal of deter-
19 rence in that, by the example of its imposition, a member of the community
20 who calculates a murder would rationally consider the harsh consequences of
21 that act;

22 (2) is consistent with the criminal sentencing goal of community
23 condemnation in that, by its use, the state affirms society's norms and
24 condemns most severely the premeditative taking of human life or the taking
25 of life under circumstances manifesting extreme indifference to its value;

26 (3) does not violate state constitutional guarantees against the
27 imposition of cruel and unusual punishment, but rather is fully consistent
28 with those guarantees;

29 (4) conforms to contemporary standards of decency in that there

1 is no evidence that Alaska's tradition and history suggest a significantly
2 different attitude toward capital punishment in this state from those that
3 prevail nationwide, and there is a widely held belief in the society that
4 capital punishment is an appropriate penalty for murder in the first
5 degree;

6 (5) serves the state's interest in justice by punishing the
7 person who is guilty according to what is deserved for the most morally
8 offensive conduct with a sentence more stringent than an extended term of
9 life imprisonment;

10 (6) serves the state's interest in public protection by assuring
11 that the most serious offenders will never again pose a threat to the
12 public; and

13 (7) is consistent with due process requirements in that the
14 circumstances in which the death penalty may be imposed provide guidance to
15 the court and jury that safeguard against the elements of arbitrariness and
16 capriciousness condemned by the United States Supreme Court in cases con-
17 cerning the death penalty statutes of other states.

18 * Sec. 2. AS 11.31.100(d) is amended to read:

19 (d) An attempt is

20 (1) an unclassified felony if the crime attempted is a
21 capital felony [MURDER IN THE FIRST DEGREE];

22 (2) a class A felony if the crime attempted is an unclas-
23 sified felony other than a capital felony [MURDER IN THE FIRST DE-
24 GREE];

25 (3) a class B felony if the crime attempted is a class A
26 felony;

27 (4) a class C felony if the crime attempted is a class B
28 felony;

29 (5) a class A misdemeanor if the crime attempted is a class

1 C felony;

2 (6) a class B misdemeanor if the crime attempted is a class
3 A or class B misdemeanor.

4 * Sec. 3. AS 11.31.110(c) is amended to read:

5 (c) Solicitation is a

6 (1) class A felony if the crime solicited is an unclas-
7 sified or capital felony;

8 (2) class B felony if the crime solicited is a class A
9 felony;

10 (3) class C felony if the crime solicited is a class B
11 felony;

12 (4) class A misdemeanor if the crime solicited is a class C
13 felony;

14 (5) class B misdemeanor if the crime solicited is a class A
15 or class B misdemeanor.

16 * Sec. 4. AS 11.41.100(b) is amended to read:

17 (b) Murder in the first degree is a capital [AN UNCLASSIFIED]
18 felony and is punishable as provided in AS 12.55.125(a) [AS 12.55].

19 * Sec. 5. AS 12.30.020(a) is amended to read:

20 (a) A person charged with an offense shall, at that person's
21 first appearance before a judicial officer, be ordered released pend-
22 ing trial on the person's personal recognizance or upon the execution
23 of an unsecured appearance bond in an amount specified by the judicial
24 officer unless the offense is a capital felony, an unclassified felo-
25 ny, or a class A felony or unless the officer determines that the
26 release of the person will not reasonably assure the appearance of the
27 person as required, or will pose a danger to other persons and the
28 community. If the offense with which a person is charged is a felony,
29 on motion of the prosecuting attorney, the judicial officer may allow

1 the prosecuting attorney up to 48 hours to demonstrate that release of
2 the person on the person's personal recognizance or upon the execution
3 of an unsecured appearance bond will not reasonably assure the appear-
4 ance of the person, or will pose a danger to other persons and the
5 community.

6 * Sec. 6. AS 12.30.040(b) is amended to read:

7 (b) Notwithstanding the provisions of (a) of this section, if a
8 person has been convicted of an offense that [WHICH] is a capital
9 felony, an unclassified felony, or a class A felony, the person may
10 not be released on bail either before sentencing or pending appeal.

11 * Sec. 7. AS 12.47.110(b) is amended to read:

12 (b) On or before the expiration of the initial 90-day period of
13 commitment the court shall conduct a hearing to determine whether or
14 not the defendant remains incompetent. If the court finds by a pre-
15 ponderance of the evidence that the defendant remains incompetent, the
16 court may recommit the defendant for a second period of 90 days. The
17 court shall determine at the expiration of the second 90-day period
18 whether the defendant has become competent. If at the expiration of
19 the second 90-day period the court determines that the defendant
20 continues to be incompetent to stand trial, the charges against the
21 defendant shall be dismissed without prejudice and continued commit-
22 ment of the defendant shall be governed by the provisions relating to
23 civil commitments under AS 47.30.700 - 47.30.915 unless the defendant
24 is charged with a crime involving force against a person and the court
25 finds that the defendant presents a substantial danger of physical
26 injury to other persons and that there is a substantial probability
27 that the defendant will regain competency within a reasonable period
28 of time, in which case the court may extend the period of commitment
29 for an additional six months. If the defendant remains incompetent at

1 the expiration of the additional six-month period, the charges shall
2 be dismissed without prejudice and either civil commitment proceedings
3 shall be instituted or the court shall order the release of the defen-
4 dant. If the defendant remains incompetent for five years after the
5 charges have been dismissed under this subsection, the defendant may
6 not be charged again for an offense arising out of the facts alleged
7 in the original charges, except if the original charge is a class A
8 felony, [OR] unclassified felony, or capital felony.

9 * Sec. 8. AS 12.55 is amended by adding a new section to read:

10 Sec. 12.55.117. REVIEW OF JUDGMENT OF CONVICTION OF A CAPITAL
11 FELONY. (a) A judgment of conviction of a capital felony for which a
12 sentence of death is imposed shall automatically be reviewed by the
13 supreme court within 60 days after imposition of the sentence. This
14 time limit may be extended by the supreme court for good cause.

15 (b) A review under this section has priority over all other
16 cases and the case shall be heard in accordance with rules adopted by
17 the supreme court. On review, the court shall determine whether

18 (1) the sentence was imposed under the influence of pas-
19 sion, prejudice, or other arbitrary factor;

20 (2) the evidence supports the finding of an aggravating
21 factor under AS 12.55.179 and whether the court has properly consider-
22 ed mitigating factors under AS 12.55.180;

23 (3) the sentence is excessive or disproportionate to the
24 penalty imposed in similar cases, considering both the crime and the
25 defendant; and

26 (4) any other issue that the defendant may raise as a point
27 on appeal.

28 (c) In its consideration of an automatic appeal under (a) and
29 (b) of this section, the supreme court

1 (1) may not require the defendant to file a notice of
2 appeal, unless the defendant raises an issue as a point on appeal
3 under (b)(4) of this section;

4 (2) may not require the defendant to pay a fee;

5 (3) shall designate the entire record of the proceedings
6 before the sentencing court as the record on appeal;

7 (4) shall prepare the transcript of the proceedings for the
8 record on appeal at public expense; and

9 (5) may not require the defendant to submit and file a
10 brief, unless the defendant raises an issue as a point on appeal under
11 (b)(4) of this section.

12 (d) If the supreme court upholds a judgment of conviction and
13 sentence of death, the court shall issue a death warrant that spec-
14 ifies a date of execution. The specified date of execution must be
15 not less than 30 days nor more than 60 days after the date of the
16 warrant. The death warrant shall be delivered to the commissioner of
17 corrections.

18 * Sec. 9. AS 12.55.125(a) is amended to read:

19 (a) A defendant convicted of a capital felony [MURDER IN THE
20 FIRST DEGREE] shall be sentenced to a definite term of imprisonment of
21 at least 20 years but not more than 99 years, or shall be sentenced to
22 death.

23 * Sec. 10. AS 12.55 is amended by adding new sections to read:

24 Sec. 12.55.177. SENTENCING PROCEDURE FOR A CAPITAL FELONY. (a)
25 If, after trial by jury, the defendant is convicted of a capital
26 felony, the court shall conduct a separate sentencing proceeding
27 before the trial jury as soon as practicable. If a jury trial has
28 been waived or if the defendant pleads guilty, the sentencing proceed-
29 ing shall be held before a jury impaneled for the purpose.

1 (b) During the sentencing proceeding, evidence may be presented
2 as to any matter relevant to the nature of the crime, the character of
3 the defendant, or any aggravating or mitigating factor that the court
4 considers to have probative value, regardless of the admissibility of
5 the evidence under the rules of evidence. The defendant shall have an
6 opportunity to rebut hearsay evidence that is admitted. The state and
7 the defendant or the defendant's counsel shall be permitted to present
8 oral statements. This subsection does not authorize the introduction
9 of evidence secured in violation of the Constitution of the State of
10 Alaska or the Constitution of the United States.

11 (c) After hearing the evidence, the jury shall deliberate and
12 recommend a sentence to the court. The recommended sentence must
13 include written findings of whether

14 (1) aggravating factors exist to justify the death sen-
15 tence;

16 (2) mitigating factors exist that outweigh the aggravating
17 factors; and

18 (3) the defendant should be sentenced to death.

19 Sec. 12.55.178. SENTENCE IMPOSITION FOR CAPITAL FELONY. (a)
20 After considering the evidence and the recommended sentence, the court
21 shall enter a sentence of death or a term of imprisonment in accor-
22 dance with AS 12.55.125(a).

23 (b) The court may not impose the death sentence unless the jury

24 (1) finds at least one aggravating factor that is not
25 outweighed by the mitigating factors; and

26 (2) recommends that the defendant be sentenced to death.

27 (c) The court may not impose the death sentence

28 (1) if the jury findings do not include an aggravating
29 factor;

1 (2) if the jury findings include an aggravating factor that
2 is outweighed by one or more of the mitigating factors; or

3 (3) if the jury does not recommend a sentence of death.

4 (d) If the court enters a sentence of death, it shall make
5 written findings of

6 (1) aggravating factors that exist to justify the sentence;
7 and

8 (2) mitigating factors considered by the court.

9 (e) A judgment of conviction for which a sentence of death is
10 imposed is subject to automatic review under AS 12.55.117.

11 Sec. 12.55.179. AGGRAVATING FACTORS. In determining whether to
12 impose a sentence of death, the following aggravating factors may be
13 considered:

14 (1) the defendant's conduct during the commission of the
15 offense manifested deliberate cruelty to another person in that it
16 involved sexual assault in the first degree, kidnapping, assault in
17 the first degree, torture, or an aggravated battery;

18 (2) the defendant's conduct caused the death of two or more
19 persons, other than accomplices;

20 (3) the defendant's conduct created a risk of imminent
21 physical injury to three or more persons, other than accomplices;

22 (4) the defendant has a prior conviction for a felony that
23 involved the use of violence against a person or for murder under
24 AS 11.41.100 - 11.41.110, former AS 11.15.010 or 11.15.030, or the law
25 of another jurisdiction with substantially similar elements;

26 (5) the defendant knowingly directed the conduct constitut-
27 ing the offense at the President of the United States or the governor
28 of this state;

29 (6) the defendant knowingly directed the conduct

1 constituting the offense at an active or former law enforcement
2 officer, prosecuting attorney, fireman, judicial officer, or correc-
3 tional officer during or because of the exercise of official duties;

4 (7) the defendant committed the offense under an agreement
5 that the defendant either pay or be paid for the commission of the
6 offense, or for other pecuniary gain;

7 (8) the defendant was on release under AS 12.30.020 -
8 12.30.040 for another felony charge or conviction having assault as a
9 necessary element.

10 Sec. 12.55.180. MITIGATING FACTORS. In determining whether to
11 impose the death sentence, all mitigating factors shall be considered,
12 including, but not limited to, the following:

13 (1) the defendant committed the offense under a degree of
14 duress, coercion, threat, or compulsion that was insufficient to
15 constitute a defense but that significantly affected the defendant's
16 conduct;

17 (2) the conduct of a youthful defendant was substantially
18 influenced by a person more mature than the defendant;

19 (3) the defendant acted with serious provocation from the
20 victim;

21 (4) the defendant assisted authorities to detect or appre-
22 hend other persons who committed the offense with the defendant.

23 * Sec. 11. AS 12 is amended by adding a new chapter to read:

24 CHAPTER 58. IMPOSITION OF DEATH PENALTY.

25 ARTICLE 1. EXECUTION.

26 Sec. 12.58.010. EXECUTION UNDER SUPREME COURT DEATH WARRANT.
27 After receiving a supreme court warrant issued under AS 12.55.117, the
28 commissioner shall specify the time and place of execution.

29 Sec. 12.58.020. EXECUTION BY LETHAL INJECTION. After consulting

1 a licensed physician, the commissioner shall select a method of in-
2 jection and a drug or combination of drugs to be used for an execution
3 by lethal injection.

4 Sec. 12.58.030. WITNESSES. The commissioner and a licensed
5 physician chosen by the commissioner shall be present at an execution
6 under this chapter.

7 Sec. 12.58.040. INVITEES. The commissioner may invite not more
8 than nine citizens, who are 19 years of age or older, to be present at
9 an execution, including the prosecuting attorney, the defense attor-
10 ney, relatives and friends of the defendant, or religious representa-
11 tives designated by the defendant. A person who is invited by the
12 commissioner may not attend an execution as a matter of right.

13 Sec. 12.58.050. COVERAGE BY NEWS MEDIA. (a) The commissioner
14 shall permit at an execution the attendance of not more than six
15 members of the print and broadcast news media selected by the commis-
16 sioner in accordance with regulations adopted by the department. The
17 selected news media members shall serve as a pool for other members of
18 the news media as a condition of attendance.

19 (b) The use of photographic or recording equipment may not be
20 permitted at the execution site until the execution is completed, the
21 body is removed and the site has been restored to an orderly condi-
22 tion. The physical arrangements for the execution may not be dis-
23 turbed.

24 (c) A person who violates (b) of this section is guilty of a
25 class B misdemeanor.

26 Sec. 12.58.060. PROVISIONS GOVERNING ATTENDANCE AT EXECUTION.
27 (a) Persons attending an execution are subject to a reasonable search
28 as a condition of attendance.

29 (b) Persons other than the necessary staff designated by the

1 commissioner and others permitted under AS 12.58.040 - 12.58.050 may
2 not be permitted to attend an execution, nor may any person under the
3 age of 19 attend.

4 (c) The department shall adopt regulations governing the atten-
5 dance of persons at an execution.

6 Sec. 12.58.070. RETURN OF DEATH WARRANT. After the execution
7 the commissioner shall make a return upon the death warrant, showing
8 the time and place in which the defendant was executed.

9 ARTICLE 2. STAY OF EXECUTION.

10 Sec. 12.58.200. INCOMPETENCY OR PREGNANCY OF PERSON SENTENCED TO
11 DEATH. If, after a sentence of death is imposed, the commissioner has
12 reason to believe that the defendant has become incompetent to proceed
13 with the execution or that the defendant is pregnant, the commissioner
14 shall immediately give written notice to the court in which the sen-
15 tence of death was imposed, the prosecuting attorney, and counsel for
16 the defendant. The execution of sentence shall be stayed pending
17 further order of the court.

18 Sec. 12.58.210. EXAMINATION INTO COMPETENCY. (a) On receipt of
19 notice under AS 12.58.200 that the defendant is believed to be incom-
20 petent, the sentencing court shall examine the mental condition of the
21 defendant in the same manner as provided for examining persons for
22 competency to stand trial under AS 12.47.070.

23 (b) If the sentencing court finds that the defendant is incompe-
24 tent, the court shall immediately certify that finding to the supreme
25 court and the commissioner, and shall enter an order for commitment in
26 the same manner as provided for commitment under AS 12.47.110.

27 (c) If the sentencing court finds that the defendant is compe-
28 tent, the court shall immediately certify the finding to the supreme
29 court and the commissioner. The supreme court shall issue and deliver

1 another warrant to the commissioner under AS 12.55.117, together with
2 a copy of the certified finding. Unless the sentencing court's find-
3 ing is appealed in accordance with applicable court rule, the warrant
4 shall specify a date of execution that is not less than 30 days nor
5 more than 60 days after the date of the warrant.

6 Sec. 12.58.220. DISPOSITION PENDING PREGNANCY. (a) If the
7 defendant is pregnant, the sentencing court shall immediately certify
8 that finding to the supreme court and the commissioner. The supreme
9 court shall issue an order staying the execution of the sentence of
10 death during the pregnancy.

11 (b) When the defendant is no longer pregnant, the sentencing
12 court shall immediately certify the finding to the supreme court and
13 the commissioner. The supreme court shall issue and deliver another
14 warrant under AS 12.55.117, together with a copy of the certified
15 finding. Unless the sentencing court's finding is appealed under
16 applicable court rule, the warrant shall specify a date of execution
17 not less than 30 days nor more than 60 days after the date of the
18 warrant.

19 ARTICLE 3. GENERAL PROVISIONS.

20 Sec. 12.58.900. DEFINITIONS. In this chapter,

21 (1) "commissioner" means the commissioner of corrections;

22 (2) "department" means the Department of Corrections.

23 * Sec. 12. AS 22.07.020(a) is amended to read:

24 (a) The court of appeals has appellate jurisdiction in actions
25 and proceedings commenced in the superior court involving:

26 (1) criminal prosecution, except prosecution for a capital
27 felony for which a death sentence is imposed;

28 (2) post-conviction relief;

29 (3) children's court matters under AS 47.10.010(a)(1),

1 including waiver of children's court jurisdiction over a minor under
2 AS 47.10;

3 (4) extradition;

4 (5) habeas corpus;

5 (6) probation and parole; and

6 (7) bail.

7 * Sec. 13. AS 22.07.020(b) is amended to read:

8 (b) Except for appeals of a death sentence, the [THE] court of
9 appeals has jurisdiction to hear appeals of sentences of imprisonment
10 imposed by the superior court on the grounds that the sentence is
11 excessive or too lenient and, in the exercise of this jurisdiction,
12 may modify the sentence as provided by law and the state constitution.

13 * Sec. 14. ADVISORY VOTE AUTHORIZED. The lieutenant governor shall
14 place before the qualified voters of the state at the next statewide
15 general election the question advisory to the legislature of whether capi-
16 tal punishment for murder in the first degree as now authorized by law
17 should go into effect on August 15, 1991. The question shall appear on the
18 ballot in substantially the following form:

19 Q U E S T I O N

20 Shall capital punishment for murder in the first degree
21 as now authorized by law go into effect on August 15, 1991?

22 Yes []

No []

23 * Sec. 15. APPLICABILITY TO CRIMINAL RULES. The amendments to AS 12.55
24 made by secs. 8 and 10 of this Act, and AS 12.58, added by sec. 11 of this
25 Act, have the effect of modifying the sentencing provisions of Rules 32,
26 32.1, and 32.3, Alaska Rules of Criminal Procedure, by establishing exclu-
27 sive procedures for imposition of death sentence by a trial court and by
28 authorizing automatic appeal of those sentences to the Alaska Supreme
29 Court.

1 * Sec. 16. APPLICABILITY TO APPELLATE RULES. AS 12.55.117(c), added by
2 sec. 8 of this Act, has the effect of amending Rules 204, 210, and 212,
3 Alaska Rules of Appellate Procedure, by establishing procedures and limita-
4 tions on procedures relating to the filing and disposition of appeals of
5 sentences in cases in which the death penalty is imposed.

6 * Sec. 17. Except for sec. 14 of this Act, this Act takes effect
7 August 15, 1991.

8 * Sec. 18. Section 14 of this Act takes effect immediately under
9 AS 01.10.070(c).

6-0343H
Chenoweth
2/7/89

Original sponsors: Fischer, Kelly,
Pearce, et al.

IN THE SENATE

BY THE JUDICIARY COMMITTEE

CS FOR SENATE BILL NO. 17 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act authorizing capital punishment, classifying murder in the first degree as a capital felony, and establishing sentencing procedures for capital felonies; directing an advisory vote on whether the capital punishment law should take effect; amending Rules 32, 32.1, and 32.3, Alaska Rules of Criminal Procedure, and Rules 204, 210, and 212, Alaska Rules of Appellate Procedure; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. FINDINGS. The legislature finds that imposition of the death penalty for the crime of murder in the first degree

(1) is consistent with the criminal sentencing goal of deterrence in that, by the example of its imposition, a member of the community who calculates a murder would rationally consider the harsh consequences of that act;

(2) is consistent with the criminal sentencing goal of community condemnation in that, by its use, the state affirms society's norms and condemns most severely the premeditative taking of human life or the taking of life under circumstances manifesting extreme indifference to its value;

(3) does not violate state constitutional guarantees against the imposition of cruel and unusual punishment, but rather is fully consistent with those guarantees;

(4) conforms to contemporary standards of decency in that there

1 is no evidence that Alaska's tradition and history suggest a significantly
2 different attitude toward capital punishment in this state from those that
3 prevail nationwide, and there is a widely held belief in the society that
4 capital punishment is an appropriate penalty for murder in the first
5 degree;

6 (5) serves the state's interest in justice by punishing the
7 person who is guilty according to what is deserved for the most morally
8 offensive conduct with a sentence more stringent than an extended term of
9 life imprisonment;

10 (6) serves the state's interest in public protection by assuring
11 that the most serious offenders will never again pose a threat to the
12 public; and

13 (7) is consistent with due process requirements in that the
14 circumstances in which the death penalty may be imposed provide guidance to
15 the court and jury that safeguard against the elements of arbitrariness and
16 capriciousness condemned by the United States Supreme Court in cases con-
17 cerning the death penalty statutes of other states.

18 * Sec. 2. AS 11.31.100(d) is amended to read:

19 (d) An attempt is

20 (1) an unclassified felony if the crime attempted is a
21 capital felony [MURDER IN THE FIRST DEGREE];

22 (2) a class A felony if the crime attempted is an unclas-
23 sified felony other than a capital felony [MURDER IN THE FIRST DE-
24 GREE];

25 (3) a class B felony if the crime attempted is a class A
26 felony;

27 (4) a class C felony if the crime attempted is a class B
28 felony;

29 (5) a class A misdemeanor if the crime attempted is a class

C felony;

(6) a class B misdemeanor if the crime attempted is a class A or class B misdemeanor.

* Sec. 3. AS 11.31.110(c) is amended to read:

(c) Solicitation is a

(1) class A felony if the crime solicited is an unclassified or capital felony;

(2) class B felony if the crime solicited is a class A felony;

(3) class C felony if the crime solicited is a class B felony;

(4) class A misdemeanor if the crime solicited is a class C felony;

(5) class B misdemeanor if the crime solicited is a class A or class B misdemeanor.

* Sec. 4. AS 11.41.100(b) is amended to read:

(b) Murder in the first degree is a capital [AN UNCLASSIFIED] felony and is punishable as provided in AS 12.55.125(a) [AS 12.55].

* Sec. 5. AS 12.30.020(a) is amended to read:

(a) A person charged with an offense shall, at that person's first appearance before a judicial officer, be ordered released pending trial on the person's personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer unless the offense is a capital felony, an unclassified felony, or a class A felony or unless the officer determines that the release of the person will not reasonably assure the appearance of the person as required, or will pose a danger to other persons and the community. If the offense with which a person is charged is a felony, on motion of the prosecuting attorney, the judicial officer may allow

1 the prosecuting attorney up to 48 hours to demonstrate that release of
2 the person on the person's personal recognizance or upon the execution
3 of an unsecured appearance bond will not reasonably assure the appear-
4 ance of the person, or will pose a danger to other persons and the
5 community.

6 * Sec. 6. AS 12.30.040(b) is amended to read:

7 (b) Notwithstanding the provisions of (a) of this section, if a
8 person has been convicted of an offense that [WHICH] is a capital
9 felony, an unclassified felony, or a class A felony, the person may
10 not be released on bail either before sentencing or pending appeal.

11 * Sec. 7. AS 12.47.110(b) is amended to read:

12 (b) On or before the expiration of the initial 90-day period of
13 commitment the court shall conduct a hearing to determine whether or
14 not the defendant remains incompetent. If the court finds by a pre-
15 ponderance of the evidence that the defendant remains incompetent, the
16 court may recommit the defendant for a second period of 90 days. The
17 court shall determine at the expiration of the second 90-day period
18 whether the defendant has become competent. If at the expiration of
19 the second 90-day period the court determines that the defendant
20 continues to be incompetent to stand trial, the charges against the
21 defendant shall be dismissed without prejudice and continued commit-
22 ment of the defendant shall be governed by the provisions relating to
23 civil commitments under AS 47.30.700 - 47.30.915 unless the defendant
24 is charged with a crime involving force against a person and the court
25 finds that the defendant presents a substantial danger of physical
26 injury to other persons and that there is a substantial probability
27 that the defendant will regain competency within a reasonable period
28 of time, in which case the court may extend the period of commitment
29 for an additional six months. If the defendant remains incompetent at

1 the expiration of the additional six-month period, the charges shall
2 be dismissed without prejudice and either civil commitment proceedings
3 shall be instituted or the court shall order the release of the defen-
4 dant. If the defendant remains incompetent for five years after the
5 charges have been dismissed under this subsection, the defendant may
6 not be charged again for an offense arising out of the facts alleged
7 in the original charges, except if the original charge is a class A
8 felony, [OR] unclassified felony, or capital felony.

9 * Sec. 8. AS 12.55 is amended by adding a new section to read:

10 Sec. 12.55.117. REVIEW OF JUDGMENT OF CONVICTION OF A CAPITAL
11 FELONY. (a) A judgment of conviction of a capital felony for which a
12 sentence of death is imposed shall automatically be reviewed by the
13 supreme court within 60 days after imposition of the sentence. This
14 time limit may be extended by the supreme court for good cause.

15 (b) A review under this section has priority over all other
16 cases and the case shall be heard in accordance with rules adopted by
17 the supreme court. On review, the court shall determine whether

18 (1) the sentence was imposed under the influence of pas-
19 sion, prejudice, or other arbitrary factor;

20 (2) the evidence supports the finding of an aggravating
21 factor under AS 12.55.179 and whether the court has properly consid-
22 ed mitigating factors under AS 12.55.180;

23 (3) the sentence is excessive or disproportionate to the
24 penalty imposed in similar cases, considering both the crime and the
25 defendant; and

26 (4) any other issue that the defendant may raise as a point
27 on appeal.

28 (c) In its consideration of an automatic appeal under (a) and
29 (b) of this section, the supreme court

1 (1) may not require the defendant to file a notice of
2 appeal, unless the defendant raises an issue as a point on appeal
3 under (b)(4) of this section;

4 (2) may not require the defendant to pay a fee;

5 (3) shall designate the entire record of the proceedings
6 before the sentencing court as the record on appeal;

7 (4) shall prepare the transcript of the proceedings for the
8 record on appeal at public expense; and

9 (5) may not require the defendant to submit and file a
10 brief, unless the defendant raises an issue as a point on appeal under
11 (b)(4) of this section.

12 (d) If the supreme court upholds a judgment of conviction and
13 sentence of death, the court shall issue a death warrant that spec-
14 ifies a date of execution. The specified date of execution must be
15 not less than 30 days nor more than 60 days after the date of the
16 warrant. The death warrant shall be delivered to the commissioner of
17 corrections.

18 * Sec. 9. AS 12.55.125(a) is amended to read:

19 (a) A defendant convicted of a capital felony [MURDER IN THE
20 FIRST DEGREE] shall be sentenced to a definite term of imprisonment of
21 at least 20 years but not more than 99 years, or shall be sentenced to
22 death.

23 * Sec. 10. AS 12.55 is amended by adding new sections to read:

24 Sec. 12.55.177. SENTENCING PROCEDURE FOR A CAPITAL FELONY. (a)
25 If, after trial by jury, the defendant is convicted of a capital
26 felony, the court shall conduct a separate sentencing proceeding
27 before the trial jury as soon as practicable. If a jury trial has
28 been waived or if the defendant pleads guilty, the sentencing proceed-
29 ing shall be held before a jury impaneled for the purpose.

1 (b) During the sentencing proceeding, evidence may be presented
2 as to any matter relevant to the nature of the crime, the character of
3 the defendant, or any aggravating or mitigating factor that the court
4 considers to have probative value, regardless of the admissibility of
5 the evidence under the rules of evidence. The defendant shall have an
6 opportunity to rebut hearsay evidence that is admitted. The state and
7 the defendant or the defendant's counsel shall be permitted to present
8 oral statements. This subsection does not authorize the introduction
9 of evidence secured in violation of the Constitution of the State of
10 Alaska or the Constitution of the United States.

11 (c) After hearing the evidence, the jury shall deliberate and
12 recommend a sentence to the court. The recommended sentence must
13 include written findings of whether

14 (1) aggravating factors exist to justify the death sen-
15 tence;

16 (2) mitigating factors exist that outweigh the aggravating
17 factors; and

18 (3) the defendant should be sentenced to death.

19 Sec. 12.55.178. SENTENCE IMPOSITION FOR CAPITAL FELONY. (a)
20 After considering the evidence and the recommended sentence, the court
21 shall enter a sentence of death or a term of imprisonment in accor-
22 dance with AS 12.55.125(a).

23 (b) The court may not impose the death sentence unless the jury

24 (1) finds at least one aggravating factor that is not
25 outweighed by the mitigating factors; and

26 (2) recommends that the defendant be sentenced to death.

27 (c) The court may not impose the death sentence if the jury

28 (1) findings do not include an aggravating factor, or
29 include an aggravating factor that is not outweighed by the mitigating

factors; or

(2) does not recommend a sentence of death.

(d) If the court enters a sentence of death, it shall make written findings of

(1) aggravating factors that exist to justify the sentence; and

(2) mitigating factors considered by the court.

(e) A judgment of conviction for which a sentence of death is imposed is subject to automatic review under AS 12.55.117.

Sec. 12.55.179. AGGRAVATING FACTORS. In determining whether to impose a sentence of death, the following aggravating factors may be considered:

(1) the defendant's conduct during the commission of the offense manifested deliberate cruelty to another person in that it involved sexual assault in the first degree, kidnapping, assault in the first degree, torture, or an aggravated battery;

(2) the defendant's conduct caused the death of two or more persons, other than accomplices;

(3) the defendant's conduct created a risk of imminent physical injury to three or more persons, other than accomplices;

(4) the defendant has a prior conviction for a felony that involved the use of violence against a person or for murder under AS 11.41.100 - 11.41.110, former AS 11.15.010 or 11.15.030, or the law of another jurisdiction with substantially similar elements;

(5) the defendant knowingly directed the conduct constituting the offense at the President of the United States or the governor of this state;

(6) the defendant knowingly directed the conduct constituting the offense at an active or former law enforcement officer,

1 prosecuting attorney, fireman, judicial officer, or correctional
2 officer during or because of the exercise of official duties;

3 (7) the defendant committed the offense under an agreement
4 that the defendant either pay or be paid for the commission of the
5 offense, or for other pecuniary gain;

6 (8) the defendant was on release under AS 12.30.020 -
7 12.30.040 for another felony charge or conviction having assault as a
8 necessary element.

9 Sec. 12.55.180. MITIGATING FACTORS. In determining whether to
10 impose the death sentence, all mitigating factors shall be considered,
11 including, but not limited to, the following:

12 (1) the defendant committed the offense under a degree of
13 duress, coercion, threat, or compulsion that was insufficient to
14 constitute a defense but that significantly affected the defendant's
15 conduct;

16 (2) the conduct of a youthful defendant was substantially
17 influenced by a person more mature than the defendant;

18 (3) the defendant acted with serious provocation from the
19 victim;

20 (4) the defendant assisted authorities to detect or apprehend
21 other persons who committed the offense with the defendant.

22 * Sec. 11. AS 12 is amended by adding a new chapter to read:

23 CHAPTER 58. IMPOSITION OF DEATH PENALTY.

24 ARTICLE 1. EXECUTION.

25 Sec. 12.58.010. EXECUTION UNDER SUPREME COURT DEATH WARRANT.
26 After receiving a supreme court warrant issued under AS 12.55.117, the
27 commissioner shall specify the time and place of execution.

28 Sec. 12.58.020. EXECUTION BY LETHAL INJECTION. After consulting
29 a licensed physician, the commissioner shall select a method of

1 injection and a drug or combination of drugs to be used for an execu-
2 tion by lethal injection.

3 Sec. 12.58.030. WITNESSES. The commissioner and a licensed
4 physician chosen by the commissioner shall be present at an execution
5 under this chapter.

6 Sec. 12.58.040. INVITEES. The commissioner may invite not more
7 than nine citizens, who are 19 years of age or older, to be present at
8 an execution, including the prosecuting attorney, the defense attor-
9 ney, relatives and friends of the defendant, or religious representa-
10 tives designated by the defendant. A person who is invited by the
11 commissioner may not attend an execution as a matter of right.

12 Sec. 12.58.050. COVERAGE BY NEWS MEDIA. (a) The commissioner
13 shall permit at an execution the attendance of not more than six
14 members of the print and broadcast news media selected by the commis-
15 sioner in accordance with regulations adopted by the department. The
16 selected news media members shall serve as a pool for other members of
17 the news media as a condition of attendance.

18 (b) The use of photographic or recording equipment may not be
19 permitted at the execution site until the execution is completed, the
20 body is removed and the site has been restored to an orderly condi-
21 tion. The physical arrangements for the execution may not be dis-
22 turbed.

23 (c) A person who violates (b) of this section is guilty of a
24 class B misdemeanor.

25 Sec. 12.58.060. PROVISIONS GOVERNING ATTENDANCE AT EXECUTION.
26 (a) Persons attending an execution are subject to a reasonable search
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29 commissioner and others permitted under AS 12.58.040 - 12.58.050 may

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2 age of 19 attend.

3 (c) The department shall adopt regulations governing the atten-
4 dance of persons at an execution.

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6 the commissioner shall make a return upon the death warrant, showing
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12 with the execution or that the defendant is pregnant, the commissioner
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15 the defendant. The execution of sentence shall be stayed pending
16 further order of the court.

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19 petent, the sentencing court shall examine the mental condition of the
20 defendant in the same manner as provided for examining persons for
21 competency to stand trial under AS 12.47.070.

22 (b) If the sentencing court finds that the defendant is incompe-
23 tent, the court shall immediately certify that finding to the supreme
24 court and the commissioner, and shall enter an order for commitment in
25 the same manner as provided for commitment under AS 12.47.110.

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27 tent, the court shall immediately certify the finding to the supreme
28 court and the commissioner. The supreme court shall issue and deliver
29 another warrant to the commissioner under AS 12.55.117, together with

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4 more than 60 days after the date of the warrant.

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6 defendant is pregnant, the sentencing court shall immediately certify
7 that finding to the supreme court and the commissioner. The supreme
8 court shall issue an order staying the execution of the sentence of
9 death during the pregnancy.

10 (b) When the defendant is no longer pregnant, the sentencing
11 court shall immediately certify the finding to the supreme court and
12 the commissioner. The supreme court shall issue and deliver another
13 warrant under AS 12.55.117, together with a copy of the certified
14 finding. Unless the sentencing court's finding is appealed under
15 applicable court rule, the warrant shall specify a date of execution
16 not less than 30 days nor more than 60 days after the date of the
17 warrant.

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29 including waiver of children's court jurisdiction over a minor under

AS 47.10;

- (4) extradition;
- (5) habeas corpus;
- (6) probation and parole; and
- (7) bail.

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(b) Except for appeals of a death sentence, the [THE] court of appeals has jurisdiction to hear appeals of sentences of imprisonment imposed by the superior court on the grounds that the sentence is excessive or too lenient and, in the exercise of this jurisdiction, may modify the sentence as provided by law and the state constitution.

* Sec. 14. ADVISORY VOTE AUTHORIZED. The lieutenant governor shall place before the qualified voters of the state at the next statewide election the question advisory to the legislature of whether capital punishment for murder in the first degree as now authorized by law should go into effect on August 15, 1991. The question shall appear on the ballot in substantially the following form:

Q U E S T I O N

Shall capital punishment for murder in the first degree
as now authorized by law go into effect on August 15, 1991?

Yes []

No []

* Sec. 15. APPLICABILITY TO CRIMINAL RULES. The amendments to AS 12.55 made by secs. 8 and 10 of this Act, and AS 12.58, added by sec. 11 of this Act, have the effect of modifying the sentencing provisions of Rules 32, 32.1, and 32.3, Alaska Rules of Criminal Procedure, by establishing exclusive procedures for imposition of death sentence by a trial court and by authorizing automatic appeal of those sentences to the Alaska Supreme Court.

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1 sec. 8 of this Act, has the effect of amending Rules 204, 210, and 212,
2 Alaska Rules of Appellate Procedure, by establishing procedures and limita-
3 tions on procedures relating to the filing and disposition of appeals of
4 sentences in cases in which the death penalty is imposed.

5 * Sec. 17. Except for sec. 14 of this Act, this Act takes effect
6 August 15, 1991.

7 * Sec. 18. Section 14 of this Act takes effect immediately under
8 AS 01.10.070(c).
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Alaska State Legislature

SENATE

Committee on Finance

Official Business

P.O. Box V
State Capitol
Juneau, Alaska 99811

The Senate Judiciary Committee took over nine hours of testimony from 111 people during their eight hearings on the subject of capital punishment.

LIST OF PEOPLE WHO TESTIFIED DURING THE JUDICIARY COMMITTEE HEARINGS ON CAPITAL PUNISHMENT

1. Allen, Ron
2. Amos, Dan
3. Anderson, Duane
4. Appell, Terry
5. Aschenbrennet, John
6. Bahovec, Clothilde
7. Barton, Louise
8. Bentley, David
9. Bollenbach, Jamie
10. Brause, Floyd
11. Brinck, Barbara
12. Brookins, Debbie
13. Burch, Kenneth
14. Burkhardt, Carol
15. Burton, Gordon
16. Burton, Jack
17. Callahan, Daniel
18. Campbell, Charles
19. Clark, Marcie
20. Clay, Jim
21. Crepps, Janet
22. Curry, Frank
23. Cvellar, Anthony
24. Dalton, Kathleen
25. Dailey, Ronald
26. Dewey, William
27. Dickens, Shirley
28. Dixon, Tim
29. Dolese, David
30. Dunker, John
31. Elson, Pete
32. English, Art

33. Fickey, Bill
34. Fields, Eugene
35. Finley, Doug
36. Fischer, Senator Paul
37. Fitzpatrick, Lisa
38. Foreman, Jill
39. Fortier, Jeanne
40. Germany, Jack
41. Gordon, Lewis
42. Grant, Paul
43. Grogan, Dwayne
44. Groth, Glenn
45. Hale, Tracy
46. Harsh, Toni
47. Hiner, Tim
48. Horst, Carl
49. Kennedy Geoff
50. Kimura, John
51. Koenig, Al
52. Jaeger, Rob
53. Jayne, Jeannette
54. Johnson, Mark
55. Keezaer, Vern
56. Kochkin, Alex
57. Koeniger, Art
58. Kurtz, Bill
59. Landon, Bruce
60. Layson, Stephen
61. Levy, Mark
62. Lerman, Avril
63. Levinson, Dan
64. Lienhart, Janice
65. Linck, Alaska
66. Luddell, Eleanor
67. Mahorney, Sharon
68. Mandel, Nat
69. Mathews, Hillary
70. McClear, Susan
71. McConnaughy, Margaret
72. McCormick, Brad
73. McCoy, Rod
74. McGee, Pat
75. McKay, Beth
76. McRorie, Bartley
77. Miller, Gary
78. Moselel, Dianna
79. Mullins, Mervin
80. Noble, Michelle
81. Nowell, Vern

82. Nugen, Leonard
83. Nusbaum, Sandy
84. Oberly, Bill
85. Otto, Laurie
86. Pease, Nancy
87. Pond, Dwight
88. Ramsom, Doreen
89. Rohrbacher, Charles
90. Rosenfeld, Rabbi Harry
91. Roten, Carol
92. Roten, Carl
93. Rubin, Jeff
94. Salemi, John
95. Sambo, Dalee
96. Shaffer John
97. Shapir, Mitchell
98. Scott, Brad
99. Slone, John
100. Spadaforda, Ken
101. Stivers, Bill
102. Tasker, Eric
103. Traxinger, Kathleen
104. Turney, Frank
105. Van den Haag, Ernest
106. Veteto, Jeff
107. Wilkins, Nancy
108. Wolforth, Caroline
109. Wood, Walt
110. Yergen, Norman
111. Yokoyama, Jane

Chapter 41. Offenses Against the Person.

Article

1. Homicide (§§ 11.41.100 -- 11.41.115)
2. Assault and Reckless Endangerment (§ 11.41.200)
4. Sexual Offenses (§§ 11.41.410 -- 11.41.436, 11.41.440, 11.41.445, 11.41.470)

Article 1. Homicide.

Section

100. Murder in the first degree
110. Murder in the second degree

Section

115. Defenses to murder

Sec. 11.41.100. Murder in the first degree. (a) A person commits the crime of murder in the first degree if

- (1) with intent to cause the death of another person, the person (A) causes the death of any person; or
- (B) compels or induces any person to commit suicide through duress or deception; or

(2) the person knowingly engages, under circumstances manifesting extreme indifference to the value of human life, in a pattern or practice of assault or torture of a child under the age of 16, and one of the acts of assault or torture results in the death of the child; for purposes of this paragraph, a person "engages in a pattern or practice of assault or torture" if the person inflicts serious physical injury to the child by at least two separate acts, and one of the acts results in the death of the child.

(b) Murder in the first degree is an unclassified felony and is punishable as provided in AS 12.55. (S 3 ch 166 SLA 1978; am § 1 ch 67 SLA 1988)

Effect of amendments. — The 1988 amendment, in subsection (a), divided the formerly included introductory language into an introductory paragraph and present paragraph (1), redesignated for-

mer paragraphs (1) and (2) as present paragraphs (1)(A) and (1)(B), added "or" at the end of paragraph (1)(B), and added paragraph (2).

NOTES TO DECISIONS

Instructions.

Where the jury was given a proper lesser-included offense instruction on murder in the second degree, but nevertheless convicted defendant of murder in the first degree, given the jury's rejection of second-degree murder as a lesser-included offense, it is evident that defendant suffered no prejudice, even assuming a manslaughter instruction he challenged was inadequate. *Ridgely v. State*, Cr. App. Op. No. 727 (File Nos. A-39, A-43, A-56), 739 P.2d 1299 (1987).

Where defendant convicted of first-degree murder claimed the trial court erred in failing to give a proper instruction on the lesser-included offense of manslaughter, premised on the fact that the manslaughter instruction given to the jury referred only to reckless homicide and did not inform the jury that knowing and intentional homicides may qualify as manslaughter, this claim must fail if defendant has suggested no theory under which the evidence might have supported a conviction of manslaughter based on inten-

tional or knowing conduct. *Ridgely v. State*, Ct. App. Op. No. 727 (File Nos. A-30, A-43, A-56), 739 P.2d 1299 (1987).

Maximum sentence for first-degree murder upheld.

See *Riley v. State*, Ct. App. Op. No. 630 (File No. A-1258), P.2d (1986).

Sentence upheld. See *Travelstead v. State*, Sup. Ct. Op. No. 407 (File No. A-114), 689 P.2d 494 (1984); *Lewis v. State*, Ct. App. Op. No. 673 (File No. A-793), 731 P.2d 68 (1987); *Jackson v. State*, Ct. App. Op. No. 781 (File No. A-2026), P.2d (1988).

Where two defendants were convicted of first-degree murder and one of second-degree murder for the same crime, the sentencing judge was entitled to make his own evaluation of the evidence in deciding how culpable was the behavior of the one convicted of second-degree murder, and where the record before the jury sufficed to support the conclusion that she was as guilty of premeditated murder as were the other defendants, the maximum term of 99 years received by each of the defendants, though certainly severe, was justified by the extreme nature of their crime. *Ridgely v. State*, Ct. App. Op. No. 727 (File Nos. A-30, A-43, A-56), 739 P.2d 1299 (1987).

Sentence of consecutive 99-year terms for two murders is not clearly mistaken where the defendant presents a risk of continued criminal conduct which would seriously threaten the public safety. *Kruhoff v. State*, Ct. App. Op. No. 487 (File No. A-183), P.2d (1985).

Sentence for attempted first degree murder upheld. — See *Stand v. State*,

Ct. App. Op. No. 453 (File No. A-78), 697 P.2d 1050 (1985).

Conviction and sentence affirmed. See *Cotton v. State*, Ct. App. Op. No. 657 (File No. A-850), 728 P.2d 649 (1986).

Convictions for first-degree and second-degree murder affirmed but sentence remanded for consideration of consecutive sentencing. See *Tucker v. State*, Ct. App. Op. No. 633 (File No. A-918), P.2d (1986).

Conviction reversed where trial court's finding of voluntary Miranda waiver was in error. See *Hampel v. State*, Ct. App. Op. No. 547 (File No. 7398), 706 P.2d 1173 (1985).

Conviction reversed because of admission of improperly seized evidence.

See *Lowry v. State*, Ct. App. Op. No. 528 (File No. A-249), 707 P.2d 280 (1985).

Cited in *Derchensteyn v. State*, Ct. App. Op. No. 453 (File No. 7729), 697 P.2d 312 (1985); *Hart v. State*, Ct. App. Op. No. 482 (File No. A-205), 702 P.2d 651 (1985); *Ridgely v. State*, Ct. App. Op. No. 503 (File No. A-30, A-43, A-56), 705 P.2d 924 (1985); *Peckham v. State*, Ct. App. Op. No. 639 (File No. 7029), P.2d (1986); *Hastings v. State*, Ct. App. Op. No. 706 (File No. A-602), P.2d (1987); *Clifton v. State*, Sup. Ct. Op. No. 3280 (File No. S-1945), P.2d (1988); *Peel v. State*, Ct. App. Op. No. 723 (File No. A-2293), 752 P.2d 472 (1988); *Cole v. State*, Ct. App. Op. No. 805 (File No. A-1595), P.2d (1988); *Ciorco v. State*, Ct. App. Op. No. 813 (File No. A-2063), P.2d (1988).

Sec. 11.41.110. Murder in the second degree. (a) A person commits the crime of murder in the second degree if

(1) with intent to cause serious physical injury to another person or knowing that the conduct is substantially certain to cause death or serious physical injury to another person, the person causes the death of any person;

(2) the person knowingly engages in conduct that results in the death of another person under circumstances manifesting an extreme indifference to the value of human life; or

(3) acting either alone or with one or more persons, the person commits or attempts to commit arson in the first degree, kidnapping, sexual assault in the first degree under AS 11.41.410(a)(1) or (2), sexual assault in the second degree, burglary in the first degree, escape in the first or second degree, or robbery in any degree and, in the course of or in furtherance of that crime, or in immediate flight from

STATE OF ALASKA

DEPARTMENT OF LAW

CRIMINAL DIVISION

February 14, 1989

STEVE COWPER, GOVERNOR

REPLY TO

X CRIMINAL DIVISION CENTRAL OFFICE
P.O. BOX KC
JUNEAU, ALASKA 99811-0310
PHONE: (907) 465-3428

OFFICE OF SPECIAL PROSECUTIONS
AND APPEALS
1031 WEST 4TH AVENUE, SUITE 312
ANCHORAGE, ALASKA 99501-5993
PHONE: (907) 279-7424

The Honorable Mike Szymanski
Alaska State Senator
P.O. Box V
Juneau, Alaska 99811

Dear Senator Szymanski:

You have asked whether capital punishment would be constitutional in light of Article I, Section 12 of the Alaska Constitution which requires that "penal administration shall be based on the principle of reformation and upon the need for protecting the public." The short answer to your question is that capital punishment, per se, is not unconstitutional in Alaska.

We would caution, however, that the approach of the judicial system to capital punishment cases is extremely complex. Our opinion relating to the constitutionality of the death penalty is primarily based on a review of the minutes of the constitutional convention and is not intended as a comprehensive analysis of either SB 17 or the constitutionality of capital punishment in Alaska.

The touchstone of interpretation of a law is to ascertain the intent of its drafters. Kenai Peninsula Borough v. State of Alaska, 612 F.2d 1210 (9th Cir. 1980), aff'd, 451 U.S. 461. Similarly, in interpreting a constitutional provision, the history and the insight it provides into the intent of the drafters is important. See, e.g., North Slope Borough v. Sohio Petroleum Corp., 585 P.2d 534 (Alaska 1978). The language utilized in Article I, Section 12 was specifically discussed at the Alaska Constitutional Convention.

The Bill of Rights Committee of the Alaska Constitutional Convention originally proposed that the state's counterpart to the eighth amendment of the U.S. Constitution include a provision borrowed from the Indiana Constitution which stated, "The penal code shall be founded on the principles of reformation, and not vindictive justice."¹ At the Convention proceedings, however, Delegate Ralph J. Rivers proposed that the Indiana provision be replaced with the sentence, "The administration of criminal justice

¹Ind. Const., art. I, §18.

shall be founded upon the principle of reformation as well as upon the need to protect the public."² The sponsor of the amendment explained that the proposed language was preferable to the Indiana provision because "the administration of criminal justice should definitely be founded upon the need for protecting the public. I think that, secondarily, it is a very good idea for us to try to reform the people who have breached the law and become antisocial, but I don't want to completely overlook the protection of the public."³

Delegates expressed concern that the effect of the provision was to abolish capital punishment. This concern was answered by members of the Bill of Rights Committee, who assured delegates that the provision had been tested in the courts and was held not to preclude capital punishment.⁴ According to Delegate Awes, "This [provision] has used almost the identical words as in other state constitutions, and in those states the supreme court upheld that it does not abolish capital punishment."⁵

Delegate Doogan went on to note that the provision was not intended to apply to sentencing of convicted criminals, but rather was adopted "in view of penal institutions and governments in their work to rehabilitate prisoners rather than lock them up on bread and water and forget about them, that this statement was more or less advisory or instructive to the penal institutions that they would work on the basis of reformation and not go back to the bread and water stage ..."⁶ The only other delegate to comment on the reformation-protection of the public provision expressed her support for it, stating that although the chief aim of criminal justice is the protection of the public, "I think that it is high time that some state constitution had in it some mention of the

²Minutes of the Proceedings of the Alaska Constitutional Convention, 1955-56, Part 2 at 1308 (hereafter "Convention Minutes"). A copy of the relevant Convention Minutes is attached as Appendix A.

³Convention Minutes, Part 2 at 1309 (comments of Delegate Rivers).

⁴Id. (comments of Chairman George M. McLaughlin and Delegate James P. Doogan).

⁵Id. It is important to note that Alaska had a capital punishment law at the time art. I, §12 was adopted by the delegates to the constitutional convention.

⁶Id. (emphasis added).

need for reformation of people who seem criminally inclined rather than the need of constantly stressing punishment for them."⁷

The legislative history of the reformation provision thus makes clear that members of the Bill of Rights Committee and delegates to the Convention did not intend to abolish capital punishment. Rather, the intent was to adopt a provision advising prison administrators to consider rehabilitation as one goal in administering the prisons. Most importantly, the originally proposed provision was deleted in favor of the present reformation-protection of the public provision because delegates felt the original proposal focused too much on reformation and did not give sufficient weight to the protection of the public as a legitimate goal of penal administration.

We have not provided you with a comprehensive analysis of the constitutionality of the death penalty for two primary reasons. The first is that we wanted to expeditiously provide you with a response to your question, and an in-depth analysis of this issue would be extremely time-consuming. The second reason for an abbreviated response is based on the ad hoc approach to constitutional analysis that is applied by the courts in death penalty cases.

As a theoretical punishment, the death penalty has repeatedly been held by the courts to be constitutional. The practical application of the punishment, however, is often found to violate constitutional protections. A simple answer to the question, "When may the state constitutionally impose death as a punishment?" does not exist. As one commentator pointed out:

The countless possible constitutional challenges and the infinite variety of circumstances surrounding a murder warrants a case-by-case approach. Although careful drafting of death penalty statutes can eliminate some arbitrariness, implementation of these statutes is subject to much discretion by prosecutors, judges, and juries. Thus, while statutes may specify the special circumstances justifying a death sentence, only a reviewing court can determine if the sentence correctly and constitutionally applied those circumstances in any particular case. The Supreme Court's approach recognizes that only the courts can fully maintain the

⁷Id. at 1309-10 (comments of Delegate Mildred R. Hermann) (emphasis added).

Letter to Senator Szymanski
SB 17 -- Capital Punishment

February 14, 1989
Page 4

constitutionally required dividing line between capital
and noncapital defendants.⁸

If you have any additional questions about capital
punishment or SB17, please contact us at your convenience.

Very truly yours,

GRACE BERG SCHAIBLE
ATTORNEY GENERAL

By: 

Laurie H. Otto
Assistant Attorney General

Attachment: Appendix A
cc: Bob Evans

⁸Margot Garey, "The Cost of Taking a Life: Dollars and Sense
of the Death Penalty," 18 U.C. Davis L. Rev 1221, 1226-28 (1985).

*Ark Constitutional Convention
Proceedings*

PRESIDENT EGAN: Mr. Davis moves the adoption of the proposed amendment. Is there a second?

NORDALE: I second the motion.

TAYLOR: I wonder if we could have a three-minute recess?

PRESIDENT EGAN: If there is no objection the Convention will stand at recess for three or four minutes. The Convention is at recess.

RECESS

PRESIDENT EGAN: The Convention will come to order. Mr. Davis.

DAVIS: Mr. President, with reference to my pending amendment, and also with reference to all of Section 7, I am advised that Mr. Buckalew who is not present today had a good deal to do with preparation of Section 7, also Mr. Hellenthal who is ill today, and so for that reason I would like to ask unanimous consent at this time to pass Section 7 and go on to Section 8 and consider Section 7 tomorrow when we expect the other two men will be here.

PRESIDENT EGAN: If there is no objection, we will pass Section 7 subject to the time that Mr. Buckalew and Mr. Hellenthal will be present. Are there amendments to Section 8? Are there amendments to be proposed to Section 9? Section 10? Mr. Ralph Rivers.

R. RIVERS: I submit one.

PRESIDENT EGAN: The Chief Clerk may read the proposed amendment.

CHIEF CLERK: Page 4, Section 10, line 3, delete the last sentence commencing on line 3 and substitute the following: 'The administration of criminal justice shall be founded upon the principle of reformation as well as upon the need to protect the public.'

PRESIDENT EGAN: What is your pleasure, Mr. Rivers?

R. RIVERS: I move the adoption of this proposed amendment.

PRESIDENT EGAN: Mr. Ralph Rivers moves the adoption of the proposed amendment. Is there a second?

KNIGHT: I second the motion.

PRESIDENT EGAN: Please read the amendment again.

(The Chief Clerk read the amendment again.)

R. RIVERS: Mr. President, the reason for that is that I think the administration of criminal justice should definitely be founded upon the need for protecting the public. I think that, secondarily, it is a very good idea for us to try to reform the people who have breached the law and become antisocial, but I don't want to completely overlook the protection of the public. I also think this business about "and not on vindictiveness" sounds a little odd. You can't legislate away that kind of sin. If a district attorney is mean, he is mean. I don't care, so I merely submit that to say that the administration of criminal justice shall be founded upon the principle of reformation as well as upon the need for protecting the public. It covers the subject better than it is now.

PRESIDENT EGAN: Mr. McLaughlin.

MCLAUGHLIN: I would like to ask the Chairman of the Bill of Rights a question. Was it the intention of this clause to abolish capital punishment on the theory that you cannot reform a dead man?

AWES: I made the same objection as did one or two others on the Committee. However, this sentence has used almost the identical words as in other state constitutions, and in those states the supreme court upheld that it does not abolish capital punishment.

PRESIDENT EGAN: Mr. Doogan.

DOOGAN: Mr. Chairman, to clarify this article more, this clause was originally taken from Indiana I believe it is. I forget the article and section number, but the way it was written in there, although it stated that it had been tested and did not preclude capital punishment, after discussion in the Committee it was purported to intend that this clause would have nothing to do until the time a person was sentenced, but in view of penal institutions and governments in their work to rehabilitate prisoners rather than lock them up on bread and water and forget about them, that this statement was more or less advisory or instructive to the penal institutions that they would work on the basis of reformation and not go back to the bread and water stage, but it was intended that it would apply after a person had received sentence. It was not to apply up until that time, and I think that is what the criminal justice is supposed to mean.

PRESIDENT EGAN: Mrs. Hermann.

HERMANN: Mr. President, I also do not like the word "vindictiveness". I would like to believe that there is never any vindictiveness in the punishment of people who have violated the laws of the country, though I am compelled to admit that sometimes I have seen evidences of it, but I do think that Mr. Ralph

Rivers is correct in saying that the chief aim of criminal justice is the protection of the public and that the reformation or rehabilitation of the persons who have been found guilty of a crime is vastly important also, so if I understand Mr. Rivers' motion correctly, I am going to support it. I think that it is high time that some state constitution had in it some mention of the need of reformation of people who seem criminally inclined rather than the need of constantly stressing punishment for them. When we learn to have preventive instead of punitive measures on our statute books we are going to be a long ways further towards really administering criminal justice.

PRESIDENT EGAN: Is there further discussion? If not, the question is, "Shall the proposed amendment as offered by Mr. Ralph Rivers be adopted by the Convention?" All those in favor of the adoption of the proposed amendment will signify by saying "aye", all opposed by saying "no". The "ayes" have it and the proposed amendment is ordered adopted. Are there other amendments to Section 10? Are there proposed amendments to Section 11? Mr. Taylor.

TAYLOR: I am preparing one, Mr. President.

PRESIDENT EGAN: Mr. Taylor is preparing one. The Convention will be at ease for a moment while Mr. Taylor prepares his amendment. The Convention will come to order. The Chief Clerk will read the proposed amendment as offered by Mr. Taylor.

CHIEF CLERK: "Section 11, page 4, line 12, after the word 'seized' insert the following sentence: 'That the legislature shall provide by law for penalties for officers of the state or any subdivision thereof violating the right of the citizens under this section.'"

PRESIDENT EGAN: What is your pleasure, Mr. Taylor?

TAYLOR: I move the adoption of the amendment.

PRESIDENT EGAN: Mr. Taylor moves the adoption of the proposed amendment. Mr. Davis.

DAVIS: May we have it read again slowly?

PRESIDENT EGAN: The Chief Clerk will please read the amendment again slowly.

(The Chief Clerk read the amendment again.)

TAYLOR: You left out the word "penalties".

CHIEF CLERK: I am sorry. "That the legislature shall provide

STATE OF ALASKA THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3800

MEMORANDUM

February 7, 1989

SUBJECT: CSHB 17 (Judiciary) draft, relating to
capital punishment

TO: Senator Jan Faiks, Chair
Senate Judiciary Committee

FROM: Jack Chenoweth
Legislative Counsel

Transmitted with this memo is a bill draft omitting the firing squad option and incorporating a set of suggested findings.

I am also submitting a memo commenting on the likely effect of article I, section 12 of the state constitution on the legislation.

In the review of the bill last Thursday, the hypothetical you directed to me suggested that the question would be "submitted at the November, 1990" election. This is not correct. The bill and this committee substitute direct bill section 14 that the question be submitted to the voters at the next statewide election which, by definition, is the August, 1990, primary. If the committee wants the decision to come to the voters at the November, 1990, general election, you would need to amend to have the phrase read "statewide general election."

JC:gc
WKG6/102

Enclosure

STATE OF ALASKA THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3800

MEMORANDUM

February 7, 1989

SUBJECT: Capital punishment: assertion that its imposition would violate state constitutional provision relating to cruel and unusual punishments and penal administration (Senate Bill 17)

TO: Senator Jan Faiks, Chair
Senate Judiciary Committee

FROM: Jack Chenoweth
Legislative Counsel



Article I, section 12 of the Alaska Constitution provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. Penal administration shall be based on the principle of reformation and upon the need for protecting the public.

You have asked whether that section would, independently of the federal constitutional protection against cruel and unusual punishment, bar imposition of the death penalty.

It is my opinion that it would not.

"... cruel and unusual punishment [shall not be] inflicted":

The language of this part of the state constitutional provision tracks the Eighth Amendment of the federal constitution. The Eighth Amendment prohibition is applicable to the states through the due process clause of the Fourteenth Amendment. Robinson v. California, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962), reh. den. 371 U.S. 905, 83 S.Ct. 202, 9 L.Ed.2d 166 (1962). The United States Supreme Court has concluded that imposition of the death penalty is not inherently cruel and unusual punishment and therefore not in all cases an Eighth Amendment violation.

Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346, (1972), reh. den. 409 U.S. 902, 93 S.Ct. 89, 34 L.Ed.2d 163 (1972); Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). The court has observed that the Eighth Amendment's prohibition against cruel punishment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 89, 78 S.Ct. 590, 2 L.Ed.2d 630, 642 (1958). Finally, the United States Supreme Court has also interpreted the cruel and unusual punishment provision so as to impart a "proportionality" test to criminal sentences, determining in Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983), that "as a matter of principle . . . a criminal sentence must be proportionate to the crime for which the defendant was convicted." 77 L.Ed.2d 637, 649.

As to article I, section 12 of the state constitution, the Alaska Supreme Court has determined that the "cruel and unusual punishment" provision applies to render inapplicable as unconstitutional

[o]nly those punishments which are cruel and unusual in the sense that they are inhuman and barbarous, or so disproportionate to the offense committed as to be completely arbitrary and shocking to the sense of justice, . . .

Green v. State, 390 P.2d 433 (Alaska 1964), at 435; quoted in Thomas v. State, 566 P.2d 630 (Alaska 1977), Davis v. State, 566 P.2d 640 (Alaska 1977). The Alaska Supreme Court, in Green, expressly ruled that "in this jurisdiction punishment for crime need not be strictly proportioned to the offense", 390 P.2d 433, at 435. However, the United States Supreme Court's later decision in Solem v. Helm, relying on the Eighth Amendment to find a proportionality requirement, does require that sentencing be in some measure related to the seriousness of the crime for which convicted. Dancer v. State, 715 P.2d 1174, 1180, n. 6 (Alaska Ct. App. 1986).

The constitutions of a majority of the states incorporate closely comparable provisions. In those that allow a death penalty, and in which death penalty challenges based on an interpretation of a "cruel and unusual punishment" provision like Alaska's have been considered, I have found only two--California and Massachusetts--in which the state's highest court has applied the provision to conclude that

imposition of the death penalty was constitutionally impermissible with reference to a state constitutional provision. People v. Anderson, 6 Cal.3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (Cal. 1972), cert. den. 406 U.S. 958, 92 S.Ct. 2060, 32 L.Ed.2d 344 (1972) (subsequently set aside by a constitutional amendment adopted by the voters, and endorsed in People v. Frierson, 25 Cal.3d 142, 599 P.2d 587, 158 Cal. Rptr. 281 (Cal. 1979), validating the death penalty as permissible punishment); District Attorney for the Suffolk District v. Watson et al., 411 N.E.2d 1274 (Mass. 1980) (concluding from "examination of the actual operation of capital punishment provisions in Massachusetts, that the death penalty [statute enacted by c. 488, St. 1979], with its full panoply of concomitant physical and mental tortures, is impermissibly cruel under art. 26 [of the state constitution] when judged by contemporary standards of decency"). In the remainder of the states, the decisions have not found the death penalty to be cruel and unusual punishment. State v. Gillies, 662 P.2d 1007 (Ariz. 1983); State v. Sheppard, 331 A.2d 142 (Del. 1974); Gilreath v. State, 279 S.E.2d 650 (Ga. 1981); People v. Gaines, 430 N.E.2d 1046 (Ill. 1981); Brewer v. State, 417 N.E.2d 889 (Ind. 1981); State v. Myles, 389 So.2d 12 (La. 1979); Tichnell v. State, 415 A.2d 830 (Md. 1980); State v. Williams, 652 S.W.2d 102 (Mo. 1983); State v. Anderson, 296 N.W.2d 440 (Neb. 1980); Shuman v. State, 578 P.2d 1183 (Nev. 1978); State v. Ramseur, 524 A.2d 188 (N.J. 1987); State v. Rondeau, 553 P.2d 688 (N.M. 1976); Commonwealth v. Zettlemoyer, 454 A.2d 937 (Pa. 1982), cert. den., 461 U.S. 970, 103 S.Ct. 2444, 77 L.Ed.2d 1327 (1983); State v. Austin, 618 S.W.2d 738 (Tenn. 1981); Ex parte Granviel, 561 S.W.2d 503 (Tex. Crim. App. 1978); Stamper v. Commonwealth, 357 S.E.2d 808 (Va. 1979), cert. den. 445 U.S. 972, 100 S.Ct. 1666, 94 L.Ed.2d 239 (1980); State v. Rupe, 683 P.2d 571 (Wash. 1984); Hopkinson v. State, 632 P.2d 79 (Wyo. 1981).

"Penal administration shall be based upon the principle of reformation and upon the need for protecting the public."

From an historical perspective, this second sentence of article I, section 12 may not be a strong basis for an argument against imposition of capital punishment.

The Alaska Constitution Convention twice took up consideration of this provision, once in preliminary discussion of language recommended by its Committee on the

Preamble and Bill of Rights, and again in consideration of a delegate's amendment to that language. In each instance, the colloquy among the delegates strongly implied that the language being adopted was not intended to preclude imposition of capital punishment.

When first offered, the proposed language in question read:

The administration of criminal justice shall be founded on principles of reformation, and not vindictiveness.

As the committee reported and explained its first draft, the following exchange occurred on the Convention floor:

PRESIDENT EGAN: . . . Mr. Emberg.

DELEGATE EMBERG: I would like to ask a question in regard to the last sentence of Section 10, page 4, lines 3, 4, and 5. It reads, "The administration of criminal justice shall be founded on principles of reformation, and not vindictiveness." Now, I have no quarrel with the thought expressed here, except as it relates to the establishment of a code which might provide forfeiture of life, capital punishment, in other words. Is there any relation between the two?

DELEGATE AWES (chair of the Bill of Rights and Preamble Committee): Is your question whether or not this would eliminate capital punishment?

DELEGATE EMBERG: Yes.

DELEGATE AWES: That was brought up in the Committee, and this provision is found in several other state constitutions, and in those states the courts have ruled that this language does not prohibit capital punishment.

Journal of the Alaska Constitutional Convention, vol. 2, at pp. 1286, 1287.

The question arose again as the Convention formally considered and acted on the Committee's report:

PRESIDENT EGAN: Are there amendments to be proposed to . . . Section 10? Mr. Ralph Rivers.

DELEGATE RALPH RIVERS: I submit one.

PRESIDENT EGAN: The Chief Clerk may read the proposed amendment.

CHIEF CLERK: Page 4, Section 10, line 3, delete the last sentence commencing on line 3 and substitute the following: 'The administration of criminal justice shall be founded upon the principle of reformation as well as upon the need to protect the public.'

. . .

DELEGATE RALPH RIVERS (speaking in support of a motion to adopt): Mr. President, the reason for this [amendment] is that I think the administration of criminal justice should definitely be founded upon the need for protecting the public. I think that, secondarily, it is a very good idea for us to try to reform the people who have breached the law and become antisocial, but I don't want to completely overlook the protection of the public. I also think this business about "and not on vindictiveness" sounds a little odd. You can't legislate away that kind of sin. If a district attorney is mean, he is mean. I don't care, so I merely submit that to say that the administration of criminal justice shall be founded upon the principle of reformation as well as upon the need for protecting the public. It covers the subject better than it is now.

PRESIDENT EGAN: Mr. McLaughlin.

DELEGATE MCLAUGHLIN: I would like to ask the Chairman of the Bill of Rights [Committee] a question. Was it the intention of this clause to abolish capital punishment on the theory that you can't reform a dead man?

DELEGATE AWES: I made the same observation as did one or two others on the Committee. However, this sentence has used almost the identical words as in other state constitutions, and in those states the supreme court upheld that it does not abolish capital punishment.

PRESIDENT EGAN: Mr. Doogan.

DELEGATE DOOGAN: Mr. Chairman, to clarify this article more, this clause was originally taken from Indiana[,] I believe it is. I forget the article and section number, but the way it was written in there, although it stated that it had been tested and did not preclude capital punishment, after discussion in the Committee it was purported to intend that this clause would have nothing to do until the time a person was sentenced, but in view of the penal institutions and governments in their work to rehabilitate prisoners rather than lock them up on bread and water and forget about them, that this statement was more or less advisory or instructive to the penal institutions that they would work on the basis of reformation and not go back to the bread and water stage, but it was intended that it would apply after a person received sentence. It was not to apply up until that time, and I think that is what the criminal justice is supposed to mean.

PRESIDENT EGAN: Mrs. Hermann.

DELEGATE HERMANN: Mr. President, I also do not like the word "vindictiveness". I would like to believe that there is never any vindictiveness in the punishment of people who have violated the laws of the country, though I am compelled to admit that sometimes I have seen evidences [sic] of it, but I do think that Mr. Ralph Rivers is correct in saying that the chief aim of criminal justice is the protection of the public and that the reformation and rehabilitation of the persons who have been found guilty of a crime is vastly important also, so if I understand Mr. Rivers' motion correctly, I am going to support it. I think that it is high time that some state constitution had in it some mention of the need of

reformation of people who seem criminally inclined rather than the need of constantly stressing punishment for them. When we learn to have preventive instead of punitive measures on our statute books[,] we are going a long ways further toward really administering criminal justice.

PRESIDENT EGAN: Is there further discussion? If not, the question is, "Shall the proposed amendment as offered by Mr. Ralph Rivers be adopted by the Convention?" All those in favor of the adoption will signify by saying "aye", all opposed by saying "no". The "ayes" have it and the proposed amendment is ordered adopted. . . .

Journal of the Proceedings of the Alaska Constitutional Convention, vol. 2, pp. 1308 - 1310.

Delegate Doogan's recollection that the provision was derived from a comparable provision of the Indiana constitution seems correct. Article I, section 18, of the Indiana Constitution of 1851 includes a provision that its state penal code should be founded on principles of reformation, not vindictive justice.

Delegate Awes's responses concerning the relationship between the Indiana provision and that state's death penalty were equally apt: both before and since the Alaska Constitutional Convention, the Indiana Supreme Court has consistently construed the state's constitutional provision so as not to bar imposition of the death penalty. McCutcheon v. State, 155 N.E. 544 (Ind. 1927); Hawkins v. State, 37 N.E.2d 79 (Ind. 1941); Brewer v. State, 417 N.E.2d 889 (1981), cert. den. 458 U.S. 1122, 102 S.Ct. 3510, 73 L.Ed.2d 1384, reh. den. 458 U.S. 1132, 103 S.Ct. 18, 73 L.Ed.2d 1403 (1982); Williams v. State, 430 N.E.2d 759 (Ind. 1982), app. dismissed, 459 U.S. 808, 103 S.Ct. 33, 74 L.Ed.2d 47, reh. denied, 459 U.S. 1059, 103 S.Ct. 479, 74 L.Ed.2d 626 (1982). And, as Delegate Awes remarked, a similar provision appears in the constitution of Wyoming (article I, section 15: "The penal code shall be framed on humane principles of reformation and prevention."). Wyoming imposes a death penalty, but there is nothing of record to note that the court has ever squarely faced a death penalty challenge grounded on article I, section 15 of that state's constitution. Substantively similar provisions also appear in the constitutions of New Hampshire (article I, section

18), Oregon (article I, section 15), and the 1889 constitution of Montana (article III, section 24), but in the case of each of these three, the respective constitutional provision includes or is accompanied by additional language explicitly or implicitly authorizing the imposition of capital punishment.

However, the Indiana precedent may be distinguished. For purposes of interpreting and applying the comparable Alaska constitutional provisions, the Indiana cases decided before Alaska's Constitutional Convention are the more pertinent. 1/ The constitutional challenge raised in the earlier of the two, McCutcheon v. State, 155 N.E. 544 (Ind. 1927), was based on the clause of article I, section 18 of the Indiana constitution that disallowed use of a penal code grounded on "vindictive justice." 2/ Alaska's constitution omits that term, substituting in its place a reference to "protecting

1/ The theory--one of statutory construction and interpretation--is based on the well-settled rule that, when the meaning of a statute is in doubt, reference to legislation in a state statute from which the language was taken is helpful. The theory also applies to construction of constitutional provisions. While the application of the rule of judicial interpretation followed in the originating state would not be binding, the conclusions reached by the originating state's high court, and the reasoning of those judicial opinions may be helpful.

2/ Specifically, the Indiana Supreme Court said:

Nor is the punishment of death for murder in the first degree in conflict with article I, section 18 of the Constitution (section 70, Burns' R.S. 1926) -- "the Penal Code shall be founded on the principles of reformation, and not of vindictive justice." Such punishment [i.e. capital punishment] "Is not * * * vindictive, but is even-handed justice" (Driskell v. State, 7 Ind. 338, 343 [(1855)]), necessarily meted out for the maintenance of the peace and the protection of the citizens of the state.

McCutcheon v. State, 155 N.E. 544, at 548.

the public." The later of the two, Hawkins v. State, 37 N.E.2d 79 (Ind. 1941), disposes of the constitutional challenge merely by citing the earlier decision and concluding that the law is "settled otherwise." 37 N.E.2d 79, at 87.

The debate may be joined on this point. Surely the explanations and conclusions offered by Delegates Awes and Doogan persuaded their colleagues to make the substantive change urged by Delegate Ralph Rivers. In so doing, both acknowledged that the Indiana (and other state court) opinions as they understood them did not interpret the language so as to preclude imposition of capital punishment. On the other hand, a closer look at the Indiana decisions construing that state's comparable constitutional provision, made before the Alaska Constitutional Convention convened in late 1955, discloses that those decisions turned on analysis and application language that was not carried forward into this state's constitution.

In the absence of a definitive interpretation, I am of the view that the decision remains open to debate, though on balance the determination would not seem to favor a successful article I, section 12 challenge.

JC:gc
WKG6/101

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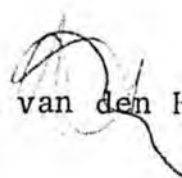
FEB 9 1989

JAN FAIKS
SENATE OFFICE February 5, 1989

Dear Senator Faiks:

I was delighted to testify. Let me take the opportunity to point out that on p.6 of the proposed law line 27 the "not" before "outweighed" should be eliminated. On p.4, lines 22-23 are constitutionally unnecessary and likely to give rise to much litigation. Moreover I don't see wherein the guilt of defendant X is diminished because defendant Y got away with less punishment.

Sincerely,


Ernest van den Haag



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FEB 9 1989

February 3, 1989

Ms. Leeann Lucas
Alaska State Legislature
Senate Advisory Council
P.O. Box V
Juneau, AK 99811

Dear Ms. Lucas:

Thank you for your recent inquiry about capital punishment systems in the United States.

Enclosed you will find a citation list to state death penalty statutes, as well as some information on the cost of administering capital punishment in several states. To my knowledge, every state that has to-date investigated the matter has found imprisonment for life to be at least one-half as expensive as execution, given the constitutional safeguards mandated by the U.S. Supreme Court.

We would be more than happy to provide you with additional information about the retentionist states' experience with capital punishment. I have taken the liberty of enclosing a recent article from The National Law Journal which I believe accurately summarizes the many practical difficulties -- unforeseen by most legislators ten years ago -- these states have encountered in administering the penalty.

Sincerely,

Tanya E. Coke
Director of Research
Capital Punishment Project

Enclosures

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STATES RETAINING CAPITAL PUNISHMENT

Citation List to Statutes

<u>Alabama:</u>	Ala. Code § 13A-5-40 (1982)
<u>Arizona:</u>	Ariz. Rev. Stat. Ann. § 13-703 (1983)
<u>Arkansas:</u>	Ark. Stat. Ann. § 41-1301 (1985)
<u>California:</u>	Cal. Penal Code § 190 (Supp. 1987)
<u>Colorado:</u>	Colo. Rev. Stat. § 16-11-101 (1986)
<u>Connecticut:</u>	Conn. Gen. Stat. Ann. § 53a-46a (West 1985)
<u>Delaware:</u>	Del. Code Ann. tit. 11, § 4209 (1979)
<u>Florida:</u>	Fla. Stat. Ann. § 921.141 (West 1985)
<u>Georgia:</u>	Ga. Code Ann. § 26-3102 (1979)
<u>Idaho:</u>	Id. Code § 18-4004 (1982)
<u>Illinois:</u>	Ill. Ann. Stat. Ch. 38 § 9-1 (Smith-Hurd. Supp. 1987)
<u>Indiana:</u>	Ind. Code Ann. § 35-50-2-9 (Burns Supp. 1987)
<u>Kentucky:</u>	Ky. Rev. Stat. Ann. § 532.030 (Baldwin 1981)
<u>Louisiana:</u>	La. Code Crim. Proc. Ann. art. 905 (West Supp. 1987)
<u>Maryland:</u>	Md. Ann. Code art. 27, § 413 (Supp. 1987)
<u>Mississippi:</u>	Miss. Code Ann. § 99-19-101 (Supp. 1987)
<u>Missouri:</u>	Mo. Ann. Stat. § 565.001 (Vernon Supp. 1987)
<u>Montana:</u>	Mont. Code Ann. § 4-5-102 (1987)
<u>Nebraska:</u>	Neb. Rev. Stat. § 28-105 (1985)
<u>Nevada:</u>	Nev. Rev. Stat. § 175. 552 (1986)
<u>New Hampshire:</u>	N.H. Rev. Stat. Ann. § 630:5 (1986)
<u>New Jersey:</u>	N.J. Stat. Ann. § 2C:11-3(c) (West Supp. 1987)
<u>New Mexico:</u>	Life Imprisonment. N.M. Stat. Ann. § 31-18-14 (1978)
<u>N. Carolina:</u>	N.C. Gen. Stat. § 14-17 (1981)
<u>Ohio:</u>	Ohio Rev. Code Ann. § 2929.02 (Baldwin 1982)
<u>Oklahoma:</u>	Okla. Stat. § 701.10 (1987)
<u>Oregon:</u>	Or. Rev. Stat. § 163.105(1) (1987)
<u>Pennsylvania:</u>	Pa. Cons. Stat. Ann. § 9711(a)(1) (Purdon 1982)
<u>S. Carolina:</u>	S.C. Code Ann. § 16-3-20(A) (1986 Cum. Supp.)

S. Dakota: S.D. Codified Laws Ann. § 22-6-1(1) (1982)
Tennessee: Tenn. Code Ann. § 39-2-203 (1985)
Texas: Tex. Code Crim. Proc. Ann. art. 37.071
(Vernon 1986)
Utah: Utah Code Ann. § 76-3-206 (Supp. 1987)
Virginia: Va. Code § 19.2-264-1 (1986)
Washinigtton: Wash. Rev. Code Ann. § 9A.32.040 (1982)
Wyoming: Wyo. Stat. § 6-2-102 (1983)

Capital Losses: Death Penalty for New York State

A report from
the Public Defense
Backup Center to the Senate
Finance Committee, the Assembly
Ways and Means Committee and the
Division of the Budget.

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PREFACE

Under its contractual obligation with the state of New York to review, assess and analyze the public defense system, the New York State Defenders Association periodically publishes reports to the Legislature, the Governor, the Judiciary and other appropriate instrumentalities. The report which follows preliminarily examines the costs of capital litigation and the fiscal impact of the death penalty on New York State. This report is directed to those who have a legal responsibility to analyze that fiscal impact.

INTRODUCTION

In the last five years, efforts in both houses of the Legislature have pushed New York closer and closer to the passage of a death penalty. During this time, shrill voices have argued every major proposition with reference to the death penalty except one—its actual cost. The floor debates during this period of time provide little hard cost data, but, as will be seen, they make clear that the death penalty will call for the most irrational and disproportionate expenditure of energy and money in the history of criminal justice in this state.¹

Despite this reality, one searches in vain for legislative information on the subject of actual cost. The memorandum in support of this year's death penalty bill (S.7600/A.9379), as in the past, states that there are "no fiscal implications." Yet, as late as the end of March 1982, the Senate sponsor of the bill reportedly did not know the fiscal implications of the death penalty.² The Senate Research Service states in its death penalty briefing paper, "Insofar as the fiscal implications of the death penalty are concerned, the costs of its imposition and the related appeals process are uncertain."³ Likewise, though the New York State Department of Correctional Services has recognized the issue,⁴ it has not projected costs under a death penalty statute.⁵

At a time when New York State is under tremendous fiscal constraint in its efforts to deliver basic human services, it is ironic that no one in government has attempted to assess and project the actual cost of a death penalty here.

Conventional wisdom suggests that it is less expensive to execute a person than to imprison a person for life. Conventional wisdom is wrong. As Mr. Justice Marshall stated in *Furman v. Georgia*, 408 U.S. 238, 357-8 (1972):

"As for the argument that it is cheaper to execute a capital offender than to imprison him for life, even assuming that such an argument, if

¹ The New York State Defenders Association opposes the death penalty for any crime because it is immoral, discriminatory, and inevitably capricious. The penalty provides, and will always provide, the opportunity for masking racism and prejudice. Its history marches in step with the history of genocide; its cadence is the cadence of expediency; its failure, the failure of humankind. The death penalty is obscene violence. There is no excuse for its existence, and someday it will be abolished.

We do not by this paper retreat from these positions.

In the course of this paper, we will comment on sections of the death penalty bill, and, in particular, on those sections dealing with publicly supported defense representation for the poor. Nothing we say here should be read as approval of the bill or an appraisal of its ultimate constitutionality. We are reporting cost data, and that is the purpose of this paper. It is important for state officials and the public to know the price tag which is attached to capital punishment. The costs outlined here are the bottom line. Because death has been held constitutionally to require greater procedural protections, *Gardner v. Florida*, 430 U.S. 349 (1977); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976), legally required procedures and their attendant costs will continue to escalate.

² *Legislative Gazette*, March 29, 1982, at 8, col. 1.

³ SENATE RESEARCH SERVICE, ISSUES IN FOCUS, No. 82-48, DEATH PENALTY 4 (Jan. 28, 1982).

⁴ In July 1978, New York's Department of Correctional Services reported, but did not evaluate the anti-death penalty position that, "... capital punishment is more costly from an economic viewpoint than other alternatives if all costs are counted, including court, prosecution, defense and correctional." DEPARTMENT OF CORRECTIONAL SERVICES, DIV. OF PROGRAM PLANNING, EVALUATION AND RESEARCH, OVERVIEW OF DEATH PENALTY AND REVIEW OF ARGUMENTS FOR AND AGAINST ITS USE 9 (July 1978).

⁵ Significantly, states with a death penalty cannot afford the "luxury" of non-examination. The Legislature of Florida knows full well the projection of costs made by Louie L. Wainwright, Director, Florida Division of Corrections. Florida projects an expenditure (absent inflation) of more than \$57 million by the year 2000 just to maintain the death row population. BUREAU OF PLANNING, RESEARCH AND STATISTICS, STATISTICAL FACTS, No. SF-80-9, FLORIDA DEP'T. OF CORRECTIONS—DEATH ROW ANALYSIS 2 (Aug. 29, 1980).

true, would support a capital sanction, it is simply incorrect. A disproportionate amount of money spent on prisons is attributable to death row. Condemned men are not productive members of the prison community, although they could be, and executions are expensive. Appeals are often automatic, and courts admittedly spend more time with death cases.

"At trial, the selection of jurors is likely to become a costly, time-consuming problem in a capital case, and defense counsel will reasonably exhaust every possible means to save his client from execution, no matter how long the trial takes.

"During the period between conviction and execution, there are an inordinate number of collateral attacks on the conviction and attempts to obtain executive clemency, all of which exhaust the time, money, and effort of the state. There are also continual assertions that the condemned prisoner has gone insane. Because there is a formally established policy of not executing insane persons, great sums of money may be spent on detecting and curing mental illness in order to perform the execution. Since no one wants the responsibility for the execution, the condemned man is likely to be passed back and forth from doctors to custodial officials to courts like a ping-pong ball. The entire process is very costly.

"When all is said and done, there can be no doubt that it costs more to execute a man than to keep him in prison for life." (Footnotes omitted.) (Emphasis supplied.)

The authority of Mr. Justice Marshall's assertions,⁶ as well as other recent work,⁷ indicate in general terms, but without contradiction, that a criminal justice system with the death penalty is inordinately more expensive than a criminal justice system without the death penalty.

Seventeen years ago, the State of New York Temporary Commission on Revision of the Penal Law and Criminal Code, in its report recommending the abolition of the death penalty in New York State, said:

"... [O]wing to their importance, capital cases take longer to litigate at the trial level and obstruct the general administration of criminal justice accordingly; . . . the appellate ramifications are intricate and extensive; . . . the pursuit of other post-judgment remedies leads to many courts, both state and federal, involving substantial segments of the judiciary; . . . the battle to save the 'doomed' man reaches into the executive branch of the government; and, in general, . . . capital cases are disruptive of the orderly process of criminal justice.***[W]hat-ever aspect of the death penalty one examines, one finds nothing but

⁶ T. THOMAS, *THIS LIFE WE TAKE* 20 (3d ed. 1965); B. ESHELMAN AND F. RILEY, *DEATH ROW CHAFLAIN* 226 (1962); Caldwell, *Why Is the Death Penalty Retained*, 284 ANNALS 45, 48 (Nov. 1952); McGee, *Capital Punishment as Seen by a Correctional Administrator*, 28 FED. PROBATION, No. 2, at 11, 13-14 (June 1964); Sellin, *Capital Punishment*, 25 FED. PROBATION, No. 3, at 3 (Sept. 1961); Slovenko, *And the Penalty Is (Sometimes) Death*, 24 ANTIOCH REVIEW 351, 363 (1964); Bailey, *Rehabilitation on Death Row*, in BEDAU, *THE DEATH PENALTY IN AMERICA* 556 (1967 rev. ed.); T. ARNOLD, *THE SYMBOLS OF GOVERNMENT* 10-13 (1935). See also *Stein v. New York*, 346 U.S. 156, 196, 73 S.Ct. 1077, 1098, 97 L.Ed. 1522 (1953) (Jackson, J.); cf. *Reid v. Covert*, 354 U.S. 1, 77, 77 S.Ct. 1222, 1261-1262, 1 L.Ed.2d 1148 (1957) (Harlan, J., concurring in result); *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968); *Carriativo v. California*, 357 U.S. 549, 78 S.Ct. 1263, 2 L.Ed.2d 1531 (1958).

⁷ Nakel, *The Cost of the Death Penalty*, 14 CRIM. L. BULL., No. 1, at 69 (Jan. 1978). See also the newly revised BEDAU, *THE DEATH PENALTY IN AMERICA* (3rd ed. 1982).

obstruction, confusion and waste."⁸

The Commission saw early on the direction of capital litigation in the United States and, accepting the inevitable consequences of the then developing moratorium on executions,⁹ rejected the death penalty as an inappropriate adjunct to the administration of criminal justice. Since 1955, while we have lived with and without a death penalty in New York State, and in recent years while we have vigorously debated its reemergence, there has been no systematic effort to identify and compute costs. This paper is a preliminary examination of those costs.

⁸ STATE OF NEW YORK TEMPORARY COMMISSION ON REVISION OF THE PENAL LAW AND CRIMINAL CODE, FOURTH INTERIM REPORT: SPECIAL REPORT ON CAPITAL PUNISHMENT, LEG. DOC. NO. 25, at 97 (1965).

⁹ From 1967 until 1977, executions in the United States were suspended by litigation in the federal courts seeking the resolution of constitutional challenges to the death penalty. The United States Supreme Court, in a plurality opinion, declared in *Furman v. Georgia*, 408 U.S. 238 (1972), that discretionary death penalty statutes then in effect constituted cruel and unusual punishment because death was imposed infrequently and in the absence of clear standards. The rare, unpredictable, discretionary use of the sanction of death was deemed to violate the Eighth and 14th Amendments to the United States Constitution. State legislatures responded to *Furman* by enacting either mandatory death statutes or "guided discretion statutes" which utilized bifurcated trial procedures to determine guilt and then punishment. In 1976, the Supreme Court ruled in *Woodson v. North Carolina*, 428 U.S. 280, 310 (1976), that the mandatory death penalty for first degree murder was unconstitutional because it treated all convicted persons not as "... uniquely individual human beings but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." On the same day, in *Gregg v. Georgia*, 428 U.S. 153 (1976), the Court upheld "guided discretion" statutes which required objective standards to guide, regularize, and make rationally reviewable the process of imposing death. Since *Gregg*, more than a dozen substantial procedural issues have been decided on behalf of defendants by the United States Supreme Court. Capital litigation routinely raises those and other constitutional questions at every stage of review.

PART I: THE NATURE OF DEFENSE SERVICES UNDER THE PROPOSED DEATH PENALTY BILL

One of the great concerns of the New York State Defenders Association concerning the implementation of the death penalty in New York is whether or not the representation of the poor in death cases will be adequate. The current delivery mechanism for public defense services is clearly inadequate to a death penalty. The County Law leaves to each county responsibility for the development of its own system of defense services. The result is that a crazy quilt of county defender systems exists in the state. The services are insulated, autonomous and unregulated. Resources differ from county to county. It follows that the adequacy of defense representation differs from county to county as well.¹⁰

The problems of the system have not gone unnoticed in the legislative debate concerning the death penalty in New York. Some representative comments from the Assembly and Senate floor debates follow:

"The fact is, ladies and gentlemen, we will look at the defense capability. Throughout New York State today there are 20 counties that have . . . no . . . investigators to help in any case, much less a capital case . . . Nine counties have one investigator available, four of them have two and four have three. *Forty-one of our counties—over two-thirds, do not have the investigative capability that the defense attorney needs to defend his client.*" (Emphasis supplied.)¹¹

"We are talking in many instances of assigned counsels who are paid very little money by any contemporary standard. *We are talking about a system where the defense really doesn't have the ability to investigate . . .* ***that's the question you are asking yourself, and that's the question each of us has to ask ourselves before we vote on this bill. . . ." (Emphasis supplied.)¹²

"Forty-six counties have asked the New York State Public (sic) Defenders Association for help in doing appeals, the appeal work for the felony criminal matters. *What kind of justice is that, where 46 counties say, after the trial, 'We don't have the expertise and the ability to deal with the appeal process.'* That is the fair trial we are talking about, with an irrevocable penalty." (Emphasis supplied.)¹³

¹⁰ Article 18-B of the County Law requires each county to adopt a systematic plan for furnishing counsel to indigent defendants. The counties may choose: 1) representation by a public defender; 2) representation by contract with a legal aid society; 3) representation by counsel furnished pursuant to an assigned counsel plan of a bar association; or 4) a combination of these. In the greater part of the state, public defense is a part-time job. Training is not a mandatory part of the statutory scheme. Assigned counsel plans are shrinking as a result of the very low fees paid to public defense attorneys. Nationally, New York ranks 45th with the lowest reimbursement rate at the trial and appellate level. There are 76 distinct defender systems in this state. The common thread that binds them together is underfunding at the county level, a lack of standards for their operation, and the unpopularity of the clients they serve.

¹¹ RECORD OF PROCEEDINGS, ASSEMBLY, STATE OF NEW YORK (Tuesday, February 17, 1981) (statement of Assemblyman Hevesi), at 875.

¹² RECORD OF PROCEEDINGS, ASSEMBLY, STATE OF NEW YORK (Tuesday, February 17, 1981) (statement of Assemblyman Miller), at 1020.

¹³ RECORD OF PROCEEDINGS, ASSEMBLY, STATE OF NEW YORK (Tuesday, February 17, 1981) (statement of Assemblyman Hevesi), at 875-876.

"Who is going to get the death penalty? The poor defendant, the defendant with the poor lawyer more likely. I'll tell you one thing, if there is one certainty—if there is one certainty in what you're about to do—it is that, if you pass the bill and it goes into effect, I am certain that no millionaire will ever burn, that no rich person will ever have the sentence carried out, and that's a fact, and I think we all acknowledge that that's a fact. *The victim of this, the person upon whom this penalty will be carried out, will be the poor unfortunate, the person with the lawyer of less skill or experience than others.*" (Emphasis supplied.)¹⁴

"When you look at the kinds of people who have been convicted and sentenced to death, they invariably are people from the low income bracket and *there are those of us who believe . . . that if you're poor, you do not necessarily get the kind of legal representation that you would if you had the money to afford the right kind of attorney.* I know you will say that that's not the case, and that there is equitable provision under the law and that there is a fair share, and everyone else will get their day in court, but I think the real world proves that poor people generally carry the brunt when they are charged with murder, particularly if there is a difference in ethnicity." (Emphasis supplied.)¹⁵

All of these comments reflect upon a defense system that is basically inadequate. Three critical aspects are identified. First, there is no set of experiential standards to be met for the representation of defendants in felony cases in this state. Second, there is county-based disparity in the financing of the public defense system such that certain counties are without the resources to provide adequate representation. Third, there are exceedingly low fees for attorneys, experts, investigators, and other necessary auxiliary services.

The Volker/Graber bill (S.7600/A.9379) responds directly to these issues by: a) removing the burden from counties and making the cost of defense services a state charge; b) attempting to create experiential standards for the representation of defendants in capital cases; and c) creating a standard whereby attorneys, experts, investigators and others will be paid the customary fee for similar privately retained representation or services. In pertinent part, the bill states:

§722-g. Assignment of counsel and related services in criminal actions in which the death sentence may be imposed. 1. *Norwithstanding any other provision of law to the contrary, in every criminal action in which a defendant is charged with an offense defined in section 125.27 of the penal law, a defendant who is or becomes financially unable to obtain adequate representation or investigative, expert or other reasonably necessary services at any time either (a) prior to judgment, or (b) after the entry of a judgment imposing a sentence of death but before the execution of that judgment, shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with the remaining provisions of this section.*

2. If the appointment is made prior to judgment, at least one attorney so appointed must have been admitted to practice in the courts of this

¹⁴ RECORD OF PROCEEDINGS, SENATE, STATE OF NEW YORK (Monday, January 14, 1980) (statement of Senator Connor), at 145.

¹⁵ RECORD OF PROCEEDINGS, SENATE, STATE OF NEW YORK (Monday, March 23, 1981) (statement of Senator Bogues), at 1279-1280.

state for not less than five years, and must have had not less than three years' experience in the actual trial of felony cases in this state.

3. If the appointment is made after judgment, at least one attorney so appointed must have been admitted to practice in the courts of this state for not less than five years, and must have had not less than three years' experience in the handling of appeals in felony cases.

4. Upon a finding in an ex parte proceeding that investigative, expert or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or sentence, the court shall authorize the defendant's attorneys to obtain such services on behalf of the defendant and shall order the payment of fees and expenses therefore pursuant to the provisions of subdivision five hereof. Upon a finding that timely procurement of such services could not practicably await prior authorization, the court may authorize the provision of and payment for such services nunc pro tunc. The court shall determine reasonable compensation for the services and direct payment to the person who rendered them or to the person entitled to reimbursement.

5. *Notwithstanding the rates and maximum limits generally applicable to criminal cases and any other provision of law to the contrary, the court shall fix the compensation to be paid to attorneys appointed pursuant to this section and the fees and expenses to be paid for investigative, expert, and other reasonably necessary services authorized pursuant to subdivision four of this section at such rates or amounts as the court determines to be appropriate in order to provide such defendant with representation by counsel and other services as nearly equivalent as possible to those available to defendants who are financially able to obtain such representation and other services for their defense and appeal.*

6. Any compensation, fee or expense to be paid pursuant to this section *shall be a state charge* payable on vouchers approved by the court which fixed the same, after audit by and on the warrant of the comptroller. (Emphasis supplied.)

The bill is an effort to overcome a defective statutory scheme. It is designed to assure equality of service for the poor. Under its terms, the state must appoint and pay for counsel for those unable to afford a lawyer both prior to judgment and at any time up until the actual imposition of the sentence of death.

Investigative, expert and other auxiliary defense services, as well as counsel fees, will be paid on the basis of customary rates for the services in amounts which will provide the defendant with representation and other services " . . . as nearly equivalent as possible to those available to defendants who are financially able to obtain such representation and other services for their defense and appeal."

The meaning of this language and the full scope and extent of what the Volker/Graber bill means is made crystal clear by a review of statements made by the bill's sponsors in debate on the floor of the Legislature. Referring to §722-g(5), Assemblyman Graber stated in 1978:

" . . . [A]nd I surmise today, as this debate progresses, we are going to hear, and hear loud and clear, from those who will say this bill is an attack at minorities, that they cannot get a fair trial, they cannot obtain good counsel, and to those of you who are going to make comment on that particular issue, please read page 9, line 1C, section 5 of the bill—

and I would like it read into the record: 'Notwithstanding the rates and maximum limits generally applicable to criminal cases and any other provisions of law to the contrary, the court shall fix the compensation to be paid to attorneys appointed pursuant to this section, and the fees and expenses to be paid for investigative, expert and other reasonably necessary services authorized pursuant to Subdivision 4 hereof, at such rates or amounts as the court determines to be appropriate in order to provide such defendant with representation by counsel and other services as nearly equivalent as possible to those available to defendants who are financially able to obtain such representation and other services for their defense and appeal.'

"I think that says a lot, for it is in that section we are *guaranteeing to those minorities, those indigent people who in the past have not been able to afford good expert counsel; we here, in the State, are going to pay the bill to make sure that they do get the counsel that they need.*" (Emphasis supplied.)¹⁶

Again in 1980, in moving A.8431, Assemblyman Graber stated:

"I am sure later today we will hear that indigent people are unable to get adequate defense counsel because they cannot afford same. ***[Referring again to proposed §722-g(5)] I think that's brand new as far as this state is concerned, that we provide for adequate defense counsel at state cost to *make it absolutely certain that anyone charged with a capital offense . . . would, in fact, have adequate defense.*" (Emphasis supplied.)¹⁷

Last year, on February 17, 1981, referring again to the same section, Assemblyman Graber stated:

"It provides for the appointment of attorneys with experience of three years, if the defendant is unable to employ such an attorney. I am sure later today we will hear that indigent people are often unable to afford adequate defense counsel, because they cannot afford it. ***[722-g(5)] is a first for New York, I believe. *I don't know of any other state that incorporated that into the text of their law.*" (Emphasis supplied.)¹⁸

Thus, a reading of the Assembly debates makes clear that the intent of the sponsors has been to pass a death penalty bill in New York distinctly different and more extensive than any other such bill in America.

Those who are familiar with New York's defense system may find it anomalous that while New York continues to rank 45th in its assigned counsel fee structure for non-capital cases, its Legislature has declared that it shall pay whatever is necessary in death penalty cases. Any doubt regarding this legislative intent, however, is laid to rest by a review of the remarks of the bill's co-sponsors. In 1980, Assemblyman George Friedman stated:

" . . . [N]ever before, never before in the history of any country operating under a system like we operate in the United States of America,

¹⁶ RECORD OF PROCEEDINGS, ASSEMBLY, STATE OF NEW YORK (Monday, March 20, 1978) (statement of Assemblyman Graber), at 2040-2041.

¹⁷ RECORD OF PROCEEDINGS, ASSEMBLY, STATE OF NEW YORK (Monday, January 14, 1980) (statement of Assemblyman Graber), at 60.

¹⁸ RECORD OF PROCEEDINGS, ASSEMBLY, STATE OF NEW YORK (Tuesday, February 17, 1981) (statement of Assemblyman Graber), at 854.

have rights of accused individuals been protected as they are in this bill. This bill doesn't say you have a right to counsel; it doesn't say just that the State will give you counsel, *it says that the State will pay the going rate for counsel competent to represent you. That is that under this bill you have the right to get somebody like Percy Foreman to represent you and the State is going to foot the bill. Under no other system do you have that right. . . .*" (Emphasis supplied.)¹⁹

Last year in responding to Assemblyman Hevesi's remarks concerning the inadequacy of counsel and investigative services (*supra* n.11), Assemblyman Friedman stated:

"The bill does not say that investigative services will be provided only where investigators exist or work in the county where the trial is held. No, not at all.

"This bill says that investigative services will be supplied, period, whether it is Onondaga County or Bronx County. If you need investigators for the defense of this accused person, you will get them no matter what county he is in. . . .

"*** Any fair-minded person would have to say, yes, it is possible an innocent person might be convicted. But I ask you to consider the other side of it. *This happens to be the most humane and fairest capital punishment bill ever passed in any house of any legislature in any state, and probably any country in the world.*

"This bill provides . . . for the best lawyers to represent the poor Blacks that you were talking about. You are right, Blacks in the past, and minority people in the past, have suffered under capital punishment bills because they have not been able to get the best kind of legal representation. But under this bill, they could, because the bill requires that the State pay the equivalent rate for lawyers in that field. . . .

***[If] I were accused of a capital crime, I could not hire a lawyer like the fellow now representing Jean Harris down in Westchester County, because he charges some \$100 to \$150 an hour, and if he was going to put in 100 or 200 hours for my defense, I could not afford it or pay for it. I would have to get one of my friends from Bronx County.

"But a poor person . . . under this bill . . . could go hire Joel Arnou now defending Mrs. Harris; F. Lee Bailey, if he feels like coming in; Mr. Edelstein from Brooklyn, you name it. Under this bill the poor person is going to have that lawyer representing him. It is not just the lawyer, it is the investigative services.

"You know the guys that were found, after their convictions, to have actually been innocent, were found to be innocent because somehow they managed, over the years, to get investigators working for them to dig into the facts and find out what actually happened, and uncover the real truth of the cases. This bill says you are going to have those investigative services at the very beginning. *Whatever is necessary, whatever is needed, if an army is necessary, you can hire them under this bill, and you can prepare a defense if a defense is necessary.*" (Emphasis supplied.)²⁰

¹⁹ RECORD OF PROCEEDINGS, ASSEMBLY, STATE OF NEW YORK (Monday, January 14, 1980) (statement of Assemblyman Friedman), at 99-100.

²⁰ RECORD OF PROCEEDINGS, ASSEMBLY, STATE OF NEW YORK (Tuesday, February 17, 1981) (statement of Assemblyman Friedman), at 881-890.

In 1980, Assemblyman Clark Wemple, another Assembly co-sponsor, stated:

"This bill is as carefully constructed a piece of legislation that has ever come before this house. There is not a single provision in our Penal Law, our Code of Criminal Procedure, absolutely nothing that comes within shouting distance of this particular bill in terms of its attention to the rights of the accused. ***Any defendant under this bill can have *unlimited funds* to hire the top attorney in his community, in his state, in the Nation, to defend him. ***You can get not just competent counsel under this bill, *you can get the best counsel*. That is the point of distinction." (Emphasis supplied.)²¹

And again last year, during the debate on this bill, Assemblyman Wemple stated:

"... [T]his bill goes far beyond anything we have ever had in this State or in the country in terms of providing those constitutional rights and extra-constitutional rights that you don't generally find." (Emphasis supplied.)²²

Assemblyman Morahan, speaking in 1981 on the floor of the Legislature, stated:

"... [A]nd they have provided adequate money for defense, and I am not talking about the average public defender brand of defense, but *defense equal to those who would have money*." (Emphasis supplied.)²³

It is apparent that the supporters of the Volker/Graber death penalty bill recognize the inadequacies of the current system for providing public defense services. It is also absolutely clear that the legislative intent of §722-g(5) is to respond to those inadequacies by supplying "unlimited funds" to the defense in capital cases. In what follows, the price of that response and other costs of capital litigation are detailed.

²¹ RECORD OF PROCEEDINGS, ASSEMBLY, STATE OF NEW YORK (Monday, January 14, 1980) (statement of Assemblyman Wemple), at 86-87.

²² RECORD OF PROCEEDINGS, ASSEMBLY, STATE OF NEW YORK (Tuesday, February 17, 1981) (statement of Assemblyman Wemple), at 908.

²³ RECORD OF PROCEEDINGS, ASSEMBLY, STATE OF NEW YORK (Tuesday, February 17, 1981) (statement of Assemblyman Morahan), at 997.

PART II: THE COST OF CAPITAL LITIGATION (TEN LEVELS AND BEYOND)

It is now clear that a permanent and indispensable feature of capital litigation involves the review of constitutional, statutory and discretionary questions at a minimum of ten state and federal judicial levels. These include, but are not limited to:

1. the guilt and penalty phases of trial;
2. review by the highest state court of a sentence of death and the underlying conviction;
3. writ of *certiorari* to the United States Supreme Court;
4. post conviction proceedings including evidentiary hearings to vacate judgment or set aside sentence or both;
5. review by the highest state court of adverse determinations in such post-conviction proceedings;
6. writ of *certiorari* to the United States Supreme Court;
7. petition for writ of *habeas corpus* to the United States District Court;
8. appeal of a negative determination of a writ of *habeas corpus* to the Federal Court of Appeals for the circuit encompassing the district wherein the writ was brought;
9. a petition for rehearing *en banc* from a negative determination of the Court of Appeals;
10. a writ of *certiorari* to the United States Supreme Court to review a negative determination of either the Court of Appeals or a rehearing *en banc*.

After final judicial review, commutation applications directed to the executive branch are conducted. Stays at each level or stage of litigation are routine. A litigation process lasting eight to ten years is the norm.²⁴

These levels of judicial review are the mandatory daily fare of capital litigation even in states where death penalty statutes, unlike the Volker/Graber bill, fail to provide representation beyond the highest state court.

There is a nationwide network of lawyers, legal workers and organizations routinely seeing to it that lawyers are supplied in the post-conviction stages of capital cases everywhere in the country.²⁵

²⁴ While nostalgic longing for simpler times may be appealing, it will not change the course or the length of capital litigation in the United States. The most recent death case before the Supreme Court, *Eddings v. Oklahoma*, ___ U.S. ___, 102 S.Ct. 869 (1982), vacated a sentence of death and remanded for resentencing. The decision handed down January 19, 1982, concerned a shooting which occurred April 4, 1977. If *Eddings* is resented to death, the appeal process will begin again. This time-consuming judicial resolution of complex legal questions is something to be proud of. It is one of the indicia which distinguishes the United States of America from a host of "overnight republics" which dot the globe. Furthermore, litigation delay is by no means unique in or limited to death cases. *United States v. IBM*, 618 F.2d 923 (2d Cir. 1980) was an antitrust suit brought by the Justice Department in 1969. The suit alleged that IBM had, *inter alia*, monopolized the electronic digital computer market. Discovery lasted from approximately 1969 to 1975. In that year the government's direct case commenced. It lasted for almost three years. From 1972 to 1980, IBM appealed at least five orders from the District Court, two of which were appealed to the Supreme Court. The IBM defense began in 1978. In January of 1982 the lawsuit was discontinued. As of 1979, 90,000 pages of testimony had been transcribed, several hundred witnesses had been deposed and 70 trial witnesses had been called.

²⁵ This network, partially the outgrowth of the death penalty moratorium strategy, is now in permanent place throughout the country. Thus, even in states which do not provide for representation beyond the highest state court, litigation still takes place and generates all the costs of responding to petitions for writs of *certiorari*, *habeas corpus* and other forms of state and federal post-conviction relief. More importantly, the

By an examination of these ten levels of judicial review, it is possible to actually chart the costs of capital litigation (see Table 1).

TABLE 1²⁶
A Model Charting System for Projecting Capital Litigation Cost

STATE I

TRIAL						1.
PENALTY PHASE	Defense	Prosecution	Court	Correction	Other	TOTAL
State Charge						
County Charge						
GUILT PHASE	Defense	Prosecution	Court	Correction	Other	TOTAL
State Charge						
County Charge						

APPEAL						2.
COURT OF APPEALS	Defense	Prosecution	Court	Correction	Other	TOTAL
State Charge						
County Charge						

WRIT OF CERTIORARI						3.
U.S. SUPREME COURT	Defense	Prosecution	Court	Correction	Other	TOTAL
State Charge						
County Charge						

extent to which capital litigants are entitled to counsel in seeking state and federal post-conviction review (in states failing to provide it) is, itself, a question raised in capital litigation. It is clear that, from an ethical point of view, a lawyer cannot just "drop a capital case." Furthermore, canon 2 of the CODE OF PROFESSIONAL RESPONSIBILITY (DR2-110[A][2]) can be read to require the lawyer in a capital case to pursue the matter in federal court independent of the state's statutory scheme. See also *In Re Anderson*, 69 Cal. 2d 613 (1968). A strong argument that counsel should be required constitutionally to pursue the case into federal court is developing. Sevilla, *Do Court Appointed Counsel In Capital Cases Have A Duty To Pursue The Case In Federal Court?*, 1 DEATH PENALTY REPORTER, No. 9, at 1 (May 1981). It is reasonable to assume that eventually in capital cases a right to counsel for all levels of review, similar to the New York State statute, will be constitutionally mandated. The cost of the death penalty in those states that have failed to provide counsel will, at that time, be geometrically increased since such a ruling will no doubt be given retroactive effect.

²⁶ This chart depicts three channels of review in which capital litigation takes place: "State I," "State II" and "Federal." The stages are numbered in the theoretical order in which a "model" case would proceed. In reality, remands, evidentiary hearings, stays, and certain concurrent proceedings would both alter and add to the numbering system. The boxes represent in graphic form a means to allocate state and county costs across the ten levels of judicial review for defense, prosecution, courts, corrections, and other miscellaneous categories. In our model, "State I" is the first channel of litigation and includes the state trial court proceeding,

STATE II

POST-CONVICTION PROCEEDING						4.
	Defense	Prosecution	Court	Correction	Other	TOTAL
State Charge						
County Charge						

APPEAL						5.
COURT OF APPEALS	Defense	Prosecution	Court	Corrections	Other	TOTAL
State Charge						
County Charge						

WRIT OF CERTIORARI						6.
U.S. SUPREME COURT	Defense	Prosecution	Court	Correction	Other	TOTAL
State Charge						
County Charge						

FEDERAL

PETITION FOR WRIT OF HABEAS CORPUS						7.
DISTRICT COURT	Defense	Prosecution	Court	Correction	Other	TOTAL
State Charge						
County Charge						

APPEAL						8.
U.S. COURT OF APPEALS	Defense	Prosecution	Court	Correction	Other	TOTAL
State Charge						
County Charge						

REHEARING						9.
U.S. COURT OF APPEALS	Defense	Prosecution	Court	Correction	Other	TOTAL
State Charge						
County Charge						

WRIT OF CERTIORARI						10.
U.S. SUPREME COURT	Defense	Prosecution	Court	Correction	Other	TOTAL
State Charge						
County Charge						

EXECUTIVE

COMMUTATION APPLICATION						11.
	Defense	Prosecution	Court	Correction	Other	TOTAL
State Charge						
County Charge						

In what follows, we discuss "State I"—the first three stages of capital litigation. We will trace a death penalty case through trial, appeal, and United States Supreme Court review. To the extent possible, we allocate and chart the costs for defense,²⁷ prosecution,²⁸ corrections,²⁹ courts,³⁰ and other miscellaneous categories.

direct appeal to the Court of Appeals, and federal relief in the form of *certiorari* to the United States Supreme Court. In the event that relief is denied in this channel, litigation in "State II" (the state's post-conviction remedy channel) commences. Post-conviction proceedings at the trial level, direct review by the Court of Appeals, and again a writ of *certiorari* to the Supreme Court are envisioned. The "Federal" channel includes *habeas corpus* relief in the U.S. District Court, review of adverse decisions by the U.S. Court of Appeals, discretionary relief by rehearing *en banc* in the U.S. Court of Appeals, and again a writ of *certiorari* for Supreme Court review. The eleventh level of this review process includes executive clemency. It should be noted that the statutory apparatus for clemency in the state of New York does not appear to be procedurally sufficient for death cases. See N.Y. CORRECT. LAW ARTICLE 11 (McKinney 1968).

²⁷ In addition to other authority cited throughout this paper, in February and March of 1982, the New York State Defenders Association conducted a telephone survey of public defender offices, private attorneys, expert witnesses, investigators, correctional personnel, and others in order to determine costs involved in litigating death penalty cases.

²⁸ Throughout the remainder of this paper, we apply a uniform formula to estimate capital prosecution costs. This formula is based on existing average statewide disparity rates between prosecution and defense. For the purposes of the estimates, we use the baseline defense costs and apply three prosecution to defense ratios. The first, a 2 to 1 ratio, is applied to counsel costs in the guilt and penalty phases. The second, a 3 to 1 ratio, is applied to expert witness and investigation costs in the guilt and penalty phases. The third, a 1 to 1 ratio, is applied to the cost of appeals to the New York Court of Appeals and the United States Supreme Court. These ratios are a reflection of actual experience based on defense/prosecution cost data. As applied, they will consistently yield what we believe are uniformly conservative dollar amounts. Actual prosecution/defense disparity is much greater than 2 to 1 or 3 to 1. In some jurisdictions, disparity runs as high as 8 or 10 to 1. The reader can thus take the prosecution costs reported hereinafter as the minimum cost of capital prosecution, resting precariously upon the assurance that these costs will be no less than what is reported, and will probably be much more. While we hesitate to say how much more, if recent experience is the bellwether, counties will assuredly go bankrupt as they pay for the cost of prosecution in capital cases. Under the capital litigation scheme envisioned for New York by the Volker/Graber bill, prosecution costs will remain a county charge.

²⁹ We do not yet know the correctional costs generated by the death penalty at the local level. There will be higher security costs attached to capital incarceration in the areas of housing, monitoring, maintenance, transportation, and feeding. Most local jails will be hard pressed to achieve adequate capital case security. We do not, herein, estimate local correctional costs generated by the death penalty. In the state system (post-verdict), capital incarceration takes a tremendous and distinctively identifiable toll. We discuss certain costs associated with state level incarceration *infra* at PART III.

³⁰ The difficulty of retrieving useful data for the purpose of projecting court costs in New York State has previously been recognized. NATIONAL CENTER FOR STATE COURTS, NEW YORK STATE BUDGET REVIEW MANUAL: A REPORT OF THE SENATE SELECT TASK FORCE ON COURT REORGANIZATION (1978). For this reason, in this report we rely on survey data from other states.

THE GUILT AND PENALTY PHASES

A. Death Is Different

The United States Supreme Court has recognized that death penalty cases require greater due process procedural safeguards than do non-capital cases. In *Gardner v. Florida*, 430 U.S. 349, 357 (1977), the Court stated:

"... [F]ive Members of the Court have now expressly recognized that death is a different kind of punishment from any other which may be imposed in this country. (Citations omitted.) From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."

The Legislature's intent to have the state pay the defense bill no doubt arises from court decisions like *Gardner* which establish that death cases require greater procedural protection.³¹

In recognizing this constitutional principle, the Legislature has declared its commitment to this new brand of equal protection. It has stated that where the state seeks the irrevocable sanction of death, inability to pay for the best counsel and auxiliary services will not be a bar to receiving them. Under the Legislature's view of due process, in such cases, the state will pay for representation, no matter what it costs.

In the ordinary criminal case in which the appointment of counsel is made for a person unable to afford counsel, the court will appoint counsel. The legislative debates indicate, however, that, although it is not a requirement of our present statutory scheme and has not yet been recognized as an element of the Sixth Amendment,³² an indigent defendant facing the death penalty in New York State will have the opportunity to choose the lawyer to be appointed. Additionally, although the mechanism for this process of appointment has not been made clear by the Legislature, the Legislature has explicitly pointed out that this will not just be competent counsel but will be the best counsel money can buy:

"... [W]hat we are saying is that whatever the fees are that F. Lee Bailey and the best attorneys, the best criminal attorneys get, are the kind of fees that the State is going to provide for the defense of accused persons who may come under the restrictions of this bill."³³

While the use of the name F. Lee Bailey may be somewhat symbolic, there is no

³¹ See *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Furman v. Georgia*, 408 U.S. 238 (1972). Mr. Justice Harlan, concurring in *Reid v. Covert*, 354 U.S. 1, 77 (1957), stated: "I do not concede that whatever process is 'due' an offender faced with a fine or a prison sentence necessarily satisfies the requirements of the Constitution in a capital case." *Gardner* makes clear that a majority of the Court accepted this position.

³² The U.S. Court of Appeals for the Ninth Circuit has held that a defendant's Sixth Amendment right to counsel is violated when a trial court judge fails to accord appropriate weight to an existing attorney/client relationship in determining whether to grant a continuance founded on the temporary unavailability of the defendant's particular attorney. *Slappy v. Morris*, 649 F.2d 718 (9th Cir. 1981). On March 29, 1982, the United States Supreme Court agreed to review the case *Morris v. Slappy*, 81-1095. See also *N.Y.L.J.*, March 30, 1982, at 1, col. 4. Thus the question of whether or not a defendant has a federal constitutional right under certain circumstances to "counsel of choice" may soon be resolved.

³³ RECORD OF PROCEEDINGS, ASSEMBLY, STATE OF NEW YORK (Monday, March 20, 1978) (statement of Assemblyman Friedman), at 2079-2080.

question that his fee structure is real. If New York is prepared to pay for the "best" counsel with taxpayers money, it can begin with his law offices in Boston. Bailey's office reported that in serious felony (non-capital) cases, it requires an initial retainer of \$50,000. This does not include expenses or per diem trial costs.³⁴

Norris Gelman, a Pennsylvania attorney with much trial experience in death penalty cases, stated that an appropriate retainer in a capital case runs anywhere from \$25,000 to \$50,000 depending on the fact pattern.

Ken Rose, an attorney with Team Defense in Atlanta, an organization that specializes in defending death penalty cases, reported that private attorneys in the Atlanta area require initial retainers ranging from \$15,000 to \$40,000. The Southern Poverty Law Center similarly found that private attorneys in Alabama require retainers of not less than \$25,000.

Fees thereafter will be based on hourly and daily (trial) rates. Fees ranging from \$100 to \$200 per hour will not be uncommon. The bill provides for the appointment of "one or more attorneys" and it is reasonable to assume that the appointment of two or more attorneys will be the rule, not the exception.³⁵

The natural result of the death penalty statute will be that jury trials will be conducted in all capital murder cases. The jury trials will be longer and more expensive than in non-capital cases. Long before the jury is empaneled, however, there will be very high pretrial costs. These include motion practice, investigations, and the use of expert witnesses. A discussion of these follows.

B. Motion Practice

Pretrial motions play an important role in *most* criminal cases. However, a death penalty trial is strikingly different than other felony trials because of the length of each procedural stage and its overall importance to the ultimate objective—preventing the imposition of the sanction of death. Extensive pretrial motions play, therefore, a crucial role in *every* death penalty case.

Motions request specific legal relief or action; they help to educate the trial court and appellate courts as to the standards of extra-special due process that have to be applied to each procedural question in a death case. Motions create a record and set a course of strategy upon which the entire litigation effort in a capital case is patterned.

The usual number of pretrial motions in non-capital cases vary between five and seven. In death penalty cases, every motion will be critical, requiring substantially more time to prepare. Experienced attorneys state that the typical capital case requires the filing of between 10 and 25 trial motions.³⁶ Many pretrial motions will relate solely to the unique aspects of the defendant's underlying criminal case. Others will be specifically a function of there being a death penalty statute in existence.

Thoroughly researched constitutional attacks on the death statute, motions directed at insulating the jury from outside influences, and in-depth motions for discovery and the right to inspect and test evidence will be routine. Ordinary motions in criminal

³⁴ Significantly, F. Lee Bailey reportedly spent \$350,000 for his own defense against charges of conspiracy to defraud investors arising from his involvement with Glenn Turner. (*Time*, Feb. 16, 1976, at 50.) Nor is he alone. John Ehrlichman is reported to have spent \$400,000 on his defense. (*Time*, Jan. 13, 1975, at 14.)

³⁵ Unlike the proposed Volker/Graher bill, the California death statute is silent on the number of lawyers to be appointed in capital cases. Nevertheless, the California Supreme Court has held that a court should presumptively appoint a second attorney if such an attorney "may lend important assistance in preparing for trial or presenting the case." *Keenan v. The Superior Court of the City and County of San Francisco*, 30 Cal. 3d _____ (Feb. 8, 1982).

³⁶ *Motions for Capital Cases*, Southern Poverty Law Center, 1981, p.2.

cases take on a different meaning in death cases. Thus, motions to suppress physical evidence or suggestive identification procedures, motions to dismiss the indictment, or motions to contravert search warrants, the routine matter of any criminal case, are longer, more complicated and more heavily litigated in death cases.

In capital cases, motions for the appointment of expert witnesses, the employment of investigators, the utilization of private psychiatrists for trial and sentencing and special motions to increase the court's consciousness of the requirements of "super due process" are not only routine but required as an element of the effective assistance of counsel.

In virtually every death penalty case, the defense will file motions for change of venue, individual *voir dire*, sequestration of jurors during *voir dire*, and sequestration of a petit jury. The motions are essential to offset prejudicial pretrial publicity and to ensure the defendant an impartial jury.³⁷ There are reported cases of individual examination of potential jurors that have lasted two to four weeks. The cost of sequestering the jury in a trial that, on the average, lasts from four to six weeks in a capital case, is also substantial.³⁸

Professor Robert Buckhout, a professor of psychology at Brooklyn College, Brooklyn, New York, has testified in over 80 death penalty cases. His expertise involves the sufficiency of eyewitness identifications as well as conducting juristic psychological surveys. Juristic psychological surveys involve consulting with the attorneys and preparation of sample questionnaires to assist in targeting special jurors during *voir dire*. At times, he has even assisted attorneys in the actual conduct of *voir dire*. Professor Buckhout's fee for the surveys is \$500 per day for in-courtroom testimony with a consulting fee of \$100 per hour. In 1977, Professor Buckhout submitted a \$25,000 bill in a death penalty trial for a juristic psychological survey.

C. Investigators

Once an attorney appears in a death penalty case, and ordinarily before many of the aforementioned pretrial motions are brought, there arises the need for auxiliary defense services. Foremost among these is the need for an investigator.

Investigators' fees, in our survey, range from \$500 to \$1500 per day. Hourly rates for experienced investigators were reported to range between \$75 and \$200. The Office of the State Public Defender in California has found the cost for investigators at trial in some death penalty cases to have been in excess of \$40,000. Similar amounts were reported by private attorneys. The National College for Criminal Defense in Houston found that the bare minimum needed for investigation is \$10,000, and this figure only represents the investigation required for the trial phase. This figure, by New York standards, is concededly low.³⁹

The Sixth Amendment right to the effective assistance of counsel in both federal and state courts requires thorough investigations in all criminal cases. Apparently, this has not gone unnoticed by the Legislature. The legislative debate on what would be paid for investigators included a comment by Assemblyman Friedman about defendants who, years after conviction, were able to secure their freedom with "late" investigative

³⁷ *Motions for Capital Cases*, Southern Poverty Law Center, 1981, pp. 43-44, 78-83

³⁸ This cost is not detailed nor estimated herein. It will, however, be a substantial charge.

³⁹ In *People v. Graydon*, 43 A.D.2d 842 (1974), a non-capital murder case involving a shooting in a social club, the American Service Bureau, the private investigation firm on the case, found and interviewed more than 35 witnesses. The work in that non-capital matter included the investigation of each complaining witness and the retrieval of statements. The cost of this alone exceeded \$25,000.

help. Referring to this issue he stated, *supra*, at n. 20, "This bill says you are going to have those investigative services at the very beginning."

"Up front" investigative services have been shown to be essential. In the recent case of Johnny Ross, imprisoned in Louisiana at 15 and sentenced at 16 to die for a rape he didn't commit, investigative services set him free. These investigative services should have been available pretrial, but were not supplied until the Southern Poverty Law Center brought a *habeas corpus* petition (in the "Federal" or third litigation channel).

The Southern Poverty Law Center received a letter from Johnny Ross in 1975 pleading his innocence. Ross was 16 at the time—the youngest person on death row in America—and the Center took his case. Ross's 1975 trial had lasted less than one day despite the fact that it was a capital case in which his life was at stake.

Among numerous other things, the Southern Poverty Law Center hired Gary Eldredge, a private investigator from New Orleans, to complete the investigation in the Johnny Ross case:

"Eldredge read the trial transcript and began tracking down alibi witnesses, interviewing investigating officers and pursuing other leads. In reading the transcript, he noticed that the prosecutor had introduced, through the testimony of a criminalist, the rapist's blood type, as determined from a semen sample taken from the rape scene, but the prosecutor had never tied this piece of evidence to Ross.

"For the sake of thoroughness, Eldredge decided to check it out and contacted Ross to see if he knew his blood type. The rapist's was the 'B' group. Ross didn't know his, but told Eldredge he had donated blood a number of times since he'd been imprisoned. So Eldredge contacted the blood bank that served the prison.

"Each of the numerous times Ross had donated, his blood had been typed, and each time it had come up 'O + .' But these were the results of testing by technicians, not physicians, so after informing [the Southern Poverty Law Center] of his findings, Eldredge arranged for a prominent university doctor to test Ross, and his tests produced exactly the same results. ***[The Southern Poverty Law Center] took the evidence to the district attorney's office. Soon thereafter, Ross was released. He is now living with his sister in Denver."⁴⁰

The price of the Gary Eldredge investigation in the Johnny Ross case was \$3500. It took place, however, years later than it should have, in conjunction with a federal *habeas corpus* petition. The waste of taxpayer dollars that ensued from unnecessary litigation is nothing compared to the abuse of Johnny Ross's liberty—a deprivation of freedom arising directly from poverty.

A typical criminal case investigation, obviously heightened in a death case, involves searching for and interviewing every potential favorable and adverse witness. It includes crime scene investigations, photographs, the search for and retention of experts, and the review of testimony presented at pretrial hearings and other evidentiary proceedings. The investigator retrieves evidence, follows leads, and develops factual theories. Frequently, the investigator is deeply involved in surveys to test for prejudice within a community and among potential jury veniremen. In a system which requires the marshalling of facts before they are applied to law, the investigator is a crucial and vital part of the defense team.

Nor should it be forgotten that the sentencing phase of the bifurcated trial process is

⁴⁰ *Poverty Law Report*, Vol. 10, No. 1, Jan./Feb. 1982, at 3.

a co-equal part of capital litigation at the trial level. Thus, the marshalling of facts on the issue of guilt is but 50 percent of the work that a good private investigator will be doing in a capital case.

D. Experts and Auxiliary Services

Experts, such as forensic scientists, juristic psychologists, psychiatrists, crime scene reconstructionists, criminalists, polygraph experts and others contacted in our survey, reported fees ranging from \$500 to \$1,000 a day for their services. These people are critically necessary to the defense team. While any particular case may require a different configuration of the experts required, all cases will require the extensive use of numerous experts. The fees reported below are exclusive of the expenses required for travel.

Judith Bunker, a technical specialist to the medical examiner in Atlanta, and one of the top crime scene reconstructionists and blood stain analysts in the country, has advised NYSDA that the going rate for such services ranges from \$700 to \$1,000 per day.

In many capital cases, difficult issues, such as the insanity defense, are often raised. Psychological Evaluations, Inc., in Atlanta, has performed psychiatric and psychological evaluations in death penalty cases throughout the country. Although the individual fees vary, Dr. Anthony Stone, a psychologist, reports the average fee is approximately \$700 a day exclusive of expenses.

Our office interviewed Mr. Robbie Robertson of W.A. Robertson and Associates from Atlanta, Georgia. Mr. Robertson is an expert in the administration and analysis of polygraph examinations. He has participated in approximately 25 capital murder cases in which his testimony and analysis were used at pretrial proceedings, and trial and sentencing phases of the bifurcated capital process. His present fee is \$200 per day for courtroom testimony. In addition, he charges \$150 for the administration of the polygraph examination with the average bill approximating \$500 plus expenses.

As stated earlier, Professor Robert Buckhout has appeared in his capacity as an expert witness regarding eyewitness identifications. His courtroom fee is \$500 per day. His consulting fee, once again, \$100 per hour.

Dr. George Jurow of New York, New York, has been involved in approximately 25 death penalty cases. His expertise centers on *Witherspoon* issues.⁴¹ His research concludes that the exclusion of jurors opposed to the death penalty at trial results in biased juries. His services include consulting with the attorney and sometimes testimony at the pretrial stage. Frequently, he is a witness in support of defense motions to empanel a separate jury for the sentencing phase. His fee is \$100 per hour for consulting as well as testimony.

Dr. David Rothstein, of the Michael Reese Medical Center, Chicago, Illinois, is a psychiatrist. Dr. Rothstein has testified in several capital cases in both the trial and penalty phases. His fee is \$125 per hour for in-court testimony and \$110 per hour for analysis. This fee is exclusive of expenses.

Dr. Seymour Halleck, of the School of Psychiatry at the University of North Carolina at Chapel Hill, has testified in both the trial and penalty phases of capital trials. With a standard fee of \$150 per hour, he approximated his average bill to be \$2500 for both phases.

⁴¹ *Witherspoon v. Illinois*, 391 U.S. 510, 522 (1968), held that a death sentence may not be "... carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction."

A typical death case will use these experts or others just like them. A hypothetical case can easily be designed. Let us assume a case in which three days of crime scene reconstruction, a juristic psychological survey and a polygraph examination are required. Let us further assume a *Witherspoon* jury challenge that takes three days of work and four hours of testimony and the use of one psychiatrist who has conducted a five hour exam and testifies for two hours. This relatively modest use of experts will run up a bill for the state of more than \$30,000 in just the guilt phase of a capital case. These costs are real. They will be paid by the state. They will be present in every capital trial.

E. Sentencing in the Penalty Phase

Any aspect of the defendant's character or record and any other circumstance offered in mitigation of punishment must be considered by the jury in the penalty phase of a capital trial. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). *Lockett* followed on the heels of *Woodson v. North Carolina*, 428 U.S. 280 (1976). In *Woodson*, the Supreme Court, in defining the requirements of capital sentencing procedures, stated that courts must consider the:

"character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." (Emphasis supplied.) *Id.*, at 304.

In *Gardner v. Florida*, 430 U.S. 349, 358 (1977), the Court held that:

"[I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause ***[T]he sentencing is a critical stage of the criminal proceeding at which [the defendant] is entitled to the effective assistance of counsel. ***The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence. . . ." (Citations omitted.) (Emphasis supplied.)

At this critical stage of the proceeding, the defense may use many of the socio-psychiatric witnesses employed during the trial phase. However, this stage additionally requires the investigation of the defendant's family, friends, neighbors, school personnel, and social workers.

The investigation at the sentencing phase requires a complete retrospective analysis of every positive aspect of the defendant's life from the day of birth to the date of sentence. The witnesses called to this proceeding, vital to establishing evidence in mitigation of sentence, must be made available to testify, requiring, in many cases, the reimbursement of travel expenses and accommodations. Military, school, work, and other records must be designated, located and retrieved.

The Volker/Graber bill will permit the court, upon a showing of prejudice, to discharge the trial jury and empanel a new sentencing jury.⁴² Hence, defense counsel will undoubtedly make the same motion as was made at trial for individual *voir dire* at the sentencing phase and for sequestration of the sentencing jury. Here again, a lengthy process of individual *voir dire* is, in many cases, the only possible remedy to empanel a fair and impartial jury on the question of sanction. The main reason courts have granted individual *voir dire* is that it is uniquely suited to capital cases.

Death cases ordinarily are accompanied by tremendous publicity and notoriety. Infection of the jury panel by this kind of publicity, and its resultant effect on jury fact-finding, creates reversible error. Therefore, it is in the interest of the court system to

⁴² Proposed CRIM. PROC. LAW §400.27(2), S.7600/A.9379 §8 (1982).

permit individual *voir dire* and sequestration of jurors during *voir dire*. Such *voir dire* enables the defense to delve into the area of prejudice without fear that the answers of one juror will taint the entire panel. Such taint preserves an issue for later litigation.

Three of the mitigating factors described in the proposed death bill for New York require the sentencing jury to consider whether "... [t]he murder was committed while the defendant was mentally or emotionally disturbed or under the influence of alcohol or any drug ...,"⁴³ whether "... [t]he defendant was under unusual and substantial duress or under the domination of another person ...,"⁴⁴ and whether "... [t]he defendant's mental capacity ... or his ability to conform his conduct to the requirements of law was significantly impaired. ..."⁴⁵ These circumstances clearly contemplate a situation where the defense will be called upon to present extensive testimony of psychologists and psychiatrists. The previously discussed costs of such services will *again* be incurred by the state. They will probably be higher in the penalty phase of the capital trial since the importance of such testimony is magnified by the omnipresence of death.

Furthermore, since 1978, it has been constitutionally explicit that:

"... [T]he Eighth and Fourteenth Amendments require that the sentencer ... not be precluded from considering, as a *mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."⁴⁶

The requirements which permit relevant evidence in mitigation also result in the defense calling witnesses to establish the cruelty of the death penalty. Former death row inmates, theologians and witnesses to prior executions are the type of non-traditional expert witnesses that now, under rules laid down by the Supreme Court, testify in the penalty phase of capital litigation. The expense of these experts at the sentencing proceeding will be considerable. Little, if any, of this evidence can be legally excluded from the sentencing phase of a capital trial in the United States.

Mr. Lloyd McClendon, Deputy Administrator, Ohio Penal Industries, Columbus, Ohio, is an ex-death row inmate, having spent two years on death row. He has been certified as an expert witness in approximately six death penalty trials throughout the country. His testimony is used at the sentencing stage to rebut the deterrent effect of the death penalty and to support mitigating factors such as the defendant's positive potential. Mr. McClendon's fee is presently \$500 a day for in-court testimony. In a recent case in the state of Florida, he submitted a bill to the public defender's office for approximately \$2000.

The array of expert witnesses, including social psychiatrists, criminologists, and counselors, whose testimony will bear on the inadequacy of the death penalty as a sanction, requires preparation for a full blown evidentiary, adversarial proceeding. Experts to testify on the death penalty as it is applied in a particular state, professors to testify on the philosophical question of capital punishment, social scientists to resolve jury doubts, and many others are called as witnesses in the penalty phase. Testimony on the inefficacy of the death penalty as a deterrent, on attitudes toward the

⁴³ Proposed CRIM. PROC. LAW §400.27(8)(f), S.7600/A.9379 §8 (1982).

⁴⁴ Proposed CRIM. PROC. LAW §400.27(8)(c), S.7600/A.9379 §8 (1982).

⁴⁵ Proposed CRIM. PROC. LAW §400.27(8)(b), S.7600/A.9379 §8 (1982).

⁴⁶ *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

death penalty, on racial prejudice, and on every imaginable issue that can prevent the execution of a human being is permissible and systematically used in the sentencing phase of a capital case.⁴⁷

THE COST OF THE GUILT AND PENALTY PHASES

The first stage of "State I" has been seen to be expensive. We recap costs here.

Defense: Charges for the defense will conservatively total \$352,700. One hundred seventy six thousand, three hundred fifty dollars (\$176,350) is allocated for each phase (guilt and penalty)⁴⁸ as follows:

Attorneys.....	\$106,350
Investigators	40,000
Experts	30,000
	<u>\$176,350</u>

Prosecution: Our estimate of prosecution costs at the trial level for the guilt and penalty phase of the average capital case in New York is \$845,400.⁴⁹

Court: As previously stated,⁵⁰ court data is difficult to retrieve for the purpose of capital litigation cost modeling. We do, however, have a guidepost and, in the absence of hard data, we use it. John Ackerman, dean of the National College for Criminal Defense, reports that a local Texas judge, counting only court-time, employees time and jury sequestration, estimated the county cost of a recent death penalty case at over \$300,000. This amount did not include appeal, and the defendant in that case did not receive a sentence of death. In fact, the case is now on appeal.

Correctional Cost: As previously stated,⁵¹ we do not estimate or allocate local jail capital incarceration costs.

⁴⁷ It should be noted that the only experiential competence statutorily required under the Volker/Graber bill is in the trial of felony cases (three years). However, the two stages of the bifurcated capital process require experiential competence in both the guilt phase (trial) and the penalty phase (sentencing). The art of sentencing advocacy is a new and developing area. Experience in New York felony court representation, absent more, is not sufficient experience for the sentencing phase of a capital case. Additionally, in New York, experiential competence in similar sentencing proceedings would be virtually impossible to acquire. Although Article 400 of the Criminal Procedure Law presently provides for presentence conferences, summary hearings, and other specified hearing procedures, these proceedings do not approach the complexity or importance of penalty phase proceedings in death cases. Furthermore, the CPL proceedings can only be held before a judge [CPL §§400.10, 400.15(7)(a), 400.16(2), 400.20(a), 400.21(7)(a), 400.30, 400.40(5)] while penalty phase proceedings are held before juries. Although the Volker/Graber bill clearly permits hiring special counsel to assist in penalty phase procedures, including post-trial, presentence motion practice, presentence investigations, hearing preparation and the sentencing hearing itself, we do not independently calculate these fees.

⁴⁸ This assumes a concededly low model four week trial of 120 trial hours, exclusive of motions. It assumes two trial lawyers, one investigator, and the expert costs detailed *supra* at D. One hundred twenty five (125) hours of motion work are allocated to the guilt phase, and 344 hours of lawyer time to investigation and preparation (research, witness preparation, client interviews).

⁴⁹ See n. 28, *supra*.

⁵⁰ See n. 30, *supra*.

⁵¹ See n. 29, *supra*.

We can now allocate and chart some of the costs arising in the first stage of capital litigation—the guilt and penalty phases. [See Table 2 below.]

TABLE 2
COST OF THE GUILT AND PENALTY PHASES

TRIAL						
PENALTY PHASE	Defense	Prosecution	Court	Correction	Other	TOTAL
State Charge	\$176,350	—0—	\$150,000	—0—	?	\$326,350
County Charge	—0—	\$422,700	—0—	?	?	\$422,700
GUILT PHASE						
PENALTY PHASE	Defense	Prosecution	Court	Correction	Other	TOTAL
State Charge	\$176,350	—0—	\$150,000	—0—	?	\$326,350
County Charge	—0—	\$422,700	—0—	?	?	\$422,700

STATE \$652,700
COUNTY \$845,400
TOTAL \$1,498,100

Under the Volker/Graber bill, it will cost New York State and its counties more than \$1.4 million to bring a capital case to the point of a death sentence. However, the drain of taxpayers' money will have just begun. The costs associated with the ensuing nine levels of appellate review are substantial.⁵² The first two stages of the appellate process within "State I" are detailed below.

DIRECT APPEAL TO THE COURT OF APPEALS

The Volker/Graber bill authorizes a direct appeal to the Court of Appeals from judgment of conviction and sentence of death. The Court of Appeals will review the law and the facts. It will examine the presence of passion, prejudice, or arbitrariness in the sentence. It will review statewide sentencing patterns and determine whether the sentence of death is disproportionate or excessive. The appellate process will increase the total cost of the death penalty procedure by: 1) being more expensive than non-capital appeals; and 2) regenerating the costs of the trial process when cases are remanded for trial. The latter result is not infrequent in death penalty appeals.

The California Office of the State Public Defender reports that nine out of the first 11 death judgment appeals under California's death penalty statute resulted in either

⁵² It bears repeating that the proposed bill does not limit the reimbursement of appellate defense counsel to the state appellate forum. Indeed, it requires the appointment of appellate counsel for the federal as well as the state level. The costs associated with "State II" and the "Federal" litigation channel (see Table 1, *supra*) (post-conviction proceedings, appeals, writs of *certiorari*, federal *habeas corpus* petition, federal appeals, rehearings, and writs of *certiorari*) are not detailed in this paper. Furthermore, the Attorney General will represent the state as respondent at each application for a writ of *habeas corpus* and other federal relief. The weighty state costs associated with this representation at three federal stages of litigation are also not detailed herein.

reversals or retrials. That office also reports the cost of a death penalty appeal on the state level to be in excess of \$30,000 per case.

The proposed New York bill would require appellate counsel to perfect two appeals at once, i.e., the sentence review⁵³ and the direct appeal. The expense of this procedure will also be felt by the state and county as they attempt to defend the conviction. The constitutionality of a death penalty statute is almost always attacked on appeal. In New York, this will require the Attorney General's office to appear and defend the constitutionality of this statute.⁵⁴

In our survey on appellate death penalty costs, F. Lee Bailey's office reported a minimum cost of \$25,000 to take a non-capital felony appeal. Again, this figure is exclusive of expenses.

The Southern Poverty Law Center reported the cost of an appeal to range from \$20,000 to \$30,000. Under the New York statute, the costs will be higher.

In order to accurately quantify time involved in a capital case, we examined jurisdictions which have objectified the appellate process by the development of workload standards. In California and Michigan, the state defender offices have quantified non-capital appellate work into work units. By calculating the number of hours to prepare one brief from 300 pages of transcript, the Michigan Appellate Defender Office has developed an "an appellate unit"—a work unit equal to 55 hours of attorney time. Under this formula, a minor non-capital case directly appealed to the highest state court would require 3.7 work units or approximately 203½ hours. This includes an application to appeal, an appellate brief, oral argument, and motion for rehearing. It does not cover reply briefs, client visits, or expenses. The standards for California are substantially similar.

Significantly, the Appellate Section of the National Legal Aid and Defender Association⁵⁵ has developed capital case appellate standards and has also done so on the basis of work units. Under these standards, which can permissibly be met under the express provisions of the Volker/Graber bill, 30 work units are the standard work load for one appellate attorney for one year. A direct appeal of a death case to the New York Court of Appeals would constitute 14 work units under these standards.

This figure, which may be somewhat low considering the extensive research and innovation that will be required in the first onslaught of constitutional challenges to the Volker/Graber bill, translates into about five months work or between 800 and 900 billable hours. At the rates charged by the "best" counsel, *supra*, at n. 33, this will translate into defense costs of \$80,000.

⁵³ The costs associated with the constitutionally required disproportionality review have not been assessed. The death penalty statute will require the arresting police officer, the prosecuting attorney, the defendant's attorney, and the trial judge to file reports with the Court of Appeals in every case where a defendant is indicted for first degree murder. These reports will have to be filed with the Court of Appeals within 30 days of a disposition by a superior court. They will also have to be separately analyzed in conjunction with each death penalty sentence appeal. The contents of the reports will be designed by rule of the Court of Appeals. They are obviously, therefore, not detailed in the bill. It is, however, clear that, independent of other increased capital case judicial costs, the judicial system will need significant additional resources just to carry out disproportionality review.

⁵⁴ N.Y. EXEC. LAW, §71 (McKinney 1972).

⁵⁵ The workload standards reported here were presented at the National Appellate Defender Conference conducted by the National Legal Aid and Defender Association, April 10-12, 1981, in Indianapolis, Indiana. The capital case workload standards of 30 work units define a capital brief as 10 units, and a petition for *certiorari* as four.

A direct appeal of a capital case to the New York State Court of Appeals will, therefore, cost New York taxpayers no less than \$160,000⁵⁶ exclusive of correctional and court costs, as indicated in Table 3 below.

TABLE 3
COST OF DIRECT APPEAL TO THE NEW YORK STATE COURT OF APPEALS

APPEAL						
COURT OF APPEALS	Defence	Prosecution	Court	Correction	Other	TOTAL
State Charge	\$80,000	—0—	?	?	?	\$80,000
County Charge	—0—	\$80,000	—0—	—0—	?	\$80,000

STATE \$80,000
COUNTY \$80,000
TOTAL \$160,000

SUPREME COURT REVIEW

Final judgments of the Court of Appeals rendered in death penalty cases are next reviewable by the United States Supreme Court by writ of *certiorari*. Bringing such petitions is routine capital practice. Preparation of the petition and the brief on the merits involve complete review of, and familiarity with, the entire trial transcript and all state court proceedings. The transcripts to be reviewed frequently contain thousands and thousands of pages.

Edward Nowak, Public Defender of Monroe County and an able appellate lawyer who successfully argued the landmark case of *Dunaway v. New York*, 99 S.Ct. 2248 (1979), before the Supreme Court, estimates that the amount of time to adequately prepare a non-capital case for Supreme Court review averages between 150 and 200 hours. Seventy to 100 of these hours cover the preparation of the petition for *certiorari*. Once the petition is granted, however, fine points have to be honed and final briefs have to be prepared. Six lawyer weeks is not an unusual amount of time in non-capital cases.

In capital cases, far more is involved. The record is longer, the issues more complex, the stakes higher. More importantly, the constitutional principles involved have frequently only recently been enunciated and are subject to precise case by case refinement. During this process of review, while the cost of defense services will be a state charge, the cost of prosecutorial time will be a county charge.

The Supreme Court does not look at a *certiorari* petition to do justice to an individual litigant. Despite its reputation, the Supreme Court does not sit as a "court of last resort." Rather, in exercising its *certiorari* jurisdiction, the court seeks to either refine existing propositions of law, explore potential areas for applying settled principles of law, or to resolve constitutional conflicts among the state or federal circuits. In death cases, these principles heighten the existing pressure to find novel issues for Supreme Court reversal.

In the most recent case before the Court, *Eddings v. Oklahoma*, ___ U.S. ___, 102 S.Ct. 869 (1982), the question presented was whether or not the infliction of the death penalty on a minor who was 16 at the time of the crime constituted cruel and unusual

⁵⁶ Prosecution costs are calculated at a ratio of 1 to 1 with defense. See n. 28, *supra*.

punishment under the Eighth and 14th Amendments to the Constitution of the United States. A second question was whether or not the Supreme Court should address the plain error committed by the trial court when it refused to consider relevant mitigating evidence. The petition for *certiorari* was 26 pages long. The state's opposition brief, 20 pages long. The brief on the merits, filed for the petitioner, was 68 pages long. It argued three points of law, cited 81 cases, and discussed 95 domestic statutes. It reviewed the statutes of 11 countries. Seventy-seven other authorities were cited in the brief. Five appendices containing in-depth social research were filed.

The *Eddings* case is not an unusual effort on behalf of a capital defendant. It involved hundreds and hundreds of attorney hours to research, prepare and present the case.⁵⁷

Applying the Michigan work unit formula, a non-capital petition for *certiorari*, brief and argument before the United States Supreme Court requires four units or 220 hours of attorney work. The California formula, applied to Supreme Court review in a non-capital case, would require three appellate work units and approximately 200 hours of attorney time for research, preparation, brief writing, and oral argument. Applying the NLADA Appellate Section standards, a petition for *certiorari* in a capital case would require approximately 256 hours of preparation. Supreme Court review itself, including legal research, preparation, *certiorari* petition, briefs, and oral argument would be equal to or surpass 46 percent of an attorney's work year. This is billable at approximately 883 hours.

Under the provisions of the Volker/Graber bill, which provides fees at the rates charged by the "best attorneys," *supra*, at n. 33, this will translate into defense costs of \$85,000.

Supreme Court review of a New York capital case will, therefore, cost New York taxpayers no less than \$170,000⁵⁸ exclusive of correctional costs as indicated in Table 4 below.

TABLE 4
COST OF SUPREME COURT REVIEW

WRIT OF CERTIORARI						
U.S. SUPREME COURT	Defense	Prosecution	Court	Correction	Other	TOTAL
State Charge	\$85,000	—0—	?	?	?	\$85,000
County Charge	—0—	\$85,000	—0—	?	?	\$85,000

STATE \$85,000
COUNTY \$85,000
TOTAL \$170,000

⁵⁷ Significantly, the Supreme Court decided the narrower of the two questions in *Eddings*. The constitutionality of imposing the death penalty on a 16-year-old thus remains an open question. The case is now in Oklahoma awaiting a resentencing procedure. NYSDA has been informed that a motion has been made seeking the appointment of a new sentencing judge. This will, of necessity, have to be decided before the case can proceed.

⁵⁸ Prosecution costs are calculated at a rate of 1 to 1 with defense. See n. 28, *supra*.

PART III: A NOTE ON THE COST OF THE "CORRECTIONAL" PROCESS

The fiscal wastefulness of a criminal justice system with a death penalty is epitomized by the cost of incarceration. Since 1976, when the death penalty was held not to be unconstitutional *per se* by the Supreme Court, four people have been executed in the United States.⁵⁹ The vast majority of capital defendants do not get executed; rather, ultimately, after enormous agony and squandering of the public treasury, they are sentenced to life imprisonment. It will be the same in New York State. New Yorkers will not only pay for the cost of trial, appeal, and nine levels of review, but also for the incarceration of the inmate during the process and most probably for the rest of his life. It would, in the eyes of some, be better at the outset to offer life imprisonment as the only sanction for first degree murder.

The annual cost of maintaining an inmate in a New York State prison was calculated at \$15,050 in 1978.⁶⁰ Assuming that the average age of persons convicted of first degree murder is 30,⁶¹ and that they will live until age 70, the cost of life imprisonment for 40 years would be \$602,000. At a cost of \$1.4 million, a death penalty trial alone will exceed the cost of life imprisonment.

For the defendant facing capital punishment, the cost of special death row security must be added to the annual charges above. Thus, according to representatives of the Florida Clearinghouse on Criminal Justice, during the eight to ten years involved in post-conviction appellate review, an additional \$15,000 per year for each inmate will probably be required. This security cost reflects the need to deal with the death row inmate individually, to maintain an individual cell, and to separate the inmate from the general population. This issue is certainly not new to correctional administrators.⁶²

Richard McGee, then Administrator of the California Youth and Adult Corrections Agency, stated 18 years ago:

"There is also the argument of cost. Why support some murderer for the rest of his life when we could execute him and save all that money, the argument goes.

"Like so many arguments favoring the death penalty, this does not

⁵⁹ Note that of the four, three—Garv Gilmore (1977); Jesse Bishop (1979), and Steven Judy (1981)—all desired execution. Only John Spenselink did not wish to die. He is thus the only person to be executed against his will since 1967. Since 1976, eight persons on death row have, however, committed suicide.

⁶⁰ D. McDONALD, THE PRICE OF PUNISHMENT: PUBLIC SPENDING FOR CORRECTIONS IN NEW YORK 13 (1980).

⁶¹ Florida reports the average age at admission to its death row is 30.8 years. BUREAU OF PLANNING, RESEARCH AND STATISTICS, FLORIDA DEPT. OF CORRECTIONS—DEATH ROW ANALYSIS 1, STATISTICAL FACTS (Aug. 29, 1980).

⁶² Thorsten Sellin, writing in 1961, said "It has been claimed that [the death penalty] is an economical way of disposing of criminals who, otherwise, would have to be supported at public expense—perhaps for the rest of their lives. Those who employ this cynical argument may be ignorant of the sometimes mountainous costs of the administration of justice in capital cases and they certainly have no knowledge of the realities of prison administration. It is no doubt true that some prisoners, including some lifers, do not make adequate returns to the state—measured in dollars and cents—for some of them are mentally or physically incapable of doing so. But most lifers work in prison. They perform domestic services, they work in prison shops, they do clerical work. If they were paid a wage commensurate with their services, they would be able to pay the costs of their maintenance, but since they are paid little or nothing, it is easy to forget that they are a source of financial profit to the institution in one way or another. Any prison warden will testify to the fact that it is from the group of lifers that he draws a considerable number of trusted inmate employees." *Capital Punishment*, 25 FED. PROBATION, No. 3, at 3 (Sept. 1961).

hold up under factual analysis. The actual costs of execution, the cost of operating the super-maximum security condemned unit, the years spent by some inmates in condemned status, and a pro-rata share of top level prison official's time spent in administering the unit add up to a cost substantially greater than the cost to retain them in prison the rest of their lives.

"Furthermore, perhaps half of those condemned could make highly useful prisoners. It is a common experience that many long-term prisoners settle down to responsible jobs in the prison community which could conservatively be valued at a minimum of half the salary of an employee in industrial, maintenance, clerical and other roles. This would more than pay for both their own keep and that of the other half.

*"Thus, our studies indicate that just on the basis of prison costs alone, it would actually be cheaper to do away with the death penalty. When the other costs of death penalty cases are added—the longer trials, the sanity proceedings, the automatic and other appeals, the time of the Governor and his staff—then there seems no question but that economy is on the side of abolition."*⁶³ (Emphasis supplied.)

⁶³ McGee, *Capital Punishment as Seen By a Correctional Administrator*, 28 FED. PROBATION, No. 2, at 13-14 (June 1964).

CONCLUSION

Throughout this paper we have suggested the existence of certain indirect costs or made reference to specific costs we do not calculate.⁶⁴ These include court costs, jury sequestration, security costs for local correctional facilities, the cost of hiring special penalty phase counsel, and millions of dollars that will be associated with state and federal post-conviction review.

It should by now be clear that government has failed to look at the actual costs of defending and prosecuting capital cases. It has failed to examine the impact of the death penalty on the state's correctional system. It has no idea what the price tag for capital litigation by the Attorney General's office will be.

While prosecution costs in capital cases will probably bankrupt some counties, local governments, already caught in a quagmire over a jail crisis, have yet to examine the impact of capital case security requirements on local correctional facilities.

All these issues must be confronted without appeal to bloodlust. Bloodlust in the name of the public good is a political lie.

And the public? The public is concerned with security on the streets, in homes, at school, in offices. The public is, at best, overlooked by a government's death-bent myopia and, at worst, disregarded.

Crime and justice need to wear a common yoke. The death penalty permanently disengages them one from the other. There can be no murder in the name of justice.

Capital cases do not need to exist. The expenditures outlined in this paper are not necessary. Millions of dollars directly attributable to a death penalty and capital litigation can be instantly saved and redirected by not reinstituting capital punishment in New York State. This is not a choice ordinarily posed to voters or those others who live petrified and diminished by the fear of crime.

Political rhetoric, however, should not be permitted to obscure the true pain of the families of homicide victims. They need closure. For capital defendants, delay and legal review mean life. For the families of homicide victims, delay and legal review mean pain. For both, the process is agonizing.

While many have voiced concern over victims or perpetrators, few seem to know the true agony of either—the agony that comes from the notoriety of five or six appeals, from two or three reviews by the Supreme Court, from being dragged, alone, through the cruel and unusual punishment of waiting.

For the victim's family, it is the seemingly endless grief, memories of the morgue, recounting the report of death, re feeling aloneness.

The death penalty perpetuates victim pain. It also eats at the innards of the accused. Death row:

"... is set up with one thing in mind: to hold a person until execution. None of the programs of education or rehabilitation available to others in even the strictest of prisons are available to death row inmates. The prison is required only to house, feed and then kill the inmate. This makes life on death row far more depressing and meaning less than life normally is in prison. ... [D]eath row, ... a ghastly zoo organized and wholly devoted to carrying out the most sordid act imaginable ... is just barely living. It is instinctive existence where the days are stitched together by a thin thread of hope that either the laws under which the penalty was decreed will be ruled unconstitutional or one's conviction will be reversed for some reason. The effects of years of isolation and deprivation, the lack of human contact, touch, and

⁶⁴ See nn. 25, 26, 29, 30, 38, 47, 52, 53, 54, *supra*, and text accompanying them.

sexuality builds unrelievable pressures. The constant possibility of execution added to those pressures makes for a grinding, withering life that is all but intolerable—a 'slow coming dark.' ⁶⁵

The debate on the death penalty has become sordid and loud. It has diminished us all. We have come very far down the road from morality. Too far. The distance is shamefully represented by the theme of this paper—cost. Capital litigation and the costs of the death penalty, however, will not go away until the death penalty is abolished.

As can be seen from Table 5 below, some of the costs of the first three stages of capital litigation will total no less than \$1,828,100.

TABLE 5
COST OF STATE I
(Trial, Appeal, Supreme Court)

	Defense	Prosecution	Court	Correction	Other	TOTAL
State Charge	\$517,700	—0—	\$300,000	?	?	\$817,700
County Charge	—0—	\$1,010,400	—0—	?	?	\$1,010,400

STATE \$817,700
COUNTY \$1,010,400
TOTAL \$1,828,100

By the time the first 40 New York death cases have been tried to verdict, over \$59 million will have been expended. By the time the first 21 New York death cases have reached the United States Supreme Court, New York State and its counties will have expended as much as the Governor, in his February crime message, deemed appropriate for the entire statewide Major Offense Prosecution Program. An amount exceeding the Legislature's fiscal year 1982-83 local criminal justice assistance budget will rapidly be spent to pay for the death penalty in New York.

A recent analysis of the criminal justice system⁶⁶ indicates that the cost of the system has increased by 120 percent every five years since the early 1900's, while the rate of inflation has only increased by 40 percent every five years. A capital case, therefore, that necessarily taps resources from all facets of the criminal justice system, can be estimated to increase in cost at a similar rate. If 20 percent of the murder cases in New York (251 convictions in 1980)⁶⁷ are prosecuted through three stages of litigation as capital offenses at an average cost of \$1.5 million, then in current dollars the death penalty will generate costs of approximately \$75,000,000. If we assume that the cost will grow in proportion to the cost of the criminal justice system as indicated by the study, then in the year 2000 A.D., the death penalty will cost \$1,075,000,000 annually. Perhaps that is what the Temporary Commission on Revision of the Penal Law meant

⁶⁵ D. MAGEE, SLOW COMING DARK. INTERVIEWS ON DEATH ROW 5, 6 (1980)

⁶⁶ Sepler, *The Next Twenty-Five Years Facing the Criminal Justice System: Using Standard Celebration Charting for Systems Analyses*, 6 AM. J. CRIM. LAW 47 (1979).

⁶⁷ Annual Report '80—Crime and Justice, NEW YORK STATE DIVISION OF CRIMINAL JUSTICE SERVICES, at 224.

in 1965 when, regarding the death penalty, it found "nothing but obstruction, confusion and waste."⁶⁸

We have not detailed the costs of an actual execution. They singularly generate inordinate, almost uncontrollable, expense. The state of Georgia, which executes by electrocution, spent more than \$250,000 solely for the anticipated, but aborted, execution of Jack Howard Potts in 1980.⁶⁹

Special telephone lines running from the prison to the United States Supreme Court and to the Governor's office are necessary. The cost of extra police personnel for crowd control, helicopter security and the shutdown of federal air space over the prison are but a few items of the irrational cost that will be generated in the rare handful of cases that ever reach the execution stage.

It is our hope that a rational discussion of the costs of the death penalty will lead New York State to a rational conclusion. ■

⁶⁸ Sec n. 8, *supra*.

⁶⁹ *Atlanta Journal*, Feb. 11, 1982, at 1, col. 1.

THE DEATH PENALTY A FAILURE OF EXECUTION

LIFE IN PRISON ONE-SIXTH AS EXPENSIVE

By DAVE VON DREHLE
Herald Staff Writer

At first glance, executions appear cheap.

Funeral suit from Jim Tatum's Fashion Showroom in Jacksonville — "We Fit Them All, Big and Tall" — costs \$150. Florida's budget for the last meal: \$20. Executioner's fee: \$150. Undertaker: \$525, box included.

But the true cost of an execution is closer to \$3.2 million.

To execute a prisoner, the state of Florida spends six times as much money as it would to keep him in prison until he dies of natural causes.

How come? Why does the death penalty cost so much more than life without parole?

Government agencies and independent analysts in eight states have scrutinized the ledgers. Said Jonathan Gradess, who calculated the cost of a proposed death penalty in New York: "People in states that have the death penalty kept telling me, 'I hope you're ready to go bankrupt.'"

Cases cost more

Although the numbers vary, all the studies agree that death penalty cases cost more than life-in-prison cases at every level — from pretrial investigation to last-gasp appeals.

To begin with, death penalty cases almost always require a trial. They usually generate a lot of publicity, making prosecutors reluctant to plea-bargain. And only a suicidal defendant pleads guilty when facing death.

And death penalty trials take longer. Attorneys have unusual freedom to question potential jurors one by one — a very time-consuming process. Fighting for their clients' lives, defense attorneys file twice as many pretrial motions as in the average nondeath murder trial, a California study found.

Once the defendant is found guilty, the law requires a second trial to decide if the prisoner should live or die.

To show why they should live, defendants often call as witnesses psychiatrists, family members, former teachers, even accomplices in past crimes. The witnesses have to be located, which can take months of expensive investigation.

To show why the defendant should die, the state tries to persuade the jury that he is hopelessly evil, a permanent danger to society. For this, prosecutors rely heavily on high-priced psychiatrists.

The total additional cost for trial and sentencing over a no-execution murder trial: at least \$36,000, a Maryland study showed. A similar study in Kansas figured the additional costs at \$116,700.

After sentencing, every death verdict must be reviewed by the state Supreme Court. The U.S. Supreme Court requires it. And every defendant is entitled to a state-paid lawyer.

Bob Spangenberg, a consultant for the American Bar Association, surveyed more than 150 capital cases across the country. For defense alone, these mandatory reviews cost an average of \$34,740 each, Spangenberg computed.

Six levels of appeals

That's just the beginning. After the mandatory review there are at least six levels of appeals. Spangenberg calculated these costs. Average cost for government-salaried defense lawyers: \$137,410.

This is a bargain compared to costs racked up by prestigious volunteer lawyers handling death penalty appeals. Wilmer, Cutler and Pickering, a big-name Washington firm, figures it has already laid out \$1.2 million in attorney time and \$173,000 in hard cash arguing federal appeals for serial killer Ted Bundy.

There are two sides, of course, to every appeal. The prosecution needs lawyers, too. Repeated studies show that prosecutors match defense attorneys dollar-for-dollar.

In Florida, state-paid prosecutors and defense attorneys received

'The costs are going to add and add and add and add. It's going to add up until something gives.'

—BOB SPANGENBERG

about \$3 million last year — to fuel a system that executed only one man, Willie Darden.

James Rinaman, former president of the Florida Bar Association, has studied the process at length, hoping to speed it up. He believes more lawyers are needed. To keep up with the demands of Florida's enormous death-penalty system, Rinaman estimates, taxpayers should be shelling out \$12 million a year for lawyers alone.

"It boggles the mind," he says.

Analyst Spangenberg estimates the cost of appellate lawyers will soon top \$30 million a year nationwide.

In the past, states kept costs down by relying on volunteer defense lawyers. Now there are too many cases and too few lawyers.

'Isn't good publicity'

Says Clearwater's Pat Doherty, one of Florida's busiest volunteer capital attorneys: "It isn't good publicity. If you're going to do volunteer work, you're better off representing the Poor Clares."

Then comes the expense of prison. Death Rows cost more to run than ordinary maximum security cell blocks, according to studies in Kansas and Alaska. Florida prison officials say specific calculations are impossible.

Florida officials calculate one cost, however. When the governor signs a death warrant and an inmate's execution is scheduled, the doomed man is moved to a cell nearer the electric chair. For 30 days, guards keep a round-the-clock watch to make sure the inmate doesn't kill himself.

The cost in overtime for guards each time a warrant is signed is \$13,800.

There have been 199 warrants signed in Florida since 1973. Sometimes the state saves money because the guards can watch several doomed men at once.

Merely feeding and housing a Death Row prisoner long enough to execute him costs, on average, \$108,000.

Total it up.

\$57 million since 1973

Florida taxpayers have paid more than \$57 million for the death penalty since 1973. This number is based on the most conservative figures available. The real cost could easily be twice that or more.

Divide the \$57 million by 18 executions. The bottom line: at least \$3.2 million per execution. And the cost is growing.

Bob Spangenberg, the bar association consultant: "The costs are going to add and add and add and add. It's going to add up until something gives."

Jonathan Gradess, who studied the issue for the state of New York: "You're going to see a death penalty that costs a billion dollars nationwide."

PRICE OF VENGEANCE

The death penalty costs more than life in prison. Here's how much more. The numbers show the range of estimates.



TRIAL & SENTENCING: \$36,000-\$116,700

The average death penalty case requires more investigation, more pretrial motions, more expert witnesses and a longer jury selection process. A separate sentencing trial is also required — not required in nondeath cases.



MANDATORY STATE REVIEW: \$69,480-\$160,000

Every death sentence must be reviewed by the state Supreme Court — not required in non-death cases.



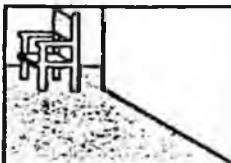
ADDITIONAL APPEALS: \$274,820-\$1 million-plus

After conviction is affirmed by the state Supreme Court, at least six levels of appeals remain open.



JAIL COSTS: \$37,600-\$312,600

Death Row requires extra guards for high security. The prison also feeds and houses inmates through their long appeals.



EXECUTION COSTS: \$845

Florida pays \$150 for the executioner, \$150 for a death suit, \$20 for the last meal and \$525 for burial.

By DAVE VON DREHLE
Herald Staff Writer

In 1974, the year President Nixon left the White House and Americans lined up at the gasoline pumps, Charles Proffitt waited for the executioner on Florida's Death Row. Proffitt had stabbed a sleeping man with a bread knife.

Nearby waited Howard Douglas, the killer a jury thought should live and a judge thought should die. Vernon Cooper, who may or may not have killed a policeman, waited, too.

The executioner never came. In fact, if Florida's Death Row Class of '74 held a reunion, two-thirds of the inmates could attend.

In bluntest terms, the death penalty was supposed to kill these men. It failed, as it has failed in 97 percent of America's death cases in the past 15 years.

Scholars, lawyers, judges — even pro-death penalty politicians — conclude that such a dramatic failure demands change: Fix it or get rid of it. They propose a bunch of solutions, most of which would do neither.

Proffitt, Douglas and Cooper were among the first killed, sentenced to die under new laws intended to make the death penalty rational and swift.

But just one in 30 people sentenced to death under those laws has been executed — leading some experts to argue that the laws aren't very rational. As for swift — consult the Class of '74.

America's death penalty enterprise has cost millions. Courts and legislatures have anguished uncounted hours. Capital punishment has driven an emotional wedge through the ranks of the law-abiding.

Now, attention is focused on a few highly publicized cases — Ted Bundy's, for example. Undoubtedly, much of an angry public would hail the execution of Bundy as the triumph of capital punishment — cost, delay and frustration be damned.

And yet, the truth is that the death penalty is a failure in the over-

'FIX IT OR GET RID OF IT'

Without dramatic change, America's capital punishment paralysis is going to get much worse. Here are the most discussed solutions.

whelming majority of cases. Almost everyone is dissatisfied, from advocates who demand vengeance to opponents who mourn each death.

Without dramatic change, America's capital punishment paralysis is going to get much worse. Here are the most discussed solutions:

Limit those eligible for execution

In most states, it is legal to execute juveniles and the mentally retarded.

But most Americans strongly oppose the idea of executing the mentally retarded. For example, a 1985 poll conducted in Florida showed eight of 10 people opposed. Americans also tend to oppose executions of juveniles — though many are undecided.

James Terry Roach was 17 and had an IQ of just 64 when he and two pals murdered a young couple in Columbia, South Carolina in 1976. A decade later, in 1986, Roach was electrocuted — despite pleas for mercy from Mother Teresa and the United Nations.

Increasingly, people argue that killers like Roach should not be executed. The Georgia Legislature recently outlawed executions of the retarded, and next year, the U.S. Supreme Court will take up the question of the death penalty for juveniles.

But eliminating juveniles wouldn't reduce the numbers noticeably: Only 32 of the more than 2,100 inmates on America's Death Rows were sentenced before their 18th birthday.

Joe Spicola, general counsel to Florida Gov. Bob Martinez, balks on principle. "A lot of our worst criminals are juveniles," he says. "You wouldn't believe some of the things they do."

No one knows how many condemned inmates are retarded. Some experts say hundreds. Even so, removing them from the process would not make a crucial difference to the nation's overloaded courts.

Executing the insane is a more difficult problem. Although laws forbid it, judges differ drastically on who's crazy and who isn't.

Anthony Antone, 66, his brain damaged by syphilis, did not meet the standard. He went to Florida's

electric chair in 1984 convinced that when the surge went through him, his spirit would emerge via his pineal gland, ascend through the nine layers of the Universe, and come to rest on a throne from which he would rule the world.

David Funchess, executed by Florida in 1986, was diagnosed as suffering an uncontrollable violent reaction to the stress of Vietnam.

Criminologists have argued for decades over what constitutes insanity. Even if they agreed, the cost of thousands of lengthy psychiatric evaluations would be staggering.

Take politics out of the system

Florida's governors have not recommended clemency in a capital case since 1982. Their explanation is that the appeals process has become so refined that no marginal case gets as far as a clemency hearing.

In fact, though, Bob Graham and Bob Martinez acknowledge they have had substantial "problems" with 10 percent to 20 percent of the cases they have reviewed. Rather than reducing these sentences to life in prison, they have pitched them into limbo by refusing to sign death warrants.

Critics say Florida's governors don't grant clemency because it is politically unpopular. They believe the political dangers are exaggerated.

One of America's most popular governors, New York's Mario Cuomo, has twice vetoed capital punishment bills. When advocates complain, Cuomo answers: "If you like capital punishment so much, don't vote for me." Cuomo won re-election in a landslide.

Larry Spalding, director of the state agency that handles Death Row appeals, says Florida could "dramatically improve" the situation in another way: Eliminate "judicial override."

In more than 20 percent of Flori-

IN KANSAS: Expense, waste killed death penalty measure

By DAVE VON DREHLE
Herald Staff Writer

Kansas state senators voted for the death penalty when they knew the governor would veto it. But when they got a new governor, pro-death penalty, the senators decided they had better take a hard look at the price tag.

What they saw made them change their minds.

Faced with a sagging farm economy, the conservative senators couldn't stomach the waste and expense of the modern-day American death penalty.

"I voted against it, and some people have tried to say I coddle

criminals. Well, I don't coddle criminals," draws Frank Gaines, a 16-year Senate veteran, one of the last of a dying breed of populist Kansas stump orators.

"It costs a lot more money to have capital punishment, and frankly, I think life in prison is just as tough a penalty," says Gaines. "You just get yourself a confining building and put all them animals in there together. If it was me, I'd rather be put out of my damn misery than have to live like that."

Senators who voted no had nightmares of political disaster. After all, the new governor, Mike Hayden, had made support of the

death penalty a major part of his campaign. And voters gave him a solid victory.

But the backlash hasn't come.

"I never received as much mail as I did on that issue — but it was thank-you mail. That's real unusual," says Senate President Ross Doyen, who changed his mind after years of supporting the death penalty. "I think a lot of people say they favor it, but when you pin 'em down on the specifics, they're not so sure."

The most eye-opening specific was the bottom line: \$11.5 million

for the first year of the death penalty alone, according to the Legislature's researchers.

"And those costs are deceptive," says researcher Mary Galligan. "They stack up over the years."

The Senate killed the death penalty initiative. Doyen, the Senate president, doesn't expect the issue to decide any future elections.

"Some people will be upset with you because you support it, and some will be upset because you don't. But it's no pendulum swinger."

"I think this issue is greatly overplayed."

Death, dollars and the scales of justice

Weighing the costs of capital punishment, life imprisonment

By DAN GROTHAUS
Post Reporter

What does capital punishment cost the state? The state doesn't know. Conventional criminal justice wisdom says it costs more to keep 'em than to kill 'em.

But in reality, it costs the state more to execute an inmate convicted of capital murder than it would cost to convict the same suspect of non-capital murder and lock him up — literally — for life.

Considering the current prison housing shortage, the state could build a new prison holding 2,250 inmates for what it has spent to place 212 inmates on death row since 1980 and keep them there.

Since executions began again in 1982, Texas has executed 19 inmates, more than any other state.

In Harris County alone, the pursuit of death sentences in the 245 capital murder trials held since 1980 represents approximately \$86.3 million, or about \$1 million per death row inmate sentenced in Harris County. Only 88 death sentences were granted in those 245 capital murder trials. If those cases had been prosecuted for non-capital murder and the 88 death row inmates were instead locked up until age 65, the cost would have been \$40,672,370. The difference would be \$45.6 million.

However, no one at the state or county level has ever attempted to determine the cost of capital punishment.

Management questions

"You're asking for basic management questions," answered Scott McCown, the Attorney General's law enforcement chief. "And the state gives us no money to provide answers like that. We're just inundated with (appellate) work."

However, the question of capital punishment's cost-effectiveness is gaining attention in other parts of the country. Last year the American Bar Association endorsed a research project that developed a formula to determine the actual cost of capital punishment.

Since 1978, the only three studies that assessed the cost of capital punishment concluded that the death penalty was not cost-effective. "The argument that the death penalty costs less to punish than does life imprisonment is erroneous," concluded a heavily documented article published in 1985 in the University of California-Davis Law Review.

Statewide, since 1980, only 40 percent (212) of the state's capital murder trials (519) have resulted in a death sentence.

Of those death sentences, the Court of Criminal Appeals, since 1972, has reversed 30 percent of all death penalty cases it has reviewed. That court currently has 122 cases pending on appeal.

Using Harris County cost figures, the state's pursuit of the death penalty has cost taxpayers \$183.2 million.

If these same suspects had been prosecuted for non-capital murder and placed in prison until their 65th birthday rather than sent to death row, it would have cost the state \$103.6 million, or \$79.6 million



less. The projected costs of building the new prison in Palestine, for 2,250 inmates, is \$67 million.

These figures were derived from computerized averages of capital murder trials in Harris County, actual cost figures from the Texas Department of Corrections and estimates of average appellate costs based on more than 30 interviews at the county, state and federal level.

In Harris County, the average capital murder trial costs \$300,125. The average appellate process and death row incarceration costs an additional \$176,305. The total: \$482,130.

Figuring the cost

The cost of capital punishment includes court costs, court-appointed attorneys' fees, average appellate costs at the coun-

ty, state and federal level, housing costs during the average six years spent on death row awaiting execution and the \$36.95 cost of the lethal injection.

The cost of capital punishment was compared to the county court administrator's average cost of a non-capital murder trial (where life is the maximum penalty) and TDC's costs of locking up someone until age 65. The average capital murder suspect in Texas is 27 at the time of conviction.

The average cost of a non-capital murder trial is \$22,640. The TDC says incarceration costs \$11,368 per inmate per year, or \$432,744 for 38 years. The total: \$455,384.

Harris County District Attorney John B. Holmes said he was "not surprised" at these cost figures or the results of this comprehensive yet unscientific study.

"But the cost doesn't enter into it when I look at pursuing the death penalty," Holmes said. "That should be a factor for the Legislature to question: Should we have a death penalty, or is it too costly a luxury?"

State Sen. Ray Farabee of Wichita Falls, who serves on the state affairs and criminal justice committees, said he supports the feelings of his constituents, no matter how much it costs the state to execute a convicted killer. "I'm not surprised at those figures (almost \$500,000 to gain and affirm a death sentence), but my constituency is overwhelmingly in favor of the death penalty," he said.

Referring to the statewide cost of capital punishment since 1980 compared to the cost of a new prison, he said, "That's an impressive comparison, but it still costs more to keep them in prison than execute them."

"It ought to be a capital offense to use that kind of logic," said Henry Schwarzschild, with the American Civil Liberties Union. "The notion that executing two people will save \$30,000 from next year's prison budget is laughable."

Favor executions

The vice chairman of the House committee on law enforcement also feels Texas want capital punishment no matter what the cost. State Rep. Allen Hightower of Huntsville, when told the cost of the state's 212 death sentences since 1980 would more than pay for the new prison being built in Palestine, said, "I think you'll find the people in Texas would still rather pursue the death penalty regardless of the cost."

There are currently 241 inmates awaiting execution on the state's death row, including 81 from Harris County.

TDC's death row population in Huntsville ranks second only to Florida. If Harris County were a state, its death row population would rank sixth in the nation.

Texas ranks first in modern-day executions with 19. Five of those executed inmates were convicted in Harris County.

The 1986 Texas Crime Poll, released Nov. 19 by the Criminal Justice Center at Sam Houston State University, showed that 85 percent of those questioned favored the death penalty. Nearly 75 percent, the survey stated, believe too few criminals have been executed.

Although popular support of the death penalty where capital punishment exists hasn't diminished, there is a small movement around the country to re-evaluate the actual cost of capital punishment.

One study, completed in 1982 by the New York State Defenders Association, was based on hypothetical figures drawn from proposed capital punishment legislation. The executive director of that association said the total costs may vary from state to state but the cost difference between pursuing a death or a life sentence remains the same.

"The cost ratio of 10 to 1 (\$500,000 to \$50,000) for a capital murder trial versus a non-capital murder trial is what we found

in New York and what we would expect to find anywhere else," said Johnathon Graves.

In the most recent study, Margot Garey concluded that the minimum cost of carrying out one execution was \$600,000.

"Although the cost of lifelong incarceration surely would be high, the cost of execution with constitutional protections is staggering," said Garey in a lengthy, heavily documented article, published July 1985 in the University of California-Davis Law Review. As a result of these questions being raised, the American Bar Association has decided it is time to provide factual answers in questions on the cost of capital punishment.

Research formula developed

Last year, a committee of prosecutors, defense attorneys and judges developed a research formula to determine the actual expense of seeking the death penalty.

"We did it because no one had ever done it before," said North Carolina Supreme Court's Chief Justice-elect James Exum. The conventional wisdom that a execution was ultimately less expensive than a life sentence has never been tested against an actual study, he said.

Exum hopes to use the formula next year to assess the cost of capital punishment in North Carolina.

The project's director, Richard Van Dulzend of the National Center for State Courts in Virginia, refused to speculate on what he expects will be "the actual cost of capital punishment."

District Attorney Holmes, who has sent more convicts to death row than any other prosecutor in the state, believes in the death penalty, although he is not a zealous proponent of executions.

Holmes said the death penalty serves as a deterrent, "even if it keeps just one guy from killing an innocent person."

But if there were such a thing as a life sentence without parole, Holmes believed most citizens and juries would prefer as a sentence life in prison rather than death sentences, "especially if it's not cheaper to kill them..."

However, Holmes believes there is another factor supporting the death penalty regardless of the cost: "It comforts people to know that retribution (the death penalty) is available. If we don't have that option, society may decide to scratch that itch itself, like Bernard Goetz did in the New York subway."

One last factor to be considered is the cost of irreversible error.

Following last Thursday's execution of a convicted killer out of Dallas, Attorney General Jim Mattox said he believes one of the 19 inmates executed since 1982 may have been wrongly sentenced to die. He refused to identify the dead man.

Mattox also told reporters there are "legitimate questions" involving the death sentences of two other unidentified inmates currently on death row.

"I think there are cases that it could be argued the punishment chosen was not the proper one, but I don't think I've seen any glaring abuse," Mattox said.

Death Penalty Costs Are Adding Millions to State Government Expenses Across the Nation

The following information is condensed from testimony by Professor David Gottlieb of the University of Kansas School of Law before the Kansas Legislature on Feb. 21, 1987. The Kansas Legislature decided against reinstating the death penalty in that state shortly thereafter.

While on the surface it might seem reasonable to assume that it is less expensive to execute a person than to imprison him for life, that assumption is wrong. As Supreme Court Justice Thurgood Marshall explained in *Furman v. Georgia* in 1972:

"As for the argument that it is cheaper to execute a capital offender than to imprison him for life, . . . it is simply incorrect. A disproportionate amount of money spent on prisons is attributable to death row. Condemned men are not productive members of the prison community, although they could be, and executions are expensive. Appeals are often automatic, and courts admittedly spend more time with death cases.

"At trial, the selection of jurors is likely to become a costly, time-consuming problem in a capital case, and defense counsel will reasonably exhaust every possible means to save his client from execution, no matter how long the trial takes.

"During the period between conviction and execution, there are an inordinate number of collateral attacks on the conviction and attempts to obtain executive clemency, all of which exhaust the time, money and effort of the state....

"When all is said and done, there can be no doubt that it costs more to execute a man than to keep him in prison for life."

Every study that has been done since Justice Marshall's writing supports his assertion. Capital cases are very

expensive. There are at least four reasons why this is so.

First, capital cases take far more time to litigate. Because the stakes are life and death, guilty pleas are a rarity. Virtually every case is taken to trial. For similar reasons, the defense contests every potential issue. Preparation for trial of a death penalty case is generally far more extensive, with two to five times as many pretrial motions. Jury selection takes longer, since the jury must be qualified not only to rule on the question of guilt, but also to decide on the death penalty. The trial itself takes up to three times as long as an ordinary first degree murder case, with far more extensive use of experts and investigators.

Second, death penalty cases require a second, separate trial on penalty if the jury returns a guilty verdict. There is no equivalent to this procedure in a regular murder case. The jury must sit for days, in some cases weeks, to hear evidence concerning whether the defendant should live or die. A host of expert witnesses may be required for this determination. As a result of this second phase, the time taken for a death penalty trial is further expanded, while a non-capital trial lasting even a week is fairly atypical, a typical death penalty case may last from three to eight weeks.

Third, if the jury imposes a death sentence, a long appeal process will begin. The process includes a direct appeal to the state supreme court, a petition for certiorari to the U.S. Supreme Court, post-conviction applications in state courts, appeals of those applications, post-conviction applications in federal courts, appeals of those applications in a U.S. Circuit Court of Appeals, second and sometimes third appeals to the U.S. Supreme Court, and finally a petition for state clemency. The process can take more than 10 years. The cost may be 10 times the ordinary murder conviction appeal. Obviously, a defense attorney will be obliged to pursue every possible legal means to avoid execution; unlike the normal case, there is no place for an attorney to recommend

to his client that he not take further appeals.

Fourth, during the time of these appeals, the defendant is housed on death row. Death row costs money to build and is more expensive to staff than an ordinary prison facility. The defendant is housed in a single cell and is unable to contribute to the prison by working in a prison industry.

Defense Costs at Trial

The Kansas public defenders' office estimated that the trial costs of defense services in capital cases could reach \$31,000 per case, more than six times that state's current first degree murder case defense costs. Their estimate was based on the assumption that the defense of a death penalty case would require 800 hours of attorney time for an average bill of \$26,000. They estimated expert services would cost \$3,000 per trial and investigative services \$2,000. They predicted 80 first degree murder cases per year for a total bill for trial-level defense services at \$2,480,000.

The Kansas projections were well below actual figures being spent in many other states. In 1983, the New Jersey public defenders' office budgeted \$100,000 for each capital case. The Ohio public defenders' office estimates the actual cost of capital cases (trial plus appeal) is \$60,000. The Kentucky public defenders' office estimates a typical capital case involves \$10,000 to \$15,000 in expert and investigative fees over and above those in a normal case. The National College of Criminal Defense estimates the investigation costs alone in a capital case at \$10,000 per case. A New York study puts the figure even higher, at \$40,000 for investigative costs.

Prosecution Costs

Just as the defense must file more pretrial motions in a capital case, the prosecution must answer them. The prosecutor, as well as the defense

(See Costs, page 4)

Costs (continued from page 3)

attorney, must be present for voir dire of the jury, for the expanded trial, and for the additional sentencing proceeding. Capital cases will take four times as long for prosecutors if they take four times as long for defense attorneys. Moreover, if the defense presents experts and uses investigators, there is no doubt the prosecutor will utilize such resources as well.

In most states, far more money already is spent on prosecution than is spent on defense. States have estimated the disparity between prosecution and defense resources as anywhere from two to one to as high as 10 to one. The most conservative estimate is from a recent study in Maryland, which found that prosecution and defense costs there were virtually identical. Taking the Maryland figure, Kansas estimated prosecution costs in that state would be \$2,500,000 per year.

Judicial Costs

There are at least three kinds of judicial costs in a trial: jury costs, security costs and the costs of the judges and court personnel.

The Kansas public defenders' office estimated a substantial increase in juror costs for capital trials. Figuring 80 first degree murder cases per year and three weeks longer per trial than in ordinary cases, they projected additional juror costs of \$168,000 per year. If the voir dire panel is 150 instead of 100 persons and voir dire lasts two days instead of one, the additional cost would be \$160,000. The total increase in jury costs would be \$328,000 per year.

Kansas did not develop figures for increased security costs of capital trials, but projected that such additional costs certainly would occur.

The increase in trial time required increases the judicial resources needed. In states where the judiciary chooses not the ask for new judges, the "costs" are borne

at the outset by all those litigants who do not have capital cases. These litigants can expect less time devoted to their cases and increased backlogs. But as backlogs mount, state legislatures eventually are forced to supply additional judges. It costs approximately \$115,000 to staff a courtroom full-time. If five additional judges are added in a state because of backlogs created by capital trials, the additional cost to the state would be \$575,000 per year.

Appellate Defense Costs

The Kansas public defenders' office estimated appellate defense cost increases (for the projected 80 cases) of \$135,000 per year in attorney fees and \$120,000 per year in additional transcript fees. Their estimate was based on a projection that of the 80 cases only 16 would actually result in death sentences and that one attorney could handle four death penalty direct appeals a year. The cost for four additional defense attorneys and one secretary was estimated at \$135,000.

In other states, the cost of each direct appeal has been estimated as an additional \$20,000 in Kentucky and California and up to \$50,000 in New Jersey. Moreover, the estimated amount of time reported in other states was up to six months of attorney time for each appeal.

Prosecution Appellate Costs

As with trial-level costs, the increase in prosecution costs for appeals is similar to the increase for the defense. Thus, Kansas estimated an increase of at least \$135,000 a year in prosecution costs based on 16 death penalty appeals in any one year.

Post-Conviction Costs

After completion of state direct appeals, a series of collateral appeals follows. Post-conviction application are made in state courts and those applications are appealed; post-conviction

applications are made in federal courts and those applications are appealed; final appeals are made to the U.S. Supreme Court and a final petition for state clemency follows. Additional defense and prosecution staff and time are required for these.

The State of Florida, which provides state funding for post conviction appeals, is spending more than \$1,000,000 per year for post-conviction defense alone.

Corrections Costs

Finally, a state with a death row is required to spend millions on housing those convicted of capital crimes. A death row capable of housing 100 inmates (Georgia currently has more than 100 inmates on death row) in maximum security confinement is more than \$7,500,000. According to former Kansas Secretary of Corrections Michael Barbara, construction costs for maximum security are greater than for medium security and run from \$75,000 to \$100,000 per bed. At that rate, a 100-person death row costs from \$7,500,000 to \$10,000,000. The State of Alaska predicted capital expenses of more than \$2,000,000 to construct a 20-person death row facility, a cost of more than \$100,000 per bed.

In addition to the costs of construction, a Department of Corrections is forced to incur additional staffing expenses. Studies have concluded that it costs far more to house an inmate in death row confinement than in the prison's general population. The costs reflect the need to house each inmate in an individual cell, to separate the inmate from the general population, to provide separate recreation, and to increase security. According to representatives of the Florida Clearinghouse on Criminal Justice, during the eight to 10 years involved in post-conviction review, an extra \$15,000 per inmate probably will be required.

Can State Afford Fourth Prosecution Of Spraggins?

BY KATIE WOOD
STAFF REPORTER

Meriwether County Commission Chairman Norman J. Rowe is not about to second-guess the judicial system.

Eddie Lee Spraggins, who is mentally retarded, has been sentenced to death three times for the 1977 rape and murder of Frances Coe in Meriwether County.

Those trials have proved costly to the west Georgia county of 21,000 residents, which not only has paid to prosecute Spraggins, but also has picked up the indigent inmate's defense tab.

Now that the Georgia Supreme Court has ordered a fourth trial in its Feb. 18 decision, *Spraggins v. State*, Case No. 44903, the county is facing what truly could be a \$64,000 question.

Has the time come for a plea bargain to avoid the expense of another trial?

"You ask me a loaded question there," Rowe responded.

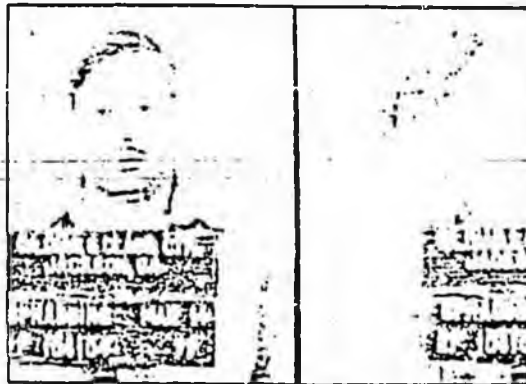
Rowe said that cost should not compromise justice and that his faith in the judicial system, despite the number of trials for Spraggins, has not been shaken.

"Not only in this case, in any case, a compromise should not be made. That's just not the way to operate," Rowe said. "In my opinion, why have a justice system that's equal and fair if you're going to compromise down the road?"

"I feel like a lot of times it's an unnecessary burden on the system, but the system does work. All in all, it works out for the best and right," Rowe said.

The burden the county has borne for the trial totals more than \$84,000 and the defense attorney's bill for Spraggins' appeal which led to the order for the fourth trial has not yet been submitted.

Meriwether County, with a \$4 million annual budget has spent more than \$84,000 on the *Spraggins* case, not including his lawyer's fees for a winning appeal and the cost of a fourth trial.



Defense counsel Michael Kennedy McIntyre, right, says he hopes prosecutors will agree to a plea bargain to avoid a fourth trial for his client, convicted murderer Eddie Lee Spraggins, left.

Meriwether County has an annual budget of just \$4 million, Rowe said. "It affects a small county with a small budget more than it would if we had a budget of \$100 million," Rowe said of the trial costs.

The first two trials—the second was a resentencing trial ordered by the Supreme Court in *Spraggins v. State*, 240 Ga. 759 (1978)—cost \$20,000, Rowe said.

Spraggins' third trial in November of 1986 came after his conviction was overturned by the federal courts—*Spraggins v. Francis*, Criminal Case No. C82-167N (N.D.Ga., Apr. 8, 1983), affirmed by the 11th U.S. Circuit Court of Appeals in *Francis v. Spraggins*, 720 F.2d 1190 (1983). The federal courts held that Spraggins' first attorney, the late A. Vernon Belcher, was ineffective in his assistance to the defendant.

The cost to Meriwether County of the third trial was \$64,887.76, Rowe said, of which the county was reimbursed \$4,000 by the state for the price of a transcript.

Of that amount, Spraggins' attorney, Atlanta sole practitioner Michael Kennedy

Comments on Death Penalty Defense Costs

EDITOR'S NOTE: On April 18, 1986 the Criminal Law Subcommittee of the Joint Interim Committee on Judiciary met in Eugene to hear testimony concerning indigent defense. Mike Hansen from the State Indigent Defense Board, Greg Veralrud from OCDLA, and Mike Phillips, an OCDLA member who tried the death penalty case of *State v. Bruce Lee Chaffin*, presented testimony. What follows are edited excerpts from the prepared comments of Mike Phillips concerning the cost of defending death penalty cases.



We are all aware that the American judicial system is an advocacy system. It is premised on the notion that the most reliable decisions, both legal and factual, come from skilled advocacy of opposing views. In any criminal case, not just death penalty cases, the failure to provide adequate counsel in a real sense, rather than merely a legal sense, has at least two social costs. First, there is the social cost in wrong factual decisions, which result in the conviction of the innocent. Second, there is a fiscal and social cost in procedural error, resulting in the cost of appeal, or post-conviction relief and retrial.

In death penalty cases, there is an additional societal interest in providing the accused adequate counsel. Under the Oregon death penalty scheme, guilt of aggravated murder begins, rather than ends, the inquiry with regard to whether death should be imposed. Therefore, citizens of the state have a right to assurance that before a person is killed in their name, both the guilt phase and the penalty phase are resolved as reliably as possible.

The present defense delivery system is being compensated by the state at the rate of about \$45 per compensable lawyer hour in addition to out-of-pocket expenses. For that expenditure the state obtains a fully operating law office complete with staff, equipment, physical plant, automobile, and generally a library. It also obtains the right to borrow from the lawyer in that it is required that certain costs (long distance phone calls, photocopies, travel expenses, photo development and enlargement, exhibit preparation, etc.) be advanced and reimbursed later. After payment of those matters, the attorney is compensated for their skill, training, and expenditure of time.

As a recent overhead cost survey demonstrates, overhead costs in running a law office typically range from \$23 to \$33 per hour. In many law offices the costs are well over \$40 per hour. By way of comparison, my overhead expense is at the low end of the range, at about \$23 per hour. To earn a pretax income comparable to either a senior prosecutor (as was assigned in the Chaffin case) I would need to charge and collect at a rate of about \$75 per hour. To earn a pretax income comparable to a district court judge, I would need to charge at a rate of about \$92 per hour.

It should be noted that the total cost of providing defense is for the most part determined reactively. That is, it is based upon choices made by prosecutors and judges, rather than the choice made by defense counsel. There are

more than sixty ways in which a person can commit aggravated murder, and thus be subjected to the death penalty. The choice of a prosecutor to charge a particular murder as a death penalty case, rather than a non-death case, dramatically affects the total defense cost. Similarly, the choice to proceed to trial and seek the death penalty, rather than resolve the case by a guilty plea resulting in life imprisonment, also affects that cost.

The decision of the judge about what sorts of evidence are admissible affects the cost of determining the sorts of things that must be investigated. Since the Oregon death penalty scheme requires that as soon as practicable after a determination of guilt, the penalty phase hearing be held before the same jury, counsel must be thoroughly prepared to try both the guilt and the penalty phase before the trial ever commences. In *State v. Chaffin*, more than 600 hours, or more than one half a year's billable hours, were expended on defense. In *State v. Quinn*, the first case tried under the previous death penalty scheme, 900 hours were expended. In *State v. Klinefelter*, the other case tried through the penalty phase under the statute, about 550 hours were expended.

Back in 1974, when I defended my first client accused of murder, the trial court judges and the chief justice authorized defense compensation at the rate of at least \$50 per hour. Not only has there not been an adjustment for inflation during the past ten years, there has actually been a ten per cent cut of this rate.

In addition to the compensated time, an attorney in a death penalty case which results in a sentence of death, is faced with the certainty that one of the defendant's latter steps will be to seek judicial review of the adequacy of representation. This will involve a donation as a state's witness of many hours in reconstructing each decision that was made which will be analysed with the benefit of hindsight that the defense was ultimately unsuccessful.

These comments are made with the hope that the Legislature, when confronted with requests for funding for death penalty defense by the State Indigent Defense Board, will recognize those requests as being real, necessary, and reasonable compensation rather than as a request to provide some sort of windfall to defense lawyers.

✓ Costs high in pursuing death penalty

Hard choice: Reduce charge
or commit money, resources

By Lori Montgomery

OF THE TIMES HERALD STAFF

The State of Texas has been trying to kill Ronald "Buffalo" Chambers since 1975. Twice sentenced to death for the fatal beating of a Texas Tech student in Dallas, Chambers today is one step away from winning a third trial.

Over 13 years Chambers, 35, has traveled a circuitous route through the criminal justice system: His case has been considered by no less than 10 judges and two juries at an estimated cost to taxpayers of \$1.5 million. The state has spent at least \$130,000 supporting Chambers, who beat 22-year-old Michael McMahan in the head with a shotgun.

The case is not unusual. With an intricate appeals system at their disposal, Death Row inmates can easily prolong their lives, or dodge the executioner altogether. That fact, plus an explosion in the number of local capital-murder indictments, increasingly forces Dallas County prosecutors to make a tough choice — reduce charges or commit substantial money and resources to seek capital punishment.

"There are a lot of them that need to die," said First Assistant District Attorney Norm Kinne, who has final review of all capital cases. "But we have to make a decision about whether this is the kind of case we want to put all our efforts into, to spend that kind of money and time trying."

Of 34 men sentenced to die by Dallas County juries since 1974, only two have been executed.

Twenty inmates are still waging expensive legal fights for their lives; 11 have won reduced sentences. One inmate was slain in prison.

Please see DEATH/A-20

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DEATH

From A-1

Because a death sentence rarely leads to execution, prosecutors carefully pick their shots. Twelve capital murder cases have been handled by district attorneys this year, but only four have been tagged for the death penalty. Five defendants have been or will be tried on lesser charges.

Three defendants were allowed to plea bargain for their lives. Rodney Dewayne Davis, 25, received a life sentence for raping and smothering a 3-year-old girl. Gary Ray Jackson, 29, fatally shot and beat a 65-year-old woman while burglarizing her home. He received a 55-year sentence. Anthony Carter, 19, shot and killed a Fair Park grocer and received a 60-year sentence.

All three men will be eligible for parole in 15 years.

The four death penalty cases involve the slaying of a woman and her two children, the fatal beating of a prominent North Dallas businessman during a burglary, and the shooting deaths of two Dallas police officers in separate incidents.

In deciding whether to pursue the death penalty, prosecutors weigh several elements: the facts of the case, the strength of the evidence and the records of the defendant and victim. Prosecutors also must be able to convince a jury that the defendant killed deliberately and is capable of future violent acts.

Unless a case is strong on all points — "pretty much open-and-shut" as Kinne put it — prosecutors will forgo the death penalty, reasoning the sentence would be rejected by a jury or overturned on appeal. Although Davis was indicted for a capital crime — murder during the commission of another felony, rape — prosecutors were hard-pressed to prove he would commit future acts of violence because he had no previous criminal record.

"If there's a question, we're not going to waste the taxpayers' money going for death," Kinne said. "Since the trial is long and expensive we only try those cases for death that we intend to get death on."

Defense attorneys in Texas and elsewhere have long argued that no death penalty case — even those that prosecutors call sure bets — is worth the cost to the public. Studies in New York and California have concluded that the pursuit of capital punishment can cost about three times

more than locking up a killer for life.

The reason is that defendants who face execution are entitled an array of constitutional protections that apply before the trial begins and long after conviction.

'We're not going to waste the taxpayers' money going for death.'

Norm Kinne, prosecutor

The average murder trial in Dallas County, for example, lasts less than a week. When prosecutors seek the death penalty, jury selection often takes a month and testimony can last an additional two weeks or more.

The initial trial, considering the cost of investigators, prosecutors, defense attorneys, expert witnesses and court staff, can cost as much as \$1.5 million, according to a 1982 study by the New York State Defenders Association. Texas defense attorneys say the price typically ranges from \$400,000 to \$800,000, depending on the length of the trial.

That's just the first round. The complicated appeals process begins with automatic review by the Texas Court of Criminal Appeals, which can take as long as three years to rule. Eight levels of appeal can follow, including petitions to federal district and appeals courts and three separate trips to the U.S. Supreme Court.

Nearly all defense costs after first appeal are borne by the lawyers, who generally volunteer their time. But taxpayers pay hundreds of thousands of dollars for prosecutors and the courts. The typical death penalty case, considering the first trial and appeals, costs \$1 million or more, attorneys say.

Many defendants, however, are able to keep the meter running. Some continue to appeal; those who win new trials can start the whole process over again.

Appeals judges have granted retrials in a third of the 34 Dallas County cases since 1974, the year the Texas Legislature reinstated capital punishment. Some defendants successfully challenged jury selection procedures by prosecutors; others argued that their

rights were violated during examination by Dallas County psychiatrist James Grigson, a frequent state witness in capital cases.

Both issues figured in Chambers' case. In 1984, the Texas Court of Criminal Appeals ruled that Chambers was deprived of his constitutional right against self-incrimination during his interview with Grigson.

Chambers won a new trial but again was sentenced to die. He now says that the prosecution intentionally excluded blacks from the jury in his second trial. This month visiting Judge Tom Ryan agreed and recommended that the Texas appeals court grant Chambers a third trial.

Prosecutors and some defense attorneys predict there will be fewer retrials in the future. As the courts settle challenges to the death-penalty law, prosecutors make fewer errors in jury selection and during trials, giving defense attorneys fewer targets.

"Since 1980 or 1981, the rate of reversal has been much less. There aren't that many doors open any more," said Mark Stevens, a San Antonio defense attorney.

Stevens, however, might have found one. The U.S. Supreme Court earlier this year heard his arguments on behalf of Death Row inmate Donald Geri Franklin, who was convicted of killing a San Antonio nurse in 1975 and retried and convicted in 1982.

At issue is whether defense attorneys should be allowed during the penalty phase of a trial to ask jurors to consider "mitigating circumstances." Franklin argues that the judge in his second trial did not instruct jurors to consider his good behavior in prison when assessing the danger he posed in the future.

Judges have halted executions in Texas pending the outcome. If the Supreme Court rules in Franklin's favor, criminal attorneys say, the decision could launch new appeals by many of the state's 270 condemned inmates.

And that could further add to the cost of justice.

"As long as lawyers have minds, there will be new issues," said Houston defense attorney Carolyn Garcia. "As long as the state wants to kill people, there will be people questioning whether it's the right thing to do."

Kelly B. Szymore of the Times Herald Staff contributed to this story.

A MATTER OF LIFE AND DEATH

Capital cases clog courts, can cost \$5 million and up

Continued from page A1

To help ease the financial burden created by death penalty trials, California spends \$10 million a year reimbursing counties for expert witnesses, investigators and other death-penalty defense costs, plus \$2 million more to help pay for the overall cost of murder trials in smaller counties.

But despite this infusion of state funds, many financially strapped smaller counties still can't afford to prosecute complicated death-penalty cases, district attorneys said.

Some small counties have only one prosecutor with little or no experience in death-penalty cases; no investigators; a single Superior Court judge; and not enough unbiased people to qualify as potential jurors.

Other criminal cases are delayed for years while death-penalty cases are decided. Ironically, Sierra County has had to cut police services to pick up the tab.

For prosecutors, taking on a death-penalty case is a high-stakes gamble with low odds of success. Only one in 10 capital cases filed in California results in a death verdict, according to the California Appellate Project.

Every death verdict is automatically appealed to the California Supreme Court, which now spends more than half its time reviewing death cases, experts noted. Nearly 10 death cases are currently under review by the high court, which gets about 30 new such cases each year.

The current California Supreme Court, headed by Chief Justice Martinez, is deciding death cases twice the rate of the previous court headed by Rose Bird.

But even at the current court's accelerated pace, it will be impossible to erase the backlog. The Supreme Court, which has more than 400 criminal and civil cases pending, is viewing ways to speed up its work. A proposal is to hire a pool of lawyers to work exclusively on death-penalty cases for the court.

Only 14 inmates on San Quentin's roll now have had their verdicts affirmed by the California Supreme Court. Those cases have kicked up the courts for an average of

to steal their car for a robbery.

The case "symbolizes the people's efforts over the last 15 years to establish a working, valid capital-punishment law," said Deputy Attorney General Michael Wellington. "We don't have an execution date yet. I can't even say we've got an execution date in sight."

Defenders must be paid

Prosecutors and defense attorneys alike agree that California's death-penalty law, as a practical matter, doesn't work.

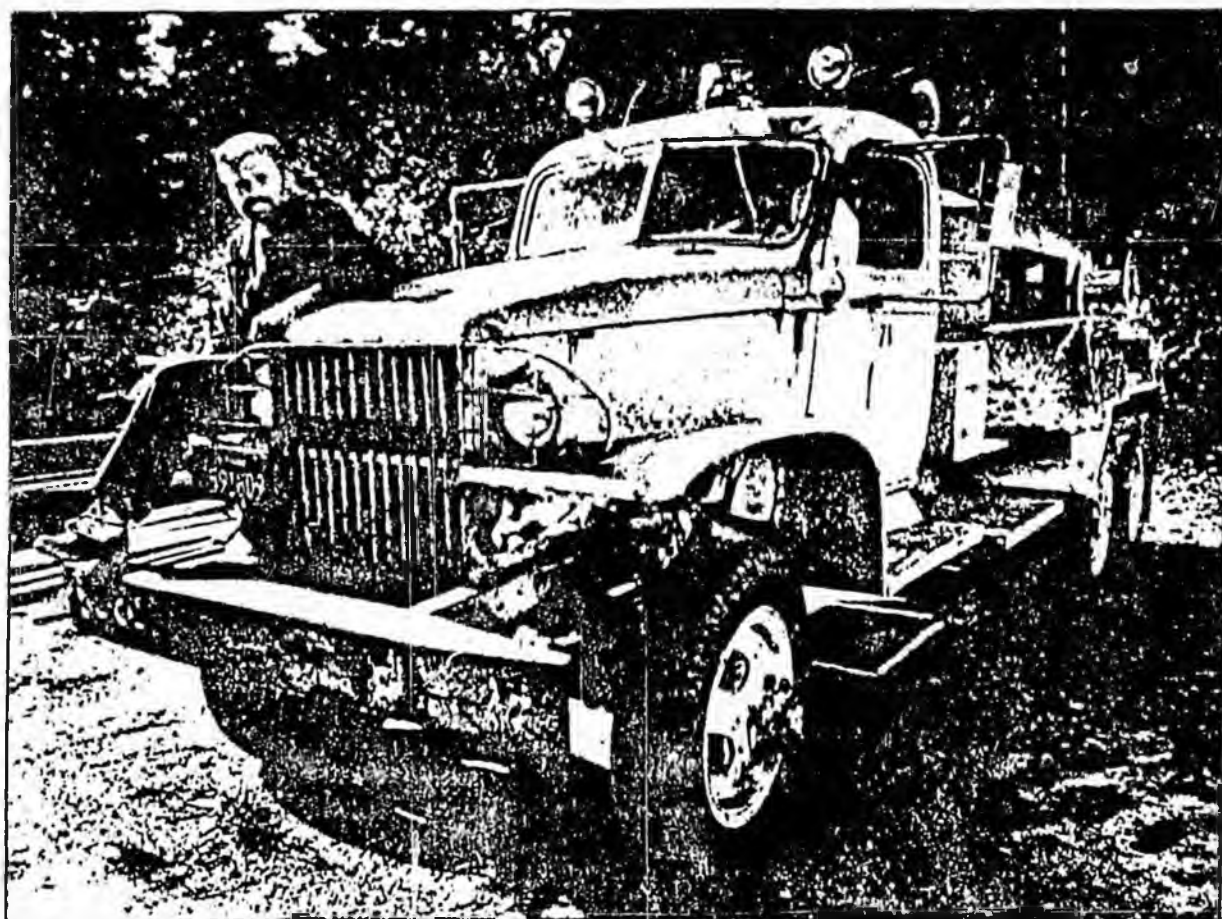
"You're not getting your money's worth," said Michael Millman, director of the California Appellate Project. "It's true that the money could be spent on AIDS research or a lot of things, but the worst thing about capital punishment is that it's an irrelevant diversion from the problems of society. The ethos is, we will feel better if we kill the SOB rather than taking the money and using it to prevent the causes of violent crime."

Chief Assistant Attorney General White also expressed dissatisfaction with the capital-punishment system. "We have the worst of all possible worlds: a society that has the death penalty as a social and moral judgment and then doesn't have the character to carry it out," he said.

Wellington favors a law that would force a defendant to make all his legal challenges at trial instead of dragging out the issues through a seemingly endless series of appeals the way Harris did. "If you give them (Harris' attorneys) nine more years, they'll think up other issues. There's never going to be a time that imaginative defense counsel runs out of issues," said Wellington.

Gov. Deukmejian and many prosecutors claim that the removal of Chief Justice Rose Bird and Associate Justices Cruz Reynoso and Joseph Grodin in 1988 will speed a condemned man's trip to the gas chamber. But even Southern states, which have managed to sufficiently speed up the legal process so that executions now take place regularly, require an average of seven years to execute someone from the date of his arrest, Millman said.

Because "death is a different kind



By Michael Williamson

Among Sierra County chief mechanic Richard Blankenbiller's responsibilities is to maintain a 1943 compressor truck. There is no money to replace it with a newer model.

Sierra County robs police to pay lawyers

By Stephen Magagnoli
Ber Staff Writer

DOWNIEVILLE — Sierra County, hit by its worst murder wave this century, is trying to put five men to death.

But while this remote, Northern California county spends millions of dollars on several lengthy death-penalty trials, it can't afford to fill vacant positions in its Sheriff's Department — and the county's crime rate keeps rising.

The little county, which has a single prosecutor and no investigators, has been forced to hire an outside prosecutor to handle one of the murder cases. The county has had to spend \$291,000 to hire outside county counsel because District Attorney James Reichle, who used to serve as county counsel too, now devotes nearly all his

homicide cases," said Board of Supervisors Chairman Craig McHenry. "There's no way we can afford these cases," he said, even though the state reimburses small counties up to 80 percent of the cost of homicide cases.

All of Sierra County's death-penalty cases are being tried elsewhere, because the county population of only 3,500 makes it impossible to assemble enough jurors who haven't learned about the murders through the media.

What really rankles local officials is the fact that only one of the murders they are forced to prosecute involved Sierra County residents. "They (the suspects) just happened to take the wrong damn exit off the freeway," said District Attorney Reichle. "If they'd taken the next exit, they'd be tried in Nevada County right now."

them to and from jails in neighboring counties, some more than 100 miles away.

Since Sierra County's staggering death-penalty bills are largely the result of bad luck and outside traffic, Supervisors McHenry and Jerome McCaffrey tried to pass a resolution last year refusing to prosecute murders committed by out-of-county residents.

"These acts have been committed in largely recreational areas used by much of the state of California," McHenry said. "We were going to inform the state that we weren't going to prosecute, that it was a state problem and the attorney general's office should come in and take over."

The resolution was defeated 3-2, McHenry said, because the other supervisors were afraid that an alleged criminal wouldn't be prosecuted.

each, according to information compiled by San Quentin information officer Dave Langerman, and the matter is still running.

State officials said the case of Earl Lloyd Jackson, convicted of murdering two elderly Los Angeles women in 1977, has already cost more than \$5 million.

"The cost of a death-penalty case could range from \$750,000 to — the limit," said Deputy Attorney General Michael Wellington. His brother, Chief Assistant Attorney General Steve White, estimated that each death-penalty case has cost at least \$1 million to prosecute so far at both the trial and appellate levels.

The prosecution of Robert Alton Harris — a seemingly open-and-shut case that included six confessions — was dragged through the court system for 10 years. Harris, considered the most likely person to be executed next in California, was convicted in 1979 of murdering two youngsters

death-penalty cases must be tried differently from other murder cases. In California, defendants of capital cases are entitled to not one but two defense attorneys at public expense during the trial stage. Taxpayers also pay for psychiatrists, forensic specialists and other expert witnesses for the defense.

San Francisco Public Defender Jeff Brown said a typical death-penalty defense costs an additional \$25,000-\$30,000 for a special investigation of the case; and \$15,000 for psychiatrists or other expert witnesses.

Months — and sometimes years — go by before the actual trial starts. Potential jurors must be questioned individually to probe their personal biases and feelings on capital punishment. Jury selection routinely takes six weeks or more.

Death-penalty trials are often stalled by dozens of pre-trial maneuvers: a change of venue because of

state had to pass emergency legislation to pick up most of the tab.

If the expenses keep piling up, Sierra County could be broke by May, said the county's auditor, Don Hemphill. The county is currently providing health services and police protection at "a minimal level," he said, and morale has hit bottom because the county's 100 employees — already among the lowest-paid in the state — weren't even granted cost-of-living raises last year.

"Our general-fund revenues (from local taxes) amount to about \$2 million a year, and we're spending in excess of \$1.2 million a year just on

drugs with cash in hand and then with cash over and dumped the bodies here," Reichle said.

"If we didn't have to pay \$500,000 a pop for Sacramento's murders, I'd have an investigator and the sheriff would have a couple of extra deputies and we could do some lasting good for Sierra County law enforcement," said Reichle. "The sewage system at the courthouse is failing, a bridge collapsed, there's no county library, no county park, and we have volunteer fire and volunteer search and rescue."

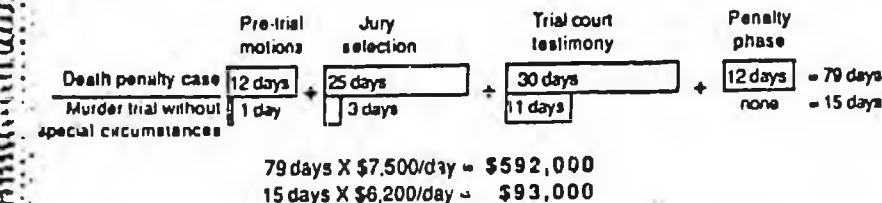
Meanwhile, the county jail can't hold all the defendants, so sheriff's deputies have been forced to spend valuable time transporting

suspects down to the Capitol and handcuff them to the front door. We won't be able to get the state's help until we actually put the criminals on their doorstep."

Sheriff's Sgt. Lee Adams is fixing up the gallows in Downieville these days. It's been 103 years since a body swung from it, and Adams is restoring the green scaffold to preserve a piece of California's frontier history. But he understands the public's frustration with the expense and time it takes to carry out the death penalty: "Somewhere along the line, things seem to have gotten lost." The gallows, he said, "certainly reflects simpler times."

Legal time is money

(Average trial times, not including appeals)



Sources: 1985 U.C. Davis Law Review study; 1986-87 study by the Administrative Office of the Courts and interviews with defense attorneys and prosecutors

See graphic

Death-penalty trials take an average of two years from arraignment to verdict — three times longer than other murder cases, The Bee found. And the longer the case, the more margin for error and grounds for appeal, said prosecutors and defense lawyers.

Death-penalty trials cost an average of six times more than other murder trials — \$592,500 compared to \$93,000, based on an analysis of average daily court costs.

There are 328 capital trials in progress in California. If the cases follow the normal course, approximately 175 of them will be decided by juries, 70 will result in life in prison or death for the defendant and 35 defendants will wind up on death row.

Since death-penalty trials cost more and last longer than standard murder cases — about \$7,500 a day for 79 days instead of \$6,200 a day for 15 days for a standard murder case — California taxpayers spend an extra \$78 million a year on death-penalty trials.

Additionally, each year the state spends an extra \$2.8 million for special housing of death-row inmates,

another \$1.8 million to prosecute death-row inmates on appeal, and yet another \$7.8 million defending condemned prisoners on appeal.

Add it all up and you get \$90 million a year spent on the death penalty.

This doesn't include the cost of federal appeals. "The first federal appeal and the first habeas corpus petition consume an average of 1,000 hours of attorney time, or \$75,000 to the taxpayers," Millman said.

No one knows how many people will be executed in California in a given year, but when the state was executing inmates, it averaged about six per year.

In Texas, where more murderers are executed than in any other state, about five inmates have been given lethal injection each year since 1982.

Thus, if California continues as expected to pursue the death penalty at a cost of \$90 million per year — and if the state moves at its historical rate of six per year — it will cost taxpayers about \$15 million per execution.

blanket pre-trial publicity; a community attitude survey; suppression of evidence or a confession; requests for release of additional evidence or exclusion of witnesses; motions for a dismissal or a new trial.

Michael Burt, a San Francisco deputy public defender, said defense attorneys and prosecutors battled

seven months over one pre-trial motion concerning the admissibility of bloodstained evidence during a recent trial in San Diego.

Once a defendant is found guilty of murder, a special penalty trial is held to decide whether to impose death or life without possibility of parole.

The added time and expense of capital cases are enough to discourage some small counties from seeking the death penalty, said Assistant Attorney General White.

"In talking to district attorneys, some of them have taken the view that it is so expensive and so unlikely to get a death judgment that they will simply seek life imprisonment without possibility of parole," White said.

Marin County recently signed a novel agreement with six defense attorneys hired to represent three San Quentin inmates accused of conspiring to murder a correctional officer — a crime punishable by death. Each attorney will receive a flat fee of \$225,000, said court administrator Howard Hanson.

Hanson acknowledged that the cap on attorney fees could jeopardize the defendants' right to a fair trial if the trial costs far exceed the cap. But Hanson said that the defendants agreed to the contract. If the trial lasts two years as projected, he said, defense attorneys will receive the equivalent of \$75 an hour.

But San Francisco Deputy Public Defender Burt said that if the trial lasts longer than expected, "they could end up making \$2.25 an hour."

The real battle is joined before the state Supreme Court, which routinely takes five years to uphold or overturn a death verdict. By then, virtually no defendants can afford their own lawyer, so the court assigns them a new attorney, at taxpayers' expense. A typical death-penalty appeal consumes about 1,000 attorney hours a year — about \$62,000 — according to the California Judicial Council.

Other states have decided that the expense of the death penalty outweighs any benefits. Last year, the Kansas Legislature voted down the death penalty — even though Gov.

Mike Hayden campaigned on a promise to bring it back and polls indicated that 80 percent of the population supports it.

A coalition of Kansas death-penalty opponents estimated that capital punishment would cost Kansas taxpayers in excess of \$50 million by the time a 100-inmate death row had been built and the first person was executed.

Imperial County's lesson

In California, county officials who balk at the high price of capital trials could learn a lesson from Imperial County, which in 1982 refused to pay \$13,000 for the defense of a man it was trying to send to the gas chamber.

Instead of saving money, Imperial County ended up spending \$500,000, only to see accused murderer Robert "King Kong" Corenevsky go free more than five years after he was arrested and charged with the murder and robbery of a Manhattan Beach jeweler in a Calexico motel room.

The county budget officer also spent three days in jail for refusing to pay the bill.

Imperial County supervisors argued at the time that the Corenevsky case could bankrupt the county and said they'd "be damned" if they'd pay for a murderer's defense. (Corenevsky's past included a murder conviction in Mexico).

This brazen policy ended up cost-

ing Imperial a bundle. Superior Court Judge William Lehnhardt reduced the charges and took away the county's right to seek the death penalty — which meant the state no longer had to reimburse the county for defense costs.

The case went all the way to the California Supreme Court, which threatened to send troops to the county auditor's office to collect.

Corenevsky's lawyer, Stephen Feldman, said the case "is an allegory for what happens in a system that doesn't fairly deliver services to a man the state is trying to kill. This innocent man could have been killed because the state illegally refused to pay for his defense."

County Supervisor James Bucher, a former judge, agreed that the death-penalty system is a failure, but for different reasons: "I don't believe justice has much to do with the court system any more; it's all dollars and cents and gamesmanship. There should be limits on what people are expected to pay for these bastards who get themselves in trouble. We pay for his doctors, his housing, his attorney and he's a goddamned convicted killer."

Corenevsky commented, "If you believe they should have the death penalty in California, you believe in Santa Claus. It's never gonna happen because it's never gonna be fair. Jesus Christ himself couldn't have had a fair trial in Imperial County."

THE SERIES

SUNDAY: California will soon send a man, most likely Robert Alton Harris, to the gas chamber. What are the implications?

TODAY: If California abolished the death penalty, taxpayers could save \$90 million a year, according to figures compiled by The Bee.

TUESDAY: What are the moral arguments for and against the death penalty? And what do the victims' families have to say?

Execution Does Not Pay

Barbarism Aside, the Death Penalty Simply Isn't Cost Efficient

The Washington Post

Sunday, February 28, 1988

By Jonathan E. Grules

FIFTEEN years ago the Supreme Court ruled that the death penalty as then applied in the United States was unconstitutional (*Furman v. Georgia*). One brief sentence in Thurgood Marshall's opinion, overlooked by many, noted that "when all is said and done, there can be no doubt that it costs more to execute a man than to keep him in prison for life."

Today, there are more than 1,900 men, women and children as young as 16 on death row, and American policy makers, political officials and criminal justice experts are beginning to regret skipping so lightly over Justice Marshall's comment.

In 1982, my office conducted a national survey to determine the cost of capital litigation. We examined the nature of capital cases, identified 11 levels of review and defined a minimum of 144 "cost centers" that determine the total price-tag of capital litigation. Based on proposed but never enacted legislation to reinstate the death penalty in New York, and using conservative estimates, we projected the potential costs of litigating a model New York capital case across just the first three levels of review—the trial and penalty phase, the appeal to the New York State Court of Appeals, and subsequent review in the United States Supreme Court. The cost of that limited process: \$1.8 million per case. The cost of life imprisonment for 40 years: \$602,000.

Since then, many more states have looked at the cost of capital punishment, including Maryland, Alaska, Hawaii, Vermont, Texas, Florida, Kansas, Ohio and New Jersey. Some authorities have estimated that capital cases cost 10 times as much as non-

capital cases. A Pennsylvania journalist has estimated the cost of a single capital case at \$5 to \$7 million. There is no longer any doubt that criminal-justice systems with a death penalty cost inordinately more to maintain and expand than criminal-justice systems without a death penalty.

Before policy can change, however, the American people need to understand why capital cases cost more than non-capital cases, why there is no chance that costs can be reduced, and why we can expect that they will exponentially increase yearly until the death penalty is abolished.

Capital cases are more expensive than non-capital cases essentially for three reasons: they are *practically* different than non-capital cases; they are *legally* different; and they are *reviewed* more thoroughly.

■ *The practical difference.* For more than a century, capital cases have been treated differently from non-capital cases. They take longer. Frequently more than one attorney is appointed for a capital defendant. Because life is at stake, trial judges provide more latitude and appeal judges search more carefully for reversible error. (The reversal rate is about 50 percent for death cases and about 7 percent for non-capital cases.) Because the decision to kill is unpleasant, responsibility in capital cases is often diffused—which makes for longer trials, lengthy delays and frequent reversals.

■ *The legal difference.* Ten years ago, the Supreme Court made it clear that heightened standards of due process must be applied to death penalty cases. Consequently, a new jurisprudence—a "super due process"—has evolved governing the trial and appeal of such cases. The investigation is more extensive, the number of pre-

trial proceedings is substantially increased, and jury selection takes longer. After conviction, a separate "penalty phase" is conducted to determine the sentence. Because mandatory death sentences have been ruled unconstitutional, the sentencing jury must consider a defendant's individual characteristics. Preparation for this phase is extensive; in essence, it is a trial for life. The defense commonly tries to talk with as many of the defendant's friends, associates, teachers and co-workers as it can reach, to trace his life history, to visit all of the places he has lived and to vigorously pursue all leads in the search for mitigating evidence.

■ *Longer review.* Any defendant convicted in a state court has the right to initiate judicial review at 11 different levels. However, the Supreme Court's ruling that poor people are entitled to appointed counsel applies to only the first two stages; representation in the remaining nine stages essentially depends on volunteer counsel. Ordinarily, lawyers do not volunteer to represent an indigent robber, burglar or non-capital murderer at those stages, but they routinely do so for death-penalty defendants. While these lawyers are not paid, the final stages of a capital case can last a decade or more and generate enormous litigation costs. Police officers and witnesses are brought in. State attorneys general are called upon to respond. Judges must preside. Court time is used up. The United States Court of Appeals for the 11th Circuit in Atlanta, deep in the heart of the nation's death-penalty belt, complains that more than 30 percent of its docket is tied up with death-penalty cases. And all the while, the prisoner is held in a costly high-security death-row cell year after year.

What, then, is the answer? Short-

circuit the process and step up the pace of executions? Most Americans recognize that our sophisticated appellate-review process, though seemingly laborious, is a fundamental part of our legal system and protects our citizens against government error and abuse. Even with 11 levels of review, we still convict and condemn the innocent. A study in the November 1987 Stanford Law Review cites more than 100 examples of innocent people sentenced to death since 1900, of whom 23 were executed.

Nor is it reasonable to expect a significantly quickened pace of execution. Since 1977, when we reintroduced the idea of slaying citizens to stop crime, there have been more than 200,000 homicides in the United States, about 2,000 death sentences but fewer than 100 executions. Not even death-penalty proponents believe the American people would tolerate the wave of executions needed to empty death row and keep it that way.

Since both the Constitution and a permanent death-row population are likely to be with us for some time, the cost of the death penalty is certain to grow at an ever-greater rate. The numbers of capitally-sentenced defendants will continue to increase. As cases are appealed, new issues decided in favor of death-penalty defendants will affect all cases not yet final. As issues increase in scope and complexity, costs will escalate. And these factors will combine with the high costs of death-row construction and security.

The cost of the death penalty is emerging as one of our most serious public policy questions. In Kansas last year, the newly-elected governor promised Kansans a death penalty while simultaneously calling for bud-

get cuts for each state agency. The high cost of capital litigation, the establishment of a death row, maintenance of death-row prisoners, the high costs and inordinate delays of the appellate process were debated not only by politicians but by university professors, governmental research units and by Kansas citizens. Opponents cited racial discrimination in the conduct of capital punishment, its lack of deterrence, its inability to stop crime, its potential for erroneous convictions, its immorality and—not least—its high cost. In the end, massive numbers of citizens declared "no" to the reintroduction of the capital sanction and the death penalty was defeated.

Other Americans will eventually realize, as did the citizens of Kansas, that there is not an endless supply of money for the criminal-justice system. Policy choices need to be made. From a conservative cost-benefit analysis, we must declare the death penalty an inordinate waste of resources that deprives our citizens of adequate police protection and reconciliation systems to make both victims and offenders whole.

As the New Jersey public defender budgets more than \$100,000 per capital case and anticipates total defense costs in the millions, as the federal judiciary bemoans the resource drain caused by capital litigation and as California prosecutors declare cases non-capital at the outset to save money, the dollars and cents of the death penalty may in fact be the clarion call that sounds the defeat of this archaic and brutal policy.

Jonathan Grules is executive director of the New York State Defenders Association.

SPRAGGINS. FROM PAGE 1

McIntyre, said his fees ran \$19,000 from his pretrial appointment through the trial. The third trial was more expensive than the first two, McIntyre said, not only because it took longer, but also because the jurors were selected from a nearby county as a result of the judge's ruling on a change-of-venue motion.

McIntyre has not submitted his bill for the expense of Spraggins' appeal to the Supreme Court; that appeal resulted in the Feb. 18 ruling overturning the 1986 murder conviction due to an error the judge made charging the jury on the effects of a guilty-but-mentally-ill verdict. The judge's error, the Supreme Court held, may have caused the jury to render a guilty verdict. (See the Feb. 26, 1988, issue of the Daily Report.)

The Georgia attorney general's office represents the state in death-penalty appeals, but Attorney General Michael J. Bowers said he could not accurately estimate the amount spent on one case.

Bowers said the division which handles those cases is his office's largest, with a \$750,000 annual operating budget. He said there are eight attorneys, two paralegals and four secretaries in the division, which handles about 110 cases per year.

As for Meriwether County's costs, Rowe said he was unable to estimate what the cost of a fourth trial would be.

McIntyre, meanwhile, said he is hopeful that a fourth trial will not be necessary.

The defense attorney said he would prefer a plea bargain which would spare Spraggins the possibility of an unprecedented fourth death sentence.

District Attorney William G. Hamrick Jr. of the Coweta Judicial Circuit could not be reached for comment on the possibility of a trial, but, technically, the Supreme Court appeal is not over. The state attorney general's office filed a petition last Friday with the Supreme Court, asking it to reconsider its decision.

Patsy Morris, who monitors death-penalty appeals for the American Civil Liberties Union of Georgia, said three other Georgia death-row inmates have been sentenced to death three times. The death sentence in the case of one of those inmates, Andrew Legare, has been reversed, she said. No new trial has been scheduled, Morris said, apparently because Legare was 17 years old at the time he committed the crime. Pending before the U.S. Supreme Court is *Thompson v. Oklahoma*, a case to determine the constitutionality of the execution of juvenile offenders.

"Of all people to have four trials, Ed- [Spraggins] is the most pathetic one," said McIntyre, who has maintained that his client is mentally retarded.

During Spraggins' third trial, McIntyre sought the guilty-but-mentally-ill charge because that provision in the law, OCGA §17-7-131 (a)(2), contains a definition of mental retardation.

Spraggins' mental retardation was formally raised as a defense for the first time in his third trial.

The issue was touched upon in Spraggins' first trial. Ironically, it was the first defense attorney's attempt to explain Spraggins' retardation during closing arguments which caused the federal courts to overturn the conviction.

The problem, according to the 11th Circuit opinion, was that Belcher, the defense attorney in the first trial, in an attempt to explain Spraggins' retardation, told the jury that his client was guilty of the murder even though Spraggins had denied guilt on the witness stand.

Belcher told the jury: "Really, I think what happened here, I think the man was intoxicated. He was heavily intoxicated. He was on drugs. And he is a retarded man too. And I think he is telling the truth when he says he doesn't remember going in the [Coe] house. He told me that all the time, but I think he did, from the evidence that the state has put up. I think he committed the crime of murder probably. ... [H]e being drunk and having this mental condition, being on drugs too, he just went all to pieces and doesn't know what he did. That oftentimes happens when you are dealing with people in that condition...."

Although the question of the constitutionality of executing a retarded person was raised in Spraggins' most recent appeal, the state Supreme Court did not reach the issue because it decided a new trial was in order due to the erroneous jury charge.

In the meantime, the General Assembly has continued to consider the issue of mental retardation and the death penalty from a policy perspective.

On Feb. 24, the state Senate passed a non-binding resolution, S.R. 388, urging the State Board of Pardons and Paroles to commute the death sentences of mentally retarded death-row inmates.

McIntyre said that measure, although non-binding, may strengthen his hand in negotiations with the district attorney in Spraggins' case.

But McIntyre said he has not given up hope that a stronger measure will be adopted before the General Assembly adjourns.

On Monday, the Senate Special Judiciary Committee voted 4-2 to amend H.B. 878 to answer a question the Supreme Court seemed to raise in its latest *Spraggins* decision.

In setting aside Spraggins' conviction because the jury charge seemed to preclude a guilty-but-mentally-ill verdict, the court said in a footnote that a difference between that verdict and a guilty verdict would be inconsequential if the death penalty applied to both. The court said it was not ready to make a decision on that question.

The Senate committee voted to give the court an answer. The amendment the committee added to the bill would state that a person found guilty but mentally ill, which already includes a definition of mental retardation, could not be put to death.

The provision was attached to a bill that creates a procedure for determining whether a death-row inmate is incompetent to be executed under the standards set by the U.S. Supreme Court in *Ford v. Wainwright*, 106 S.Ct. 2595 (1986).

Sen. Arthur B. "Skin" Edge IV, R-Newnan, argued against attaching the amendment because it may lead to defeat of the measure containing the procedure made necessary by *Ford*.

But Sen. Alex Crumbley, D-McDonough, who suggested the amendment, noted that even Bowers, in opposing previous attempts to legislate an exemption, has said he is opposed to executing the mentally retarded.

So late in the legislative session, Crumbley said, H.B. 878 "may be the best and most logical vehicle we have to accomplish what everybody says they want to do." □



State Attorney General Michael J. Bowers says the division in his office which handles death-penalty cases is his largest, with a budget of \$750,000.

THE DEATH PENALTY: A FAILURE OF EXECUTION

Bottom line: Life in prison one-sixth as expensive

By DAVE VON DREHLE
Miami Staff Writer

At first glance, executions appear cheap.

Funeral suit from Jim Tatum's Fashion Showroom in Jacksonville — "We Fit Them All, Big and Tall" — costs \$150. Florida's budget for the last meal: \$20. Executioner's fee: \$150. Undertaker: \$525, box included.

But the true cost of an execution is closer to \$3.2 million.

To execute a prisoner, the state of Florida spends six times as much money as it would to keep him in prison until he dies of natural causes.

How come? Why does the death penalty cost so much more than life-without-parole?

Governmental agencies and independent analysts in eight states have scrutinized the ledgers. Said Michael Gradson, who calculated the cost of a proposed death penalty in New York: "People in states that have the death penalty kept telling me, 'I hope you're ready to go bankrupt.'"

Although the numbers vary, all the studies agree that death penalty cases cost more than life-in-prison cases at every level — from pretrial investigation to last-gasp appeals.

To begin with, death penalty cases almost always require a trial. They usually generate a lot of publicity, making prosecutors reluctant to plea bargain. And only a suicidal defendant pleads guilty when facing death.

And death penalty trials take longer. Attorneys have unusual freedom to question potential jurors one by one — a very time-consuming process. Fighting for their clients' lives, defense attorneys file twice as many pretrial motions as in the

average nondeath murder trial, a California study found.

Once the defendant is found guilty, the law requires a second trial to decide if the prisoner should live or die.

To show why they should live, defendants often call as witnesses psychiatrists, family members, former teachers, even accomplices in past crimes. The witnesses have to be located, which can take months of expensive investigation.

To show why the defendant should die, the state tries to persuade the jury that he is hopelessly evil, a permanent danger to society. For this, prosecutors rely heavily on high-priced psychiatrists.

The total additional cost for trial and sentencing over a non-execution murder trial: at least \$36,000, a Maryland study showed. A similar study in Kansas figured the additional costs at \$116,700.

After sentencing, every death verdict must be reviewed by the state Supreme Court. The U.S. Supreme Court requires it. And every defendant is entitled to a state-paid lawyer.

Bob Spangenberg, a consultant for the American Bar Association, surveyed more than 150 capital cases across the country. For defense alone, these mandatory reviews cost an average of \$34,740 each, Spangenberg computed.

That's just the beginning. After the mandatory review there are at least six levels of appeals. Spangenberg calculated these costs: Average cost for government-salaried defense lawyers: \$137,410.

This is a bargain compared to costs racked up by prestigious volunteer lawyers handling death penalty appeals. Wilmer, Cutler and Pickering, a big-name Washington firm, figures it has already laid out

THE PRICE OF VENGEANCE

The death penalty costs more than life in prison. Here's how much more. The numbers show the range of estimates.

TRIAL & SENTENCING:
\$36,000-\$116,700

The average death penalty case requires more investigation, more pretrial motions, more expert witnesses and a longer jury selection process. A separate sentencing trial is also required — not required in nondeath cases.

MANDATORY STATE
REVIEW: \$66,460-
\$140,000

Every death sentence must be reviewed by the state Supreme Court — not required in nondeath cases.

ADDITIONAL
APPEALS: \$274,820-
\$1 million-plus

After conviction is affirmed by the state Supreme Court, at least six levels of appeals remain open.

JAIL COSTS:
\$37,860-\$512,800

Death Row requires extra guards for high security.

EXECUTION COSTS:
\$646

Florida pays \$150 for the executioner, \$150 for a death suit, \$20 for the last meal and \$425 for burial.

SOURCE: A. Bruce Harrell research, Florida Dept. of Corrections; Florida attorney general's Florida Office of Capital Collateral Representation; American Bar Association Post-Conviction Death Penalty Representation Project.

J. Criminal Justice Act Division, Administrative Office of the U.S. Courts, Committee to Study the Death Penalty in Maryland, Kansas Legislative Research Department, Alaska Department of Corrections, Capital Litigation, a report to

The New York Assembly on the Death Penalty, The End of the Death Penalty in the University of California, Davis Law Review.

\$1.2 million in attorney time and \$173,000 in hard cash arguing federal appeals for serial killer Ted Bundy.

There are two sides, of course, to every appeal. The prosecution needs lawyers, too. Repeated studies show that prosecutors match defense attorneys dollar-for-dollar.

In Florida, state-paid prosecutors and defense attorneys received about \$3 million last year — to fuel a system that executed only one man, Willie Darden.

James Kincaid, former president of the Florida Bar Association, has studied the process at length, hoping to speed it up. He believes more lawyers are needed. To keep up with the demands of Florida's enormous death-penalty system, Kincaid estimates, taxpayers should be

shelling out \$12 million a year for lawyers alone.

"It boggles the mind," he says. Analyst Spangenberg notes: "As the cost of appellate lawyers will soon top \$30 million a year nationwide."

In the past, states kept costs down by relying on volunteer defense lawyers. Now there are the money cases and too few lawyers.

Says Chairman's Pat DeBarry, one of Florida's busiest volunteer capital attorneys: "It isn't good publicity. If you're going to do volunteer work, you're better off representing the Poor Clares."

Then comes the expense of prison. Death Row costs more to run than ordinary minimum security cell blocks, according to studies in Kansas and Alaska. Florida prison

officials say specific calculations are impossible.

Florida officials calculate one cost, however. When the governor signs a death warrant and an inmate's execution is scheduled, the doomed man is moved to a cell across the electric chair. For 30 days, guards keep a round-the-clock watch to make sure the inmate doesn't kill himself.

The cost in overtime for guards each time a warrant is signed is \$13,800.

There have been 199 warrants signed in Florida since 1973. Sometimes the state saves money because the guards can watch several doomed men at once.

Merely feeding and housing a Death Row prisoner long enough to execute him costs, on average,

\$108,000.

Total it up.

Florida taxpayers have paid more than \$37 million for the death penalty since 1973. That number is based on the most conservative figures available. The real cost could easily be twice that or more.

Divide the \$37 million by 18 executions. The bottom line: at least \$2.1 million per execution. And the cost is growing.

Bob Spangenberg, the law association consultant, says: "The costs are going to add and add and add and add. It's going to add up until something gives."

Michael Gradson, who studied the issue for the state of New York: "You're going to see a death penalty that costs a billion dollars nationwide."

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Lawyer/First Lady?

Candidates' Spouses: A New Breed

BY RORIE SHERMAN
National Law Journal Staff Reporter

NANCY REAGAN brought clothes by famous fashion designer Adolfo to the White House. But the next first lady may well bring a law degree and a new definition to the unofficial office of first lady.



HARRIET C. BABBITT



ELIZABETH H. DOLE



ELISE R.W. DU PONT



JEANNE H. SIMON

able of discussing substantive issues and fielding difficult questions, they are acting as their husbands' primary surrogates on the road, enabling the campaigns to cover twice as much territory in the same amount of time.

"I'm frankly astounded by the quality of the spouses," says Irene Natividad, national chairwoman of the

Reflecting the rise of women in professional ranks, four of the presidential candidates' wives are attorneys, their numbers split evenly between the two major parties.

Among the Republicans, two are lawyers already skilled in the art of dealing with the federal government: former Secretary of Transportation Elizabeth "Liddy" H. Dole and her lesser known, but highly respected, colleague in the Reagan administration, Elise R.W. du Pont, former chief of the Agency for International Development's Bureau for Private Enterprise.

In the Democrats' corner are two lawyers gaining recognition on the campaign circuits as formidable advocates for their husbands: Jeanne H. Simon, a former Illinois state legislator, and Harriet "Hattie" C. Babbitt, partner in the Phoenix, Ariz., law firm of Robbins & Green, P.A.

Even at this early stage of the race, they're leaving their mark. Capable of discussing substantive issues and fielding difficult questions, they are acting as their husbands' primary surrogates on the road, enabling the campaigns to cover twice as much territory in the same amount of time.

DEATH IN THE U.S.A.



Nearly 2,000 U.S. prisoners now await execution by various means, including gas chambers and electric chairs.

Capital Punishment At the Crossroads

At the silent sunrise, on a cold January morning 11 years ago, Gary Mark Gilmore walked into an abandoned cinder block prison shed, calmly took a seat in a black chair, and the state of Utah pumped four rounds of rifle fire into his heart.

By David A. Kaplan

So it was in 1977 that capital punishment resumed in the United States, inaugurated by the fusillade of a volunteer firing squad near Point of the Mountain, Utah. Before that dawn, there had not been an American execution since Aaron

Continued on page 31

More Random Audits

Big Brother Might Be Watching

BY RORIE SHERMAN
National Law Journal Staff Reporter

THE NATION'S largest program for randomly auditing lawyers' trust accounts reeled in its biggest fish when it caught its 12th, and most prestigious, attorney using his clients' money as if it were his own.

Walter M.D. Kern Jr. — Republican chairman of the state Assembly Judiciary Committee, longtime legislator, and respected sole practitioner in Ridgewood, N.J. — misappropriated about \$57,000 of the money clients entrusted to his care. And he made the mistake of doing it in his home state, one of five that regularly probe attorneys' trust and business accounts.

Disbarred after 25 years of practice, Mr. Kern is flailing furiously — especially at the procedure that snared him and that is likely to catch other attorneys in the future.

"It's not a random audit, it's a witch hunt," says Mr. Kern.

"The world ought to know about the secret police and dictatorship that has been established in New Jersey," he adds, "because they're trying to push this thing around the country so that there will be a universal police state when it comes to regulation of the practice."

He's right about the nationwide interest: Several bar associations around the country are so impressed with the

Continued on page 30

HIGHLIGHTS

A School's 'Soul' p. 3

A FIGHT over the appointment of a controversial feminist was described by one Yale Law School professor as a battle "for the soul of the school."

Market's Future p. 3

SECURITIES lawyers anxiously awaited the SEC's report on last October's market crash. Now they're not sure what will — or should — happen next.

Legal Practice? p. 3

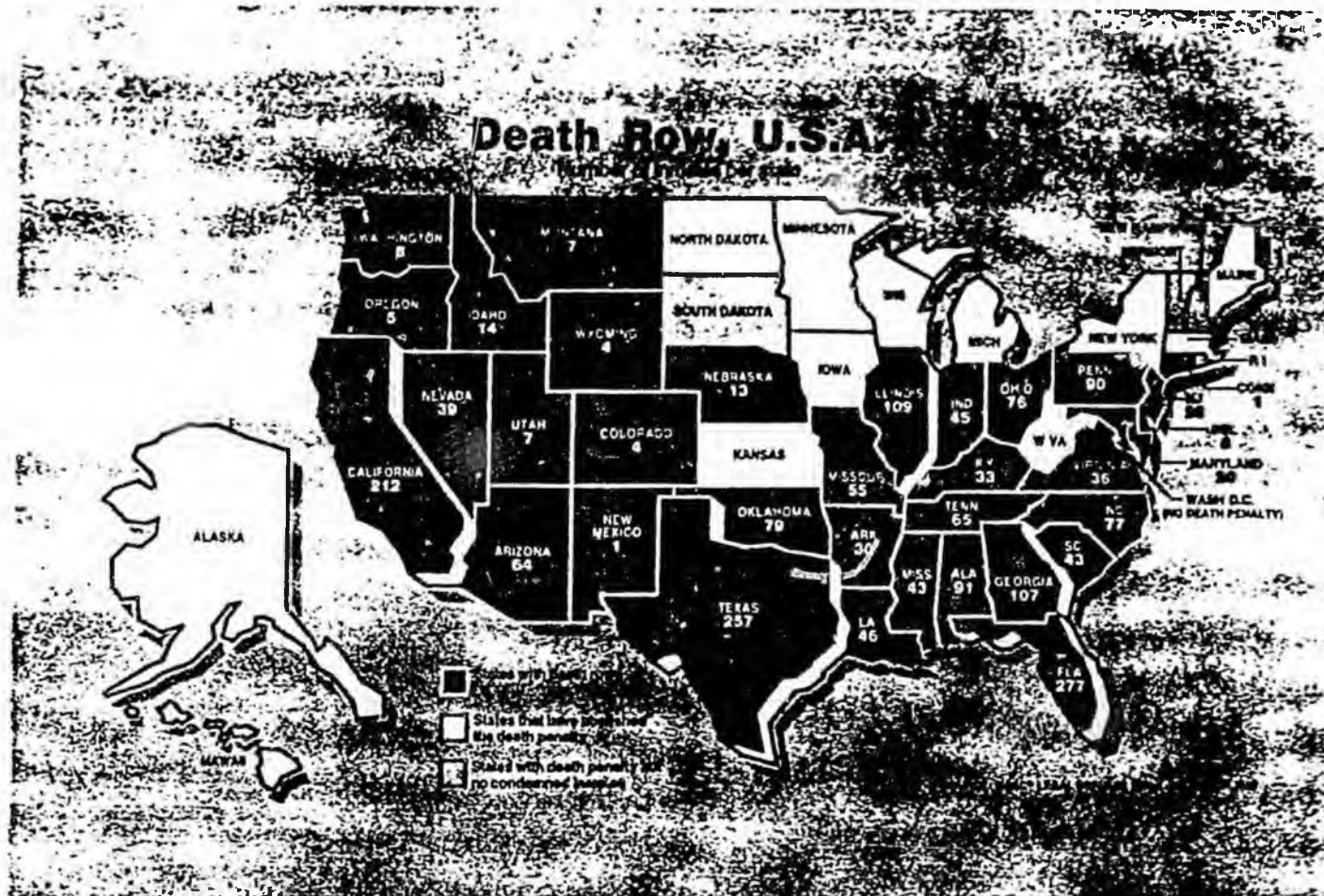
DISCLOSURES that the FBI spied on political groups raise questions about executive orders and attorneys general's guidelines about such practices.

Career Opportunities: Page 38

The Shopping Guide: Page 40

Lawyers' Service Mart: Page 41

DEATH IN THE U.S.A.



Will Death Penalty Be a Reality in the North?

Continued from page 1

Mitchell was put to death in California 10 years earlier — a gridlock caused by intense litigation and legislative warfare.

Since Gilmore, 93 other inmates have gone the way of the electric chair, gas chamber, lethal needle or rifleman. In 1967 alone, 25 were executed — a total last reached in 1962. It is a significant number, for it troubles death penalty opponents and supporters alike.

"Even I am getting used to them," says Henry Schwarzschild, director of the American Civil Liberties Union's Capital Punishment Project. "But the killings are just as revolting the 25th or 90th time. Our culture seems to be in a very bad mood."

"It's a pittance," counters an assistant attorney general from one Southern state, emphasizing that the national death row population stands at just below 2,000.

U.S. Chief Justice William H. Rehnquist himself has taken note. Several years ago, while still an associate justice, he penned a dissent that skewered his Supreme Court colleagues for allowing a capital "stalemate" to develop. "The existence of the death penalty in this country is largely an illusion," Justice Rehnquist wrote. While hundreds and hundreds had been sentenced to death since the court reinstated capital punishment in 1956, he said, "virtually nothing happens except endlessly drawn-out legal proceedings."

True enough, acknowledges Richard H. Burr III of the NAACP Legal Defense and Educational Fund Inc. (LDF) in New York, but he takes none of the

blame. "A crazy system inevitably produces its own contradictions," he says. **Tumbrels' Heyday**

Each side has a point. While the annual number of executions in the United

States is far from the tumbrels' heyday during the Depression (199 in 1935 was the peak), it nonetheless represents a figure unheard of in contemporary Western society. Indeed, according to London-based Amnesty International, the only major countries left in the world that regularly execute are China, South Africa, Iran and the Soviet Union. Canada, Mexico and all of Western Europe have abolished the death penalty.

But if the American system is notable for the fact that it has capital punishment at all, it is unique for the way it does not use the penalty. As the end of 1967, the national death row population stood at 1,980. That is 150 more than a year ago — twice as many as in 1962, and more than any nation in the annals of criminal justice.

Florida alone has 282 capital prisoners, tops among the country's 34 separate death rows and the largest state collection of the condemned in American history. (See accompanying chart.) Texas, despite a leading 26 lethal injections since the Gilmore execution ended the modern moratorium, is next with 258 inmates, followed by California with 211 and Illinois with 111. Louisiana, first in executions during 1967 with eight, has 66 more to go. Some inmates, on their fifth or sixth appeal, have been waiting since the mid-1970s.

In Texas, death row is a growth industry. There is enough condemned manpower to run a garment factory annexed to the row. The plant manager boasts that his workers are better than the general prison population. "I wish I had more of them," he told the Associated Press. Juries and judges

will likely oblige him; Texas officials talk of a 1,000-inmate death row within the next decade.

Creative minds have a field day with those kinds of numbers. According to Amnesty International, the American backlog of death exceeds by a factor of five the total executions in the United States and Western Europe in the last quarter-century. David L. Bruck, a Columbia, S.C., lawyer who has represented several condemned inmates, puts it more sarcastically.

Given the annual additions, he recently said, "you could execute someone every day of the week — including Sundays, Christmas, New Year's Day and Easter — and you still couldn't do it by the end of the century."

Prison officials and state attorneys downplay the significance of the figure of so many warehoused inmates. They say it's a function of all the litigation of the past 10 years and the legal safeguards that ensure fair procedures. Now that the U.S. Supreme Court has thrown out the last of the broad constitutional challenges to capital punishment — based on such issues as race and jury selection procedure — they say the pace of executions should pick up.

Even if that's true — and the experience of just the past year suggests it isn't — the backlog is remarkable. And it's intractable, unless there is a momentous surge in executions or drop in death sentences.

The choice, as Prof. FRANKS Z. Zimring of the University of California at Berkeley School of Law wrote in a recent book, "is between a permanent Reign of Terror or an execution policy."

Continued on page 32

In What State Is It Easiest To Be Sentenced To Death?

Death Row Inmates Per Capita (in millions)

The Leaders:

Nevada	40.2
Florida	24.1
Oklahoma	23.3
Alabama	21.7
Arizona	19.0
Georgia	17.7

Others:

Texas	15.5
Louisiana	10.2
California	7.8
National Average	8.3

Growing Death Row Pushes System to Brink

Continued from page 31

that makes [a] mockery of the legal standards governing the use of the death penalty."

Which it will be — an unprecedented bloodbath or the institutionalizing of a grisly charade — may vary well pivot on the experience of the next few years, as capital punishment, American-style, reaches a key crossroad.

Across Mason-Dixon Line

Since 1976, executions have been almost exclusively a Southern event. Indeed, four states — Texas, Florida, Georgia and Louisiana — are responsible for more than 75 percent of all U.S. executions since 1976, though those states constitute only 16 percent of the nation's population.

The Southern monopoly partially explains why the national debate over state-administered death has not been more acrimonious; that may change when and if the executioner moves north. As lethal injections and electrocutions lose their abstract quality in California, Illinois, Ohio and Pennsylvania (whose death rows make up one-

quarter of the nation's condemned), something will likely give.

Hugo A. Bedau, a professor of philosophy at Tufts University and the leading chronicler of the death penalty for a quarter-century, says American capital punishment historically has been a regional phenomenon.

He explains that "you've got the states that always execute (typically in the South); the states that never execute, whatever their laws provide (typically in New England and the populist Upper Midwest); and then the rest of the states. What happens in places like California and Pennsylvania over the next few years will determine whether we break out of that historical pattern."

"I believe the Southern states are operating at full power," says Mr. Burr of the NAACP Legal Defense Fund. "California will be a turning point."

When will the executioner's song begin to include some Northern and Western stanzas? Though the California Supreme Court stalled most death cases under the now-deposed Chief Justice Rose E. Bird, convicted murderer Bobby Harris lost all his state challenges and is facing his final federal appeal. If he loses — a decision is expected roughly by summertime — San Quentin's gas chamber will go into service for the first time in 21 years.

Illinois, Ohio and Pennsylvania are somewhat behind in having their capital statutes cleared for action, but lawyers on both sides of the emotional aisle expect executions in those states by 1990.

While Professor Zimring acknowledges the significance of the Northern states, he expresses serious doubt any momentous change is in the works. "No one can tell you we won't have 200 executions a year in this country," he says. "We've been hearing every year this decade that the bloodbath is just months away. It isn't happening, and the number of states actually doing the executing is dropping. That is no accident."

At least in California, officials don't agree. Steve White, chief of the criminal division in the attorney general's office, says there will be three or four executions over the next two years, a hiatus as a bunch of cases reach federal court, and then "about 30 a year."

De-regulation of Death

Beyond the regional phenomenon, of course, is the continuing legal struggle that gave rise in the first place to the modern era of capital punishment. Twenty years ago, as Professor Bedau points out, "the Supreme Court really hadn't heard of the death penalty."

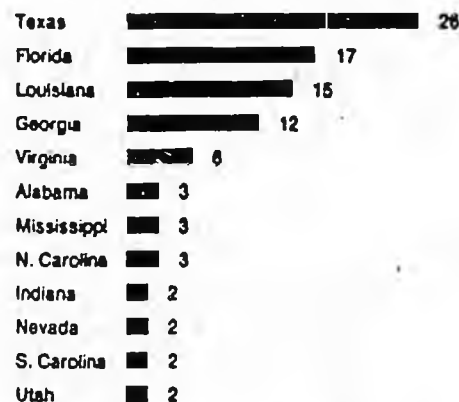
Back then, the civil rights crusade was in full stride, in part due to the litigation efforts of the NAACP Legal Defense Fund. The LDF's civil rights work led to its interest in capital punishment, and that involvement culminated in *Furman v. Georgia*, 408 U.S. 238 (1972), when the Supreme Court, 5-4, ruled the death penalty, as then administered in an "arbitrary and freakish" way, constituted "cruel and unusual punishment" in violation of the Eighth and 14th Amendments.

Most scholars viewed *Furman* as the executioner's death-knell, especially in light of a decade's momentum toward abolition. But such prophecies ignored the public and legislative frenzy that accompanied the court's decision. By 1976, 35 states had enacted new statutes that attempted to correct the constitutional flaws in pre-*Furman* statutes; and that year, the justices, 7-2, upheld death penalty laws as long as they provided "guided discretion" to judges and juries. *Gregg v. Georgia*, 428 U.S. 153.

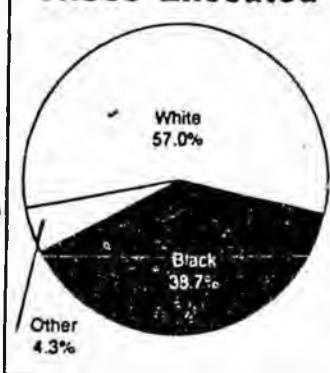
The big question, never fully answered in *Furman*, was thus resolved. For the next decade, particularly the first half of it, the Supreme Court fine-tuned capital statutes — and largely in

Executions by State

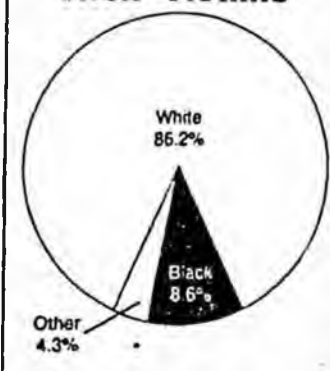
Since 1976



Race of Those Executed



Race of Their Victims



Matching the Races

Since 1976, 85 of 93 murder convictions that resulted in executions involved blacks and whites. How do defendants and victims match up?

White kills white	60%
Black kills white	30%
Black kills black	10%
White kills black	0%



Photo, Chris Todd, The Oklahoman

Southern prisons, such as the one in Parchman, Miss. (above) have been the site of more than 75 percent of all U.S. executions since 1976.

a way that further reduced the penalty's scope. Mandatory death sentences were struck down. Non-homicidal crimes, such as rape, could not be capital. (Crimes against the state, such as treason, may be an exception.) Defendants were given special procedural protections on the ground that death was different.

Such strictures, however, seemed to mean that nobody got executed. One figure in the early 1980s showed three-quarters of the capital cases before the 5th U.S. Circuit Court of Appeals (based in the South) went the defendants' way.

In the last few years — whether because of increasingly permissive jurisprudence or better-prepared prosecutors and attorneys general — the tide has turned. And the Supreme Court itself has shown impatience at the seemingly interminable delays.

"Death was different," Professor Bedau says, "but it's not very different anymore."

Justices Against Themselves

Virtually every major capital case to come before the justices in the last decade has been won by the state. That is especially ironic, given that the court seems more divided now than at any point since *Gregg*. Gone for the most part are the 7-2 votes, with Justices William J. Brennan Jr. and Thurgood Marshall filing lonely dissents. Key de-

cisions last spring — on race and on whether a non-triggerman can nonetheless be sentenced to death — both went 5-4 against the defendants.

Justices Harry A. Blackmun and John Paul Stevens are not abolitionists, but they are far closer on the capital spectrum to the Brennan-Marshall end than to that led by Chief Justice Rehnquist. Whoever takes the currently vacant seat on the court will likely determine death doctrine in close cases. 9th Circuit Judge Anthony M. Kennedy appears to be a capital moderate.

One of the decisions last spring, *McCleskey v. Kemp*, indicates the court has come full circle. *Furman*, at its core, was a race case. *Gregg* said capital punishment had cleansed itself of such taint.

McCleskey showed the race issue persists. It isn't that of earlier decades — the *Furman* variety — in which discriminatory imposition of the death penalty against blacks was plain; in fact, of those executed since 1976, 57 percent have been white. It's more subtle, based on the race of the victim rather than that of the defendant. Of the murders resulting in all the executions of the last 11 years, 90 percent have involved white victims. And no white person who killed a black has been executed. In *McCleskey*, the court ruled such a statistical pattern of discrimination was constitutionally allowable. 107 S. Ct. 1756.

"The Supreme Court has neither the ability nor the will to face up consistently to what it has created," says the LDF's Mr. Burr.

The *McCleskey* theory, conceived by the LDF, represented the last global constitutional attack on capital punishment. So with its defeat went the viability of a 20-year strategy. The LDF, the vanguard of anti-death-penalty efforts, can no longer handle it all because there are few cases anymore that raise issues applicable to a large class of condemned inmates. With essentially individual appeals, the work falls to a decentralized and fragmented regiment of government-appointed counsel, public-interest groups and pro bono lawyers.

"It's not that we're cutting back," says the LDF's John Charles Boger, responding to what has become a popular perception. "But we obviously can't provide the comprehensive coverage we used to. Three of us here can't handle 2,000 cases."

State-Supported Defense

Some states, notably California and Florida, have taken up the shortfall — and now, in effect, fund fights against themselves. They guarantee a prisoner counsel for every round of appeals (at

Continued on following page

The Southern monopoly partially explains why the national debate has not been more acrimonious; that may change when and if the executioner moves north. 'California will be a turning point,' says one lawyer.

Continued from preceding page

a total cost in the millions of dollars). In Tallahassee, for example, the Office of the Capital Collateral Representative was established several years ago — not out of altruism, but because it had pressed for it and, more important, the Florida Supreme Court wouldn't tolerate getting emergency petitions for stays of execution from unrepresented inmates.

Whether because of OCR or because of some novel legal questions that have arisen, Florida's pace of putting inmates in "Old Sparky" has dropped, to only one execution in 1987. "Nobody wants to see cases that are 15 years old," says Richard E. Doran, an assistant attorney general. "We do want to see cases speeded up."

They've tried. Last summer when the Louisiana electric chair was humming, Mr. Doran says the attorney general's office called its counterpart in Louisiana to ask why there had been so many executions. The answer was the pendency of *McCleskey* at the Supreme Court, which had temporarily spared a whole class of prisoners.

In San Francisco, the California Appellate Project, funded by the state Supreme Court, finds lawyers for capital cases. Established in 1984, the group pays attorneys \$60 an hour. The average appeal, says Executive Director Michael G. Millman, takes between 800 and 1,000 hours.

A former public defender, Mr. Millman applauds the state for the project. "There is a crisis in representation, which the American Bar Association and the bars of many states have recognized," he says. "California is to be commended for creating CAP."

Millions for Death

States providing lawyers for defendants throughout the appeals process obviously also continue to run up costs on the other side. Richard Moran, a

sociologist at Mount Holyoke College, has estimated it costs prosecutors between \$500,000 and \$1.8 million to win a death sentence.

In Texas, the counsel crisis for the condemned is acute. There is no state support for appellate counsel beyond the first round of appeals, and critics there say the day is approaching when an inmate will be executed because he had no lawyer.

Tanya Coke, LDF research director, calls Texas "the vision of disaster and chaos." Lone Star Attorney General Jim Mattox calls that "nonsense."

Whatever the status quo, it isn't likely to change soon. "There's lots of publicity about how few lawyers there are on the defense side in capital cases," Mr. Mattox notes. "But what about how few we've got handling cases for the prosecution? Our entire staff for appellate work is 3½ lawyers."

"I am convinced," Mr. Mattox adds, "that the individuals we've put to death have had superior representation, at least on the appellate level. There is no rush to justice in Texas, just a crawl."

Nonetheless, the attorney general says he expects his state to pare its death row by the 1990s. "You could see 200 executions with a five-year period," he predicts, "though 100 is more likely."

And things could get interesting on Texas television, if the attorney general has his way. He wants cameras in the death chamber so citizens can see what the state is doing in their name and to maximize the punishment's deterrent impact.

"I've always thought that having executions in the dead of night in some secluded place is wrong," says Mr. Mattox, a strong supporter of capital punishment.

System on the Brink

Demand on the legal system go beyond lawyers. From the U.S. Supreme Court down to the state appeals courts, judges increasingly complain about their capital burdens. Late last month, Chief Justice Rehnquist criticized the "chaotic conditions that often develop within a day or two before an execution is scheduled."

"The practical result of this," he explained, "is that judges...are called upon to make important constitutional decisions, often without as much time as would be ideal for making them."

Judges of federal appeals courts in the South and the supreme courts of such states as Florida say death cases take up an oppressive amount of their time and are pushing the appellate system to the brink. The courts are experimenting with different streamlining procedures to cope.

So, it seems, no one is happy with the system of capital punishment. Not the condemned. Not the advocates of the penalty. And not the lawyers and judges who are charged with making the system run. Where does this mean death is headed?

If last year is any indication, there are mixed signals.

In June, Louisiana electrocuted four men in just over a week. On a single day in August, America had its first triple execution in a generation, as Florida, Alabama and Utah all participated.

But before the run of executions, the Kansas Legislature — despite overwhelming popular support and an aggressive, new law-and-order governor — voted down a bill reinstating the death penalty.

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Two Eras Of Executions Compared

Since 1976

Year	Executions
1976-1979	3
1980	0
1981	1
1982	2
1983	5
1984	21
1985	18
1986	18
1987	25

Prior Decades

1970-1975	0
1960-1969	191
1950-1959	717
1940-1949	1,284
1930-1939	1,667

Figures unavailable before 1930; military executions not included.

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November 1, 1988

DEATH ROW. U.S.A.

TOTAL NUMBER OF DEATH ROW INMATES KNOWN TO LDF: 2,151 ^{*/}

Race: Defendant:

Black	862 (40.07%)
White	1,116 (51.88%)
Hispanic	123 (5.72%)
Native American	32 (1.49%)
Asian	13 (.61%)
Unknown at this issue	5 (.23%)

Sex: Male	2,130 (99.02%)
Female	21 (.98%)

DISPOSITIONS SINCE JANUARY 1, 1973:

Executions: 101 (See page 2)
Suicides: 27
Commutations: 49 (including those by the Governor of Texas
resulting from favorable court decisions)
Died of natural causes, or killed while under death sentence: 40
Sentences vacated under unconstitutional statutes: 558 (rev. est)
Convictions/Sentences reversed on other grounds: 890

JURISDICTIONS WITH CAPITAL PUNISHMENT STATUTES: 39

(Underlined states have statutes but no sentences imposed)

Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, Wyoming, U.S. Government, U.S. Military.

JURISDICTIONS WITHOUT CAPITAL PUNISHMENT STATUTES: 14

Alaska, District of Columbia, Hawaii, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, New York, North Dakota, Rhode Island, West Virginia, Wisconsin.

^{*/} Seventeen inmates in this issue appear with a plus sign (+) next to their names. Seven of them (4B, 2W, 1N) are under death sentence in two states, two (1W, 1B) are under death sentence in three states, and the others (2B, 3W, 1N) are serving term sentences previously imposed in other states. All multiple death-sentenced inmates are listed in their respective several state totals, but each is counted as only one inmate in the national total.

This issue of Death Row, U.S.A. includes bracketed names for 144 capital inmates. The brackets indicate that either a new sentence proceeding is pending following a court order, or that a court-ordered reversal of conviction or sentence is not yet final due to an appeal filed by the State.

Thirty two inmates (30 males and two females) appear with a (#) sign next to their names. These inmates were under the age of eighteen at the time of offense.

Racial Combinations

White defendant/White vic . . .	56	(55.45%)
Minority defdnt/White vic . . .	31	(30.69%)
Minority defdnt/Mnrty vic . . .	15	(14.85%)
White defendant/Mnrty vic . . .	0	(0.00%)

Executions by State

Alabama	3	Nevada	2*
Florida	18	North Carolina	3
Georgia	13	South Carolina	2
Indiana	2*	Texas	27
Louisiana	18	Utah	3**
Mississippi	3	Virginia	7

* Both inmates voluntarily gave up appeals

** Two of three executions were voluntary

<u>Date</u>	<u>Defendant</u>	<u>State</u>	<u>Race</u>	<u>Race of Victim(s)</u>
1/17/77	* Gary Gilmore	UT	W	W
5/25/79	John Spenkelink	FL	W	W
10/22/79	* Jesse Bishop	NV	W	W
3/9/81	* Steven Judy	IN	W	W
8/10/82	* Frank Coppola	VA	W	W
12/7/82	Charlie Brooks	TX	B	W
4/22/83	John Evans	AL	W	W
9/2/83	Jimmy Lee Gray	MS	W	W
11/30/83	Robert Sullivan	FL	W	W
12/14/83	Robert Wayne Williams	LA	B	B
12/15/83	John Eldon Smith	GA	W	W
1/26/84	Anthony Antone	FL	W	W
2/29/84	John Taylor	LA	B	W
3/14/84	James Autry	TX	W	W
3/16/84	James Hutchins	NC	W	W
3/31/84	Ronald O'Bryan	TX	W	W
4/5/84	Arthur Goode	FL	W	W
4/5/84	Elmo Sonnier	LA	W	W
5/10/84	James Adams	FL	B	W
6/20/84	Carl Shriner	FL	W	W
7/12/84	o Ivon Stanley	GA	B	W
7/13/84	David Washington	FL	B	W/B
9/7/84	Ernest Dobbert	FL	W	W
9/10/84	Timothy Baldwin	LA	W	W
9/20/84	James Henry	FL	B	B
10/12/84	Linwood Briley	VA	B	W
10/30/84	Thomas Barefoot	TX	W	W
10/30/84	Ernest Knighton	LA	B	W
11/2/84	Velma Barfield	NC	W	W
11/8/84	Timothy Palmes	FL	W	W
12/12/84	Alpha Otis Stephens	GA	B	W
12/28/84	Robert Lee Willie	LA	W	W
1/4/85	David Martin	LA	W	W
1/9/85	@ Roosevelt Green	GA	B	W
1/11/85	Joseph Carl Shaw	SC	W	W
1/16/85	Doyle Skillern	TX	W	W
1/30/85	James Raulerson	FL	W	W
2/20/85	Van Roosevelt Solomon	GA	B	W
3/6/85	Johnny Paul Witt	FL	W	W
3/13/85	* Stephen Peter Morin	TX	W	W
3/20/85	John Young	GA	B	W
4/18/85	James Briley	VA	B	B
5/15/85	Jesse de la Rosa	TX	H	W
5/29/85	Marvin Francois	FL	B	B
6/25/85	Charles Milton	TX	B	B
6/25/85	o Morris Mason	VA	B	W



NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. (LDF)
99 Hudson Street, Suite 1600, New York, N.Y. 10013 • (212) 219-1900

November 1, 1988

DEATH ROW. U.S.A.

TOTAL NUMBER OF DEATH ROW INMATES KNOWN TO LDF: 2,151 ^{*/}

Race: Defendant:

Black	862 (40.07%)
White	1,116 (51.88%)
Hispanic	123 (5.72%)
Native American	32 (1.49%)
Asian	13 (.61%)
Unknown at this issue	5 (.23%)

Sex: Male	2,130 (99.02%)
Female	21 (.98%)

DISPOSITIONS SINCE JANUARY 1, 1973:

Executions: 101 (See page 2)
Suicides: 27
Commutations: 49 (including those by the Governor of Texas
resulting from favorable court decisions)
Died of natural causes, or killed while under death sentence: 40
Sentences vacated under unconstitutional statutes: 558 (rev. est)
Convictions/Sentences reversed on other grounds: 890

JURISDICTIONS WITH CAPITAL PUNISHMENT STATUTES: 39

(Underlined states have statutes but no sentences imposed)

Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, Wyoming, U.S. Government, U.S. Military.

JURISDICTIONS WITHOUT CAPITAL PUNISHMENT STATUTES: 14

Alaska, District of Columbia, Hawaii, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, New York, North Dakota, Rhode Island, West Virginia, Wisconsin.

^{*/} Seventeen inmates in this issue appear with a plus sign (+) next to their names. Seven of them (4B, 2W, 1N) are under death sentence in two states, two (1W, 1B) are under death sentence in three states, and the others (2B, 3W, 1N) are serving term sentences previously imposed in other states. All multiple death-sentenced inmates are listed in their respective several state totals, but each is counted as only one inmate in the national total.

This issue of Death Row, U.S.A. includes bracketed names for 144 capital inmates. The brackets indicate that either a new sentence proceeding is pending following a court order, or that a court-ordered reversal of conviction or sentence is not yet final due to an appeal filed by the State.

Thirty two inmates (30 males and two females) appear with a (#) sign next to their names. These inmates were under the age of eighteen at the time of offense.

IN THE U.S. SUPREME COURT

Dugger v. Aubrey Adams (No. 87-121) (review granted March 7 at 108 S. Ct. 1106) (argued November 1, 1988). The Court will decide the applicability of Caldwell v. Mississippi, 472 U.S. 320 (1985), which prohibits a prosecutor from suggesting that the responsibility for sentence rests with the appellate court rather than the jury, to Florida, where the final decision as to punishment rests with the trial judge.

Zant v. Billy Moore (No. 87-1104) (review granted at 108 S. Ct. 1467, April 18) (to be argued November 29). The Court granted Georgia's petition to consider abuse of the writ and procedural default questions in successive habeas corpus petitions.

Tompkins v. Texas (No. 87-6405) (review granted at 56 U.S.L.W. 3789, May 13) (to be argued December 6). (1) Under what circumstances is an instruction on lesser included offenses required in a capital case? (2) Under Batson v. Kentucky, 476 U.S. 79 (1986), what standards should determine whether a prosecutor's explanation for the striking of black jurors is satisfactorily race-neutral, or merely dubious and pretextual?

Penry v. Lynaugh (No. 87-6177) (review granted June 30 at 56 U.S.L.W. 4894) (to be argued January 11, 1989). The Court will decide whether, and under what circumstances, Texas courts must provide a sentencing instruction to juries which allows them to give independent weight to mitigating evidence about the defendant or the crime. A second question raises the constitutionality of executing the mentally retarded

Stanford v. Kentucky (No. 87-5765) (granted October 31 1988 at 57 U.S.L.W. 3259) and Wilkins v. Missouri (No. 87-6025) (56 U.S.L.W. 3894, June 30). Is the execution of a 16-year old and 16-year old is cruel and unusual punishment? (Is the execution of a 16-year old is cruel and unusual punishment? Is the execution of a 16-year old is cruel and unusual punishment?) v. Zant is suspended; Stanford will be argued tandem with Wilkins).

South Carolina v. Gathers (No. 88-305) (granted October 11 at 57 U.S.L.W. 3259). Whether prosecutorial comment about the character of the victim violated Booth v. Maryland, whether Booth was wrongly decided.

Murray v. Giarratano (No. 88-411) (granted October 31 at 57 U.S.L.W. 3304). Does the right to meaningful access to the courts for death-sentenced inmates require that the State of Virginia provide attorneys and litigation costs for a habeas corpus appeal in the state courts?

Additions or corrections,
contact Tanya Coke

EXECUTIONS

Total Executions since 1976 reinstitution of capital punishment: 101

'76	'77	'78	'79	'80	'81	'82	'83	'84	'85	'86	'87	'88
0	1	0	2	0	1	2	5	21	18	18	25	8

Race of Those Executed

Black defendants . . .	39 (38.61%)
White defendants . . .	56 (55.45%)
Hispanic defdnts . . .	6 (5.94%)

Race of Their Victims

Black victims . . .	11 (10.89%)
White victims . . .	87 (86.13%)
Hispanic vics . . .	3 (2.97%)
Asian victims . . .	1 (.99%)

Racial Combinations

White defendant/White vic . . .	56	(55.45%)
Minority defdnt/White vic . . .	31	(30.69%)
Minority defdnt/Mnrty vic . . .	15	(14.85%)
White defendant/Mnrty vic . . .	0	(0.00%)

Executions by State

Alabama	3	Nevada	2*
Florida	18	North Carolina	3
Georgia	13	South Carolina	2
Indiana	2*	Texas	27
Louisiana	18	Utah	3**
Mississippi	3	Virginia	7

* Both inmates voluntarily gave up appeals

** Two of three executions were voluntary

<u>Date</u>	<u>Defendant</u>	<u>State</u>	<u>Race</u>	<u>Race of Victim(s)</u>
1/17/77	* Gary Gilmore	UT	W	W
5/25/79	John Spenkelink	FL	W	W
10/22/79	* Jesse Bishop	NV	W	W
3/9/81	* Steven Judy	IN	W	W
8/10/82	* Frank Coppola	VA	W	W
12/7/82	Charlie Brooks	TX	B	W
4/22/83	John Evans	AL	W	W
9/2/83	Jimmy Lee Gray	MS	W	W
11/30/83	Robert Sullivan	FL	W	W
12/14/83	Robert Wayne Williams	LA	B	B
12/15/83	John Eldon Smith	GA	W	W
1/26/84	Anthony Antone	FL	W	W
2/29/84	John Taylor	LA	B	W
3/14/84	James Autry	TX	W	W
3/16/84	James Hutchins	NC	W	W
3/31/84	Ronald O'Bryan	TX	W	W
4/5/84	Arthur Goode	FL	W	W
4/5/84	Elmo Sonnier	LA	W	W
5/10/84	James Adams	FL	B	W
6/20/84	Carl Shriner	FL	W	W
7/12/84	o Ivon Stanley	GA	B	W
7/13/84	David Washington	FL	B	W/B
9/7/84	Ernest Dobbert	FL	W	W
9/10/84	Timothy Baldwin	LA	W	W
9/20/84	James Henry	FL	B	B
10/12/84	Linwood Briley	VA	B	W
10/30/84	Thomas Barefoot	TX	W	W
10/30/84	Ernest Knighton	LA	B	W
11/2/84	Velma Barfield	NC	W	W
11/8/84	Timothy Palmes	FL	W	W
12/12/84	Alpha Otis Stephens	GA	B	W
12/28/84	Robert Lee Willie	LA	W	W
1/4/85	David Martin	LA	W	W
1/9/85	e Roosevelt Green	GA	B	W
1/11/85	Joseph Carl Shaw	SC	W	W
1/16/85	Doyle Skillern	TX	W	W
1/30/85	James Raulerson	FL	W	W
2/20/85	Van Roosevelt Solomon	GA	B	W
3/6/85	Johnny Paul Witt	FL	W	W
3/13/85	* Stephen Peter Morin	TX	W	W
3/20/85	John Young	GA	B	W
4/18/85	James Briley	VA	B	B
5/15/85	Jesse de la Rosa	TX	H	W
5/29/85	Marvin Francois	FL	B	B
6/25/85	Charles Milton	TX	B	B
6/25/85	o Morris Mason	VA	B	W

7/9/85	Henry Martinez Porter	TX	H	W
9/11/85	* Charles Rumbaugh	TX	W	W
10/16/85	* William Vandiver	IN	W	W
12/6/85	* Carroll Cole	NV	W	W
1/10/86	#o James Terry Roach	SC	W	W
3/12/86	Charles William Bass	TX	W	W
3/21/86	Arthur Lee Jones	AL	B	B
4/15/86	Daniel Thomas	FL	B	W
4/16/86	* Jeffrey Allen Barney	TX	W	W
4/22/86	David Funchess	FL	B	W
5/15/86	# Jay Pinkerton	TX	W	W
5/20/86	Ronald Straight	FL	W	W
6/9/86	Rudy Esquivel	TX	H	W
6/18/86	Kenneth Brock	TX	W	W
6/24/86	o Jerome Bowden	GA	B	W
7/31/86	Michael Smith	VA	B	W
8/20/86	Randy Woolls	TX	W	W
8/22/86	Larry Smith	TX	B	W
8/26/86	Ester Wicker	TX	W	W
9/19/86	John Rook	NC	W	W
12/04/86	Michael Wayne Evans	TX	B	H
12/18/86	Richard Andrade	TX	H	H
1/30/87	* Ramon Hernandez	TX	H	H
3/4/87	* Elisio Moreno	TX	H	W
5/15/87	Joseph Mulligan	GA	B	B
5/19/87	Richard Tucker	GA	B	W
5/20/87	Edward Earl Johnson	MS	B	W
5/28/87	William Boyd Tucker	GA	W	W
5/28/87	Anthony Williams	TX	B	W
6/7/87	Benjamin Berry	LA	W	W
6/9/87	Alvin Moore	LA	B	W
6/12/87	Jimmy Glass	LA	W	W
6/16/87	Jimmy Wingo	LA	W	W
6/24/87	Elliott Johnson	TX	B	W
7/6/87	Richard Whitley	VA	W	W
7/8/87	John R. Thompson	TX	W	W
7/8/87	Connie Ray Evans	MS	B	A
7/20/87	Willie Celestine	LA	B	W
7/24/87	@ Willie Watson	LA	B	W
7/30/87	o John Brogdon	LA	W	W
8/24/87	Sterling Rault	LA	W	W
8/28/87	Beauford White	FL	B	B
8/28/87	Wayne Ritter	AL	W	W
8/28/87	Dale Pierre Selby	UT	B	W
9/01/87	Billy Mitchell	GA	B	W
9/10/87	Joseph Starvaggi	TX	W	W
9/21/87	Timothy McCorquodale	GA	W	W
1/07/88	@ Robert Streetman	TX	W	W
3/15/88	Willie Darden	FL	B	W
3/15/88	Wayne Felde	LA	W	W
4/13/88	Leslie Lowenfield	LA	B	B
4/14/88	Earl Clanton	VA	B	B
6/10/88	* Arthur Bishop	UT	W	W
6/14/88	Edward Byrne	LA	W	W
7/28/88	James Messer	GA	W	W

* Voluntary

Juvenile at time of crime

o Mentally retarded (IQ below 70)

@ Executed after tie votes on stays of execution
at the U.S. Supreme Court

ALABAMA (52B; 40W; 1A)

TOTAL: 93

Electrocution

1. THIGPEN, DONALD (B)
2. RICHARDSON, HERBERT (B)
3. WRIGHT, FREDDIE (B)
4. DANIELS, JOHN R (W)
5. HILL, WALTER (B)
6. # DAVIS, TIMOTHY (W)
7. DUNKINS, HORACE (B)
8. [DANIEL, GEORGE (B)]
9. * THOMAS, PATRICIA (B)
10. COULTER, DAVID (W)
11. CADE, CLYDE (B)
12. NELSON, DAVID (W)
13. KENNEDY, VICTOR (B)
14. HUBBARD, J.B. (W)
15. JULIUS, ARTHUR (B)
16. WATKINS, DARRYL (B)
17. WEEKS, VARNELL (B)
18. GRAYSON, DARRELL (B)
19. THOMAS, WALLACE (B)
20. LINDSEY, MICHAEL (B)
21. MAGWOOD, KENNETH (B)
22. LUKE, JOHNNY (B)
23. [GILES, ARTHUR (B)]
24. JONES, AARON (B)
25. + HEATH, LARRY (W)
26. WALDROP, BILLY (W)
27. [WILLIAMS, ROY (W)]
28. HARRELL, ED (B)
29. * NEELLEY, JUDITH (W)
30. BELL, RANDY (B)
31. CLISBY, WILLIE (B)
32. [HARRIS, JOHNNY (B)]
33. BRADLEY, DANNY JOE (W)
34. SINGLETON, CORNELIUS (B)
35. BALDWIN, BRIAN (B)
36. HORSLEY, EDWARD (B)
37. MORRISON, JESSE (B)
38. PEOPLES, JOHN (W)
39. GODBOLT, JERRY (B)
40. HAYS, HENRY (W)
41. JEFFERSON, ALBERT (B)
42. FORD, PERNELL (B)
43. NICKS, HARRY (B)
44. FREEMAN, DARRYL (B)
45. DUREN, DAVID (W)
46. TARVER, ROBERT LEE (B)
47. DAVIS, JIMMY WAYNE (W)

48. FLOYD, TOMMY (B)
49. HENDERSON, JOE (B)
50. MUSGROVE, PHILLIP (W)
51. THOMPSON, MICHAEL EUGENE
52. HOOKS, JOSEPH (W)
53. THOMPSON, STEVEN ALLEN (W)
54. HENDERSON, CURTIS LEE (B)
55. HAMILTON, TOMMY (W)
56. [RUTLEDGE, MITCHELL (B)]
57. JOHNSON, ANTHONY KEITH (W)
58. MADISON, VERNON (B)
59. MURRY, PAUL (B)
60. FORTENBERRY, TOMMY JERRY
61. MARTIN, JAMES (W)
62. THOMAS, KENNETH GLENN (W)
63. # LYNN, FREDERICK (B)
64. BUI, QUAING (A)
65. FRAZIER, RICHARD (W)
66. MCGAHEE, EARL (B)
67. MCWILLIAMS, JAMES (B)
68. COCHRAN, JAMES (B)
69. HINTON, ANTHONY RAY (B)
70. MAGWOOD, BILLY JOE (B)
71. WILSON, SHEPP (B)
72. TABB, WILLIE (B)
73. BROWNLEE, VIRGIL LEE (B)
74. WHISENHANT, THOMAS (W)
75. BROWN, GARY LEON (W)
76. HALLFORD, PHILLIP (W)
77. POWELL, TIMOTHY (B)
78. SIEBERT, DANIEL LEE (W)
79. BOYD, WILLIAM (W)
80. BANKHEAD, GRADY (W)
81. ARTHUR, THOMAS (W)
82. HOLLADAY, GLENN (W)
83. TARVER, BOBBY (B)
84. CALLAHAN, JAMES (W)
85. HAMM, DOYLE LEE (W)
86. SMITH, JAMES WYMAN (W)
87. DUNCAN, JOSEPH CECIL (W)
88. BROWN, RAYMOND (W)
89. MUSGROVE, DONNIS (W)
90. ROGERS, DAVID (W)
91. HENDERSON, JERRY (W)
92. MCMILLAN, WALTER (B)
93. WESLEY, RONALD (B)

ARIZONA (8B; 61W; 14H; 1N)

TOTAL: 84

Gas Chamber

1. CLARK, JAMES DEAN (W)
2. [ARNETT, JAMES (W)]
3. MATA, LUIS (H)
4. BISHOP, RONALD (W)
5. [EVANS, LARRY (W)]
6. GREENAWALT, RANDY (W)
7. CEJA, JOSE (H)
8. VICKERS, ROBERT (W)
9. ORTIZ, IGNACIO (H)
10. SMITH, JOE (W)
11. RICHMOND, WILLIE LEE (B)
12. [JEFFERS, JIMMY (W)]
13. BLAZAK, MITCHELL (W)
14. [WORATZECK, WILLIAM (W)]
15. ADAMSON, JOHN (W)
16. GERLAUGH, DARRICK (N)
17. GRETZLER, DOUGLAS (W)
18. ZARAGOSA, RUBEN (H)

19. MCCALL, EDWARD (W)
20. LAMBRIGHT, JOE (W)
21. SMITH, ROBERT (W)
22. SUMMERLIN, WARREN (W)
23. FISCHER, JAMES (W)
24. LIBBERTON, LAWRENCE (W)
25. CARRIGER, PARIS (W)
26. JAMES, STEVEN (W)
27. HARDING, DONALD (W)
28. POLAND, PATRICK (W)
29. POLAND, MICHAEL (W)
30. CLABOURNE, SCOTT (B)
31. + BRACEY, WILLIAM (B)
32. + HOOPER, MURRAY (B)
33. ROSCOE, KEVIN (W)
34. CHANEY, ANTHONY (W)
35. MARTINEZ-VILLAREAL, RAMON (F)
36. NASH, VIVA LEROY (W)

37. GILLIES, JESSE (W)
 38. VILLAFUERTE, JOSE (H)
 39. SMITH, ROGER LYNN (W)
 40. SMITH, BERNARD (B)
 41. CHARO, ROBERT PHILLIP (W)
 42. + WILLIAMS, RONALD TURNEY (W)
 43. MAURO, WILLIAM CARL (W)
 44. CORRELL, MICHAEL (W)
 45. CASTANEDA, WILLIAM (H)
 46. LAGRAN, KARL (W)
 47. LAGRAN, WALTER (W)
 48. MCMURTREY, JASPER (W)
 49. MOORMANN, ROBERT HENRY (W)
 50. SHACKART, RONALD (W)
 51. BEATY, DONALD (W)
 52. SCHAD, EDWARD (W)
 53. CONNOR, RONNIE (W)
 54. ROCKWELL, RONALD (W)
 55. FULMINANTE, ORESTES (H)
 56. AMAYA-RUIZ, JOSE (H)
 57. PRINCE, LARRY (W)
 58. DAVIS, MICHAEL (W)
 59. HENSLEY, ROBERT (W)
 60. WALTON, JEFFREY (W)

61. FIERRO, JOSE (H)
 62. LOPEZ, SAMUEL (H)
 63. ATWOOD, FRANK (W)
 64. ROMANOSKY, JOHN (W)
 65. SERNA, JOHN (H)
 66. WALLACE, JAMES (W)
 67. STANLEY, MILO (W)
 68. TITON, RAYMOND (W)
 69. TITON, RICKY (W)
 70. MANNING, JAMES (W)
 71. HINCHEY, JOHN (W)
 72. EPPERSON, GEORGE (B)
 73. ROBINSON, FRED (B)
 74. MATHERS, JIMMY LEE (W)
 75. WASHINGTON, THEODORE (B)
 76. # JIMENEZ, JESUS (H)
 77. SALAZAR, ALPHONSO (H)
 78. HENRY, GRAHAM (W)
 79. COMER, ROBERT (W)
 80. ROSSI, RICHARD (W)
 81. WEST, THOMAS (W)
 82. WHITE, MICHAEL (W)
 83. COOK, DANIEL WAYNE (W)
 84. BREWER, JOHN (W)

ARKANSAS (9B; 20W; 1H; 1N)

TOTAL: 31 Lethal Injection or
 Choice of Electrocution for Those
 Sentenced Before 3/4/83

1. HULSEY, DEWAYNE (W)
 2. + CLARK, ANTONIO (B)
 3. SWINDLER, JOHN (W)
 4. MILLER, EDDIE LEE (B)
 5. HILL, DARRELL (W)
 6. FORD, CLAY ANTHONY (B)
 7. PERRY, EUGENE (W)
 8. SIMMONS, THOMAS (W)
 9. HOLMES, JAMES W (W)
 10. [CLINES, HOYT (W)]
 11. [RICHLEY, DARYL (W)]
 12. [ORNDORFF, MICHAEL (W)]
 13. HENDERSON, WILBUR (W)
 14. HAYES, T.J. (B)
 15. PRUETT, MARION (W)
 16. RECTOR, RICKY (B)

17. FAIRCHILD, BARRY (B)
 18. HILL, STEVEN DOUGLAS (W)
 19. FRETWELL, BOBBY RAY (W)
 20. SNELL, RICHARD WAYNE (W)
 21. [PICKENS, CHARLES (B)]
 22. PARKER, WILLIAM FRANK (W)
 23. GARDNER, MARK (W)
 24. + REMETA, DANIEL (N)
 25. STARR, DAVID LEE (B)
 26. O'ROURKE, MICHAEL (W)
 27. [WILSON, RONALD (B)]
 28. WHITMORE, JONAS HOTAN (W)
 29. RUIZ, PAUL (H)
 30. VAN DENTON, EARL (W)
 31. SIMMONS, RONALD (W)

CALIFORNIA (91B; 100W; 30H; 5N; 5A; 2U)

TOTAL: 233 Gas Chamber

1. BELL, RONNIE (B)
 2. HARRIS, ROBERT (W)
 3. JACKSON, EARL (B)
 4. WILLIAMS, KEITH (W)
 5. FIELDS, STEVIE (B)
 6. GHENT, DAVID (A)
 7. [ANDERSON, JAMES (B)]
 8. AINSWORTH, STEVEN (W)
 9. [PHILLIPS, RICHARD (W)]
 10. RUIZ, ALEJANDRO (H)
 11. WALKER, MARVIN (B)
 12. [BOYD, JUAN (B)]
 13. GRIFFIN, DONALD (W)
 14. GARRISON, RICHARD (W)
 15. RICH, DARRELL (W)
 16. [BUNYARD, JERRY (W)]
 17. [WARREN, ROBERT (B)]
 18. [WARREN, WOODROW (B)]
 19. HAMILTON, BERNARD LEE (B)
 20. BITTAKER, LAWRENCE (W)
 21. HEISHMAN, HARVEY (W)
 22. KIMBLE, ERIC (B)

23. WILLIAMS, STANLEY (B)
 24. MYERS, VENSON (B)
 25. MCLAIN, ROBERT (W)
 26. JOHNSON, JOE (B)
 27. [RODRIGUEZ, LUIS (H)]
 28. BEAN, ANTHONY (B)
 29. GONZALEZ, JESSE (H)
 30. GATES, OSCAR (B)
 31. COLEMAN, CALVIN (B)
 32. [BURGNER, MICHAEL (W)]
 33. HAMILTON, BILLY RAY (W)
 34. [DAVENPORT, JOHN (W)]
 35. COLEMAN, RUSSELL (B)
 36. HENDRICKS, EDGAR (B)
 37. GUZMAN, GARY (W)
 38. CARO, FERNANDO (H)
 39. [BLOYD, DALE (W)]
 40. HAYES, BLUFFORD (B)
 41. [LUCERO, PHILIP (H)]
 42. [CRANDELL, KENNETH (W)]
 43. HOVEY, RICHARD (W)
 44. AVENA, CARLOS (H)

45.	BROWN, ALBERT (B)	115.	JENNINGS, MICHAEL (W)
46.	JOHNSON, JAMES (B)	116.	HUNTER, MICHAEL (W)
47.	SANDERS, RONALD (W)	117.	MOORE, CHARLES (B)
48.	PAYTON, WILLIAM (W)	118.	JACKSON, MICHAEL (B)
49.	BONIN, WILLIAM (W)	119.	PINHOLSTER, SCOTT (W)
50.	SILVA, BENJAMIN (A)	120.	ANDREWS, JESSE J. (B)
51.	[MILNER, LYNN (B)]	121.	DIAZ, ROBERT R. (H)
52.	LUCKY, DARNELL (B)	122.	HARRIS, VON M. (B)
53.	BOYDE, RICHARD (B)	123.	MITCHAM, STEPHAN (B)
54.	WILLIAMS, KENNETH (B)	124.	[EASLEY, ELBERT (W)]
55.	WADE, MELVIN (B)	125.	BLOOM, ROBERT S (W)
56.	HOWARD, GARY (W)	126.	KAURISH, JAY (W)
57.	GRANT, RICHARD (W)	127.	KIRKPATRICK, WILLIAM (B)
58.	BROWN, JOHN (W)	128.	THOMPSON, THOMAS MARTIN (W)
59.	BABBITT, MANUEL (B)	129.	MARQUEZ, GONZALO (H)
60.	JONES, TROY (B)	130.	ALLISON, WATSON (B)
61.	WILLIS, MOSE (B)	131.	MCDOWELL, CHARLES (W)
62.	KARIS, JAMES (H)	132.	LEWIS, ROBERT (B)
63.	MIRANDA, ADAM (H)	133.	CARPENTER, DAVID (W)
64.	PENSINGER, BRETT (W)	134.	BOYER, RICHARD DELMER (W)
65.	BELMONTES, FERNANDO (H)	135.	LANG, KENNETH (W)
66.	WRIGHT, BRONTE (B)	136.	TURNER, THADDEUS LOUIS (B)
67.	POGGI, JOSEPH (H)	137.	CLARK, JOHN WILLIAM (W)
68.	ALLEN, CLARENCE R. (N)	138.	JONES, EARL (B)
69.	SANDERS, RICARDO (B)	139.	WEAVER, WARD FRANCIS (W)
70.	CHAMPION, STEVE (B)	140.	DOUGLAS, FRED BERRE (W)
71.	ROSS, CRAIG (B)	141.	GORDON, PATRICK (W)
72.	HAMILTON, MICHAEL (W)	142.	COOPER, KEVIN (B)
73.	FARMER, LEE (W)	143.	WHITT, CHARLES (W)
74.	KEENAN, MAURICE (W)	144.	BURTON, ANDRE (B)
75.	GERSON-FULLER, RONALD (W)	145.	MINCEY, BRYAN (W)
76.	SIXTO, FELIPE (H)	146.	HASKETT, RANDY (B)
77.	NEELY, CHARLES (W)	147.	HOLLOWAY, DUAYNE (B)
78.	CLARK, DOUGLAS (W)	148.	STANSBURY, ROBERT (W)
79.	MURTISHAW, DAVID (W)	149.	RAMIREZ, ANTHONY (H)
80.	MELTON, JAMES (B)	150.	CUMMINGS, RAYNARD (B)
81.	WILLIAMS, MICHAEL (W)	151.	GAY, KENNETH (B)
82.	SIRIPONGS, JATURUN (A)	152.	HORTON, JAMES (B)
83.	HITCHINGS, KEITH (W)	153.	COX, MICHAEL (W)
84.	ROBBINS, MALCOLM (W)	154.	SHELDON, JEFFREY (W)
85.	BONILLAS, LOUIS (H)	155.	DESANTIS, STEPHEN (W)
86.	EDELBACHER, PETER (W)	156.	MATTSON, MICHAEL (B)
87.	ROBERTS, LARRY (B)	157.	HAWTHORNE, ANDERSON (B)
88.	WEBSTER, LARRY (N)	158.	ANDERSON, STEPHEN (W)
89.	MALONE, KELVIN (B)	159.	MICKLE, DENNY (B)
90.	MORALES, MICHAEL (H)	160.	COX, TIEQUON A. (B)
91.	+ GALLEG0, GERALD (W)	161.	DUNCAN, HENRY EARL (B)
92.	MARSHALL, GEORGE (B)	162.	MCPETERS, RONALD (B)
93.	PROCTOR, WILLIAM (W)	163.	MARSHALL, RYAN (W)
94.	GONZALEZ, MARTIN (H)	164.	TAYLOR, FREDDIE LEE (B)
95.	ADCOX, KEITH (W)	165.	KELLY, HORACE (B)
96.	HERNANDEZ, FRANCIS (H)	166.	PRICE, CURTIS (W)
97.	HOWARD, ALBERT C (B)	167.	WILLIAMS, BARRY (B)
98.	ODLE, JAMES (W)	168.	SULLY, ANTHONY JACK (W)
99.	DYER, ALFRED (B)	169.	DEERE, RONALD (N)
100.	MICKEY, DOUGLAS (W)	170.	ASHMUS, TROY (W)
101.	MAYFIELD, DEMETRIE (B)	171.	SILVA, MAURICIO (H)
102.	CARRERA, CONSTANTINO (H)	172.	HAYES, ROYAL (W)
103.	VISCOTTI, JOHN (W)	173.	ALCALA, RODNEY (H)
104.	MILLER, DONALD (B)	174.	FIERRO, DAVID (H)
105.	STANKEWITZ, DOUGLAS (N)	175.	ESPINOZA, ANTONIO (H)
106.	[MORRIS, OSCAR (B)]	176.	THOMAS, RALPH (B)
107.	THOMPSON, ROBERT (W)	177.	JENNINGS, WILBUR (B)
108.	MASON, DAVID (W)	178.	DANIELSON, ROBERT (W)
109.	HARDY, JAMES (W)	179.	MONTIEL, RICHARD (H)
110.	REILLY, MARK (W)	180.	EDWARDS, THOMAS F. (W)
111.	ROBERTSON, ANDREW (B)	181.	BREAUX, DAVID (W)
112.	STANLEY, GERALD (W)	182.	FRANK, THEODORE (W)
113.	BEARDSLEE, DONALD (W)	183.	MEDINA, TEOFILO (H)
114.	DANIELS, JACKSON (B)	184.	DAY, CHRISTOPHER (B)

185. FRIERSON, LAVELL (B)
 186. BENSON, RICHARD ALLAN (W)
 187. NICOLAUS, ROBERT HENRY (W)
 188. BASIGALUPO, MIGUEL (H)
 189. WHARTON, GEORGE (B)
 190. SANDOVAL, ALFRED (H)
 191. WILLIAMS, DARREN C. (B)
 192. LIVADITIS, STEVEN (W)
 193. MEMRO, HAROLD (W)
 194. JOHNSON, WILLIE D. (B)
 195. GARCEAU, ROBERT (W)
 196. PRIDE, TIMOTHY (B)
 197. WASH, JEFFERY DAVID (W)
 198. MORRIS, BRUCE (W)
 199. THOMAS, DONRELL (B)
 200. SIMS, MITCHELL (W)
 201. FUENTES, JOSE (H)
 202. KIPP, MARTIN (N)
 203. TUILAEP, PAUL (A)
 204. FREEMAN, FRED (W)
 205. LUCAS, LARRY (W)
 206. CLAIR, KENNETH (B)
 207. FUDGE, KEITH (B)
 208. CLARK, RICHARD (W)
 209. WADER, MICHAEL (W)

210. HILL, MICHAEL (B)
 211. NOGUERA, WILLIAM (H)
 212. JOHNSON, LAVERNE (B)
 213. OSBAND, LANCE (B)
 214. RAMOS, MARCELINO (H)
 215. ROGERS, DAVID (W)
 216. MAYFIELD, DENNIS (B)
 217. RALEY, DAVID (W)
 218. BRADFORD, BILL (W)
 219. FAUBER, CURTIS (W)
 220. REST, THEODORE (W)
 221. CUDJO, ARMENIA (B)
 222. HART, JOSEPH (W)
 223. SAMAYOA, RICHARD (A)
 224. TURNER, MELVIN (B)
 225. ROWLAND, GUY KEVIN (U)
 226. HINES, GARY (U)
 227. CAIN, TRACY (B)
 228. WILSON, ROBERT (W)
 229. WEBB, DENNIS (W)
 230. DENNIS, WILLIAM (W)
 231. HILL, SHAWN (B)
 232. HALEY, KEVIN (B)
 233. JENKINS, DANIEL (B)

COLORADO (2W; 1H) TOTAL: 3 Lethal Injection

1. RODRIGUEZ, FRANK (H)
 2. DAVIS, GARY (W)
 3. O'NEIL, JOHN (W)

CONNECTICUT (1W) TOTAL: 1 Electrocution

1. ROSS, MICHAEL (W)

DELAWARE (5B; 2W) TOTAL: 7 Lethal Injection or Choice of Hanging for Those Sentenced Before 6/13/86

1. FLAMER, WILLIAM (B)
 2. BAILEY, BILLY (W)
 3. DEPUTY, ANDRE (B)
 4. RILEY, JAMES (B)
 5. DESHIELDS, KENNETH (B)
 6. SANDERS, REGINALD (B)
 7. DAWSON, DAVID (W)

FLORIDA (100B; 168W; 17H; 2N; 1A; 1U) TOTAL: 289 Electrocution

1. ALVORD, GARY (W)	22. HALL, FREDDIE LEE (B)
2. [COOPER, VERNON (W)]	23. [MORGAN, FLOYD (W)]
3. [JACKSON, RONALD (B)]	24. [RUFFIN, MACK (B)]
4. FORD, ALVIN (B)	25. STEINHORST, WALTER (W)
5. ALDRICH, LEON (W)	26. [THOMPSON, WILLIAM (W)]
6. MEEKS, DOUGLAS (B)	27. SMITH, JIMMY LEE (W)
7. MUHAMMAD, ASKARI (B)	28. [BOOKER, STEPHEN (B)]
8. [HARGRAVE, LENSON (W)]	29. MARTIN, NOILLIE (W)
9. JACKSON, CARL (B)	30. [CHRISTOPHER, WILLIAM (W)]
10. [ARMSTRONG, SAMPSON (B)]	31. WHITE, WILLIAM (W)
11. [STONE, RAYMOND (W)]	32. JOHNSON, MARVIN (W)
12. [FOSTER, CHARLES KENNETH (W)]	33. [ADAMS, AUBREY (W)]
13. [JACOBS, ELIGAAH (N)]	34. [JONES, LESLIE (B)]
14. TAFFERO, JESSE (W)	35. [DELAP, DAVID (W)]
15. [ZEIGLER, WILLIAM (W)]	36. BREEDLOVE, MCARTHUR (B)
16. [SIRECI, HENRY (W)]	37. HEINEY, ROBERT (W)
17. [ELLEDGE, WILLIAM (W)]	38. [RILEY, WARDELL (B)]
18. CLARK, RAYMOND (W)	39. GRIFFIN, KENNETH (B)
19. [DOWNS, ERNEST (W)]	40. [TRAWICK, GARY (B)]
20. [BUFORD, ROBERT (B)]	41. STEWART, ROY (W)
21. DEMPS, BENNIE (B)	42. SIMS, TERRY (W)

43.	[MIKENAS, MARK (W)]	113.	ROSE, MILO A. (W)
44.	BUNDY, THEODORE (W)	114.	EUTZY, WILLIAM (W)
45.	STEVENS, RUFUS (W)	115.	ROSE, JAMES (W)
46.	SMITH, FRANK (B)	116.	HOOVER, HAROLD (W)
47.	COPELAND, JOHNNY (B)	117.	WRIGHT, JOEL (W)
48.	SCOTT, PAUL (W)	118.	WOODS, RONALD (B)
49.	JOHNSON, LARRY JOE (W)	119.	GARCIA, ENRIQUE (H)
50.	BASSETT, THEODORE (W)	120.	DOLINSKY, RAYMOND (W)
51.	LUSK, BOBBY (W)	121.	WAY, FRED (W)
52.	+ JUSTUS, BUDDY (W)	122.	PHILLIPS, HARRY (B)
53.	MILLS, GREGORY (B)	123.	* JACKSON, ANDREA H. (B)
54.	BLENDER, BERNARD (W)	124.	PEEDE, ROBERT (W)
55.	[COMBS, ROBERT (W)]	125.	COOPER, RICHARD (W)
56.	[WATERHOUSE, ROBERT (W)]	126.	GORE, DAVID (W)
57.	[MIDDLETON, WILLIAM (W)]	127.	LAMBRIX, CARY (W)
58.	JOHNSON, TERRELL (W)	128.	SUAREZ, ERNESTO (H)
59.	QUINCE, KENNETH (B)	129.	WELLEY, WILLIAM (W)
60.	AGAN, JAMES (W)	130.	BERTOLOTTI, ANTHONY (B)
61.	ROUTLY, DANIEL (W)	131.	OATS, SONNY BOY (B)
62.	MASON, OSCAR (B)	132.	GLOCK, ROBERT D. (W)
63.	DAUGHERTY, JEFFREY (W)	133.	PUIATTI, CARL (W)
64.	[MICHAEL, JOHN (W)]	134.	JOHNSTON, DAVID E. (W)
65.	LIGHTBOURNE, IAN (B)	135.	DEATON, JASON P. (W)
66.	BOTTOSON, LINROY (B)	136.	MUEHLEMAN, JEFFREY A. (W)
67.	MAXWELL, CHESTER (B)	137.	HUFF, JAMES (W)
68.	O'CALLAGHAN, JOHN (W)	138.	MAREK, JOHN R. (W)
69.	SPAZIANO, JOSEPH (W)	139.	+ DUFOR, DONALD (W)
70.	PORTER, RALEIGH (W)	140.	PROVENZANO, THOMAS (W)
71.	THOMAS, EDWARD (W)	141.	KIGHT, CHARLES (W)
72.	HARRIS, THEODORE (B)	142.	ATKINS, PHILLIP (W)
73.	JONES, RONNIE LEE (B)	143.	MELENDEZ, JUAN (H)
74.	JONES, LEO (B)	144.	HAMBLIN, JAMES W. (W)
75.	PRESTON, ROBERT A. (W)	145.	TORRES-ARBOLEDO, OSCAR (B)
76.	PARKER, NORMAN (B)	146.	KOKAL, GREGORY (W)
77.	WILLIAMS, FREDDIE LEE (B)		ROGERS, JERRY LAYNE (W)
78.	KENNEDY, EDWARD DEAN (B)		SCOTT, ABRON (B)
79.	CARD, JAMES (W)		JACKSON, NATHANIEL (B)
80.	HERRING, TED (B)	150.	TEFFETELLER, ROBERT (W)
81.	[PATTEN, ROBERT (W)]	151.	RAMIREZ, JOSEPH (H)
82.	SQUIRES, WILLIAM (W)	152.	# MORGAN, JAMES (W)
83.	POPE, THOMAS DEWEY (W)	153.	NIXON, JOE ELTON (B)
84.	HARICH, ROY (W)	154.	RHODES, RICHARD (W)
85.	CLARK, LARRY (B)	155.	TOMPKINS, WAYNE (W)
86.	WHITE, JERRY (B)	156.	COCHRANE, GUY (B)
87.	[CRAIG, ROBERT (W)]	157.	COOK, DAVID (B)
88.	DOYLE, DANNY (W)	158.	DOUGLAS, HOWARD (W)
89.	BURR, CHARLIE (B)	159.	BATES, KAYLE (B)
90.	[BLANCO, OMAR (H)]	160.	TURNER, WILLIAM (B)
91.	LARA, MARIO (H)	161.	KING, AMOS LEE (B)
92.	JAMES, DAVIDSON (B)	162.	SWAFFORD, ROY (W)
93.	BYRD, MILFORD (W)	163.	* BUENOANO, JUDI (W)
94.	GRIFFIN, FRANK (B)	164.	JACKSON, CLARENCE (B)
95.	GORHAM, DAVID (B)	165.	GROSSMAN, MARTIN (W)
96.	BROWN, LARRY (B)	166.	KOON, RAYMOND (W)
97.	BUSH, JOHN EARL (B)	167.	ROBERTS, RICKEY (B)
98.	HENDERSON, THOMAS (W)	168.	OSBORN, JAMES (W)
99.	CAVE, ALFONSO (B)	169.	DIAZ, ANGEL (H)
100.	PARKER, J.B. (B)	170.	CORRELL, JERRY (W)
101.	[MANN, LARRY (W)]	171.	[TILLMAN, GARY (B)]
102.	MILLS, JOHN (B)	172.	OWEN, DUANE (W)
103.	HOFFMAN, BARRY (W)	173.	ENGLE, GREGORY (W)
104.	GROOVER, TOMMY (W)	174.	HILL, CLARENCE (B)
105.	HARDWICK, KENNETH (W)	175.	HARDWICK, JOHN GARY (W)
106.	DAVIS, ALLEN (W)	176.	JENNINGS, BRYAN (W)
107.	FRANCIS, BOBBY (B)	177.	SMITH, FRANK L. (B)
108.	MEDINA, PEDRO (B)	178.	[SCULL, JESUS (H)]
109.	DUEST, LLOYD (W)	179.	WILLIAMSON, JOHNNY (W)
110.	FERGUSON, JOHN (B)	180.	BRYAN, ANTHONY (W)
111.	PARKER, ROBERT LACEY (W)	181.	JACKSON, DOUGLAS (B)
112.	STANO, GERALD (W)	182.	REMETA, DANIEL (N)

183. [ROBINSON, JOHNNY L. (B)]
 184. HARVEY, HAROLD (W)
 185. FUENTE, HECTOR (W)
 186. [LONG, ROBERT (W)]
 187. JACKSON, ETHERIA (B)
 188. THOMPSON, RAYMOND (W)
 189. WALTON, JASON DIRK (W)
 190. HILDWIN, PAUL (W)
 191. # LECROY, CLEO (W)
 192. STEWART, KENNETH (W)
 193. BROWN, WALTER (B)
 194. ROUNDTREE, ROBERT (B)
 195. [PRIDGEN, CHARLES (W)]
 196. KYSTER, WALTER (W)
 197. MITCHELL, WILLIE (B)
 198. EDWARDS, JOHN (B)
 199. HOLTON, RUDOLPH (B)
 200. RUTHERFORD, ARTHUR (W)
 201. SPENCER, LEONARD (B)
 202. AMOS, VERNON (B)
 203. REED, GROVER (W)
 204. * DUDLEY, KATSIE (W)
 205. BARWICK, DARRYL (W)
 206. DAVIS, MARK (W)
 207. HUDSON, TIMOTHY (B)
 208. BROWN, JAMES R. (W)
 209. # [LAMB, WILBURN (W)]
 210. FARINAS, ALBERTO (W)
 211. BROWN, PAUL A. (W)
 212. MORRIS JR., GEORGE (B)
 213. CHANDLER, JAMES (W)
 214. THOMPSON, CHARLIE (B)
 215. HILL, GEORGE A. (B)
 216. BELLO, CARLOS (W)
 217. HENRY, JOHN (B)
 218. RIVERA, MICHAEL (H)
 219. LUCAS, HAROLD (W)
 220. HALLMAN, DARRELL (W)
 221. ZERQUERA, JORGE (H)
 222. TROTTER, MELVIN (B)
 223. SCHAFER, ARTHUR (W)
 224. RIVERA, SAMUEL (H)
 225. MACK, JAMES (W)
 226. DAILEY, JAMES (W)
 227. COLINA, MANUEL (H)
 228. WILLIAMS, ANDREW (B)
 229. REAVES, WILLIAM (B)
 230. STOKES, JERRY (B)
 231. WRIGHT, MACK RAY (B)
 232. IRVINE, MICHAEL (W)
 233. RHODES, WILLIAM (W)
 234. * CASTEEL, DEE DYNE (W)
 235. BRYANT, JAMES A. (W)
 236. BRUNO, MICHAEL (W)

237. CHERRY, ROGER (B)
 238. KEEN, MICHAEL SCOTT (W)
 239. JACKSON, CLINTON L. (B)
 240. GREEN, ALPHONSO (B)
 241. ALVIN, EDDIE (B)
 242. SOCHOR, DENNIS (W)
 243. DOMINICK, OCCHICONE (W)
 244. MENDYK, TODD (W)
 245. CARTER, ANTONIO (B)
 246. MAHARAJ, KRISHNA (A)
 247. HAKIM, YAQUB (B)
 248. CHRISTIAN, DOY (B)
 249. FREEMAN, JOHN (W)
 250. NOWITZKE, FREDERICK (W)
 251. PENTECOST, DAVID (W)
 252. VENTURA, PETER (W)
 253. SONGER, CARL (W)
 254. SCOTT, BRADLEY (W)
 255. CASTRO, EDWARD (H)
 256. NIBERT, BILLY RAY (W)
 257. SOUTH, GEORGE (W)
 258. FLOYD, JAMES (B)
 259. YOUNG, DAVID (B)
 260. HITCHCOCK, JAMES (W)
 261. ANDERSON, RICHARD (W)
 262. PORTER, GEORGE (W)
 263. VALLE, MANUEL (H)
 264. # HEGWOOD, BERNELL (B)
 265. BOUIE, JOHNNIE (B)
 266. CZUBAK, WALTER (W)
 267. HAMILTON, THEWELL (W)
 268. HALIBURTON, JERRY (B)
 269. PARDO, MANUEL (H)
 270. MCCRAE, JAMES (B)
 271. JOHNSON, PAUL BEASLEY (W)
 272. JONES, RANDALL SCOTT (W)
 273. BLAKLEY, ROBERT (W)
 274. RAGSDALE, EDWARD (W)
 275. CAMPBELL, JAMES (B)
 276. CRAIG, DONNY GENE (W)
 277. BURNS, DANIEL (B)
 278. SMALLEY, LEONARD (W)
 279. DUCKETT, JAMES (W)
 280. DERRICK, SAMUEL (W)
 281. GILLIAM, BURLEY (W)
 282. GARCIA, HENRY (H)
 283. WALLS, FRANK (W)
 284. CARTER, CHARLES (W)
 285. PONTICELLI, ANTHONY (W)
 286. SANCHEZ, RIGOBERTO (H)
 287. LEWIS, LAWRENCE (W)
 288. COX, ROBERT CRAIG (U)
 289. HENRY, ROBERT LAVERN (B)

GEORGIA (46B; 58W; 1U)

TOTAL: 105

Electrocution

1. [JARRELL, DAVID (W)]
 2. DOBBS, WILEY (B)
 3. [MOORE, WILLIAM NEAL (B)]
 4. CHENAULT, MARCUS (B)
 5. [BIRT, BILLY SUNDAY (W)]
 6. [GADDIS, BOBBY GENE (W)]
 7. [CORN, CHARLES (W)]
 8. PEEK, DAVID (B)
 9. MOORE, CARZELL (B)
 10. [DAVIS, CURFEW (B)]
 11. [MORGAN, ALFONSO (B)]
 12. GATES, JOHNNY LEE (B)
 13. FLEMING, SON (B)

14. WILLIS, HENRY (B)
 15. REDD, BOBB (W)
 16. COLLIER, ROBERT (B)
 17. # HIGH, JOSE (B)
 18. PRESNELL, VIRGIL (W)
 19. BROWN, NATHAN (B)
 20. # BURGER, CHRISTOPHER (W)
 21. STEVENS, THOMAS (W)
 22. JONES, BRANDON (B)
 23. CUNNINGHAM, JAMES (B)
 24. [DICK, DENNIS (W)]
 25. [STEPHENS, WILLIAM (B)]
 26. GILREATH, FRED (W)

27. NELSON, GARY (B)
 28. + JUSTUS, BUDDY (W)
 29. COLLINS, ROGER (B)
 30. DAVIS, FRED (W)
 31. CASTELL, JAMES (W)
 32. WATERS, EURUS (W)
 33. HORTON, JIMMY (B)
 34. [HARDY, KENNETH (W)]
 35. MATHIS, JAMES (B)
 36. HILL, FLOYD (B)
 37. *# BUTTRUM, JANICE (W)
 38. [SMITH, WILLIAM (B)]
 39. WILSON, WILLIE (B)
 40. WILLIAMS, HAROLD (W)
 41. BURDEN, JIMMY (B)
 42. CONNOR, JOHN WAYNE (W)
 43. ALLEN, STANLEY (B)
 44. MINCEY, TERRY (W)
 45. PUTMAN, WILLIAM (W)
 46. FELKER, ELLIS (W)
 47. ROBERTS, VICTOR (B)
 48. [PAGE, JERRY (W)]
 49. BAXTER, NORMAN (W)
 50. DEVIER, DARRELL (W)
 51. INGRAM, NICHOLAS (W)
 52. SPIVEY, RONALD (W)
 53. FINNEY, EDDIE (W)
 54. ROSS, EDDIE LEE (B)
 55. BLANKS, KENNITH (B)
 56. WALKER, RICHARD (B)
 57. ALDERMAN, JACK (W)
 58. HANCE, WILLIAM HENRY (B)
 59. CONKLIN, ROBERT (W)
 60. FORD, JAMES ARTHUR (B)
 61. PARKER, BYRON (W)
 62. # [LEGARE, ANDREW (W)]
 63. CURRY, WALTER (B)
 64. DAVIS, GEORGE (B)
 65. COOK, JAMES (B)
 66. CHILDS, JOHNNY (B)

67. BECK, ELI (B)
 68. DAVIS, JOHN MICHAEL (W)
 69. ROGERS, JAMES (W)
 70. CARGILL, DAVID (W)
 71. [POPE, JOHN DAVID (W)]
 72. ROMINE, LARRY (W)
 73. FUGITT, JOHN THOMAS (W)
 74. HICKS, ROBERT KARL (W)
 75. HOUSEL, TRACEY LEE (W)
 76. JEFFERSON, LAWRENCE (B)
 77. HARRISON, ADEN (B)
 78. BLANKENSHIP, ROY (W)
 79. GARY, CARLTON (B)
 80. # WILLIAMS, ALEXANDER (B)
 81. [SKIPPER, GILBERT (W)]
 82. FORD, MELBERT RAY (W)
 83. HOLIDAY, DALLAS (B)
 84. COHEN, MICHAEL (B)
 85. FRAZIER, LEONARD (W)
 86. CRAWFORD, EDDIE (W)
 87. PATILLO, KEITH (W)
 88. LIPHAM, WILLIAM (W)
 89. WADE, JOHNNY (W)
 90. KINSMAN, RONALD (W)
 91. FOSTER, TIMOTHY (B)
 92. LEE, JESSIE (B)
 93. LONCHAR, LARRY GRANT (W)
 94. NEWLAND, ROBERT (W)
 95. SPENCER, JAMES (B)
 96. PRUITT, MARK ANTHONY (W)
 97. ALLEN, WILLIAM HORTON (W)
 98. MORRISON, ERNEST (W)
 99. LEE, LARRY (W)
 100. POTTS, JACK (W)
 101. MOON, LARRY EUGENE (W)
 102. ISAACS, CARL (W)
 103. JARRELLS, JONATHAN (W)
 104. DANIEL, LARRY (U)
 105. FERRELL, ERIC (B)

IDAHO (14W; 1H) TOTAL: 15 Lethal Injection or Firing Squad

1. GIBSON, THOMAS HENRY (W)
 2. CREECH, THOMAS (W)
 3. MCKINNEY, RANDY (W)
 4. PARADIS, DONALD (W)
 5. STUART, EUGENE (W)
 6. FAIN, CHARLES (W)
 7. FETTERLY, DONALD (W)
 8. BEAM, ALBERT RAYMOND (W)

9. LANKFORD, BRIAN (W)
 10. LANKFORD, MARK (W)
 11. LEAVITT, RICHARD (W)
 12. PIZZUTO, GERALD (W)
 13. RHOADES, PAUL (W)
 14. PAZ, FEDERICO (H)
 15. SIVAK, LACEY (W)

ILLINOIS (73B; 38W; 6H) TOTAL: 117 Lethal Injection

1. SZABO, JOHN (W)
 2. [GAINES, DWIGHT (B)]
 3. FREE, JAMES (W)
 4. DELVECCHIO, GEORGE (W)
 5. WILLIAMS, HERNANDO (B)
 6. ALLEN, KENNETH (B)
 7. GACY, JOHN WAYNE (W)
 8. CABALLERO, JUAN (H)
 9. JONES, ANDRE (B)
 10. RUIZ, LUIS (H)
 11. [EDDMONDS, DURLYN (B)]
 12. SILAGY, CHARLES (W)
 13. [KUBAT, ROBERT (W)]
 14. STEWART, WALTER (B)
 15. DAVIS, GIRVIES (B)
 16. OWENS, ROBIN (B)

17. MACK, LARRY (B)
 18. KING, DERRICK (B)
 19. COLLINS, ROGER (B)
 20. BRACEY, WILLIAM (B)
 21. HOOPER, MURRAY (B)
 22. STEWART, RAYMOND (B)
 23. ALBANESE, CHARLES (W)
 24. THOMPCKINS, WILLIE (B)
 25. MADEJ, GREGORY (W)
 26. HOPE, EDGAR (B)
 27. NEAL, JOHN (W)
 28. OLINGER, PERRY (W)
 29. MORGAN, SAMUEL (B)
 30. PEREZ, DOMINGO (H)
 31. MONTGOMERY, ULECE (B)
 32. GUEST, ANTHONY (B)

33. WHITEHEAD, JOHN (W)
34. ERICKSON, PAUL (W)
35. PORTER, ANTHONY (B)
36. WRIGHT, PATRICK (W)
37. WALKER, CHARLES (W)
38. ENOCH, WILLIE (B)
39. CHRISTIANSON, EDGAR (W)
40. LEGO, DONALD (W)
41. HALL, ANTHONY (B)
42. RICHARDSON, FLOYD (B)
43. YOUNG, WILLIAM (B)
44. EVANS, JOHNNIE LEE (B)
45. HARRIS, JAMES (B)
46. SANCHEZ, HECTOR (H)
47. JOHNSON, MILTON (B)
48. GACHO, ROBERT (W)
49. TITONE, DINO (W)
50. SHURN, KEITH (B)
51. REDD, FRANK (B)
52. MAHAFFEY, JERRY (B)
53. MAHAFFEY, REGINALD (B)
54. EMERSON, DENNIS (B)
55. ORANGE, LEROY (B)
56. BARROW, RONALD (W)
57. FOSTER, JAMES (B)
58. HOLMAN, TAFFORD (B)
59. KIDD, LEONARD (B)
60. FLORES, MARIO (H)
61. GRIFFIN, HENRY (B)
62. CREWS, WILLIAM (W)
63. JONES, WILLIAM (B)
64. BRITZ, DEWAYNE (W)
65. [SIMMS, DARRYL (B)]
66. SALAZAR, MANUEL (H)
67. JIMERSON, VERNEAL (B)
68. WILLIAMS, BENNIE (B)
69. JOHNSON, BRIAN (B)
70. SPREITZER, EDWARD (W)
71. ASHFORD, JAMES (B)
72. HOUSE, DERRICK (B)
73. HARRIS, TERRY (B)
74. TYE, JIMMY (B)
75. SCOTT, LARRY (B)

76. SEUFFER, JAMES (W)
77. [ROGERS, WAYNE (W)]
78. TURNER, ROBERT (W)
79. ODLE, THOMAS (W)
80. BOCLAIR, STANLEY (B)
81. JOHNSON, ANDREW (B)
82. SMITH, STEVEN (B)
83. TERRELL, DREW (B)
84. [BURCHETTE, FRANKLIN (B)]
85. FIELDS, NATHSON (B)
86. HAWKINS, EARL (B)
87. EYLER, LARRY (W)
88. CHANDLER, MARK (W)
89. HAYES, CLARENCE (B)
90. BRISBON, HENRY (B)
91. PHILLIPS, JOHN PAUL (W)
92. THOMAS, WILLIE (B)
93. FRANKLIN, WILLIAM (B)
94. COLEMAN, ALTON (B)
95. BEAN, HAROLD (W)
96. WILLIAMS, DENNIS (B)
97. KOKORALEIS, ANDREW (W)
98. HOWARD, STANLEY (B)
99. WEST, PAUL (B)
100. STEIDL, GORDON (W)
101. HENDERSON, DEMETRIUS (B)
102. LUCAS, JOHN (W)
103. GIBSON, SHERMAN (B)
104. PUGH, WILLIE (B)
105. PECORARO, JOHN (W)
106. STRICKLAND, TYRONE (B)
107. JOHNSON, MARK (B)
108. THOMAS, WALTER (B)
109. MAXWELL, ANDREW (B)
110. ENNIS, TONY (B)
111. WARD, JERRY (B)
112. EDWARDS, DANIEL (W)
113. LEGER, WILLIAM (W)
114. JACKSON, LAWRENCE (B)
115. MORGAN, DERRICK (B)
116. ST. PIERRE, ROBERT (W)
117. PITSONBARGER, JIMMY (W)

INDIANA (20B; 28W; 2H)

TOTAL:

50

Electrocution

1. BREWER, JAMES (B)
2. DANIELS, MICHAEL (B)
3. [WILLIAMS, LARRY (W)]
4. MOORE, RICHARD (B)
5. BURRIS, GARY (B)
6. SMITH, TOMMIE (B)
7. RESNOVER, GREGORY (B)
8. SCHIRO, THOMAS (W)
9. AVERHART, RUFUS (B)
10. WALLACE, DONALD (W)
11. LOWERY, JAMES (W)
12. BIEGHLER, MARVIN (W)
13. VAN CLEAVE, GREG (B)
14. WISEHART, MARK (W)
15. BOYD, RUSSELL (W)
16. SMITH, CHARLES (B)
17. SPRANGER, WILLIAM (W)
18. FLEENOR, D.H. (W)
19. DAVIS, FRANK (W)
20. HARRIS, JAMES (B)
21. GAMES, JAMES (W)
22. DAVIS, GREG (B)
23. MCCULLOM, PHILLIP (B)
24. TOWNSEND, JOHNNY (B)

25. WOODS, DAVID (W)
26. RONDON, REYNALDO (H)
27. CHAVEZ, ELADIO MARTINEZ (H)
28. * THACKER, LOIS (W)
29. UNDERWOOD, HERBERT (W)
30. HUFFMAN, RICHARD (W)
31. MINNICK, WILLIAM (W)
32. LOWERY, TERRY (W)
33. BELLMORE, LARRY (W)
34. + COLEMAN, ALTON (B)
35. JOHNSON, GREGORY SCOTT (W)
36. *+ BROWN, DEBRA (B)
37. *# COOPER, PAULA (B)
38. EVANS, CHARLES (B)
39. CANAAN, KEITH (W)
40. BAIRD, ARTHUR (W)
41. ROUSTER, GREGORY (B)
42. WILLIAMS, DARNELL (B)
43. HOUGH, KEVIN (W)
44. KENNEDY, STUART (W)
45. JACKSON, DONALD (W)
46. CASTOR, MARVIN (W)
47. ALLEN, HOWARD (B)
48. BERNISCHKE, WILLIAM (W)

49. CONNER, KEVIN (W)

KENTUCKY (8B; .23W)

TOTAL: 31

1. GALL, EUGENE (W)
2. WHITE, GENE 'KARU' (W)
3. MCQUEEN, HAROLD (W)
4. KORDENBROCK, PAUL (W)
5. SKAGGS, DAVID (W)
6. MARLOWE, HUGH (W)
7. # STANFORD, KEVIN (B)
8. MATTHEWS, DAVID (W)
9. HARPER, EDDIE LEE (W)
10. BEVINS, WILLIAM (W)
11. SMITH, DAVID (W)
12. HALVORSEN, LEIF (W)
13. WILLOUGHBY, MITCHELL (W)
14. SLAWTER, JAMES (B)
15. MOORE, BRIAN KEITH (W)
16. ASKEW, ROBERT (B)

LOUISIANA (23B; 19W)

TOTAL: 42

1. # PREJEAN, DAITON (B)
2. MONROE, RONALD (B)
3. SAWYER, ROBERT (W)
4. JAMES, ANTONIO (B)
5. [NELSON, LANE (W)]
6. WELCOME, HERBERT (B)
7. KIRKPATRICK, FREDERICK (W)
8. RUSHING, DAVID (W)
9. MESSIAH, KEITH (B)
10. BUSBY, ERNEST (W)
11. WILSON, DAVID EARL (B)
12. WARD, THOMAS LEE (B)
13. JONES, ANDREW LEE (B)
14. DEBOUE, THOMAS (B)
15. FORD, GLENN (B)
16. KYLES, CURTIS (B)
17. SULLIVAN, JOHN (W)
18. SCIRE, ANTHONY (W)
19. SMITH, CLARENCE (W)
20. LOYD, ALVIN (W)
21. BATES, WAYNE (W)

MARYLAND (14B; 5W)

TOTAL: 19

1. [COLVIN, EUGENE (B)]
2. CALHOUN, JAMES (B)
3. TICHNELL, RICHARD (W)
4. WHITE, DERRICK (B)
5. # TRIMBLE, JAMES (W)
6. THOMAS, DONALD (B)
7. # JOHNSON, LAWRENCE (B)
8. HUFFINGTON, JOHN (W)
9. EVANS, VERNON (B)
10. GRANDISON, ANTHONY (B)

MISSISSIPPI (29B; 18W; 1H)

TOTAL: 48

1. CULBERSON, ALVIN (B)
2. REDDIX, WILLIE (B)
3. [WHEAT, KENNETH (W)]
4. [HILL, ALVIN (B)]
5. KING, MACK ARTHUR (B)
6. EDWARDS, LEO (B)
7. BOOKER, JOHN (B)
8. SMITH, WILLIE ALBERT (B)
9. # [TOKMAN, GEORGE (W)]

50. BENEFIEL, WILLIAM (W)

Electrocution

17. [WHITE, LARRY (B)]
18. SIMMONS, BEORIA (B)
19. DEAN, ROY WAYNE (W)
20. MORRIS, JAMES E. (W)
21. WALLS, CHRISTOPHER (W)
22. COSBY, TEDDY LEE (B)
23. TAYLOR, VICTOR (B)
24. EPPERSON, ROGER DALE (W)
25. HODGE, BENNY LEE (W)
26. THOMPSON, WILLIAM (W)
27. * FOSTER, LAFONDA FAY (W)
28. SANDERS, DAVID LEE (W)
29. CLARK, MICHAEL (W)
30. THOMAS, ALFRED (W)
31. WILSON, GREGORY (B)

Electrocution

22. WILLIAMS, DOBIE (B)
23. THOMPSON, JOHN (B)
24. BROWN, JOHN (W)
25. COPELAND, JAMES (W)
26. BROOKS, GEORGE (W)
27. MARTIN, DARYL (B)
28. PERRY, MICHAEL OWEN (W)
29. # [COMEAUX, ADAM (B)]
30. JOHNSON, SAUL (B)
31. SMITH, NORVELL (B)
32. EL-MUMIT, ABDULLAH (B)
33. WILLE, JOHN FRANCIS (W)
34. EATON, WINTHROP (B)
35. BROWN, BRYAN (W)
36. # DUGAR, TROY (B)
37. LINDSEY, TYRONNE (B)
38. TASSIN, ROBERT (W)
39. GRAHAM, MICHAEL (W)
40. CAGE, TOMMY (B)
41. BURRELL, ALBERT RONNIE (W)
42. LEE, TRACY (B)

Gas Chamber

11. BOWERS, MARSELLE (B)
12. [MILLS, RALPH (W)]
13. JONES, GREGORY (B)
14. [HUNT, FLINT GREGORY (B)]
15. [HARRIS, JACKIE (B)]
16. BEDFORD, ROBERT (B)
17. [DOERING, AL WAYNE (W)]
18. COLLINS, KENNETH (B)
19. BOOTH, JOHN (B)

Gas Chamber or
Lethal Injection

10. GILLIARD, ROBERT (B)
11. IRVING, JOHN BUFORD (B)
12. [LEATHERWOOD, MICHAEL (W)]
13. NEAL, HOWARD (W)
14. WILCHER, BOBBY (W)
15. [JOHNSON, SAMUEL (B)]
16. STRINGER, JAMES R. (W)
17. BILLIOT, JAMES (W)
18. DUFOUR, DONALD (W)

19. [JORDAN, RICHARD (W)]
20. WILLIAMS, JESSE (W)
21. [ABRAM, DONALD (B)]
22. COLE, WEST (B)
23. JONES, GREGORY M. (B)
24. LANIER, ARTHUR RAY (B)
25. FOSTER, JAMES HENRY (B)
26. WILEY, WILLIAM (B)
27. PINKNEY, BOBBY JOE (B)
28. GRIFFIN, GARY (B)
29. LANIER, JOHNNY (B)
30. [WHITE, WILLIE LEE (B)]
31. LEATHERWOOD, ALFRED (B)
32. FERAGA, LAZARO (H)
33. NIXON, JOHN (W)

MISSOURI (27B; 42W; 1N)

TOTAL: 70

Lethal Injection

1. [NEWLON, RAYFIELD (B)]
2. MERCER, GEORGE (W)
3. STOKES, WINFORD (B)
4. BOLDER, MARTSAY (B)
5. BLAIR, WALTER (B)
6. SHAW, ROBERT (B)
7. GRIFFIN, LARRY (B)
8. SMITH, GERALD (W)
9. BATTLE, THOMAS (B)
10. LARETTE, ANTHONY (W)
11. WILLIAMS, DOYLE (W)
12. # LASHLEY, FREDERICK (B)
13. GILMORE, GEORGE (W)
14. MCDONALD, SAM (B)
15. GUINAN, FRANK (W)
16. PRESTON, ELROY (B)
17. LAWS, LEONARD (W)
18. BYRD, MAURICE (B)
19. JOHNS, STEPHEN (W)
20. BANNISTER, ALAN (W)
21. + MALONE, KELVIN (B)
22. YOUNG, MOSES (B)
23. KENLEY, KENNETH (W)
24. NAVE, EMMETT (N)
25. FOSTER, EMMITT (B)
26. BOLIEK, WILLIAM (W)
27. JONES, MARVIN (W)
28. MATHENIA, CHARLES LEE (W)
29. DRISCOLL, ROBERT (W)
30. ROBERTS, ROY (W)
31. RODDEN, JAMES (W)
32. O'NEAL, ROBERT (W)
33. ZEITVOGEL, RICHARD (W)
34. CHAMBERS, JAMES (W)
35. SCHNEIDER, ERIC (W)

MONTANA (1B; 5W; 2N)

TOTAL: 8

Hanging or Lethal Injection

1. FITZPATRICK, BERNARD (W)
2. COLEMAN, DEWEY (B)
3. MCKENZIE, DUNCAN (W)
4. SMITH, RONALD (W)

34. LOCKETT, CARL (B)
35. WHEELER, NOAH (B)
36. MACKABEE, FRANK (B)
37. WOODWARD, PAUL (W)
38. MEASE, BART (W)
39. BEVILL, RANDY (W)
40. CLEMONS, CHANDLER (B)
41. SHELL, ROBERT LEE (B)
42. WEST, OTHIE LEE (B)
43. LADNIER, JEFFREY (W)
44. HANSEM, TRACY (W)
45. TURNER, KEVIN (B)
46. HOLLAND, GERALD (W)
47. DAVIS, GREGORY (B)
48. THORSON, ROGER (W)

36. SCHLUP, LLOYD (W)
37. ANTWINE, CALVERT (B)
38. POLLARD, ROOSEVELT (B)
39. [MALLETT, JEROME (B)]
40. LINGAR, STANLEY (W)
41. GRUBBS, RICKY LEE (W)
42. # WILKINS, HEATH (W)
43. AMRINE, JOSEPH (W)
44. SANDERS, CLINDELL (B)
45. WALLS, ROBERT (W)
46. MURRAY, ROBERT "TONY" (B)
47. JONES, WILLIAM (W)
48. SIDEBOTTOM, ROBERT T. (W)
49. PARKUS, STEVEN J. (W)
50. S'AN, JEFFREY (W)
51. MONS, ERIC (B)
52. RE, DAVID R. (W)
53. GILPIN, MILTON (B)
54. KILGORE, BRUCE (B)
55. OTTWELL, CLARENCE (W)
56. SWEET, GLENNON (W)
57. WELLS, LUTHER (B)
58. GRIFFIN, REGINALD (B)
59. MCMILLAN, RICHARD (W)
60. REESE, DONALD (W)
61. SCHNICK, JAMES (W)
62. * WACASER, NILA (W)
63. FIX, ANDREW (W)
64. FELTROP, RALPH (W)
65. DEBELER, SHELBY (W)
66. WEAVER, WILLIAM (B)
67. SHURN, DARYL (B)
68. SMITH, SAMUEL D. (B)
69. OXFORD, RICHARD (W)
70. PETARY, DONALD (W)

NEBRASKA (2B; 9W; 1N)

TOTAL: 12

Electrocution

1. RUST, JOHN (W)
2. [HOLTAN, RICHARD (W)]
3. ANDERSON, C. MICHAEL (W)
4. OTEY, HAROLD (B)
5. HOCHSTEIN, PETER (W)
6. HARPER, STEVEN (W)

7. WILLIAMS, ROBERT (B)
8. [MOORE, CAREY (W)]
9. REEVES, RANDOLPH (N)
10. PALMER, CHARLES (W)
11. JOUBERT, JOHN (W)
12. RYAN, MICHAEL (W)

<u>NEVADA</u>	(11B; 29W; 5H)	TOTAL: 45	Lethal Injection
1. DEUTSCHER, HENRY (W)		24. MAZZAN, JOHN (W)	
2. WILSON, EDWARD (W)		25. LOPEZ, MANUEL (H)	
3. OLAUSEN, JOHN (W)		26. HOGAN, MICHAEL RAY (B)	
4. YBARRA, ROBERT (H)		27. [FLANAGAN, DALE (W)]	
5. MILLIGAN, RONNIE GAYLE (W)		28. [MOORE, RANDOLPH (W)]	
6. ROGERS, MARK (W)		29. COLLIER, GREGORY (W)	
7. * FORD, PRISCILLA (B)		30. PADILLA, DANIEL (W)	
8. MCKENNA, PATRICK (W)		31. STEVENS, DWAYNE (W)	
9. PETROCELLI, TRACY (W)		32. ADAMS, LARRY (W)	
10. MIRANDA, ROBERTO (H)		33. PERTGEN, WES (W)	
11. NEVIUS, THOMAS (B)		34. BROWNING, PAUL LEWIS (B)	
12. WILLIAMS, CARY (B)		35. MCKAGUE, KENNETH (W)	
13. NEUSHAFFER, JIMMY (W)		36. HARDISON, RICHARD (B)	
14. HOWARD, SAMUEL (B)		37. PELLIGRINI, DAVID (W)	
15. HILL, JAMES E. (B)		38. HABERSTROH, RICHARD (W)	
16. SECHREST, RICKY (W)		39. DAWSON, HENRY (B)	
17. FARMER, ROBERT (W)		40. JIMENEZ, VICTOR (W)	
18. CRUMP, THOMAS (W)		41. BEJARANO, JOHN (H)	
19. SNOW, JOHN (B)		42. FLANAGAN, SEAN (W)	
20. GALLEG0, GERALD (W)		43. EMIL, RODNEY (W)	
21. THOMPSON, WILLIAM (W)		44. VALERIO, JOHN (H)	
22. CAVANAUGH, PATRICK (B)		45. BENNETT, EDWARD (W)	
23. MORAN, RICHARD (W)			

<u>NEW JERSEY</u>	(14B; 12W; 1H)	TOTAL: 27	Lethal Injectio
1. [BIEGENWALD, RICHARD (W)]		15. MCDUGALD, ANTHONY (B)	
2. WILLIAMS, JAMES (B)		16. CLAUSELL, JAMES (B)	
3. HUNT, JAMES (B)		17. HARVEY, NATHANIEL (B)	
4. [ZOLA, JAMES E. (W)]		18. HIGHTOWER, JACINTO (B)	
5. [KOEDATICH, JAMES (W)]		19. DIXON, PHILIP (B)	
6. SAVAGE, ROY (B)		20. JACKSON, KEVIN (B)	
7. PITTS, DARRYL LEE (W)		21. PERRY, ARTHUR (B)	
8. COYLE, BRYAN (W)		22. SCHIAVO, DOMENIC (W)	
9. DAVIS, STEVEN RAY (W)		23. PENNINGTON, FRANK (W)	
10. ROSE, TEDDY (W)		24. MOORE, SAMUEL LEON (B)	
11. JOHNSON, WALTER (W)		25. ERAZO, SAMUEL (H)	
12. LONG, RONALD (B)		26. DIFRISCO, ANTHONY (W)	
13. MARSHALL, ROBERT (W)		27. [BEY, MARKO (B)]	
14. OGELSBY, WALTER (B)			

<u>NEW MEXICO</u>	(1W; 1N)	TOTAL: 2	Lethal Injection
1. CLARK, TERRY (W)			
2. HENDERSON, THOMAS (N)			

<u>NORTH CAROLINA</u>	(40B; 34W; 1H; 5N)	TOTAL: 80	Gas Chamber or Lethal Injection
1. TAYLOR, NORRIS (B)		20. ROBBINS, PHILLIP (B)	
2. [MCDOWELL, ROBERT (B)]		21. BROWN, WILLIE (B)	
3. WILLIAMS, LARRY DARNEL (B)		22. MCNEIL, LEROY (B)	
4. MCDUGALL, MIKE (W)		23. GREEN, HARVEY LEE (B)	
5. PINCH, MICHAEL (W)		24. ARTIS, ROSCOE (B)	
6. [BROWN, DAVID JUNIOR (B)]		25. MCLAUGHLIN, ELTON (B)	
7. SMITH, KERMIT (W)		26. ROBINSON, EDDIE (B)	
8. LAWSON, DAVID (W)		27. WILSON, MICHAEL (W)	
9. WILLIAMS, DOUGLAS (B)		28. BROWN, THOMAS JACK (W)	
10. MAYNARD, ANSON (N)		29. SPRUILL, JONNIE LEE (B)	
11. [MOORE, GEORGE (B)]		30. ZUNIGA, BERNARDINO (H)	
12. OLIVER, JOHN WESLEY (B)		31. [SIMPSON, PIERRE DYON (B)	
13. CRAIG, ANDREW (B)		32. SMITH, TERRY WILLIAM (W)	
14. ANTHONY, FRANCIS (B)		33. SANDERS, STANLEY (B)	
15. NOLAND, JOHN (W)		34. LLOYD, OSCAR (B)	
16. BOYD, ARTHUR MARTIN (W)		35. MCKOY, DOCK (B)	
17. GLADDEN, WILLIE (B)		36. LAWS, WAYNE ALAN (W)	
18. HUFFSTETLER, DAVID (W)		37. ROSS, JAMES KEITH (W)	
19. GARDNER, JOHN (W)		38. HOLDEN, RUSSELL (B)	

39. BROWN, BOBBY RAY (W)
 40. GREEN, ALTON GARNER (W)
 41. DAVIS, EUGENE (B)
 42. FULLWOOD, MICHAEL LEE (B)
 43. HUNT, HENRY LEE (N)
 44. BARNES, ELWELL (N)
 45. CASE, JERRY DOUGLAS (W)
 46. MONROE, CASEY JACK (B)
 47. SANDERSON, RICKY LEE (W)
 48. HENNIS, TIMOTHY (W)
 49. MILLER, GENERAL SAM (B)
 50. SMITH, ROWLAND (W)
 51. LYNCH, GREGORY (B)
 52. ALLEN, TIMOTHY (B)
 53. PORTER, WILLIAM HOWARD (N)
 54. HANDY, WILLIAM (B)
 55. CUMMINGS, EDWARD LEE (B)
 56. BACON, ROBERT JR. (B)
 57. HUFF, EVERETT R. (W)
 58. CUMINGS, JERRY RAY (N)
 59. THOMAS, JAMES EDWARD (B)

OHIO (45B; 36W; 2H; 2N)

TOTAL: 85

Electrocution

1. JENKINS, LEONARD (B)
 2. GLENN, JOHN (B)
 3. MAURET, DONALD (W)
 4. STEFFEN, DAVID (W)
 5. MAPES, DAVID (B)
 6. MARTIN, ERNEST (B)
 7. SPISAK, FRANK (W)
 8. BYRD, JOHN WILLIAM (W)
 9. * GRANT, ROSALIE (B)
 10. BEUKE, MICHAEL (W)
 11. SOWELL, BILLIE (B)
 12. WILLIAMS, LEWIS (B)
 13. BROOKS, REGINALD (B)
 14. BARNES, STERLING (B)
 15. [JOHNSTON, DALE (W)]
 16. SCOTT, JAY D. (B)
 17. BUELL, ROBERT (W)
 18. HAMBLIN, DAVID (W)
 19. ESPARZA, GREGORY (H)
 20. [DAVIS, VON CLARK (B)]
 21. JESTER, WILLIE LEE (B)
 22. WILLIAMS, DONALD (B)
 23. SPIRKO, JOHN GEORGE (W)
 24. STUMPF, JOHN (W)
 25. ZUERN, WILLIAM (W)
 26. HOLLOWAY, ALLEN (W)
 27. BEDFORD, DANIEL (W)
 28. CLARK, JOSEPH LEWIS (B)
 29. APANOVITCH, ANTHONY (W)
 30. HOOKS, DANNY (W)
 31. POST, RONALD (W)
 32. + COLEMAN, ALTON (B)
 33. BRADLEY, WILLIAM (B)
 34. POINDEXTER, DEWAINE (B)
 35. * BROWN, DEBRA (B)
 36. [GILLARD, JOHN (W)]
 37. GREER, PAUL (B)
 38. VAN HOOK, ROBERT (W)
 39. HENDERSON, JEROME (B)
 40. WICKLINE, WILLIAM (W)
 41. BROOM, ROMELL (B)
 42. BREWER, DAVID (W)
 43. JAMISON, DERRICK (B)

60. GREENE, GARY (W)
 61. QUICK, HAROLD (B)
 62. ROBINSON, DWIGHT (B)
 63. PRICE, RICKY LEE (W)
 64. COFFEY, FRED (W)
 65. WILLIS, JAMES EARL (W)
 66. * COX, SUE (W)
 67. JONES, WILLIAM Q. (B)
 68. HEDGEPEETH, ROLAND (W)
 69. BROWN, DUANE (B)
 70. QUESINBERRY, MICHAEL (W)
 71. BRIDGES, WILFRED (B)
 72. PAYNE, RANDY JOE (W)
 73. ALI, EL-AMIN AHMAD (B)
 74. MCCARVER, ERNEST (W)
 75. SMITH, ROGER (B)
 76. CALDWELL, RICKIE TIM (W)
 77. CALDWELL, RICKIE (W)
 78. POPE, JIMMIE (W)
 79. TURNER, CLAUDE (W)
 80. BOYD, KENNETH (W)

44. DICKERSON, FREDERICK (B)
 45. ROE, JOHN GLENN (W)
 46. MORALES, ALFRED (N)
 47. WILES, MARK WAYNE (W)
 48. TYLER, ARTHUR (B)
 49. HUTTON, PERCY (B)
 50. HICKS, JOHN (B)
 51. HILL, DANNY LEE (B)
 52. LANDRUM, LAWRENCE (W)
 53. MORELAND, SAMUEL (B)
 54. LAWRENCE, JEFFREY (W)
 55. BENNER, GLEN (W)
 56. SEIBER, LEE (W)
 57. SNEED, DAVID (B)
 58. MONTGOMERY, WILLIAM (B)
 59. COOEY, RICHARD (W)
 60. LORRAINE, CHARLES (W)
 61. JOHNSON, GARY (B)
 62. RICHEY, KENNETH (W)
 63. POWELL, TONY (B)
 64. HUERTAS, EDIBERTO (H)
 65. CLAYTOR, JUSTIN (B)
 66. ELEY, JOHN (B)
 67. HEINISH, WAYNE (W)
 68. LOTT, GREGORY (B)
 69. MURPHY, JOSEPH (W)
 70. JELLS, REGINALD (B)
 71. FRAZIER, WAYNE (B)
 72. EVANS, DERRICK (B)
 73. WADDY, WARREN (B)
 74. WATSON, KEVIN (B)
 75. COMBS, RONALD (W)
 76. HENDERSON, CHARLES (W)
 77. BONNELL, MELVIN (W)
 78. SLAGEL, BILLY (N)
 79. SMITH, WILLIAM HENRY (B)
 80. JACKSON, ANDRE (B)
 81. ROJAS, MARTIN (B)
 82. LAWSON, JERRY (W)
 83. DAVIS, RAYMOND (W)
 84. * GREEN, ELIZABETH (B)
 85. MILLS, JAMES E. (B)

OKLAHOMA (17B; 67W; 1H; 8N; 1A)

TOTAL: 94 Lethal Injection

1. HAYS, THOMAS "SONNY" (W)
2. DAVIS, CHARLES (W)
3. PARKS, ROBIN LEROY (B)
4. STOUT, BILLY GENE (W)
5. COLEMAN, CHARLES (W)
6. STAFFORD, ROGER (W)
7. [BROGIE, KIRK (W)]
8. JONES, D.L. (W)
9. BANKS, ANTHONY (B)
10. ROBISON, OLAN RANDLE (W)
11. GREEN, MICHAEL (W)
12. NUCKOLS, KENNETH (W)
13. COOKS, CORNELL (B)
14. JOHNSON, MALCOLM (B)
15. HAYES, ROGER DALE (W)
16. LILES, MARK (W)
17. BRECHEEN, ROBERT (W)
18. ROSS, BOBBY LYNN (B)
19. [CARTWRIGHT, TIMOTHY (W)]
20. BREWER, BENJAMIN (B)
21. FOSTER, CHARLES (B)
22. * SMITH, LOIS NADINE (W)
23. FISHER, JAMES (B)
24. CASTRO, JOHN (W)
25. VAN WOUDEBERG, SAMMY (N)
26. + JAMES, TERRENCE (N)
27. JONES, RICHARD (W)
28. SMITH, PHILLIP (W)
29. + HALE, ALVIE (W)
30. MANN, ANTHONY (W)
31. WASHINGTON, JOHN PAUL (B)
32. NEWSTEAD, NORMAN LEE (W)
33. PORTER, ROGER (W)
34. MOORE, SCOTT LEE (W)
35. WALKER, GARY ALAN (W)
36. BOLTZ, JOHN (W)
37. JOHNSON, ROBERT GRADY (W)
38. NEILL, JAY WESLEY (W)
39. SMITH, HENRY (W)
40. BATTENFIELD, BILLY (W)
41. STOUFFER, BIGLER (W)
42. WALKER, GARY ALAN (W)
43. MUNSON, ADOLF (B)
44. ROJEM, RICHARD (W)
45. MOORE, DEWEY (W)
46. BRENNAN, MARK EDWARD (W)
47. CLAYTON, ROBERT W. (W)

48. MCCARTY, EDDIE (W)
49. LAFEVER, LLOYD (W)
50. CANNON, RANDY (W)
51. STILES, RUSSELL (W)
52. CRAVATT, DARIAS JR. (N)
53. FOX, BILLY (W)
54. FOWLER, MARK (W)
55. ROUBEAUX, JAMES (N)
56. HAWKINS, DON WILSON (W)
57. BOYD, RONALD LEE (B)
58. NGUYEN, TUAN (A)
59. # SELLERS, SEAN (W)
60. CYRIL, WAYNE (B)
61. SMITH, RICHARD (W)
62. WILLIAMS, MELVIN (N)
63. BARNETT, LARRY (W)
64. TIBBS, DEREK (W)
65. ROMANO, JOHN (W)
66. WOODWARD, CLAUDE (W)
67. BERGET, ROGER (W)
68. HATCH, STEVEN (W)
69. WORKMAN, WENDELL (W)
70. DUVALLE, JOHN (W)
71. WOODRUFF, DAVID (W)
72. WILHOIT, GREGORY (W)
73. TRICE, EDDIE (B)
74. THOMAS, DARRELL (W)
75. LONG, MICHAEL EDWARD (W)
76. TATE, KENNETH (W)
77. ALLEN, GARY (N)
78. REVILLA, DANIEL (W)
79. BOOKER, WINFRED (W)
80. HUMPHREY, JACKIE (W)
81. MARTINEZ, GILBERTO (H)
82. PARKER, HENRY (W)
83. LAMBERT, ROBERT (W)
84. HUNTER, THOMAS (W)
85. # HAIN, SCOTT ALLAN (W)
86. WILLIAMSON, ROBERT (W)
87. NOLTE, MICHAEL (W)
88. BOWIE, BENITO (B)
89. MILLER, ROBERT LEE (B)
90. SALAZAR, MAXIMO (N)
91. FONTENOT, KARL (W)
92. ROBERTS, MICHAEL (B)
93. MARQUEZ, HOWARD (N)
94. HOOKER, JOHN (B)

OREGON (1B; 7W; 2H; 1N)

TOTAL: 11 Lethal Injection

1. WAGNER, JEFFREY SCOTT (W)
2. FARRAR, STEPHEN L. (N)
3. MOEN, RONALD H. (W)
4. SMITH, CHARLES F. (W)
5. MIRANDA, REYES (H)
6. NESTAD, STEPHEN (W)

7. PRATT, JESSE (W)
8. GUZEK, RANDY (W)
9. WALTON, TYRONE (B)
10. MCDONNELL, MICHAEL (W)
11. MONTEZ, MARCO (H)

PENNSYLVANIA (60B; 47W; 4H; 1A; 1U)

TOTAL: 111 Electrocution

1. GRAHAM, HARRISON (B)
2. FREY, RODERICK (W)
3. JONES, JAMES (B)
4. SOULT, CHARLES (W)
5. BEASLEY, LESLIE (B)
6. ZETTLEMOYER, KEITH (W)
7. PURCELL, ALAN (W)
8. LESKO, JOHN (W)
9. HALL, DONALD (B)

10. TRAVAGLIA, MICHAEL (W)
11. MAXWELL, FRED (B)
12. MORAN, WILLARD (W)
13. GREEN, WILLIAM (B)
14. LOGAN, RONALD (B)
15. PETERKIN, OTIS (B)
16. CROSS, CHARLES (W)
17. HARDCASTLE, DONALD (B)
18. BUEHL, ROGER (W)

19. DOUGLAS, ROBERT (B)
20. YARRIS, NICHOLAS (W)
21. WHITNEY, RAY (B)
22. JONES, THOMAS (B)
23. WHEELER, RONALD (B)
24. ALBRECHT, ALFRED (W)
25. SZUCHON, JOSEPH (W)
26. MORALES, SALVADOR (H)
27. JONES, DAMON (B)
28. BAKER, LAWRENCE (B)
29. ABU-JAMAL, MUMIA (B)
30. STOKES, RALPH (B)
31. LEWIS, REGINALD (B)
32. MOORE, TYRONE (B)
33. # HUGHES, KEVIN (B)
34. FAHY, HENRY (W)
35. WATSON, HERBERT (B)
36. KINDLER, JOSEPH (W)
37. CHRISTY, LAWRENCE (W)
38. MORRIS, KEVIN (B)
39. LAMBERT, JAMES (B)
40. NELSON, JOHN ANDREW (W)
41. ROLAN, FLORENCIO (H)
42. BLYSTONE, SCOTT (W)
43. CARPENTER, JAMES (B)
44. D'AMATO, CARMEN (W)
45. GABLER, MILES (W)
46. DEHART, ROBERT (W)
47. BAKER, HERBERT (B)
48. STRONG, JAMES (W)
49. MARSHALL, JEROME (B)
50. TERRY, BENJAMIN (B)
51. GIBBS, BARRY (W)
52. WILLIAMS, RONALD (B)
53. DUFFY, STEVEN (W)
54. SMITH, JAMES (B)
55. EDWARDS, GEORGE (W)
56. CRAWLEY, DEWITT (B)
57. LARK, ROBERT (B)
58. ATKINS, ROBERT (B)
59. WHARTON, ROBERT (B)
60. GRIFFIN, RODNEY (B)
61. CHMIEL, DAVID (W)
62. WALLACE, WILLIAM (B)
63. BANKS, GEORGE (B)
64. STEELE, ROLAND (B)
65. MOSER, LEON (W)
66. O'SHEA, RONALD (W)

67. BANNERMAN, SAMUEL (B)
68. HOLLAND, WILLIAM (W)
69. CLAYTON, WILLIE (B)
70. PORTER, ERNEST (B)
71. PROCTOR, ROGER (B)
72. JERMYN, FREDERIC (W)
73. SNEED, WILLIE (B)
74. SANTIAGO, SALVADORE (H)
75. SMITH, JAY C. (W)
76. JASPER, ALFRED (B)
77. MURPHY, CRAIG (B)
78. THOMAS, BRIAN (B)
79. APPEL, MARTIN (W)
80. ZOOK, ROBERT P. (W)
81. TEDFORD, DONALD (W)
82. BRYANT, ROBERT (B)
83. BRODE, RICHARD (W)
84. HENRY, JOSEPH (B)
85. ROLLINS, SAHARRIS (B)
86. JUDGE, ROGER (B)
87. CHAMBERS, KARL (W)
88. YOUNG, JOSEPH (B)
89. HAAG, RANDY (W)
90. BILLA, LOUIS (H)
91. TILLEY, WILLIAM (W)
92. WILLIAMS, KENNETH (W)
93. WILSON, ZACHARY (B)
94. LEE, PERCY (B)
95. COX, RUSSELL (B)
96. MAYHUE, FRED (W)
97. LY, CAM (A)
98. BREAKIRON, MARK (W)
99. GRAHAM, HARRISON (B)
100. LAIRD, RICHARD (W)
101. CHESTER, FRANK (W)
102. WILLIAMS, CRAIG (B)
103. RUSH, LARRY (U)
104. THOMAS, LEROY (B)
105. HIEDNIK, GARY (W)
106. HACHETT, RICHARD (W)
107. SPENCE, MORRIS (B)
108. HENRY, JOSOPH (B)
109. YOUNG, JOSEPH LOUIS (B)
110. MORRIS, KELVIN (B)
111. STARR, GARY (W)
112. GORBY, THOMAS (W)
113. CARTER, DARRYL (W)

SOUTH CAROLINA

(20B; 22W)

TOTAL: 42

Electrocution

1. GLEATON, J.D. (B)
2. GILBERT, LARRY (B)
3. ROBERTS, SAMMY (W)
4. BUTLER, HORACE (B)
5. WOOMER, RONALD (W)
6. ADAMS, SYLVESTER (B)
7. S'ANN, STERLING (B)
8. ARNOLD, JOHN (W)
9. PLATH, JOHN (W)
10. [KOON, PAUL (W)]
11. GASKINS, DONALD (W)
12. [CHAFFEE, JONATHAN (W)]
13. [FARRELL, DALLAS (W)]
14. LUCAS, CECIL (W)
15. SINGLETON, FRED (B)
16. SOUTH, ROBERT (W)
17. [DAMON, SHELLIE (B)]
18. KORNAHRENS, FRED (W)
19. BELL, LARRY GENE (W)

20. DRAYTON, LEROY (B)
21. OWENS, ALVIN (W)
22. HOWARD, RONNIE (B)
23. [WELDON, DANA (B)]
24. WEST, FLOYD (W)
25. MIDDLETON, FRANK (B)
26. CAIN, RUSSELL (W)
27. ELMORE, EDWARD LEE (B)
28. [GATHERS, DEMETRIOUS (B)]
29. JONES, DONALD ALLEN (B)
30. MATTHEWS, EARL (B)
31. [PLEMMONS, JERRY (W)]
32. ARTHUR, LIMMIE (B)
33. RIDDLE, ERNEST (W)
34. TRUESDALE, LOUIS (B)
35. SMITH, ANDY LAVERNE (B)
36. PATTERSON, RAYMOND (B)
37. JOHNSON, RICHARD (W)
38. TORRENCE, MICHAEL (W)

39. CALDWELL, RICKIE TIM (W)
40. ATKINS, JOSEPH (W)

41. GREEN, ANTHONY (B)
42. VICTOR, WILLIAM (W)

TENNESSEE (22B; 48W; 1N) TOTAL: 71 Electrocution

1. AUSTIN, RICHARD (W)
2. GROSECLOSE, WILLIAM (W)
3. RICKMAN, RONALD (W)
4. STROUTH, DONALD (N)
5. HOUSTON, RICHARD (B)
6. DICKS, JEFFREY (W)
7. SIMON, RICHARD (B)
8. COLEMAN, MICHAEL ANGELO (B)
9. [MELSON, HUGH (W)]
10. [JOHNSON, CECIL (B)]
11. COE, GLEN (W)
12. MORRIS, TIMOTHY (W)
13. LANEY, THOMAS GERALD (W)
14. HARRIES, RONALD (W)
15. CAMPBELL, KENNETH (W)
16. WORKMAN, PHILLIP (W)
17. MATSON, MICHAEL (W)
18. CONE, GARY (W)
19. CALDWELL, RICHARD (W)
20. SAMPLE, MICHAEL (B)
21. MCKAY, WILLIAM (B)
22. KING, THOMAS (B)
23. BARNES, JAMES (W)
24. CARUTHERS, WALTER (B)
25. DUNCAN, DAVID (B)
26. HARTMAN, EDDIE (W)
27. TEAGUE, RAYMOND (W)
28. ZAGORSKI, EDMUND (W)
29. SMITH, RICKY (B)
30. GOAD, WILLIAM W. JR. (W)
31. TAYLOR, RICHARD C. (W)
32. SPARKS, WILLY (B)
33. JOHNSON, WALTER (W)
34. MCNISH, DAVID (W)
35. HARBASON, EDWARD (B)
36. CARTER, JAMES DAVID (W)

37. KING, TERRY (W)
38. O'GUINN, KENNETH W. (W)
39. COOPER, VERNON (W)
40. BOBO, TONY L. (B)
41. MCCORMICK, MICHAEL (W)
42. WRIGHT, CHARLES (B)
43. COKER, ROCKY (W)
44. THOMPSON, GREGORY (B)
45. JOHNSON, DONNIE (W)
46. JOHNSON, ERSKINE (B)
47. HINES, ANTHONY (W)
48. * OWENS, GAILE (W)
49. PORTERFIELD, SIDNEY (B)
50. HOUSE, PAUL GREGORY (W)
51. HENLEY, STEVE (W)
52. ADKINS, CARL WAYNE (W)
53. SUTTON, NICHOLAS (W)
54. BELL, ROGER MORRIS (B)
55. BARBER, TERRY (W)
56. IRICK, BILLY RAY (W)
57. MILLER, DAVID (W)
58. WILCOXSON, BOBBY (W)
59. WEST, STEVEN (W)
60. POE, DAVID (W)
61. BATES, WAYNE LEE (W)
62. TAYLOR, DARRYL (W)
63. ALLEY, SEDLEY (B)
64. JONES, JAMES LEE (B)
65. TEEL, BOULDIN (W)
66. PAYNE, PERVIS (B)
67. CAUTHERN, RONNIE (W)
68. BOYD, MICHAEL JOE (B)
69. MCCORD, J.B. (W)
70. HARRIS, EDWARD (W)
71. TERRY, DAVID (W)

TEXAS (102B; 135W; 34H; 2N; 3A) TOTAL: 276 Lethal Injection

1. CORLEY, EDWARD (W)
2. WOODS, BILLY JOE (W)
3. EARVIN, HARVEY (B)
4. GREEN, G.W. (W)
5. WHITE, BILLY WAYNE (B)
6. BIRD, JERRY JOE (W)
7. RUSSELL, JAMES (B)
8. WILLIAMS, JAMES C. (B)
9. HAWKINS, SAMUEL (B)
10. COOK, KERRY MAX (W)
11. SMITH, JACK HARVEY (W)
12. DAVIS, WILLIAM PRINCE (B)
13. [POWELL, DAVID LEE (W)]
14. RILES, RAYMOND (B)
15. [CASS, MARK R (W)]
16. JOHNSON, CARL (B)
17. ARANDA, ARTURO (H)
18. PAYNE, EDWARD (B)
19. VIGNEAULT, DONALD L. (W)
20. [VANDERBILT, JIMMY (W)]
21. GRIFFIN, JEFFERY (B)
22. SELVAGE, JOHN HENRY (B)
23. FIERRO, CESAR (H)
24. DEGARMO, ROGER (W)
25. HOGUE, JERRY (W)
26. PENRY, JOHNNY PAUL (W)

27. RUSSELL, CLIFTON CHARLES
28. MOORE, BOBBY JAMES (B)
29. KING, LEON RUTHERFORD (B)
30. STEWART, DARRYL E. (B)
31. WILLIAMS, CALVIN J. (B)
32. BRIDGE, WARREN (W)
33. [SATTERWHITE, JOHN (B)]
34. SESSION, JAMES (B)
35. BANKS, DELMA (B)
36. BARBER, DANNY LEE (W)
37. [DUNN, KENNETH D. (B)]
38. MITCHELL, ANDREW L (B)
39. WILLIAMS, WILLIE RAY (B)
40. GARDNER, DAVID (W)
41. BRANDLEY, CLARENCE (B)
42. BARNARD, HAROLD (W)
43. JENECKA, ALLEN (W)
44. SOFFAR, MAX (W)
45. KELLY, CARL E. (B)
46. NETHERY, STEPHEN (W)
47. FAULDER, JOSEPH (W)
48. TOMPKINS, PHILLIP D. (B)
49. MEANES, JAMES R. (B)
50. DUFF-SMITH, MARKHAM (W)
51. HOLLOWAY, EMMETT (W)
52. RICHARDSON, MIGUEL A. (B)

53.	GOODMAN, MICHAEL (B)	123.	SPENCE, DAVID WAYNE (W)
54.	FEARANCE, JOHN (B)	124.	CASTILLO, DAVID ALLEN (H)
55.	SANTANA, CARLOS (H)	125.	HARRIS, DANNY RAY (B)
56.	BONHAM, ANTONIO (B)	126.	MCCOY, STEPHEN (W)
57.	# GRAHAM, GARY (B)	127.	WHITE, LARRY WAYNE (W)
58.	JERNIGAN, JOSEPH (W)	128.	* PERILLO, PAMELA (W)
59.	[BEASLEY, RAYMOND (W)]	129.	MARQUEZ, MARIO (H)
60.	DERRICK, MIKEL (W)	130.	SOSA, PEDRO S. (H)
61.	HERRERA, LEONEL (H)	131.	GARRETT, DANIEL (W)
62.	WILLIAMS, WALTER KEY (B)	132.	+ JACKSON, TOMMY RAY (B)
63.	MANN, FLETCHER (W)	133.	MAYS, NOBEL (W)
64.	# CANNON, JOSEPH J (W)	134.	[DUNNE, THOMAS LENNON (B)
65.	BRIDDLE, JAMES (W)	135.	MODDEN, WILLIE MAX (B)
66.	# CARTER, ROBERT ANTHONY (B)	136.	MAYO, RANDY (W)
67.	NICHOLS, JOSEPH B. (B)	137.	MOTLEY, JEFFREY (W)
68.	BELL, WALTER (B)	138.	MAY, JUSTIN LEE (W)
69.	THOMAS, DANNY DEAN (N)	139.	KUNKLE, TROY (W)
70.	FRANKLIN, DONALD GENE (B)	140.	BEATHARD, JAMES LEE (W)
71.	CLARK, HERMAN ROBERT (B)	141.	DEEB, MUNEER M. (W)
72.	MCKAY, DAVID WAYNE (W)	142.	STERLING, TERRY NASH (N)
73.	RECTOR, CHARLES (B)	143.	DAVIS, JAMES CARL LEE (B)
74.	EAST, WAYNE (B)	144.	SMITH, SAMMIE LOUIS (W)
75.	# GARRETT, JOHNNY F. (W)	145.	LITTLE, WILLIAM H. (W)
76.	PHILLIPS, CLIFFORD X. (B)	146.	LIVINGSTON, CHARLES (B)
77.	ANDREWS, MAURICE (B)	147.	FURTELL, ROBERT M. (W)
78.	GUERRA, RICARDO (H)	148.	BARRIENTES, ANTONIO (H)
79.	MILLER, DONALD A. (W)	149.	WESTLEY, ANTHONY RAY (B)
80.	PYLES, JOHNNY (W)	150.	# WILLS, BOBBY JOE (B)
81.	CORDOVA, JOSEPH ANGEL (H)	151.	DUHAMEL, EMILE PIERRE (W)
82.	ANDERSON, LARRY NORMAN (W)	152.	COUNTY, CHARLES (B)
83.	WEST, ROBERT W (W)	153.	LOSADA, DAVIS (H)
84.	ANDERSON, JOHNNY RAY (W)	154.	CRANK, DENTON ALAN (W)
85.	WILLIAMS, ARTHUR LEE (B)	155.	HAWTHORNE, GENE (W)
86.	LAMB, JOHN MICHAEL (W)	156.	ROMERO, JESUS (H)
87.	REED, JONATHAN (W)	157.	# CANTU, RUBEN (H)
88.	PEREZ, MANUEL J. (H)	158.	KINNAMON, RAYMOND (W)
89.	DEMOUCHETTE, JAMES (B)	159.	GREEN, NORMAN EVANS (B)
90.	LACKEY, CLARENCE (W)	160.	HERNANDEZ, RUDOLFO BAIZA (H)
91.	GRANVIEL, KENNETH (B)	161.	WILLIAMS, TOBY LYNN (B)
92.	MONTOYA, RAMON (H)	162.	DEBLANC, DAVID WAYNE (B)
93.	MORELAND, JAMES (W)	163.	HAVARD, PATRICK CURTIS (W)
94.	LANDRY, RAYMOND (B)	164.	* BEETS, BETTY LOU (W)
95.	BUXTON, LAWRENCE (B)	165.	ROBINSON, WILLIAM (B)
96.	SHARP, MICHAEL (W)	166.	ROSALES, MARIANO (H)
97.	SAWYERS, JOHN (W)	167.	FOSTER, RICHARD D. (W)
98.	CUEVAS, IGNACIO (H)	168.	[BENNETT, BABY RAY (B)]
99.	DELUNA, CARLOS (H)	169.	ALLRIDGE, RONALD (B)
100.	SKELTON, JOHN (W)	170.	KNOX, JAMES ROY (W)
101.	# HARRIS, CURTIS PAUL (B)	171.	CHAMBERS, RONALD (B)
102.	ELLIS, EDWARD (W)	172.	ROGERS, PATRICK (B)
103.	TURNER, JOSEPH PAUL (W)	173.	MATA, RAMON (H)
104.	PASTER, JAMES (W)	174.	BLACK, ROBERT (W)
105.	JORDAN, LARENCE (W)	175.	HOLLAND, DAVID LEE (W)
106.	JORDAN, CLARENCE (W)	176.	CUMBO, SAM EDWARD (B)
107.	DREW, ROBERT (W)	177.	MADDEN, ROBERT (W)
108.	GARDNER, BILLY CONN (W)	178.	HAFDAHL, RANDALL W. (W)
109.	ROUGEAU, PAUL (W)	179.	GIBBS, DAVID EARL (W)
110.	WILKERSON, RICHARD (B)	180.	CARTER, JOHNNY RAY (B)
111.	JOHNSON, CURTIS (B)	181.	MILLER-EL, THOMAS JOE (B)
112.	BURDINE, CALVIN (W)	182.	HERNANDEZ, ROGELIO (H)
113.	WYLE, JAMES (B)	183.	MITCHELL, GERALD LEE (B)
114.	SMITH, JAMES E. (B)	184.	MATSON, JOHN, JR. (B)
115.	GENTLEY, KENNETH (W)	185.	EMERY, JEFF (W)
116.	MCGEE, JEWEL R. (B)	186.	FARRIS, TROY DALE (W)
117.	* TUCKER, KARLA FAY (W)	187.	LINCECUM, KEVIN (B)
118.	BOWER, LESTER L. (W)	188.	UPTON, JACKIE WAYNE (W)
119.	LUCAS, HENRY LEE (W)	189.	MONTOYA, IRINEO (H)
120.	RANSOM, KENNETH RAY (B)	190.	RIVERA, ANGEL (H)
121.	MACIAS, FREDERICO (H)	191.	SORIA, JUAN (H)
122.	TREVINO, JOSE MARIO (H)	192.	BURNS, WILLIAM (B)

193.	BELYEU, CLIFTON (W)	235.	WILLIS, ERNEST RAY (W)
194.	DRINKARD, RICHARD (W)	236.	NAPIER, CARL (W)
195.	KITCHENS, WILLIAM (W)	237.	JONES, RICHARD (W)
196.	GOSCH, LESLEY LEE (W)	238.	RICE, TONY (W)
197.	LAUTI, AUA (A)	239.	WASHINGTON, TERRY (B)
198.	BAREFIELD, JOHN KENNEDY (B)	240.	NOBLES, JONATHAN (W)
199.	TEAGUE, DELBERT BOYD (W)	241.	ROBERSON, BRIAN (B)
200.	WEBB, FREDDIE (B)	242.	BOGGESE, HOLT (W)
201.	BOYLE, BENJAMIN (W)	243.	ROBISON, LARRY (W)
202.	BUTLER, JEROME (B)	244.	RICHARDS, MICHAEL (B)
203.	JOHNSON, DORSIE (B)	245.	BOYD, CHARLES (B)
204.	RILEY, MICHAEL LYNN (B)	246.	STOCKER, DAVID (W)
205.	WASHINGTON, WILLIE (B)	247.	BLACKMON, RICKY (W)
206.	COCKRUM, JOHN (W)	248.	ELLASON, THOMAS (W)
207.	BALDREE, ERNIE (W)	249.	FRONCKIEWICZ, MARK (W)
208.	SATTIEWHITE, VERNON (B)	250.	TURNER, JESSEL (W)
209.	RAMIREZ, CARLOS (H)	251.	WILKENS, JAMES JAY (W)
210.	PIERCE, ANTHONY LEROY (B)	252.	JOHNSON, EDDIE (B)
211.	MORENO, JOSE (H)	253.	BRIMAGE, RICHARD (W)
212.	TENNARD, ROBERT (B)	254.	KEMP, EMANUEL (B)
213.	ELLIOTT, JOHN (H)	255.	DELK, MONTY ALLEN (W)
214.	MUNIZ, PEDRO CRUZ (H)	256.	HARRIS, KENNETH (B)
215.	LONG, DAVID MARTIN (W)	257.	JOINER, ORIENT (W)
216.	THOMAS, KENNETH WAYNE (B)	258.	MCBRIDE, MICHAEL (W)
217.	ESEQUEL, BANDA (H)	259.	VUONG, HAI HAI (A)
218.	GUNTHER, JAMES LEE (W)	260.	EARHART, JAMES (W)
219.	HAMMOND, KARL (B)	261.	HUGHES, BILLY GEORGE (W)
220.	LEWIS, DAVID LEE (W)	262.	DE LA CRUZ, JOSE (H)
221.	MOONEY, NELSON W. (W)	263.	COLE, TED CALVIN (W)
222.	RICHARDSON, JAMES (B)	264.	AMOS, BERNARD (B)
223.	JACOBS, JESSE DEWAYNE (W)	265.	JUAREZ ROSALES, MARIANE (H)
224.	MCGOWEN, ROGER WAYNE (B)	266.	RABBANI, SYED (A)
225.	NORRIS, MICHAEL (B)	267.	VALDEZ, ALBERTO (H)
226.	ALLRIDGE, JAMES (B)	268.	JOHNSON, GARY (W)
227.	FIRST, KENNETH (W)	269.	LANE, HAROLD (W)
228.	CLARK, DAVID M. (W)	270.	GOSS, CORNELIUS (B)
229.	LEWIS, ANDRE (B)	271.	NELSON, MARLIN (W)
230.	JACOBS, BRUCE (W)	272.	BEAVERS, RICHARD LEE (W)
231.	WHITE, EXCELL (W)	273.	BEHRINGER, EARL (W)
232.	MCFADDEN, JERRY (W)	274.	RICHARDSON, DAMON (B)
233.	DRAUGHON, MARTIN (W)	275.	LOCKHART, MICHAEL (W)
234.	GOODWIN, ALVIN (W)	276.	COOK, ANTHONY (W)

UTAH (3B; 3W) TOTAL: 6 Firing Squad or Lethal Injection

1. ANDREWS, WILLIAM (B)
2. TILLMAN, ELROY (B)
3. LAFFERTY, RON (W)
4. GARDNER, RONNIE LEE (W)
5. CARTER, DOUGLAS (B)
6. HOLLAND, JAMES (W)

VIRGINIA (21B; 17W) TOTAL: 38 Electrocution

- | | | | |
|-----|--------------------------|-----|--------------------------|
| 1. | WAYE, ALTON (B) | 17. | WATKINS, JOHNNY (B) |
| 2. | STAMPER, CHARLES (B) | 18. | POYNER, SYVASKY (B) |
| 3. | GIARRATANO, JOSEPH (W) | 19. | [BOGGS, RICHARD (W)] |
| 4. | JUSTUS, BUDDY (W) | 20. | WISE, JOE (B) |
| 5. | BASSETT, HERBERT (B) | 21. | BEAVER, GREGORY (W) |
| 6. | FITZGERALD, EDWARD (W) | 22. | GRAY, COLEMAN WAYNE (B) |
| 7. | COLEMAN, ROGER (W) | 23. | PRUETT, DAVID MARK (W) |
| 8. | PETERSON, DERRICK (B) | 24. | PAYNE, JOSEPH (W) |
| 9. | BUNCH, TIMOTHY (W) | 25. | CORRELL, WALTER (W) |
| 10. | [STOCKTON, DENNIS (W)] | 26. | TOWNES, RICHARD (B) |
| 11. | CLOZZA, ALBERT (W) | 27. | POPE, CARLTON (B) |
| 12. | TUGGLE, LEM (W) | 28. | BARNES, HERMAN (B) |
| 13. | WASHINGTON, EARL JR. (B) | 29. | O'DELL, JOSEPH (W) |
| 14. | JONES, WILLIE LEROY (B) | 30. | WILLIAMS, TERRY (B) |
| 15. | EVANS, WILBURT (B) | 31. | DELONG, WAYNE (W) |
| 16. | EDMONDS, DANA (B) | 32. | TURNER, WILLIE LLOYD (B) |

33. FISHER, DAVID LEE (W)
34. STOUT, LARRY ALAN (B)
35. HOKE, RONALD LEE (W)

36. MACKALL, TONY (B)
37. BENNETT, RONALD (B)
38. WATKINS, RONALD (B)

WASHINGTON (1B; 5W; 1A) TOTAL: 7 Lethal Injection or Hanging

1. CAMPBELL, CHARLES (W)
2. MAK, KWAN (A)
3. JEFFRIES, PATRICK (W)
4. HARRIS, BENJAMIN (B)
5. RUPE, MITCHELL (W)
6. RICE, DAVID LEWIS (W)
7. LORD, BRIAN KEITH (W)

WYOMING (3W) TOTAL: 3 Lethal Injection

1. HOPKINSON, MARK (W)
2. [OSBORN, KEVIN (W)]
3. ENGBERG, ROY (W)

FEDERAL JURISDICTIONS (U.S. Military) (3B; 1W) TOTAL: 4
Lethal Injection

1. [DOCK, TODD (W)]
2. CURTIS, RONNIE ALLEN (B)
3. MURPHY, JAMES (B)
4. GRAY, RONALD (B)

(B) Black
(W) White
(H) Hispanic
(A) Asian
(N) Native American
(U) Unknown at this issue
* Female
Juvenile at time of offense
+ Sentenced to death in the state where listed, but incarcerated under death sentence or under term sentence in another state

Errata from August 1, 1988 issue:

AZ: #79, JESUS JIMENEZ is a juvenile;
MD: #13, GREGORY JONES bracketed erroneously;
NJ: MARKO BEY should have appeared on list with brackets (sentence for this offense is non-juvenile);
OK: #4, BILLY STOUT and #15, ROGER HAYES, bracketed erroneously;
TX: #157, RUBEN CANTU is a juvenile;
VA: #34, LARRY STOUT is black;
US: TODD DOCK should have appeared on list with brackets;

Alaska State Legislature

Chairman
(907) 465-4523



Jan Faiks
Post Office Box V
Juneau, Alaska 99811

Senate Judiciary Committee

January 30, 1989

MEMORANDUM

TO: All Senators

FROM: Senator Jan Faiks, Chairman
Senate Judiciary Committee

SUBJECT: Judiciary Committee Hearing on Capital Punishment

At its meeting on Tuesday, January 31, the Senate Judiciary Committee will take testimony via teleconference on Senate Bill 17, from two of the nation's leading authorities on capital punishment.

At 2:00, Dr. Stephan Layson, an economist at the University of North Carolina, will offer testimony on the deterrent effect of capital punishment. Dr. Layson is well known for a statistical study he published in 1985, which offered evidence that every execution deters, on average, 18 murders that would have occurred without it.

At 2:30, Professor Ernest van den Haag, the John M. Olin Professor of Jurisprudence and Public Policy at Fordham University, will offer testimony on the philosophical arguments for and against capital punishment. Professor van den Haag is one of the nation's most prominent criminologists, and he has written extensively on the death penalty in both the professional and popular press.

The meeting will be in the Butrovich Room. All senators are welcome to attend.

Members

Mike Szymanski, Vice-Chairman • Rick Halford • Drue Pearce • Pat Rodey

Out of Session

3111 C Street, Anchorage, Alaska 99503 • (907) 561-7610

COMMENTARIES*

THE ULTIMATE PUNISHMENT: A DEFENSE

Ernest van den Haag**

In an average year about 20,000 homicides occur in the United States. Fewer than 300 convicted murderers are sentenced to death. But because no more than thirty murderers have been executed in any recent year, most convicts sentenced to death are likely to die of old age.¹ Nonetheless, the death penalty looms large in discussions; it raises important moral questions independent of the number of executions.²

The death penalty is our harshest punishment.³ It is irrevocable: it ends the existence of those punished, instead of temporarily imprisoning them. Further, although not intended to cause physical pain, execution is the only corporal punishment still applied to adults.⁴ These singular characteristics contribute to the perennial, impassioned controversy about capital punishment.

I. DISTRIBUTION

Consideration of the justice, morality, or usefulness, of capital punishment is often conflated with objections to its alleged discriminatory or capricious distribution among the guilty. Wrongly so. If capital punishment is immoral *in se*, no distribution among the guilty could make it moral. If capital punishment is moral, no distribution would make it immoral. Improper distribution cannot affect the quality of what is distributed, be it punishments or rewards. Discriminatory or capricious distribution thus could not justify abolition of the

* The authors of these Commentaries have not seen drafts of each other's pieces. The Commentary format is not meant to be a debate, but rather is meant to present different perspectives on current issues of public importance.

** John M. Olin Professor of Jurisprudence and Public Policy, Fordham University.

¹ Death row as a semipermanent residence is cruel, because convicts are denied the normal amenities of prison life. Thus, unless death row residents are integrated into the prison population, the continuing accumulation of convicts on death row should lead us to accelerate either the rate of executions or the rate of commutations. I find little objection to integration.

² The debate about the insanity defense is important for analogous reasons.

³ Some writers, for example, Cesare Bonesana, Marchese di Beccaria, have thought that life imprisonment is more severe. See C. BECCARIA, *DEI DELITTI E DELLE PENE* 62-70 (1764). More recently, Jacques Barzun, has expressed this view. See Barzun, *In Favor of Capital Punishment*, in *THE DEATH PENALTY IN AMERICA* 154 (H. Bedau ed. 1964). However, the overwhelming majority of both abolitionists and of convicts under death sentence prefer life imprisonment to execution.

⁴ For a discussion of the sources of opposition to corporal punishment, see E. VAN DEN HAAG, *PUNISHING CRIMINALS* 196-265 (1975).

death penalty. Further punishment than in any other case. Maldistribution betwixt the guilty and the innocent, unjust. But the punishment is because of the grievous maldistribution. However, the frequent refer to maldistribution of the innocent.⁵

Maldistribution of punishment is irrelevant to its justice. Guilty of capital offense, equally guilty of the same, however desirable, is more just to the innocent.

Punishments are for groups. Guilt is personal. A person to be executed, who deserved the same, group, have avoided execution of the executed, or of punishment he less deserving. Punishment were imposed on it if it were imposed by a discriminatory or capricious distribution, unjust, nor cause undue impunity bestowed.

Equality, in short, so justice is independent of justice demands that it be replaced by equality. It is possible to be punished, retributive. To let these of justice to them, or to let them not escape.

These moral considerations of discrimination, or capricious distribution, or capricious distribution.

⁵ See *infra* pp. 1662-65.

⁶ Justice Douglas, concurring in *Grain Processing Corp. v. American Petroleum Inst.*, 392 U.S. 161 (1968), reaches that (discriminatory) result "in terms" would be in the fourteenth amendment, as well as could be changed by changing the result. A discriminatory result is ineluctably must produce.

A DEFENSE

les occur in the United are sentenced to death have been executed in death are likely to die of in discussions; lent of the number of

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oral punishment, see E. VAN DEN

death penalty. Further, maldistribution inheres no more in capital punishment than in any other punishment.

Maldistribution between the guilty and the innocent is, by definition, unjust. But the injustice does not lie in the nature of the punishment. Because of the finality of the death penalty, the most grievous maldistribution occurs when it is imposed upon the innocent. However, the frequent allegations of discrimination and capriciousness refer to maldistribution among the guilty and not to the punishment of the innocent.⁵

Maldistribution of any punishment among those who deserve it is irrelevant to its justice or morality. Even if poor or black convicts guilty of capital offenses suffer capital punishment, and other convicts equally guilty of the same crimes do not, a more equal distribution, however desirable, would merely be more equal. It would not be more just to the convicts under sentence of death.

Punishments are imposed on persons, not on racial or economic groups. Guilt is personal. The only relevant question is: does the person to be executed deserve the punishment? Whether or not others who deserved the same punishment, whatever their economic or racial group, have avoided execution is irrelevant. If they have, the guilt of the executed convicts would not be diminished, nor would their punishment be less deserved. To put the issue starkly, if the death penalty were imposed on guilty blacks, but not on guilty whites, or, if it were imposed by a lottery among the guilty, this irrationally discriminatory or capricious distribution would neither make the penalty unjust, nor cause anyone to be unjustly punished, despite the undue impunity bestowed on others.⁶

Equality, in short, seems morally less important than justice. And justice is independent of distributional inequalities. The ideal of equal justice demands that justice be equally distributed, not that it be replaced by equality. Justice requires that as many of the guilty as possible be punished, regardless of whether others have avoided punishment. To let these others escape the deserved punishment does not do justice to them, or to society. But it is not unjust to those who could not escape.

These moral considerations are not meant to deny that irrational discrimination, or capriciousness, would be inconsistent with consti-

⁵ See *infra* pp. 1664-65.

⁶ Justice Douglas, concurring in *Furman v. Georgia*, 408 U.S. 238 (1972), wrote that "a law which . . . reaches that [discriminatory] result in practice has no more sanctity than a law which in terms provides the same." *Id.* at 256 (Douglas, J., concurring). Indeed, a law legislating this result "in terms" would be inconsistent with the "equal protection of the laws" provided by the fourteenth amendment, as would the discriminatory result reached in practice. But that result could be changed by changing the distributional practice. Thus, Justice Douglas notwithstanding, a discriminatory result does not make the death penalty unconstitutional, unless the penalty ineluctably must produce that result to an unconstitutional degree.

tutional requirements. But I am satisfied that the Supreme Court has in fact provided for adherence to the constitutional requirement of equality as much as is possible. Some inequality is indeed unavoidable as a practical matter in any system.⁷ But, *ultra posse nemo obligatur*. (Nobody is bound beyond ability.)⁸

Recent data reveal little direct racial discrimination in the sentencing of those arrested and convicted of murder.⁹ The abrogation of the death penalty for rape has eliminated a major source of racial discrimination. Concededly, some discrimination based on the race of murder victims may exist; yet, this discrimination affects criminal victimizers in an unexpected way. Murderers of whites are thought more likely to be executed than murderers of blacks. Black victims, then, are less fully vindicated than white ones. However, because most black murderers kill blacks, black murderers are spared the death penalty more often than are white murderers. They fare better than most white murderers.¹⁰ The motivation behind unequal distribution of the death penalty may well have been to discriminate against blacks, but the result has favored them. Maldistribution is thus a straw man for empirical as well as analytical reasons.

II. MISCARRIAGES OF JUSTICE

In a recent survey Professors Hugo Adam Bedau and Michael Radelet found that 7000 persons were executed in the United States between 1900 and 1985 and that 25 were innocent of capital crimes.¹¹ Among the innocents they list Sacco and Vanzetti as well as Ethel and Julius Rosenberg. Although their data may be questionable, I do not doubt that, over a long enough period, miscarriages of justice will occur even in capital cases.

⁷ The ideal of equality, unlike the ideal of retributive justice (which can be approximated separately in each instance), is clearly unattainable unless all guilty persons are apprehended and thereafter tried, convicted and sentenced by the same court, at the same time. Unequal justice is the best we can do; it is still better than the injustice, equal or unequal, which occurs if, for the sake of equality, we deliberately allow some who could be punished to escape.

⁸ Equality, even without justice, may remain a strong psychological, and therefore political, demand. Yet Charles Black, by proving the inevitability of "caprice" (inequality), undermines his own constitutional argument, because it seems unlikely that the Constitution's fifth and fourteenth amendments were meant to authorize the death penalty only under unattainable conditions. See C. BLACK, *CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE* (1974).

⁹ See BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, BULLETIN NO. NCJ-68,399, *CAPITAL PUNISHMENT 1984*, at 9 (1985); Johnson, *The Executioner's Bias*, NAT'L REV., Nov. 15, 1985, at 44.

¹⁰ It barely need be said that any discrimination against (for example, black murderers of whites) must also be discrimination for (for example, black murderers of blacks).

¹¹ Bedau & Radelet, *Miscarriages of Justice in Potentially Capital Cases* (1st draft, Oct. 1985) (on file at Harvard Law School Library).

Despite precautions, near lighting, or construction, cost. We do not give up these active material, outweigh the unit who think the death penalty the moral benefits, and the use think the death penalty unjust. Carriages can hardly be decided.

III.

Despite much recent work demonstration that the death alternative punishments.¹² For either side. Most abolitionists to favor abolition even if more murders than alternative value the life of a convicted more highly than they value might be spared by deterring.

Deterrence is not altogether retention of the death penalty that the threat of execution could already deterred by the threat death penalty, because of its merit, and deters some pros.

¹² An excessive number of trucking benefits gained by trucking or the practice situation.

¹³ For a sample of conflicting views see *Work of Thorsten Sellin and Isaac Ehrlich* YALE L.J. 170 (1975); Bowers & Pierce, *Executions?*, 26 CRIME & DELINQ. 453; Isaac Ehrlich's *Research on Capital Punishment: A Critical Evaluation of the Incapacitative Effects*, 6 J. LEGAL STUD. 1; *Punishment: A Question of Life and Death*, 6 J. LEGAL STUD. 35 (1977).

¹⁴ For most abolitionists, the decision is indecisive: they would favor abolition.

¹⁵ If executions were shown to increase abolition. Sparing the innocent victims of murderers would be more important. But although there is a lively discussion of the hypothesis that executions produce a *Capital Punishment: New Evidence* arguing that murder rates drop immediately.

threat of imprisonment. Sparing the lives of even a few prospective victims by deterring their murderers is more important than preserving the lives of convicted murderers because of the possibility, or even the probability, that executing them would not deter others. Whereas the lives of the victims who might be saved are valuable, that of the murderer has only negative value, because of his crime. Surely the criminal law is meant to protect the lives of potential victims in preference to those of actual murderers.

Murder rates are determined by many factors; neither the severity nor the probability of the threatened sanction is always decisive. However, for the long run, I share the view of Sir James Fitzjames Stephen: "Some men, probably, abstain from murder because they fear that if they committed murder they would be hanged. Hundreds of thousands abstain from it because they regard it with horror. One great reason why they regard it with horror is that murderers are hanged."¹⁶ Penal sanctions are useful in the long run for the formation of the internal restraints so necessary to control crime. The severity and finality of the death penalty is appropriate to the seriousness and the finality of murder.¹⁷

IV. INCIDENTAL ISSUES: COST, RELATIVE SUFFERING, BRUTALIZATION

Many nondecisive issues are associated with capital punishment. Some believe that the monetary cost of appealing a capital sentence is excessive.¹⁸ Yet most comparisons of the cost of life imprisonment with the cost of execution, apart from their dubious relevance, are flawed at least by the implied assumption that life prisoners will generate no judicial costs during their imprisonment. At any rate, the actual monetary costs are trumped by the importance of doing justice.

Others insist that a person sentenced to death suffers more than his victim suffered, and that this (excess) suffering is undue according to the *lex talionis* (rule of retaliation).¹⁹ We cannot know whether

¹⁶ H. GROSS, A THEORY OF CRIMINAL JUSTICE 409 (1975) (attributing this passage to Sir James Fitzjames Stephen).

¹⁷ *Weems v. United States*, 217 U.S. 349 (1910), suggests that penalties be proportionate to the seriousness of the crime — a common theme of the criminal law. Murder, therefore, demands more than life imprisonment, if, as I believe, it is a more serious crime than other crimes punished by life imprisonment. In modern times, our sensibility requires that the range of punishments be narrower than the range of crimes — but not so narrow as to exclude the death penalty.

¹⁸ Cf. Kaplan, *Administering Capital Punishment*, 36 U. FLA. L. REV. 177, 178, 190-91 (1984) (noting the high cost of appealing a capital sentence).

¹⁹ For an example of this view, see A. CAMUS, REFLECTIONS ON THE GOLLIOIVE 23-30 (1959). On the limitations allegedly imposed by the *lex talionis*, see Neuman, *Justice, Civilization, and the Death Penalty: Answering van den Haag*, 14 PAUL. & FED. REV. 115, 117-14 (1985).

the murderer on death or, however, unlike the murderer, suffering inflicted. Further, to restrain private vengeance in its place. Punishment — tended to revenge, offset, to be measured by it. If social order undermined, penal confinement is not like his victim; nor is a burglar suffering or the harm he offset the advantage he got.

Another argument heard a murderer, we encourage. Yet, although all punishment argued that they legitimize pleasantness. Imprisonment neither are fines thought to murder and execution; or that the first is unlawful, deserved punishment for of the punishment to the victim is not physical, but social.

V. JUSTICE

We threaten punishment not only to make the threat for the crimes that were necessary to deter and deter for them. Retribution is

²⁰ Thus retribution (a civil liability) whether the purpose be retributive.

²¹ See *supra* notes 1-3.

²² Some abolitionists challenge: not to revise executions? The answer: deterred, should not serve as public respect our sensibility has changed, would trivialize executions, wedge societies and the like. Finally, because of the punishment, rather than the execution would present a deterring the moral significance of the act of the murderer. We no longer have to public view. Why should

²³ See van den Haag, *Punishment*, L. REV. 700, 710 (1981) (explaining how to be satisfied even if deterrence

of even a few prospective more important than preserving one of the possibility, or even could not deter others. Whereas saved are valuable, that of the cause of his crime. Surely the lives of potential victims in

any factors; neither the severity of sanction is always decisive. The view of Sir James Fitzjames in favor of murder because they

would be hanged. Hundreds regard it with horror. One horror is that murderers are in the long run for the formation to control crime. The severity appropriate to the seriousness and

RELATIVE SUFFERING, DEATH

ated with capital punishment of appealing a capital sentence of the cost of life imprisonment and their dubious relevance, are option that life prisoners will imprisonment. At any rate, the importance of doing justice of death suffers more than suffering is undue according

¹⁹ We cannot know whether

the murderer on death now suffers more than his victim suffered; however, unlike the murderer, the victim deserved none of the suffering inflicted. Further, the limitations of the *lex talionis* were meant to restrain private vengeance, not the social retribution that has taken its place. Punishment — regardless of the motivation — is not intended to revenge, offset, or compensate for the victim's suffering, or to be measured by it. Punishment is to vindicate the law and the social order undermined by the crime. This is why a kidnapper's penal confinement is not limited to the period for which he imprisoned his victim; nor is a burglar's confinement meant merely to offset the suffering or the harm he caused his victim; nor is it meant only to offset the advantage he gained.²⁰

Another argument heard at least since Beccaria²¹ is that, by killing a murderer, we encourage, endorse, or legitimize unlawful killing. Yet, although all punishments are meant to be unpleasant, it is seldom argued that they legitimize the unlawful imposition of identical unpleasantness. Imprisonment is not thought to legitimize kidnapping; neither are fines thought to legitimize robbery. The difference between murder and execution, or between kidnapping and imprisonment, is that the first is unlawful and undeserved, the second a lawful and deserved punishment for an unlawful act. The physical similarities of the punishment to the crime are irrelevant. The relevant difference is not physical, but social.²²

V. JUSTICE, EXCESS, DEGRADATION

We threaten punishments in order to deter crime. We impose them not only to make the threats credible but also as retribution (justice) for the crimes that were not deterred. Threats and punishments are necessary to deter and deterrence is a sufficient practical justification for them. Retribution is an independent moral justification.²³ Al-

²⁰ Thus restitution (a civil liability) cannot satisfy the punitive purpose of penal sanctions, whether the purpose be retributive or deterrent.

²¹ See *supra* note 3.

²² Some abolitionists challenge: if the death penalty is just and serves as a deterrent, why not televise executions? The answer is simple. The death even of a murderer, however well-deserved, should not serve as public entertainment. It so served in earlier centuries. But in this respect our sensibility has changed for the better, I believe. Further, television unavoidably would trivialize executions, wedged in, as they would be, between game shows, situation comedies and the like. Finally, because televised executions would focus on the physical aspects of the punishment, rather than the nature of the crime and the suffering of the victim, a televised execution would present the murderer as the victim of the state. Far from communicating the moral significance of the execution, television would shift the focus to the pitiable fear of the murderer. We no longer place in cages those sentenced to imprisonment to expose them to public view. Why should we so expose those sentenced to execution?

²³ See van den Haag, *Punishment as a Device for Controlling the Crime Rate*, 33 *RUTGERS L. REV.* 706, 719 (1981) (explaining why the desire for retribution, although independent, would have to be satisfied even if deterrence were the only purpose of punishment).

189 (1979) (attributing this passage to Sir

agrees that penalties be proportionate to criminal law. Murder, therefore, demands a more serious crime than other crimes. Our sensibility requires that the range be not so narrow as to exclude the death

135 *U. PA. L. REV.* 177, 178, 190-3 (1987)

REFLECTIONS ON THE GUILLOTINE 24-30

1981, see Reiman, *Justice, Civilize* 100-11 *PHIL. & PUB. AFF.* 115, 117-18

though penalties can be unwise, repulsive, or inappropriate, and those punished can be pitiable, in a sense the infliction of legal punishment on a guilty person cannot be unjust. By committing the crime, the criminal volunteered to assume the risk of receiving a legal punishment that he could have avoided by not committing the crime. The punishment he suffers is the punishment he voluntarily risked suffering and, therefore, it is no more unjust to him than any other event for which one knowingly volunteers to assume the risk. Thus, the death penalty cannot be unjust to the guilty criminal.²⁴

There remain, however, two moral objections. The penalty may be regarded as always excessive as retribution and always morally degrading. To regard the death penalty as always excessive, one must believe that no crime — no matter how heinous — could possibly justify capital punishment. Such a belief can be neither corroborated nor refuted; it is an article of faith.

Alternatively, or concurrently, one may believe that everybody, the murderer no less than the victim, has an imprescriptible (natural?) right to life. The law therefore should not deprive anyone of life. I share Jeremy Bentham's view that any such "natural and imprescriptible rights" are "nonsense upon stilts."²⁵

Justice Brennan has insisted that the death penalty is "uncivilized," "inhuman," inconsistent with "human dignity" and with "the sanctity of life,"²⁶ that it "treats members of the human race as nonhumans, as objects to be toyed with and discarded,"²⁷ that it is "uniquely degrading to human dignity"²⁸ and "by its very nature, [involves] a denial of the executed person's humanity."²⁹ Justice Brennan does not say why he thinks execution "uncivilized." Hitherto most civilizations

have had the death penalty; Europe, where it is current, abuse by totalitarian regime.

By "degrading," Justice degrades the executed convict. Kant and G.F.W. Hegel, however, far from degrading the convict by affirming his rationality and thought that execution, while convict's dignity. (Does not more than execution, by ! autonomy?)³⁰

Common sense indicates that death is inhuman. The death degrades when it comes but as a deliberate social act, his punishment that his living; that because he has community of the living. Therefore, the murderer has remain among the living. The punitive essence of death appears to, that the reverses the direction of causality. Execution of those who deter only one murder per year. It is also the only fitting re-

²⁴ An explicit threat of punitive action is necessary to the justification of any legal punishment: *nulla poena sine lege* (no punishment without [preexisting] law). To be sufficiently justified, the threat must in turn have a rational and legitimate purpose. "Your money or your life" does not qualify; nor does the threat of an unjust law; nor, finally, does a threat that is altogether disproportionate to the importance of its purpose. In short, preannouncement legitimizes the threatened punishment only if the threat is warranted. But this leaves a very wide range of justified threats. Furthermore, the punished person is aware of the penalty for his actions and thus volunteers to take the risk even of an unjust punishment. His victim, however, did not volunteer to risk anything. The question whether any self-inflicted injury — such as a legal punishment — ever can be unjust to a person who knowingly risked it is a matter that requires more analysis than is possible here.

²⁵ 2 THE WORKS OF JEREMY BENTHAM 105 (J. Bowring ed. 1972). However, I would be more polite about prescriptible natural rights, which Bentham described as "simple nonsense." *Id.* (It does not matter whether natural rights are called "moral" or "human" rights as they currently are by most writers.)

²⁶ THE DEATH PENALTY IN AMERICA 136-63 (H. Bedau ed., 3d ed. 1982) (quoting Furman v. Georgia, 408 U.S. 238, 286, 305 (1972) (Brennan, J., concurring)).

²⁷ *Id.* at 272-73; see also Gregg v. Georgia, 428 U.S. 153, 230 (1976) (Brennan, J., dissenting).

²⁸ Furman v. Georgia, 408 U.S. 238, 291 (1972) (Brennan, J., concurring).

²⁹ *Id.* at 290.

³⁰ See Barzun, *supra* note 3, passim.

or inappropriate, and those infliction of legal punishment. By committing the crime, the risk of receiving a legal punishment is committed. The fact that he voluntarily risked suffering to him then any other event assume the risk. Thus, the guilty criminal.²⁴

objections. The penalty may be too severe and always morally excessive, one must be sure that the punishment is not too heinous — could possibly be neither corroborated

may believe that everybody, the punishment is an imprescriptible (natural) right not to deprive anyone of life. Such "natural and imprescrip-

death penalty is "uncivilized, undignified" and with "the sanctity of the human race as nonhuman,"²⁷ that it is "uniquely justified by its very nature, [involves] a reversal of causality."²⁹ Justice Brennan does not agree. "Hitherto most civilizations

have had the death penalty, although it has been discarded in Western Europe, where it is currently unfashionable probably because of its abuse by totalitarian regimes.

By "degrading," Justice Brennan seems to mean that execution degrades the executed convicts. Yet philosophers, such as Immanuel Kant and G.F.W. Hegel, have insisted that, when deserved, execution, far from degrading the executed convict, affirms his humanity by affirming his rationality and his responsibility for his actions. They thought that execution, when deserved, is required for the sake of the convict's dignity. (Does not life imprisonment violate human dignity more than execution, by keeping alive a prisoner deprived of all autonomy?)³⁰

Common sense indicates that it cannot be death — our common fate — that is inhuman. Therefore, Justice Brennan must mean that death degrades when it comes not as a natural or accidental event, but as a deliberate social imposition. The murderer learns through his punishment that his fellow men have found him unworthy of living; that because he has murdered, he is being expelled from the community of the living. This degradation is self-inflicted. By murdering, the murderer has so dehumanized himself that he cannot remain among the living. The social recognition of his self-degradation is the punitive essence of execution. To believe, as Justice Brennan appears to, that the degradation is inflicted by the execution reverses the direction of causality.

Execution of those who have committed heinous murders may deter only one murder per year. If it does, it seems quite warranted. It is also the only fitting retribution for murder I can think of.

³⁰ See Barzun, *supra* note 3, *passim*.

to the justification of any legal punishment (preexisting law). To be sufficient, the punishment must be the ultimate purpose. "Your money or your life" is not a threat; it is a law; nor, finally, does a threat that is not a law. In short, preannouncement is not warranted. But this leaves a very wide margin for error. If a person is aware of the penalty for his crime, he is aware of the punishment. His victim, however, is not aware of any self-inflicted injury — such as a person who knowingly risked it is a matter that

writing (d. 1972). However, I would be willing to describe it as "simple nonsense" or "moral" or "human" rights as they

edman ed., 3d ed. 1982) (quoting Furman v. Georgia, 408 U.S. 238 (1972) (Brennan, J., dissenting)).

U.S. 153, 230 (1976) (Brennan, J., dissenting).

edman, J., concurring).

DEATH AND DETERRENCE

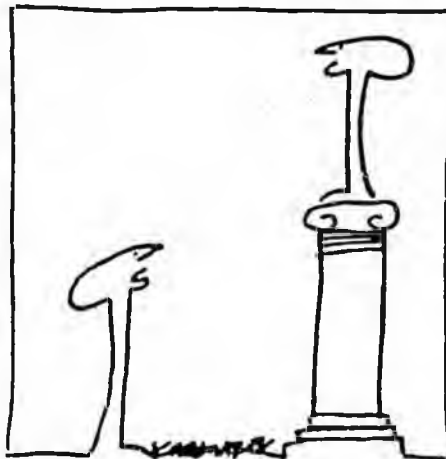
PROFESSOR Stephen K. Layson, an economist at the University of North Carolina at Greensboro, has published in the *Southern Economic Journal* (July 1985) a statistical study of the effects of executions on the murder rate. He concluded that every execution of a murderer deters, on the average, 18 murders that would have occurred without it.

Layson also inquired into the effects of the arrest and conviction of murderers on the murder rate. His correlations indicate that a 1 per cent increase in the clearance (arrest) rate for murder would lead to 250 fewer murders per year. Currently the clearance rate is 75 per cent. Further, a 1 per cent increase in murder convictions would deter about 105 murders. Currently 38 per cent of all murders result in a conviction; 0.1 per cent of murders result in an execution.

Attempts to correlate murder to punishment rates have been made for a long time. Most had flagrant defects. Some correlated murder rates to the presence or absence of capital-punishment statutes—not to executions, which alone matter. Others failed properly to isolate murder rates from variables other than punishment, even when these variables were known to influence murder rates. For instance, changes in the proportion of young males in the population do influence murder rates regardless of executions, since most murders are committed by young males. The first major statistical analysis that properly handled all variables was published by Isaac Ehrlich in the *American Economic Review* (June 1975). Ehrlich found that from 1933 to 1969 "an additional execution per year . . . may have resulted on the average in seven or eight fewer murders."

Ehrlich's study went against the cher-

ished beliefs of most social scientists (after all, it confirmed what common sense tells us). A whole cottage industry arose to refute him. In turn he refuted the refuters. The verdict is inconclusive. As is often the case in statistical matters, if a different period is analyzed, or some technical assumptions are changed, a different result is produced. Thus the testimony of Professor Thorsten Sellin, given in 1953—long before Ehrlich wrote—to the Royal Commission on Capital Punishment in Great Britain, still stands. Asked whether he could "conclude . . . that capital punishment has no deterrent effect," Sellin, an ardent but honest opponent of capital punishment, replied, "No, there is no such conclusion." Despite considerable advances in methods of analysis I think that, as yet, it has not been proved conclusively that capital punishment deters more than life imprisonment, or that it does not. However, the preponderance of evidence now does tend to show that capital punishment deters more than alternative punishments. Professor Layson's paper will add to that preponderance. But many attempts will be made to refute it, and, in all likelihood, the verdict will still be that the statistics are not conclusive.



"You're way up there, but you're not way, way up there."

What are we to deduce? Obviously people fear death more than life imprisonment. Only death is final. Where there is life there is hope. Actual murderers feel that way: 99.9 per cent prefer life imprisonment to death. So will prospective murderers. What is feared most deters most. Possibly, statistics do not show this clearly, because there are so few executions compared to the number of murders. It is even possible that the uncertain prospect of execution deters so few not already deterred by the prospect of life imprisonment that there is no statistical trace. Yet, if by executing convicted murderers there is any chance, even a mere possibility, of deterring future murderers, I think we should execute them. The life even of a few victims who may be spared seems infinitely precious to me. The life of the convicted murderer has but negative value. His crime has forfeited it.

OPPONENTS of capital punishment usually admit that their opposition has little to do with statistical data. When asked whether they would favor the death penalty if it were shown conclusively that each execution deters, say, one hundred murders, such opponents as Ramsey Clark (former U.S. attorney general) or Henry Schwarzschild (ACLU) resoundingly say no. But neither likes the inference that must be drawn: that he is more interested in keeping murderers alive than in sparing their victims, that he values the life of a convicted murderer more than the life of innocent victims. Those who do not share this bizarre valuation will favor capital punishment.

For beyond deterrence, or possible deterrence, there is justice. The thought that the man who cruelly and deliberately slaughtered your child for fun or profit is entitled peacefully to live out his days at taxpayers' expense, playing

(Continues on page 61)

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Clemens, a/k/a Mark Twain, who was also known as Papa, though in a more familial and private sense of that endearing term. The endearment was especially pronounced, in this case, because it came from Twain's 12-year-old daughter Susy. She was an unusually bright and sensitive child and very much the natural offspring of the beloved "Livy" and our first truly indigenous storyteller of world rank. This is simply an astonishing book, in several ways at once, and one that must become a necessary reference for all Mark Twain enthusiasts and scholars. It gives Susy's biography of her father for the first time in its entirety, usefully set in large-print type in order to distinguish it from the rest of the text, and introduced by Mark Twain along with his predictably amusing and copious comments. Then there is editor Charles Neider's introduction, with its revelations of Susy as someone rather more complex than an adoring daughter in thrall to the father-genius. More than anything else, however, *Papa* is an intensely human document, which appeared in the great celebratory year of 1985: the 150th anniversary of Mark Twain's birth (1835); the 75th of his death (1910); and the centenary of both the American publication of *Huckleberry Finn* (1885) and Susy Clemens's charming biography of her father. She died at age 24 of spinal meningitis. THOMAS P. McDONNELL

The Glenn Gould Reader, edited by Tim Page (Knopf, 476 pp., \$20)

"GLENN GOULD," B. H. Haggin once grumbled, "prefers talking nonsense on anything anywhere to playing the piano marvelously in the concert hall." For the benefit of those who appreciated Gould's particular brand of nonsense more than Mr. Haggin did, Tim Page has put together a lengthy collection of essays, speeches, and interviews called *The Glenn Gould Reader*. Gould's prose was as uneven as his piano playing; some of these pieces (particularly "The Prospects of Recording") are startlingly provocative, some embarrassingly sophomoric, one or two just plain dull. Virtually all are more or less perverse: Gould calls Richard Strauss "the greatest musical figure who has lived in this century" on one page and dismisses the Mozart G Minor Symphony as "a half-hour

of banality" on the next. But all are worthy of your closest attention—for despite his extreme (and self-conscious) eccentricities of taste and thought, Glenn Gould was the most gifted pianist of his generation, and his best writings on music were as thought-provoking, closely argued, and compelling as his best performances. Avoid the dragged-out spoofs and parodies; savor the liner notes, which are to recorded classical music as Paul Desmond's triple sec jacket essays were to jazz. A wonderful, irritating book.

TERRY TEACHOUT

VAN DEN HAAG

(Continued from page 44)

tennis or baseball or enjoying the prison library, is hard to stomach. Wherefore about 75 per cent of Americans favor the death penalty, for the sake of justice, and to save innocent lives. I think they are right.

On occasion I have been presented with a hypothetical. Suppose, I have been asked, that each execution were shown to raise rather than reduce the murder rate. Of course this is quite unlikely (wherefore there is no serious evidence): The more severe and certain the punishment, the less often the crime occurs, all other things being equal. The higher the price of anything, the less is bought. But, if one accepts, *arguendo*, the hypothetical, the answer depends on whether one prefers justice—which demands the execution of the murderer—or saving the lives that, by this hypothesis, could be saved by not executing him. I love justice, but I love innocent lives more. I would prefer to save them.

Fortunately we do not face this dilemma. On the contrary. Capital punishment not only satisfies justice but is also more likely to save innocent lives than life imprisonment. □

BROOKS

(Continued from page 36)

U.S. has been able to concentrate its foreign policy on faraway places like the Middle East and Asia precisely because of the lack of any threat close to home. Disorder in Latin America ties down our forces and makes us less able to fulfill commitments in Europe and elsewhere. Meanwhile, every effort to stabilize Latin America draws a flood of anti-American vitriol from

the American Left, our European allies, and the Latin Americans themselves. The Soviets want nothing constructive out of Latin America. They can view the disintegration of Latin America from a distance, hoping the U.S. will get sucked into the mess, while keeping their own hands clean.

In a limited sense, those who say our Latin America problem is not primarily part of the East-West conflict are correct. But neither is the unrest there an indigenous product of poverty and exploitation. Even in Nicaragua, there was no widespread anti-American sentiment before the rise of the Sandinistas. Rather, unrest in Latin America is brought on by a small vanguard of university-educated, upper-middle-class terrorists who have been elevated to guerrilla status by the strategy and support of Fidel Castro. Demographically, these groups are identical to Italy's Red Brigades or the German Baader-Meinhof Gang. The leader of Sendero Luminoso is an old philosophy professor who went off into the hills to form a pseudo-Maoist, pseudo-Inca personality cult. Arturo Cruz captured the character of the Sandinistas when he asked derisively, "Do you think a single one of them—the nine comandantes—could get a job and earn a living?"

In 1981, then Secretary of State Alexander Haig argued for going after what he called "the source" of Central America's trouble by applying direct pressure on Cuba. Since Haig's departure, nobody in the Administration or in Congress has echoed that view. Our hesitancy stems from the myth that the Cubans are Soviet puppets, and thus that pressure on the Cubans is the same as pressure on Moscow. The Cubans are not Soviet puppets but Soviet allies. They are dependent allies to be sure, but Moscow neither demands absolute Cuban obedience nor absolutely supports Cuban adventures. We must adopt a defensive posture vis-à-vis the Soviets because we don't have the power to defang them. But there is no reason to be similarly intimidated by Fidel Castro. We should not be satisfied with confronting Castro over his conquests in Grenada and Nicaragua; we should take aim at the factory of Latin revolution. Our Latin America policy would be more realistic if we were to pretend that except as a source of money and guns, the Soviet Union doesn't exist. □

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Homicide and Deterrence: A Reexamination of the United States Time-Series Evidence*

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1. Introduction

Since the publication of Isaac Ehrlich's controversial articles [6; 9] on murder and capital punishment, there has been extensive criticism of his findings. Using regression analysis with U.S. time-series data, Ehrlich found that increases in the relative frequency of arrest, the relative frequency of conviction given arrest and the relative frequency of execution given conviction, reduce the number of homicides per capita and that the magnitudes of these effects are consistent with sharp predictions—the "elasticity conditions"—derived from the hypothesis that potential murderers act as if they were maximizing expected utility.¹

Among the criticisms of Ehrlich's time-series work on homicide, the most important are: (1) The FBI data used by Ehrlich to measure homicides and the probabilities of punishment is highly suspect, especially during the 1930s [3]. (2) Ehrlich's results are sensitive to the inclusion of additional explanatory variables and the choice of functional form [3; 19; 26]. (3) Ehrlich's regressions are unstable over the 1960s [26]. (4) The negative correlations between the homicide rate and the probabilities of punishment found by Ehrlich may be explained by the effect of the homicide rate on the probabilities of punishment not vice versa [17].

Ehrlich has responded to these criticisms in some detail [7; 8; 9; 11]; perhaps his strongest rebuttal is his cross-sectional study of homicide [9] which replicated the deterrence findings reported in his 1975 time-series article. Recently, however, Ehrlich's cross-sectional results have also come under fire. McManus [25] and Leamer [22; 23] have argued that Ehrlich's cross-sectional finding that capital punishment is a deterrent to homicide is sensitive to one's prior beliefs concerning the variables to be included in the homicide regression.

The purpose of this paper is not to debate the merits of Ehrlich's research but to move the debate forward by presenting new updated time-series estimates of the U.S. homicide function. Within the context of the new estimates presented in this paper, the criticisms of

*The author thanks Gary Becker, Isaac Ehrlich, Terry Seaks and George Stigler for helpful suggestions.

1. Let E_{PA} = the elasticity of homicide with respect to the probability of arrest, E_{PC} = the elasticity of homicide with respect to the conditional probability of conviction and E_{PE} = the elasticity of homicide with respect to the conditional probability of execution. For a group of expected utility maximizing individuals it can be shown that $-E_{PA} > -E_{PC} > -E_{PE}$. See Ehrlich [6, 401].

Ehrlich's results are considered. In section II of the paper Hoenack and Weiler's [17] results are critically examined. In the third section of the paper several improvements are made in the estimation of the U.S. homicide function: the time-series sample is updated to 1977, numerous alternative sets of explanatory variables are considered and most importantly, the homicide rate is measured using Vital Statistics data rather than FBI data. The results in this section confirm Ehrlich's findings. The *t*-statistics of the estimated coefficients on the probabilities of punishment are, in general, highly significant and much larger than the *t*-statistics reported by Ehrlich. Also, the magnitudes of the coefficients on the probabilities of punishment are consistent with the "elasticity conditions" derived by Ehrlich.

In section four the stability and proper functional form of the homicide function are analyzed. The homicide function is shown to be reasonably stable over time. The choice of the proper functional form is carefully analyzed using the Box-Cox analysis: the hypothesis that the homicide function is log-linear cannot be rejected whereas the hypotheses that the homicide function has a semi-logarithmic or a linear functional form are decisively rejected. Also, the optimal functional form resulting from the Box-Cox analysis is highly consistent with the deterrence theory.

II. Hoenack and Weiler's Results Reconsidered

The crucial idea underlying Hoenack and Weiler's [16; 17] (hereafter H&W) argument that Ehrlich's results are spurious is that an increase (decrease) in homicides increases (decreases) the work-loads of the police and courts causing the arrest, conviction, and execution rates to decline (rise), at least in the short run. If the increase (decrease) in homicides is found to be permanent, the amount of resources devoted to enforcing the law against homicide may be increased (decreased), but this occurs only after a time lag. According to this theory, even if potential murderers are unaware of, or unaffected by, changes in the relative frequencies of punishment, one would still expect to observe negative short run correlations between the homicide rate and the relative frequencies of punishment.

After specifying a complete structural model of homicide depicting the response of the law enforcement system to changes in homicides and the response of homicides to changes in deterrence variables, H&W estimate 4 different homicide functions using 2SLS. In their first two regressions which contain the same variables used by Ehrlich, H&W report results that are similar to Ehrlich's. However, after including another age distribution variable not used by Ehrlich, or after replacing Ehrlich's single age distribution variable with two different age distribution variables, H&W get dramatically different results.

In the latter two regressions, the coefficients on the relative frequencies of conviction and execution are both positive. Using tests of overidentifying restrictions and FBI data on the age distribution of arrests, H&W argue that their homicide regressions containing two age distribution variables are superior to Ehrlich's homicide regression containing only one age distribution variable. H&W conclude their paper by arguing that Ehrlich's findings supporting the deterrence theory are spurious and reflect the response of the relative frequencies of punishment to changes in the homicide rate, not the response of the homicide rate to changes in the relative frequencies of punishment. H&W's criticism of Ehrlich's results is too ambitious. At best, they have shown that their 2SLS estimates of the para-

Table I. Definition of Variables in the Regression Analysis

$\ln q^*$	= Natural logarithm of non-negligent homicides per 1000 civilian population based on FBI data.
$\ln q$	= Natural logarithm of non-negligent homicides per 1000 civilian population based on Vital Statistics data.
$\ln PA$	= Natural logarithm of probability of arrest.
$\ln PC$	= Natural logarithm of conditional probability of conviction given arrest.
$\ln PE$	= Natural logarithm of conditional probability of execution given conviction.
$\ln LFP$	= Natural logarithm of proportion of the population in the labor force.
$\ln U$	= Natural logarithm of percent of labor force unemployed.
$\ln Y$	= Natural logarithm of Friedman's estimate of real permanent income per capita.
$\ln NW$	= Natural logarithm of the proportion of the population which is nonwhite.
$\ln REL$	= Natural logarithm of the proportion of the population which belongs to a religion.
$\ln HWF$	= Natural logarithm of the proportion of families that have both husband and wife present.
TT	= Time trend: 1933 = 1, 1934 = 2, . . . , 1977 = 45.
$\ln A1424$	= Natural logarithm of the proportion of the population within the 14-24 age group.
$\ln A2124$	= Natural logarithm of the proportion of the population within the 21-24 age group.
$\ln A2529$	= Natural logarithm of the proportion of the population within the 25-29 age group.
$\ln A2129$	= Natural logarithm of the proportion of the population within the 21-29 age group.

Note: Except for the variable q , the data used in this paper is identical to the data used by Hoenack and Weiler for 1933-1969. For a listing of the instrumental variables used in the 2SLS regressions, see Hoenack and Weiler [17, 329]. A detailed listing of the data sources and data used in this paper is available from the author on request.

meters of the homicide function are sensitive to the inclusion of additional explanatory variables.

In Table II, H&W's 2SLS estimates of the U.S. homicide function are replicated² in equations (1) and (2). Table I defines the variables used in the regression analysis. There is a serious flaw in H&W's estimates replicated in equations (1) and (2). They fail to correct for statistically significant first-order autocorrelation. Possibly they were misled by the reasonable looking Durbin-Watson statistics. The Durbin-Watson statistic, however, is not valid for 2SLS estimation.

Equations (3) and (4) report the 2SLS estimates with a correction for first-order autocorrelation.³ The estimates of the first-order autocorrelation, $\hat{\rho}$, in equations (3) and (4), .572 and .535, respectively, are large and statistically significant. Contrary to H&W's estimates in equations (1) and (2), the coefficients on the probabilities of conviction and execu-

2. See Hoenack and Weiler [17, 334], table 2, equations 10 and 11. The author wishes to thank Hoenack and Weiler for providing me with their data.

3. Beach and MacKinnon's [1] method which retains the first observation has been used to correct for autocorrelation in the residuals. The instrumental variables include the lagged value of the dependent variable and the lagged values of the explanatory variables except for the time trend [12; 14].

Table II. H & W's Results Reconsidered

Equation	(1)	(2)	(3)	(4)	(5)	(6)
Dependent Variable	q^*	q^*	q^*	q^*	q^*	q^*
$\ln PA$	-.186 (2.81)	-.213 (2.70)	-.075 (2.20)	-.097 (2.55)	-.074 (2.60)	-.079 (2.69)
$\ln PC$	.0046 (.39)	.010 (.72)	-.0079 (1.33)	-.0030 (.45)	-.0080 (1.55)	-.0057 (1.03)
$\ln PE$	.00016 (.05)	.00021 (.05)	-.00098 (.63)	-.0019 (1.15)	-.0011 (.94)	-.0016 (1.31)
$\ln U$	-.0024 (.78)	-.0030 (.82)	-.0027 (1.35)	-.0028 (1.27)	-.0026 (1.36)	-.0027 (1.30)
$\ln Y$	-.0048 (.13)	-.023 (.50)	.0139 (.64)	-.0036 (.14)	.016 (.67)	.0021 (.08)
$\ln LFP$	.046 (.57)	.068 (.62)	-.053 (.88)	-.036 (.51)	-.055 (.94)	-.053 (.80)
TT	.00042 (.24)	.00093 (.44)	-.00041 (.46)	-.000047 (.05)	-.00045 (.54)	-.00016 (.18)
$\ln A1424$	.022 (1.59)		.036 (2.65)		.035 (2.68)	
$\ln A2124$		.016 (1.07)		.021 (1.50)		.022 (1.48)
$\ln A2529$	.039 (1.74)	.035 (1.43)	.031 (2.27)	.021 (1.13)	.030 (2.38)	.020 (.96)
C	1.08 (2.08)	1.30 (2.01)	.445 (1.81)	.636 (2.41)	.438 (2.09)	.516 (2.40)
$\bar{p}$			.572 (3.46)	.535 (3.08)	.568 (3.42)	.679 (4.53)
DW	1.75	1.75	1.70	1.80	1.71	1.71
Period	1935-69	1935-69	1935-69	1935-69	1935-69	1935-69

Note: Equations (1)-(4) are estimated with 2SLS. Equations (1) and (2) replicate H & W's [17, 334] results. Equations (3) and (4) are estimated with a correction for first order autocorrelation. Equations (5) and (6) are estimated assuming PA , PC and PE are exogenous variables again with a correction for first order autocorrelation. The absolute value of t -statistics are given in parentheses.

tion in equations (3) and (4) are negative. Also, the ranking of the coefficients on $\ln PA$, $\ln PC$ and $\ln PE$ in equations (3) and (4) is consistent with the "elasticity conditions."

The correct estimation of H & W's specification of the homicide function yields results consistent with the deterrence theory. The coefficients on the conviction and execution variables, however, remain insignificant in the correctly estimated regressions reported in equations (3) and (4). The weakness of H & W's argument will be demonstrated more convincingly in section III where the OLS regression estimates with lagged relative frequencies of punishment are reported. While both H & W and Ehrlich have used 2SLS estimation

Table III. Results of Hausman's Test

Regression Specification	Coefficients (Absolute Value of <i>t</i> -statistics in parentheses)		
	$\ln \hat{P}A$	$\ln \hat{P}C$	$\ln \hat{P}E$
A1424 and A2529	.006 (.09)	-.0022 (.16)	-.0016 (.67)
A2124 and A2529	.027 (.35)	.012 (.81)	-.0024 (1.06)

based on different theoretical models,⁴ the econometric justification for 2SLS estimation of the U.S. homicide function is weak.⁵ It is possible to test whether the homicide function estimated with OLS methods is misspecified. Using a test developed by Hausman [15], which tests for correlation between the error term in an equation and the possibly endogenous variables, one cannot reject the hypothesis that the probabilities of punishment are exogenous variables. This result is of some importance because in cases where the explanatory variables are orthogonal to the error term, the use of 2SLS estimation yields inefficient estimates, whereas ordinary least squares methods yield efficient estimates.

The test is performed by estimating the regression

$$q^* = X_1 \beta_1 + X_2 \beta_2 + \bar{X}_1 \alpha + u, \quad (7)$$

where q^* is the $T \times 1$ vector of observations on homicides per capita, X_1 is the $T \times 3$ matrix of observations on the relative frequencies of punishment, X_2 is a $T \times 7$ matrix of exogenous variables in the homicide function and $\bar{X}_1$ is a $T \times 3$ matrix of instruments for the relative frequencies of punishment. β_1 , β_2 , and α are coefficient vectors and u is a vector of error terms subject to first-order autocorrelation. The matrix of instruments, $\bar{X}_1$, is found by regressing each of the relative frequencies of punishment on a set of instrumental variables which include the dependent variable lagged one year and the right-hand-side variables in the homicide function lagged one year as well as all the predetermined variables in H&W's [17, 329] model. A test of $H_0: \alpha = 0$ is a test for correlation between the error terms and the probabilities of punishment. If $H_0: \alpha = 0$ is rejected, this indicates that the OLS regression is misspecified and that the homicide function should be estimated with 2SLS. Estimation of equation (7) for the two specifications of the homicide function with different age distribution variables yields the estimates of α reported below in Table III.

The coefficients on the instruments for the probabilities of punishment in Table III are, with only one exception, less than their standard errors. The F -value for the test of the hypothesis $H_0: \alpha = 0$ is .67, well below the critical value of F for this test.⁶ Clearly one cannot reject the hypothesis that the probabilities of punishment are exogenous. Because there is no evidence that the probabilities of punishment are endogenous and because

4. Ehrlich's decision to estimate the homicide function with 2SLS was based on an optimal law enforcement model. Ehrlich hypothesized that exogenous increases in the homicide rate would lead to increases in the probabilities of arrest, conviction, and execution. H&W's disequilibrium model of law enforcement predicts exogenous increases in the homicide rate will cause the probabilities of arrest, conviction and execution to fall.

5. The author [20; 21] did use 2SLS to estimate the Canadian homicide function. Unlike the U.S., Canada has a uniform crime code and law enforcement authority. Because of this difference it is more plausible to believe that law enforcement behavior is endogenous in Canada. The use of 2SLS estimation for the Canadian homicide function was supported by the use of Hausman's test.

6. The 5% critical value of F for 3 and 22 degrees of freedom is 3.95.

2SLS is less efficient than OLS when the explanatory variables are exogenous, the remaining regressions are estimated with OLS methods. Equations (5) and (6) in Table II report the results of estimating the homicide function assuming that PA , PC and PE are exogenous variables. As expected, the coefficients on the deterrence variables in (5) and (6) have smaller standard errors than the coefficients on the deterrence variables in equations (3) and (4) but the difference is not dramatic. The coefficients on the probabilities of conviction and execution in equations (5) and (6) are still less than twice their standard errors.

III. Updating the Homicide Regression and the Choice of Explanatory Variables

In this section the homicide function is estimated using the Vital Statistics data to measure homicides per capita. Bowers and Pierce [3, 187-89] argue persuasively that the FBI measure of homicides during the 1930s is suspect. In the 1930s when the FBI reporting system was just beginning the number of reporting agencies was relatively small. As Bowers and Pierce note, the FBI measure of homicides during the 1930s is 15% below the Vital Statistics measure of homicides. However, after 1939 the two series are in much closer agreement.

Despite Bowers and Pierce's criticism of Ehrlich for using the FBI measure of homicides, they do not present alternative regression estimates utilizing the Vital Statistics measure of homicides. Had Bowers and Pierce shown that the probabilities of punishment have insignificant coefficients in the regression with the Vital Statistics measure of homicides, their claim that Ehrlich's results are an illusion would have been strengthened considerably. H&W [17, 339] are aware of Bowers and Pierce's criticism of the FBI measure of homicides yet they too report only estimates of the homicide function using the FBI measure of homicides. Had Bowers and Pierce or H&W estimated the homicide function with the Vital Statistics measure of homicide they would have found that the resulting regression estimates support the deterrence theory more strongly than the regression estimates with the FBI measure of homicides.⁷

Measuring the Execution Risk

Before the homicide regression can be updated, some provision must be made for measuring the subjective probability of execution from 1968-76 when the relative frequency of execution was zero. Despite the fact that there were no executions in the U.S. from 1968-76, it is doubtful that potential murderers believed there was no possibility of being executed in these years. Another problem with assuming the subjective probability of execution is zero is that it makes the use of the log-linear functional form impossible because the logarithm of zero is undefined.

One solution to this problem is to use an alternative functional form that does not

7. For example reestimating equation (2), Table II with the Vital Statistics measure of homicides yields the following:

Variable	$\ln PA$	$\ln PC$	$\ln PE$
Coefficient	-.136	-.029	-.0058
t-statistic	-1.86	-2.66	-1.64

measure the probability of execution in logarithms.⁸ This approach will be discussed later in section IV. Ehrlich [6, 409] dealt with the problem of zero relative frequencies of execution in the last two years of his sample, 1968 and 1969, by assuming for measurement purposes that 1 execution occurred in each of the years 1968 and 1969. In this section two methods of measuring the probability of execution are used. First Ehrlich's approach is followed by arbitrarily assuming 1 execution per year from 1968 to 1976. Secondly, a Bayesian approach is used which allows potential criminals to annually revise their subjective probabilities in light of new information. The latter method is explained below.

Assume that potential murderers' uncertainty about the relative frequency of execution in 1968 can be described by a beta prior density function

$$f(Pe(t_0)|\alpha, \beta) = [\Gamma(\alpha + \beta)Pe(t_0)^{\alpha-1}(1-Pe(t_0))^{\beta-1}]/[\Gamma(\alpha)\Gamma(\beta)], \quad (8)$$

where $0 < Pe < 1$, $t_0 = 1968$ and Γ is the gamma function defined by

$$\Gamma(\alpha) = \int_0^\infty u^{\alpha-1}e^{-u}du \quad \alpha > 0. \quad (9)$$

The expected value of the relative frequency of execution in 1968 is

$$E[Pe(t_0)] = \alpha/(\alpha + \beta). \quad (10)$$

Given $c(t_0)$ independent convictions in 1968, $e(t_0)$ of which result in executions, the posterior distribution of $Pe(t_0)$ is also a beta distribution with a density function⁹ $f(Pe(t_0+1)|\alpha+e(t_0), \alpha+\beta+c(t_0)-e(t_0))$. The expected value of Pe in 1969 is given by

$$E[Pe(t_0 + 1)] = [\alpha + e(t_0)]/[\alpha + \beta + c(t_0) - e(t_0)]. \quad (11)$$

The annual revision of the beta distribution in light of new sample information gives the expected value of $Pe(t)$ in year $t_0 + j$ of

$$E[Pe(t_0 + j)] = [\alpha + \sum_{i=0}^{j-1} e(t_0 + i)]/[\alpha + \beta + \sum_{i=0}^{j-1} c(t_0 + i) - e(t_0 + i)], \quad (12)$$

where $j = 1, \dots, 8$. Because $e(t) = 0$ from 1968 to 1976 equation (12) simplifies to

$$E[Pe(t_0 + j)] = \alpha/[\alpha + \beta + \sum_{i=0}^{j-1} c(t_0 + i)]. \quad (13)$$

The values of α and β are chosen in the following manner. After the class action suits filed by Anthony Amsterdam [17, 331] in 1965 there were only 3 executions in the U.S. in 1966 and 1967. From 1968 to 1976 there were no executions. The estimated sum of homicide convictions in 1966 and 1967 is 9436.¹⁰ Based on the sample information in 1966 and 1967, it is assumed that $\alpha = 3$ and $\alpha + \beta = 9436$, yielding an expected value of Pe in 1968 in percentage points of .032. The implied values of the subjective probabilities of execution for 1969-76 are .0207, .0156, .0124, .0099, .0083, .0071, .0061, and .0052.¹¹

8. Ehrlich [9] argues on both theoretical and empirical grounds that the probabilities of punishment should be measured in logarithms.

9. See DeGroot [4, 40, 60].

10. The number of convictions in 1966 and 1967 are calculated using the formula $PA_t + PC_t + Q_t$, where Q_t is the number of homicides and t is a subscript referring to the year.

11. The value of PE from 1933-67 and 1977 is measured by the number of executions divided by the estimated number of homicide convictions lagged one year. The estimates of homicide convictions are calculated as explained in footnote 10.

The Updated Regressions

The log-linear functional form is used in this section rather than the semilogarithmic form used by H&W. Ehrlich [9] found the cross-sectional evidence to be consistent with the log-linear functional form. Statistical justification for the log-linear functional form is presented in the next section. In the equations in Table IV, a single age distribution variable $A2/29$, the proportion of the population between 21 and 29 years of age, is used rather than two separate age distribution variables.¹² Finally, three new explanatory variables are added to the regressions in Table IV. NW , the proportion of the population that is nonwhite, REL , the proportion of the population that belongs to a religion and HWF , the proportion of families with both husband and wife present.

Equations (14) and (15) in Table IV present the updated estimates of H&W's homicide regression treating the probabilities of punishment as exogenous variables. In equation (14) the probability of execution is measured using the Bayesian approach discussed previously. In equation (15) the probability of execution is measured by assuming 1 execution per year in the years when there were no executions, 1968-1976. The alternative measures of the probability of execution used in equations (14) and (15) yield similar estimates of the elasticity of homicide with respect to the conditional probability of execution, respectively, $-.076$ and $-.068$. These estimates are comparable to the estimates reported by Ehrlich [6, 410].

The probability of arrest, the conditional probability of conviction and the conditional probability of execution all have negative and statistically significant coefficients in equations (14) and (15). Furthermore, the magnitudes of the coefficients on the probabilities of punishment are consistent with the "elasticity conditions." The coefficients on the probability of arrest in equations (14) and (15) are larger at the 5% significance level than the coefficients on the conditional probability of conviction which are in turn larger at the 5% significance level than the coefficients on the conditional probability of execution.

As expected, the age distribution variable $A2/29$ has positive and statistically significant coefficients in equations (14) and (15). The unemployment rate and the labor force participation rate are included in the regressions as measures of the opportunity costs of committing homicide. The unemployment rate is expected to have a positive effect on the homicide rate and the labor force participation rate is expected to have a negative effect. Although the coefficients on the unemployment and labor force participation rates have the expected signs in equations (14) and (15), none of these coefficients are significant. The coefficient on permanent income has a positive but insignificant coefficient in equations (14) and (15) and the coefficients on the time trend are negative and insignificant. Finally, neither equation exhibits much autocorrelation in the residuals.

In the next four equations in Table IV potential murderers' subjective probabilities of punishment are measured by averaging the current values of PA , PC and PE with the two previous years' values. Thus $PA3 = (PA + PA_{-1} + PA_{-2})/3$, $PC3 = (PC + PC_{-1} + PC_{-2})/3$ and $PE3 = (PE + PE_{-1} + PE_{-2})/3$ are used rather than the current values of PA , PC , and PE . This averaging process produces a smoother, less erratic series for these variables which probably corresponds more closely to potential murderers' subjective probabilities than the current relative frequencies.

12. The use of a single age distribution variable instead of two separate age distribution variables makes little difference in the regressions results.

Table IV. Updated OLS Estimates of the U.S. Homicide Function

Equation	(14)	(15)		(16)	(17)	(18)	(19)
Dependent Variable	ln q	ln q		ln q	ln q	ln q	ln q
ln PA	-2.24 (5.91)	-2.31 (5.47)	[ln PAJ]	-1.57 (4.57)	-1.34 (4.81)	-1.21 (3.95)	-1.37 (4.00)
ln PC	-.315 (4.79)	-.307 (4.12)	[ln PCJ]	-.436 (11.8)	-.544 (11.6)	-.547 (9.78)	-.548 (10.45)
ln PE	-.076 (5.21)		[ln PEJ]	-.103 (12.0)	-.098 (13.0)	-.102 (13.2)	-.103 (13.51)
ln PE*		-.068 (3.99)					
TT	-.013 (1.35)	-.011 (1.02)		-.023 (3.33)	-.005 (1.32)	-.013 (1.51)	-.008 (2.06)
ln A2/29	.462 (3.15)	.533 (3.36)		.392 (4.44)	.200 (2.89)	.159 (1.33)	.103 (2.08)
ln U	.010 (.31)	.015 (.40)		-.025 (1.51)	-.027 (1.86)		
ln LFP	-1.03 (1.50)	-.842 (1.03)		-2.33 (7.48)	-2.18 (8.11)	-2.04 (7.35)	-1.95 (6.35)
ln Y	.244 (.87)	.256 (.80)		.297 (1.98)	.244 (2.28)	.422 (5.42)	.340 (2.94)
ln NW				1.10 (1.91)		.333 (.50)	
ln REL					-1.11 (3.47)	-1.17 (2.44)	-1.29 (3.97)
ln HIWF							.378 (.67)
C	7.33 (4.84)	7.74 (4.56)		6.22 (7.08)	2.21 (1.50)	1.20 (.67)	1.60 (.80)
$\hat{\rho}$	.004 (.024)	.153 (.87)		-.272 (1.60)	-.403 (2.48)	-.360 (2.13)	-.364 (2.17)
R ²	.973	.957		.996	.998	.997	.997
Period	1936-77	1936-77		1936-77	1936-77	1936-77	1936-77

Note: Absolute value of *t*-statistics in parentheses.

Another advantage of averaging the current values of *PA*, *PC*, and *PE* with their lagged values is that it further justifies treating the probabilities of punishment as exogenous variables. Changes in the current homicide rate may affect current and future relative frequencies of punishment in the manner suggested by H&W, but the current homicide rate should have no effect on past values of *PA*, *PC* and *PE*.

As mentioned earlier, some new variables have been added to the regressions in Table IV. Because a disproportionate number of homicide victims and persons arrested for

homicide are nonwhite, NW is expected to have a positive effect on the homicide rate. Ehrlich [5; 9] found in his cross-sectional studies that the proportion of state population that is nonwhite is positively associated with homicide and other felony crime rates. The religion variable, REL , is included in the regressions as a measure of the quality of the environment, moral inhibitions of committing homicide, or possibly as a measure of fears of other worldly punishment for committing homicide.

In equations (16)-(19) in Table IV, the coefficients on $PA3$, $PC3$ and $PE3$ are all negative and highly significant. Comparing equations (14) and (15) with equations (16)-(19), the averaging process reduces the magnitude of the coefficients on the arrest variable but increases the magnitude of the coefficients on the conviction and execution variables. In the latter 4 equations in Table IV, the coefficients on the conviction and execution variables have much larger t -statistics than in equations (14) or (15). The t -statistics on $PC3$ in equations (16)-(19) range from -9.78 to -11.8 ; the t -statistics on $PE3$ in equations (16)-(19) range from -12 to -13.5 . The much larger t -statistics on the conviction and execution variables in the last 4 regressions in Table IV are consistent with the belief that averaging the relative frequencies of punishment over a number of years produces a better measure of criminals' subjective probabilities of punishment than the use of the current relative frequencies of punishment.

Averaging the relative frequencies of punishment has some important effects on the other estimated coefficients too. In contrast to the positive coefficients on the unemployment rate, U , in equations (14) and (15), the coefficients on the unemployment rate are negative in equations (16) and (17). In equation (18) and subsequent equations the unemployment rate is dropped from the regression. The coefficients on the labor force participation, LFP , in equations (16)-(19) are negative, as expected, and highly significant. The t -statistics on the permanent income variable, Y , are also much larger in equations (16)-(19) than in equations (14) and (15).

The coefficient on $\ln NW$ in equation (16) is positive as expected but not quite significant at the 5% level. The coefficient on $\ln REL$ in equation (17), -1.11 , is an estimate of elasticity of homicide with respect to the proportion of the population that belongs to an organized religion. According to this estimate a 10% increase in REL would reduce the homicide rate by approximately 11%. The coefficient on the religion variable in equation (17) is significant at the 1% level.

Equation (18) shows the results of including both the nonwhite and religion variables in the regression. The religion variable remains significant at the 5% level but the t -statistics on the nonwhite variable drops sharply. The age distribution variable also becomes insignificant in equation (18). The coefficients on the nonwhite and age distribution variables in Table IV illustrate what Leamer [22; 23; 24] and other econometricians have been emphasizing recently, that the significance and even the sign of regression coefficients often depend on the set of explanatory variables chosen by the researcher.

Fragility of the Regression Results

To examine the fragility of the regression results in Table IV in a systematic way, the homicide function is estimated with a large number of alternative specifications. Each specification consists of a different subset of explanatory variables taken from a set of variables that includes all the variables listed in Table IV plus the following variables: the

Table V. Specification Search

Variable	N	Negative Coefficient	Negative and Significant	Positive Coefficient	Positive and Significant
ln <i>PA3</i>	210	209 (.995)	134 (.638)	1 (.005)	0 (.0)
ln <i>PC3</i>	210	210 (1.0)	210 (1.0)	0 (.0)	0 (.0)
ln <i>PE3</i>	210	210 (1.0)	210 (1.0)	0 (.0)	0 (.0)
<i>TT</i>	210	173 (.824)	111 (.529)	37 (.176)	2 (.01)
ln <i>A2I29</i>	210	7 (.033)	0 (.0)	203 (.962)	87 (.414)
ln <i>LFP</i>	84	84 (1.0)	84 (1.0)	0 (.0)	0 (.0)
ln <i>Y</i>	84	10 (.119)	0 (.0)	74 (.881)	25 (.298)
ln <i>REL</i>	84	84 (1.0)	72 (.857)	0 (.0)	0 (.0)
ln <i>HWF</i>	84	0 (.0)	0 (.0)	84 (1.0)	26 (.310)
ln <i>U</i>	84	63 (.750)	29 (.345)	21 (.250)	0 (.0)
ln <i>NIW</i>	84	13 (.155)	0 (.0)	71 (.845)	12 (.143)
ln <i>MALE</i>	84	84 (1.0)	18 (.214)	0 (.0)	0 (.0)
ln <i>WELF</i>	84	49 (.583)	10 (.119)	35 (.417)	3 (.036)
ln <i>SCH</i>	84	27 (.321)	7 (.083)	57 (.690)	28 (.357)
<i>INF</i>	84	6 (.071)	0 (.0)	78 (.929)	4 (.048)

Note: *N* = number of specifications in which variable appeared. Percentages expressed as a proportion of *N* are given in parentheses.

proportion of the population that is male (*MALE*), real welfare payments (*WELF*), median years of schooling (*SCH*), inflation (*INF*) and the proportion of families that have both husband and wife present (*HWF*).

Each specification consists of 9 explanatory variables: *PA3*, *PC3*, *PE3*, *TT*, *A2I29*, plus 4 other variables taken from the 10 remaining variables described above.¹³ The total number of specifications is given by $10^C 4 = 210$. Table V summarizes the results by the sign and significance of the estimated coefficients. A coefficient is considered "significant" in Table V if its *t*-statistic is greater than 2 in absolute value.

In every regression but one, *PA3* has a negative coefficient and the arrest variable is negative and significant in 134 of the 210 specifications. The conviction and execution variables are negative and significant in every one of the 210 specifications. Clearly the conviction and execution variables are robust with respect to the choice of explanatory variables. A further examination of the regressions shows that in 183 of the 210 specifications the magnitude of the coefficients on ln *PA3*, ln *PC3* and ln *PE3* are in accordance with the "elasticity conditions."

Concerning the non-deterrence variables, the labor force participation rate has negative and significant coefficients in each of the 84 specifications in which this variable was used. The religion variable also has negative coefficients in each of the 84 regressions in

13. To provide a valid test of the deterrence theory one must include all 3 of the conditional probabilities of punishment.

which it was used.¹⁴ In 72 of the 84 specifications the coefficient on the religion variable is significant. Two other variables that have coefficients with the same sign in each specification are: (1) the proportion of families with husband and wife present and (2) the proportion of the population that is male. Ironically, both of these variables have coefficients with unexpected signs.

In each of the 84 specifications the proportion of families with both husband and wife present has positive coefficients. It was thought that the proportion of families with both husband and wife present would measure the quality of the social environment and hence would be negatively related to the homicide rate. However, an alternative explanation for the effect of *HWF* consistent with the positive coefficients on this variable is that separation of antagonistic spouses reduces the number of homicides by spouses. The coefficients on *HWF* are significant in 26 of the 84 specifications. Because a disproportionate number of the persons arrested for homicide are males, it was thought that the proportion of the population that is male might have a positive effect on the homicide rate. However, in each case the coefficient on this variable is negative, although the coefficients are significant in only 18 of the 84 specifications.

The age distribution variable *A2129*, has positive coefficients in 203 of the 210 specifications in which this variable appears. In 87 of these specifications the coefficients on the age distribution variable are positive and significant. The time trend has negative coefficients in 173 of the 210 specifications in which it appears and in 111 specifications the coefficients are negative and significant. The permanent income variable, *Y*, has positive coefficients in 74 of the 84 specifications in which it appears and has positive and significant coefficients in 25 of the specifications.

Interestingly, the inflation rate has positive coefficients in 78 of the 84 specifications in which this variable appears. However, this variable is only significant in 4 of the 84 specifications in which it appears. The proportion of the population that is nonwhite has positive coefficients in 71 of the 84 specifications in which it appears but has positive and significant coefficients in only 12 cases. The effects of the remaining 3 variables — unemployment, real federal welfare payments, and schooling — are inconsistent and in most specifications insignificant.

Based on the specification search described in Table V and other considerations equation (19) in Table IV represents the specification of the homicide function that is used for subsequent analysis in this paper. Aside from the deterrence variables, *PAJ*, *PCJ* and *PEJ*, the explanatory variables included are the time trend, age distribution, labor force participation, permanent income per capita, the proportion of the population that is a member of a religious group and the proportion of families with both husband and wife present. The coefficient on $\ln HWF$ in equation (19), .378, is positive but insignificant. The inclusion of the new variable in the homicide function has little effect on the other estimated coefficients as can be seen by comparing equations (16)-(18) to equation (19).

Tradeoff of Executions for Murders

The *ceteris paribus* tradeoff of executions for homicides evaluated at the mean number of homicides $\bar{Q}$ and the mean number of executions $\bar{E}$ is given by

14. However, if the probabilities of punishment are measured by their current values *PA*, *PC*, and *PE*, rather than their averaged values *PAJ*, *PCJ*, and *PEJ*, the coefficient on the religion variable is sometimes positive.

$$\Delta Q / \Delta E = \hat{\alpha} (\bar{Q} / \bar{E}). \quad (20)$$

where $\hat{\alpha}$ is the estimate of the elasticity of homicide with respect to the probability of execution. Letting $\hat{\alpha} = -.1$ based on the estimates reported in equations (16)-(19) of Table IV, the tradeoff of executions for murders is approximately -18.5.

This tradeoff is considerably larger than the estimate tradeoffs of -7 to -8 reported by Ehrlich [6, 414]. There are two reasons for the higher tradeoff reported in this paper. First from equation 20 the tradeoff increases proportionally with $\bar{Q}/\bar{E}$. In the updated sample used in this paper the value of $\bar{Q}/\bar{E}$ is larger than in Ehrlich's sample.¹⁵ Secondly the value of $\hat{\alpha}$ (-.10) used in computing the tradeoff in this paper is larger than the $\hat{\alpha}$ values used by Ehrlich [6, 410], -.06 and -.065.

A number of qualifications should be considered in interpreting the estimated tradeoff of executions for homicides. First the standard errors of the point estimates of α should be considered. From equations (19) in Table IV, the 99% confidence interval for α is (-.082, -.124). The confidence intervals for α based on equations (16)-(18) yield similar ranges. Evaluating the tradeoff at the lower and higher range of the confidence interval yields tradeoffs of -15.2 and -23, respectively. More importantly the estimated value of α varies considerably depending on the choice of explanatory variables used. From the specification search discussed earlier, 210 different regressions were considered. The values of α in these regressions ranged from a low of -.046 to a high of -.152. The corresponding tradeoff of executions for homicides ranges from -8.5 to -28. It is interesting to note that even at the lower range of α the tradeoff is still substantial.

Finally the estimated tradeoffs reported in this paper are calculated under the *ceteris paribus* assumption. Under certain conditions this may give misleading estimate of the true tradeoff. For example, if juries react to an increased relative frequency of execution by demanding greater proof of guilt before convicting, an increase in the probability of execution may reduce the probability of conviction, wholly or partially offsetting the deterrent effect of the increase in the probability of execution.¹⁶ The author investigated this possibility by regressing the probability of conviction on the probability of execution and other explanatory variables. These regressions provide no evidence in favor of the hypothesis that the probability of execution has a negative effect on the probability of conviction.

IV. The Choice of Functional Form and the Stability of the Homicide Function over Time.

As mentioned in the introduction, Bowers and Pierce [3], Passell and Taylor [26] and Klein, Forst and Filatov [19] have criticized Ehrlich's time-series results as being sensitive to the choice of time period and functional form. To check the stability of the homicide regression over time, equations (21)-(24) in Table VI report the results of estimating the homicide regression over alternative subperiods of the full sample. Equation (21) presents the full sample (1963-77) regression. Equation (22) is estimated over the 1936-69 period to check how sensitive the regression results are to omitting the 1970s data from the sample.

15. For the updated sample used in this paper $\bar{Q} = 10696$ and $\bar{E} = 58$. For Ehrlich's [6, 414] sample $\bar{Q} = 8963$ and $\bar{E} = 75$.

16. The author [20, 68] found some evidence of a negative relationship between PC and PE in his study of homicide in Canada.

Table VI. OLS Estimates of the Homicide Function Over Alternative Time Periods

Equation	(21)	(22)	(23)	(24)
Dependent Variable	$\ln q$	$\ln q$	$\ln q$	$\ln q$
$\ln PAJ$	-1.37 (4.00)	-1.20 (3.66)	-2.02 (3.57)	-1.62 (3.78)
$\ln PC3$	-.548 (10.4)	-.543 (11.4)	-.382 (3.34)	-.576 (7.34)
$\ln PE3$	-.103 (13.5)	-.130 (9.11)	-.073 (1.52)	-.119 (9.26)
TT	-.0083 (2.06)	-.017 (3.34)	-.016 (1.64)	-.0075 (1.69)
$\ln A2/29$	.103 (2.08)	-.0087 (.13)	-.226 (1.73)	.130 (2.00)
$\ln LFP$	-1.95 (6.35)	-2.86 (6.39)	-3.28 (6.02)	-1.93 (5.63)
$\ln Y$	.340 (2.94)	.319 (1.79)	-.225 (.64)	-.063 (.20)
$\ln REL$	-1.29 (3.97)	-.886 (2.44)	.173 (.21)	-.685 (1.24)
$\ln HWF$	.378 (.67)	1.14 (.96)	4.47 (2.03)	.063 (.10)
C	1.60 (.80)	.731 (.29)	7.93 (1.69)	6.02 (1.57)
$\bar{p}$	-.364 (2.17)	-.465 (2.66)	-.605 (2.64)	-.439 (2.25)
R^2	.997	.998	.999	.998
Period	1936-77	1936-69	1936-57	1944-77

Note: Absolute value of t -statistics are given in parentheses.

Equation (23) reports the regression estimated over the even shorter 1936-57 period. In equation (24) the regression is estimated from 1944-77 to check how sensitive the results are to omitting the first 8 years of the sample. Bowers and Pierce [3] argue that the FBI data on conviction rates is unreliable until the 1940s.

Comparing equations (22) and (24) to the full sample regression, equation (21), one can see that deleting the first 8 observations or the last 8 observations from the sample does not substantially alter the coefficient estimates, or their t -statistics. Deleting the last 8 observations from the sample causes the coefficient on the age distribution variable to switch from positive to negative; deleting the first 8 observations causes the coefficient on permanent income per capita to switch from positive to negative. In equation (23), estimated from 1936-57, the t -statistic on the coefficient on $\ln PE3$ falls to -1.52 which is not significantly different from 0 at the 5% level. It is possible, as Passell and Taylor [26] argue, that the sharp decline in the execution rate in the late 1950s and 1960s is a proxy for some

Table VII. Stability of the Homicide Function Over Time

Period	SSR $\times 100$	SE $\times 100$	F	F ₀₅	F'
1936-55	.405078	2.01265	.82	2.30	1.75
1936-56	.503054	2.13851	1.65	2.30	1.44
1936-57	.539733	2.12080	1.54	2.30	1.30
1936-58	.694215	2.31087	1.08	2.30	.823
1936-59	.699655	2.23552	1.39	2.30	1.22
1936-60	.725234	2.19884	1.60	2.30	1.14
1936-61	.725258	2.12905	1.84	2.30	1.26
1936-62	.737985	2.08353	2.64	2.30	1.59
1936-63	.763841	2.05999	3.06	2.30	1.70
1936-64	.848132	2.11278	2.55	2.30	1.15
1936-65	.852513	2.06460	2.52	2.30	1.31
1936-66	.894152	2.06346	2.01	2.28	1.35
1936-67	.978733	2.10921	1.92	2.30	1.22
1936-68	.979003	2.06314	2.23	2.32	1.46
1936-69	.999335	2.04056	2.51	2.36	1.66
1936-70	1.00338	2.00338	2.96	2.41	2.04
1936-71	1.11938	2.07492	2.77	2.47	1.70
1936-72	1.18212	2.09242	2.98	2.57	1.76
1936-73	1.31173	2.16443	2.79	2.71	1.08
1936-74	1.41293	2.20730	2.89	2.93	.0002
1936-75	1.41294	2.17020	4.48	3.32	—
1936-76	1.76421	2.38558	1.24	4.15	—
1936-77	1.83472	2.39447	—	—	—

unknown omitted variables that are really responsible for the rising homicide rate during this period. Another explanation for the insignificant coefficient on $\ln PEJ$ (and $\ln PAJ$) in equation (23) is the small number of degrees of freedom — 13 — combined with the multicollinearity among the explanatory variables.¹⁷

To examine the stability of the homicide regression more systematically, Table VII reports the sum of squared residuals (SSR) and the standard error of the homicide regression (SE) over different time periods beginning with 1936-55 and ending with 1936-77. From column 3 in Table VII one can see that the standard error of the regression is reasonably stable over time, exhibiting no systematic trend. Inspection of column 2 in the table shows a very large increase in the SSR from 1975 to 1976. The large jump in the SSR from 1975 to 1976 is associated with a sharp decline in the homicide rate in 1976. The homicide rate reached its minimum sample value in 1957 and except for a very slight

17. Examples of first-order correlations between variables for the 1936-57 period are: TT and $\ln Y$ (.976), TT and $\ln REL$ (.973), TT and $\ln PEJ$ (-.954), $\ln PEJ$ and $\ln Y$ (-.936), $\ln PEJ$ and $\ln REL$ (-.906), $\ln PEJ$ and $\ln PAJ$ (-.899).

decline in 1961 the homicide rate increased steadily from 1957 to 1974. From 1962 to 1974 the average annual rate of increase in the homicide rate was 6%. In 1975 the homicide rate fell by a small amount and then fell very sharply by more than 9% in 1976. The large increase in the SSR from 1975 to 1976 in column 2 reflects the fact that the regression equation does not predict the sharp decline in the homicide rate in 1976.

Column 4 reports the F -values for the Chow tests of the equality of the coefficients for the subperiod in column 1 and the subperiod consisting of the remaining years in the full sample. For example, the first F -value in column 4 is for the test of the hypothesis that the regression coefficients are equal over the 1936-55 and 1956-77 subperiods. Beginning with the 1936-66 and 1967-77 subperiods the F -values are calculated using the Chow test for the case of insufficient degrees of freedom. The 5% critical values of F are reported in column 5.

If the full sample is divided between 1962 and 1965 or between 1969 and 1973 the hypothesis that the coefficients are equal over the two subperiods is rejected at the 5% level. However, if one divides the sample between 1955 and 1961 or between 1966 and 1968, the hypothesis that the regression coefficients are equal over the two subperiods is not rejected. One might argue that dividing the sample at 1957 provides the most plausible division. The trend of the homicide rate was negative from the early 1930s to 1957. In 1957 the homicide rate reached its minimum sample value; thereafter the trend of the homicide rate was increasing until 1974. The F -statistic for the hypothesis that the coefficients are equal from 1936-57 and 1958-77 is 1.54 which is well below the 5% critical value of F .

Even if one were to believe that the division of the sample between 1962 and 1965 or between 1969 and 1973 is more appropriate than some other division, the increased efficiency from using the full sample regression estimates may outweigh the bias in the coefficient estimates resulting from the restriction that the coefficient estimates be equal in the two subperiods. Wallace [28] has shown that if the goal is to minimize the weighted average of the mean square errors of the coefficient estimates, the resulting critical values of F are higher than the conventional F -values for Chow tests. Using Goodnight and Wallace's [13] tables for the weak MSE test for restrictions in regressions, the critical 5% F -value is, 4.29. From column 3 of Table VII the 5% critical value of F for the weak MSE test is never exceeded.

Column 6 presents the F -values for the hypothesis of equal coefficients over the subperiod indicated in column 1 and the remaining years in the full sample except for the last two years, 1976 and 1977. The largest F -value in column 6 is 2.04 which is below the 5% critical of F for the conventional Chow test. Even the weak evidence of instability in the homicide function depends critically on the last two years of the sample. By deleting the last two years from the sample there is no partition of the sample that yields an F -value which exceeds the 5% critical value of F for the Chow test. In summary, the homicide function appears to be reasonably stable over time. The evidence for instability of the homicide is weak and critically dependent on the last two years of the sample.

To test for the optimal functional form for the time-series data, suppose the model to be estimated with the time-series data is

$$q_t^{(A1)} = c + B_1 PAJ_t^{(A2)} + B_2 PCJ_t^{(A2)} + B_3 PEJ_t^{(A2)} + B_4 Y_t^{(A2)} + B_5 LFP_t^{(A2)} \\ + B_6 TT + B_7 A2I29_t^{(A2)} + B_8 REL^{(A2)} + B_9 HWF^{(A2)}. \quad (25)$$

$$u_t = \rho u_{t-1} + \epsilon_t.$$

where $|\rho| < 1$ and ϵ_i is $NID(0, \sigma^2)$. The Box-Cox [2] transformation of the dependent variable is defined by

$$q_i^{(\lambda_1)} = (q_i^{\lambda_1} - 1)/\lambda_1 \quad \text{for } \lambda_1 \neq 0, \quad (26)$$

and

$$q_i^{(\lambda_1)} = \ln q_i \quad \text{for } \lambda_1 = 0.$$

The transformation of the right-hand-side variables are similarly defined. The log-linear functional form is represented by $(\lambda_1, \lambda_2) = (0, 0)$ and the linear functional form is represented by $(\lambda_1, \lambda_2) = (1, 1)$.

Letting $q^{(\lambda_1)}$ be the vector of transformed observations on the homicide rate, $X^{(\lambda_2)}$ the matrix of transformed observations on the right-hand-side variables, and B the vector of coefficients, the log likelihood function for the sample of observations on the homicide rate is

$$L = -T/2[\ln(2\pi\sigma^2)] + 1/2\ln(1 - \rho^2) - 1/2(\sigma^2)[q^{(\lambda_1)} - X^{(\lambda_2)}B]' V^{-1}[q^{(\lambda_1)} - X^{(\lambda_2)}B] + (\lambda_1 - 1) \sum_{i=1}^T \ln q_i, \quad (27)$$

where V^{-1} is the matrix

$$\begin{bmatrix} 1 & -\rho & 0 & . & . & . & 0 & 0 \\ -\rho & 1+\rho^2 & -\rho & 0 & . & . & 0 & 0 \\ 0 & -\rho & 1+\rho^2 & . & . & . & . & . \\ . & 0 & . & . & . & . & . & . \\ . & . & . & . & . & . & . & . \\ . & . & . & . & . & . & . & . \\ . & . & . & . & . & . & . & . \\ 0 & 0 & . & . & . & . & 1+\rho^2 & -\rho \\ & & & & & & -\rho & 1 \end{bmatrix}$$

Letting the first three terms in equation (27) be denoted by L_1 , equation (27) simplifies to

$$L = L_1 + (\lambda_1 - 1) \sum_{i=1}^T \ln q_i. \quad (28)$$

For given values of λ_1 and λ_2 , maximizing L_1 with respect to B , σ^2 , and ρ is the same as maximizing the log-likelihood function for a linear regression with autocorrelated errors. Beach and MacKinnon's [1] maximum-likelihood technique is used to estimate L_1 for given values of λ_1 and λ_2 and then it is a simple matter to add L_1 and $(\lambda_1 - 1)\sum \ln q_i$ to find L .¹⁸

In Table VIII, the values of the estimated log likelihood function for the 1936-77 data

18. See Seaks and Layson [27] for a more detailed discussion of this procedure.

Table VIII. Test for Functional Form

λ_2	λ_1^*	L	λ_2	λ_1^*	L
-2.0	.0	197.4	.1	-.4	222.0
-1.9	.0	197.5	.2	-.5	220.5
-1.8	.0	197.5	.3	-.5	218.3
-1.7	.0	197.4	.4	-.5	215.6
-1.6	-.1	197.5	.5	-.4	212.6
-1.5	-.1	197.4	.6	-.3	209.6
-1.4	-.1	197.4	.7	-.1	207.0
-1.3	-.1	197.3	.8	.0	204.7
-1.2	-.1	197.2	.9	.1	203.0
-1.1	-.1	197.1	1.0	.2	201.9
-1.0	-.1	197.1	1.1	.2	201.2
-.9	-.1	197.0	1.2	.3	201.0
-.8	-.1	197.0	1.3	.3	201.0
-.7	-.1	197.1	1.4	.3	201.2
-.6	-.1	197.4	1.5	.3	201.6
-.5	.0	198.0	1.6	.4	202.0
-.4	.8	199.8	1.7	.4	202.6
-.3	.6	209.0	1.8	.4	203.2
-.2	.3	216.5	1.9	.4	203.9
-.1	.0	220.8	2.0	.4	204.5
.0	-.3	222.3	2.1	.4	205.1

are computed for different pairs of (λ_1, λ_2) . In constructing Table VIII the value of λ_2 was allowed to vary between -2 and 2.0 in increments of .1, and then for each value of λ_2 , the value of λ_1 was allowed to vary between -2 and 2 in increments of .1. Letting λ_1^* be the value of λ_1 that maximizes L for a given value of λ_2 , the values of L for different ordered pairs (λ_1^*, λ_2) are reported in Table VIII.

The global maximum value of the likelihood function in Table VIII is 222.33 at $(\hat{\lambda}_1, \hat{\lambda}_2) = (-.3, 0)$. The results of estimating this regression are given by

$$\begin{aligned}
 q^{(-3)} = & 3.04 - 2.82 \ln PA3 - 1.25 \ln PC3 - .246 \ln PE3 \\
 & (.70) \quad (3.84) \quad (11.1) \quad (15.2) \\
 & - .020 TT + .207 \ln A2I29 - 5.41 \ln LFP \\
 & (2.30) \quad (1.98) \quad (8.23) \\
 & + .839 \ln Y - 3.27 \ln REL + .717 \ln HWF, \quad \hat{\rho} = -.465. \quad (29) \\
 & (3.32) \quad (4.71) \quad (.58)
 \end{aligned}$$

Table IX. Likelihood Ratio Tests for Alternative Simple Functional Forms

Functional Form	(λ_1, λ_2)	$L(\lambda_1, \lambda_2)$	χ^2
Log-linear	(0, 0)	220.96	2.75
Semi-log	(0, 1)	201.70	41.26
Semi-log	(1, 0)	205.06	34.54
Linear	(1, 1)	198.55	47.56
Optimal	(-0.3, 0)	222.33	

In equation (29) the coefficients on the probabilities of punishment are all negative, statistically significant,¹⁹ and consistent with the elasticity conditions. It is interesting to note that the transformation of the independent variables, $\lambda_2 = 0$, is consistent with Ehrlich's [9, 734-44] theoretical arguments for measuring the probabilities of punishment in logarithms.

The values of the log likelihood function for 4 alternative simple functional forms and the optimal functional form, $(\hat{\lambda}_1, \hat{\lambda}_2) = (-0.3, 0)$, are presented in Table IX. The likelihood ratio test statistic for the hypothesis $H_0: (\lambda_1, \lambda_2) = (\lambda_1^0, \lambda_2^0)$ is $2[(\hat{\lambda}_1, \hat{\lambda}_2) - L(\lambda_1^0, \lambda_2^0)]$ which has a χ^2 distribution with 2 degrees of freedom. The last column in Table IX reports the values of this test statistic for 4 alternative simple functional forms. The 5% and 1% critical values of χ^2 are, respectively, 5.99 and 9.21. The hypothesis that the homicide function is log-linear cannot be rejected at the 5% significance level. However, both versions of the semi-log functional form and the linear functional form are easily rejected at the 1% significance level. The finding that the time-series estimates of the homicide function are consistent with the log-linear specification corroborates Ehrlich's [9] finding that the optimal functional form for the cross-sectional homicide function is close to the log-linear specification.

Table X reports the coefficient estimates and *t*-statistics of the probabilities of punishment for the 4 simple functional forms. For all 4 functional forms the probabilities of punishment are negative and statistically significant at the 1% level. The deterrence findings are clearly robust with respect to the choice of functional form. However, the *t*-statistics on the probability of execution measured in natural values are considerably lower than the *t*-statistics on probability of execution measured in logarithms.

V. Conclusion

This paper has presented updated estimates of the U.S. homicide function that strongly confirm Ehrlich's [6; 9] deterrence findings. The basic deterrence results reported here are also consistent with the author's [20; 21] studies of Canadian homicide and Wolpin's [29] study of homicide in England and Wales. For the full sample regressions estimated in this paper, the probability of arrest, the conditional probability of conviction given arrest, and the conditional probability of execution given conviction have negative and statistically significant effects on the homicide rate. In addition the ranking of the estimated elasticities of homicide with respect to the probabilities of punishment is consistent with sharp predictions derived from the hypothesis of expected utility maximization.

19. In equation 29 all *t*-statistics are conditional on the assumption that $\lambda_1 = -0.3$ and $\lambda_2 = 0$.

Table X. Coefficients on the Probabilities of Punishment for Alternative Functional Forms

Functional Form	Variables		
	$\ln PA3$	$\ln PC3$	$\ln PE3$
Log-linear	-1.37 (4.00)	-.548 (10.4)	-.103 (13.5)
Semi-log	-.118 (3.18)	-.035 (6.01)	-.0058 (6.13)
	$PA3$	$PC3$	$PE3$
Semi-log	-.028 (3.72)	-.021 (7.70)	-.073 (3.28)
Linear	-.0018 (3.71)	-.0014 (7.89)	-.0044 (3.08)

Note: Absolute value of *t*-statistics in parentheses.

In this paper the homicide rate is measured using the Vital Statistics measure of homicides rather than the FBI series. Previous researchers have used exclusively the FBI data in their time-series analysis. Bowers and Pierce [3], however, argue forcefully that the Vital Statistics measure of homicides is superior to the FBI measure. It is found in this paper that the Vital Statistics data supports the deterrence theory more strongly than the FBI series.

Two other important differences between previous research in this area and the estimates presented in this paper are: (1) OLS methods are used in this paper rather than 2SLS and (2) the probabilities of punishment are measured by averaging the current relative frequencies of punishment with their lagged values of the two previous years. The use of OLS methods rather than 2SLS is justified by an application of Hausman's test and by the use of lagged relative frequencies of punishment to measure murders subjective probabilities of punishment. The particular lag structure used to measure the probabilities is very simple and somewhat arbitrary. However, the deterrence findings reported in this paper are found to be robust with respect to the lag structure used.

Three other important issues that have arisen in the debate over Ehrlich's homicide work are carefully discussed: (1) the sensitivity of the deterrence results to the choice of explanatory variables, (2) the stability of the homicide function over time and (3) the choice of functional form. The deterrence findings are found to be robust with respect to the choice of explanatory variables and functional form. The use of the log-linear functional form is justified by the Box-Cox analysis. The homicide function estimated in this paper is also shown to be reasonably stable over time.

From the specification search, it was found that the proportion of the population that belongs to a religion has a negative and significant effect on the homicide rate in most specifications. Two variables often used by researchers in estimating homicide functions—the unemployment rate and the proportion of the population that is nonwhite—were found to have inconsistent and generally insignificant effects on the homicide rate depending on the choice of explanatory variables. The labor force participation rate has a negative and significant effect on the homicide rate in most specifications. Permanent income per

capita and the proportion of the population between 21 and 29 years of age have positive effects on the homicide rate in most specifications.

The econometric evidence presented in this paper provides solid support for the deterrence hypothesis. The deterrence findings reported in this paper are not fragile. Different sets of explanatory variables have been used, alternative functional forms for the homicide function have been used and the homicide function has been estimated over different time periods. The regression results consistently support the deterrence hypothesis that increases in the probabilities of arrest, conviction, and execution reduce the homicide rate. Even murderers appear to obey the law of demand.

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Steve suggests when we can these guys, explain that we contacted the University of Alaska for someone to speak to the deterrent effects capital punishment has (be specific as to purpose of testimony so they know points to make). An economist suggested we contact them because of their work on this issue.

Dr. Gary Becker
312-962-8168 (office)
312-241-6828 (home)

462 Bryan Bldg
UNC-G
27412

His writes for Business Week and is a "biggie" in the field

Dr. Steve Layson
University of North Carolina
~~919-379-5463 (office)~~
~~919-272-6872 (home)~~ downracted

(919) 334-5463
334 53114

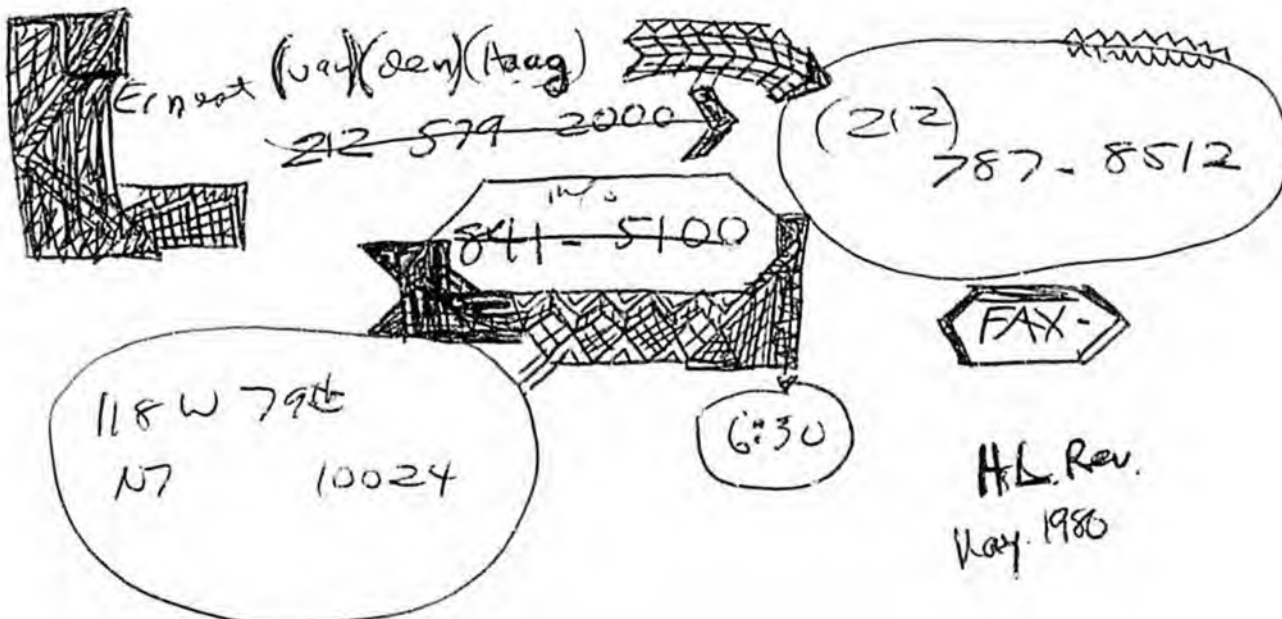
334-5463 econ
dept

His study appeared in the 1985 Southern Economist Journal (or something like that). He has done the most recent published research on this.

There's one more, Issac Erlic of the University of Chicago. He may be dead but Steve is checking for certain.

Haag

Tuesday 2:30 6:30



Alaska State Legislature

Senator Paul Fischer
Senate District D
Box 784
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(907) 262-9420 W
262-9269 H



State Senate

While in Juneau
P.O. Box V
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MEMORANDUM

TO: Senator Jan Faiks, Chairman
Senate Judiciary Committee

FROM: Senator Paul Fischer *PF*

SUBJECT: Senate Bill 17
(relating to capital punishment)

DATE: January 16, 1989

Per your staff's instruction, please find attached a sectional analysis on the above referenced bill, as well as the most recent bulletin I've run across from the Bureau of Justice Statistics entitled "Capital Punishment 1987. It is my hope that before your scheduled hearing on January 24, I will also be able to provide the committee with the requested fiscal note from the Alaska Court System.

Chris, of your staff, also inquired if I had any witnesses that I would like to appear during this hearing. Might I suggest you contact Jan Lienhart and allow her to testify from Anchorage by telephone? You may also have other proponents in mind that may wish to testify in this manner.

I appreciate your scheduling this bill in such a timely manner.

PAF/sgn

Attachments

JAN 23 1989

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800

M E M O R A N D U M

January 23, 1989

SUBJECT: Senate Bill 17: Capital punishment --
comparative aspects

TO: Senator Paul Fischer

FROM: Jack Chenoweth
Legislative Counsel 

You have asked for brief memo comparing the punishment provisions of existing law and the change proposed by this legislation, with particular emphasis on the "aggravators."

Senate Bill 17 authorizes capital punishment for certain first degree murders. Under current law, murder in the first degree is punishable by imprisonment for a term of not less than 20 or more than 99 years. AS 12.55.125(a). Section 8 of this bill adds to the existing punishment the alternative of imposition of a death sentence.

The death sentence may be imposed only if

(1) the sentencing jury determines that at least one of the eight aggravating factors identified in AS 12.55.179, added by section 9 of the bill, is present, and that the aggravating factor(s) is not outweighed by one of the four mitigating factors identified in AS 12.55.180, also added by the bill section;

(2) the sentencing jury recommends imposition of the death sentence; and

(3) the court affirms the jury's findings.

If the court cannot affirm the jury's determination, then the death sentence may not be imposed and the court must determine a range of jail sentence between the 20 and 99 year parameters of existing law.

The aggravating factors of AS 12.55.179, applicable to deliberations concerning imposition of the death penalty, are unrelated to the aggravating factors applicable to presumptive sentencing under current law. The aggravating factors identified for purposes relating to imposition of the death penalty apply only to consideration of those sentences, and are based essentially on elements of comparable capital punishment laws of other jurisdictions (notably, Florida and Georgia) that have been reviewed and sustained on appeal by the United States Supreme Court.

In contrast, some of the aggravating factors identified for presumptive sentencing (AS 12.55.155(c)) were identified early in the course of development of the Criminal Code revision in 1977, while others were added in the course of committee deliberations on various drafts of that legislation. The state, of course, has more flexibility as to the definition and applicability of aggravating factors to sentences in contexts other than those involving capital punishment.

There is, admittedly, some similarity between the two sets of factors:

<u>Capital punishment aggravator proposed in SB 17</u>	<u>Presumptive senten- cing aggravator under current law</u>
Defendant's conduct manifested deliberate cruelty to another in the commission of certain crimes (AS 12.55.179(1))	Defendant's conduct manifested deliberate cruelty to another (AS 12.55.155(c)(2))
Defendant's conduct caused the death of at least two persons, not accomplices (AS 12.55.-179(2))	No exactly comparable provision
Defendant's conduct created a risk of imminent physical injury to at least three persons, not accomplices (AS 12.55.179(3))	Exactly comparable provision (AS 12.55.-155(c)(6))
Defendant has a prior conviction for a felony involving use of violence against a	Defendant's prior criminal history includes conduct involving

person (AS 12.55.179(4))

aggravated or repeated
instances of assaultive
behavior (AS 12.55.-
155(c)(8))

Defendant knowingly directed
the conduct against the pres-
ident or governor (AS 12.55.-
179(5))

No comparable provision

Defendant knowingly directed
the conduct against other
designated state or municip-
al officials (AS 12.55.-
179(6))

Comparable provision --
AS 12.55.155(c)(13) --
includes additional of-
ficials performing
emergency health
related functions

Defendant committed offense
under reimbursement agree-
ment or expectation of
payment (AS 12.55.179(7))

Roughly analogous provi-
sion (AS 12.55.-
155(c)(11))

Defendant committed offense
while on release for another
felony charge or conviction
having assault as a neces-
sary element (AS 12.55.-
179(8))

Comparable provision,
AS 12.55.155(c)(12),
adds "release on a
misdemeanor charge
. . . ."

Finally, I want to note that, under current law, murder in the first degree is not made subject to presumptive sentencing requirements and, when imposing sentence, the court is not bound to analyze and consider the applicability of the aggravating factors in AS 12.55.155(c) in determining whether to impose a shorter or longer sentence within the 20 - 99 year range now authorized.

I trust this is sufficient for the purposes intended.
Please contact me if it is not.

JC:gc
WKG6/021

Alaska State Legislature

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SUMMARY OF SENATE BILL 17 (AUTHORIZING CAPITAL PUNISHMENT)

Enactment of Senate Bill 17 would make first degree murder a capital felony and a person convicted of the crime could be sentenced to death under certain circumstances. Under current law, first degree murder is considered an unclassified felony and carries a definite term of imprisonment of at least 20 years, but not more than 99 years.....the death penalty is not an option.

This legislation stipulates that, when a person is convicted of a capital felony and sentenced to death, the sentence must automatically be reviewed by the state supreme court within 60 days from the time the sentence is imposed. The court may extend the time limit, however, for good cause. A sentence review of this nature has priority over all other cases. The court must determine whether the sentence was imposed under the influence of passion, prejudice, or other arbitrary factors; whether the evidence supports the finding of an aggravating factor and whether the court has properly considered mitigating factors; whether the sentence is excessive or disproportionate to the penalty imposed in similar cases (considering both the crime and the defendant); and any other issue that the defendant may raise as a point on appeal. If the court upholds the death sentence it has to issue a death warrant that specifies a date of execution not less than 30 days nor more than 60 days after the date of the warrant.

Senate Bill 17 outlines sentencing procedures that must be followed for a capital felony. The recommended sentences have to include written findings of whether aggravating factors exist to justify the death sentence; mitigating factors existing that outweigh the aggravating factors; and whether the defendant should be sentenced to death. The court cannot impose the death sentence unless the sentencing jury finds at least one aggravating factor that is not outweighed by the mitigating factors; and recommends the defendant be sentenced to death. Senate Bill 17 also outlines aggravating and mitigating factors that may be considered in determining whether to impose the death penalty.

SUMMARY OF SENATE BILL 17 (AUTHORIZING CAPITAL PUNISHMENT)
PAGE TWO

The original legislation allows the person sentenced to death the opportunity to choose the manner of execution - either by lethal injection or by a firing squad. If the person does not make a choice, the Commissioner of Corrections must determine the manner of execution. The bill also stipulates who may be invited to witness the execution, including prosecuting and defense attorneys, relatives and friends, religious representatives, and the news media.

Under this legislation, if the Commissioner of Corrections has reason to believe a person sentenced to death is incompetent to proceed with the execution, or is pregnant, the Commissioner must immediately give written notice to the court in which the death sentence was imposed, and the sentence will be stayed pending further order of the court. It also allows for examination into competency. When a defendant is no longer pregnant or if found competent, the court has to issue another death warrant specifying a date of execution not less than 30 days nor more than 60 days after the date of the warrant. The court of appeals would not have appellate jurisdiction in actions and proceedings for a capital felony.

The original legislation authorizes an advisory vote to be put before the qualified voters of the state asking: Shall capital punishment for murder in the first degree as now authorized by law go into effect on August 15, 1991?

Except for the advisory vote effective date clause, all other sections of the bill take effect immediately after the bill is signed into law.

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Prepared by Senator Paul A. Fischer
January 23, 1989

STATE OF ALASKA THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

STATE OF ALASKA
LEGISLATIVE AFFAIRS AGENCY
1000 EAST ALASKA STREET
JANUARY 1989

MEMORANDUM

January 16, 1989

SUBJECT: Senate Bill 17 - sectional analysis
TO: Senator Paul Fischer
FROM: Jack Chenoweth
Legislative Counsel

Critical to an appreciation of Senate Bill 17 and this sectional analysis is an understanding of what constitutes a "capital felony." As defined in bill section 3, the crime of murder in the first degree is a capital felony. Under current law, "murder in the first degree" is defined as follows:

A person commits the crime of murder in the first degree if

(1) with intent to cause the death of another person, the person

(A) causes the death of any person;

or

(B) compels or induces any person to commit suicide through duress or deception;

(2) the person knowingly engages, under circumstances manifesting extreme indifference to the value of human life, in a pattern or practice of assault or torture of a child under the age of 16, and one of the acts of assault or torture results in the death of the child; for purposes of this paragraph, a person "engages in a pattern or practice of assault or torture" if the person inflicts serious physical injury to the child by at least two separate acts, and one of the acts results in the death of the child.

AS 11.41.100(a).

Murder in the first degree is currently defined as an "unclassified felony." AS 11.41.100(b). In this proposed

measure, it is given separate status as a "capital felony" in order to permit more stringent penalties to attach.

*

The legislation contains the following provisions:

Bill section 1 addresses attempted capital felonies. It amends AS 11.31.100(d) to shift an attempted murder in the first degree from its status as a "class A felony" to the more serious status as an "unclassified felony."

Bill section 2 amends the definition of the penalty for the crime of solicitation, AS 11.31.110(c). This section makes the penalty for the solicitation of a capital felony itself a "class A felony."

AS 12.30.020, amended by bill section 4, addresses the subject of the right of a prisoner to release before trial. The amendment adds "capital felony" to the category of serious crimes for which release before trial on personal recognizance or bond is not authorized.

AS 12.30.040, amended by bill section 5, addresses the subject of a convicted person's right to release after trial and before sentencing and pending appeal. The amendment adds "capital felony" to the category of serious crimes for which release after trial and before sentencing and pending appeal is not authorized.

AS 12.47.110(b), amended by bill section 6, addresses the subject of trial of an incompetent person. Under certain circumstances, the trial of an incompetent may be deferred, the criminal proceedings dismissed, and civil commitment proceedings initiated. If the person adjudicated incompetent remains incompetent for a period of five years after the criminal charges are dropped, those criminal charges may not thereafter be reinstated, except that the charges may be reinstated for serious felonies. The amendment made in this bill section adds "capital felony" to the list of serious felonies for which reinstatement of criminal charges may be made without regard to the five year limitation.

Bill section 7 adds a new section, AS 12.55.117, authorizing automatic review by the state supreme court of convictions for capital felonies in which the trial court imposes the

death penalty. The various subsections prescribe a process and define the factors that the court must apply in its review. In an effort to encourage consolidated disposition of all pertinent legal questions relating to the trial, the court is authorized to consider on review any other point of appeal that the defendant would want to raise. If the court upholds the judgment, it shall prepare and issue a death warrant and deliver the warrant to the commissioner of corrections.

AS 12.55.125(a,, amended by bill section 8, prescribes the sentence of imprisonment for first degree murder. Since another provision of this bill makes first degree murder a capital felony, the technical amendment is made in this section. The substantive change adds the death penalty as the alternative sentence that may issue upon conviction.

In bill section 9 is set out the sentencing procedures applicable to convictions for capital felonies. The bill section adds four new interrelated provisions:

Proposed AS 12.55.177 provides that, upon conviction of first degree murder, a separate sentencing procedure should be undertaken before the trial jury or, if conviction has been had by a judge without jury, before a specially impaneled jury. The section relates generally the manner in which the sentencing proceedings are to be conducted, including applicable limitations, and indicates how the sentencing jury is to reach a recommended sentence.

Proposed AS 12.55.178 addresses the trial court's review and disposition of a death sentence recommended by a jury. The section includes limitations on the court's imposition of a death sentence. The key provision is subsection (b): a court may not affirm a recommended death sentence unless it determines that the jury has based its decision on a finding of at least one aggravating factor that is not outweighed by one or more mitigating factors (see AS 12.55.179 and 12.55.180 and the references in next paragraph). When a jury has recommended imposition of a death sentence and the court acts on the recommendation, the section directs the court to enter written findings of the applicable factors. A death sentence is, of course, subject to automatic review under AS 12.55.117, discussed earlier.

Imposition of a death penalty must involve the jury's

consideration of the facts against various factors. Proposed AS 12.55.179 sets out the "aggravating factors" that the jury may consider; proposed AS 12.55.180 prescribes the "mitigating factors" that the jury must consider. */

*/ Let me expand this discussion in this extended footnote.

Prior to 1972, the United States Supreme Court almost invariably upheld capital punishment statutes. Then, in Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346 (1972), the court struck down the Georgia death penalty statute. The court said that the Eighth Amendment to the United States Constitution, which prohibits the imposition of "cruel and unusual punishment," is violated where the jury has unguided discretion to impose the death penalty.

In response to the Furman decision Georgia and virtually every other state with the death penalty rewrote its capital punishment statutes to comply with that decision. In 1976, the United States Supreme Court upheld the capital punishment statutes of Georgia, Florida, and Texas. Gregg v. Georgia, 428 U.S. 153, 49 L.Ed.2d 859 (1976); Proffitt v. Florida, 428 U.S. 242, 49 L.Ed.2d 913 (1976); Jurek v. Texas, 428 U.S. 262, 49 L.Ed.2d 929 (1976). In each case, the court found the guidelines for imposition of the death penalty constitutionally sufficient. The details of the statutes differ. In general, however, they require the court or jury to find one of several enumerated aggravating circumstances before the penalty can be imposed. Moreover, the aggravating circumstances must not be outweighed by mitigating circumstances. This measure, which is based on the Georgia and Florida statutes, operates in this manner and is therefore probably valid.

The United States Supreme Court has offered other guidelines with regard to the imposition of the death penalty, all of which seem to be satisfied in this legislation. For example, the death penalty may be imposed only when it is proportional to the crime for which the defendant is convicted. In the case of deliberate murder, the punishment is clearly proportionate. Gregg v. Georgia, supra. But in the case of the rape of an adult woman not resulting in the victim's death, the death penalty may not be imposed. Coker v. Georgia, 53 L.Ed.2d 982 (1977). This bill applies only to murder in the first degree.

Bill section 10 adds a new chapter to AS 12 that prescribes how the imposed death sentence is to be carried out.

Generally, if after its automatic review, the supreme court sustains the imposition of the death penalty, the court shall issue a death warrant and deliver it to the commissioner of corrections. By AS 12.58.010, the commissioner is to give the defendant the choice of the means of execution--lethal injection or firing squad--or, if the defendant fails or refuses to choose, make the choice for the defendant. The commissioner is then to specify the time, place, and manner of execution.

AS 12.58.020 gives additional specifics applicable in the event of execution by firing squad; AS 12.58.030 gives additional specifics relating to death by lethal injection. In either event, the commissioner and a licensed physician designated by the commissioner must witness the execution. AS 12.58.040.

Additional witnesses, here styled "invitees" are permitted, not to exceed nine in number; their selection by the commissioner of corrections is provided for in AS 12.58.050.

A statute providing a mandatory death penalty for conviction of certain crimes is unconstitutional. Wadson v. North Carolina, 428 U.S. 280, 49 L.Ed.2d 944 (1976). Under this bill, the death penalty is never mandatory and may be imposed only after it is considered by a jury. The Court has also held that the refusal of the trial court to consider certain relevant mitigating factors is an unconstitutional application of the death penalty. Eddings v. Oklahoma, 455 U.S. 104, 71 L.Ed.2d 1 (1982). Again, in its proposed AS 12.55.180, this bill requires the trial court to consider all mitigating factors.

There are, of course, numerous grounds upon which any death penalty statute might be challenged. It is impossible to say whether any of them will ultimately succeed in light of the evolution of the doctrine of the United States Supreme Court on the death penalty. Under current decisions as I understand them, however, the bill appears to satisfy the requirements of the federal constitution.

Press coverage of an execution is authorized. AS 12.58.060 specifies how press coverage is to be allowed and sets limitations on the use of photographic and recording equipment during the execution. Subsection (c) imposes a penalty for violation of the conditions under which the press may cover an execution.

Proposed AS 12.58.070 sets additional limitations and conditions on attendance of witnesses and the press at an execution.

When the execution is completed, the commissioner of corrections is to affirm certain details of it by return of a death warrant. AS 12.58.080.

AS 12.58.200 - 12.58.220 generally address instances in which an execution may be stayed or postponed. Two instances are identified: incompetency of the defendant and pregnancy of a female defendant. If either circumstance exists, the commissioner is to notify the sentencing court, the prosecuting attorney, and defendant's counsel in writing, and execution of sentence on the death warrant is stayed (AS 12.58.200). It is the responsibility of the sentencing court to conduct proceedings to affirm the commissioner's determination of competency or pregnancy and, if it does, to stay the effect of execution. When the disability ceases to exist, the trial court is to so certify to the supreme court, and the latter is to issue another death warrant. In the "stay" provision, AS 12.58.210(c) and 12.58.220(b), there are provisions that would allow for appeal of the sentencing court's findings that the defendant was not incompetent or pregnant.

Bill section 10 concludes with a section adding pertinent definitions.

AS 22.07.020(a) defines the jurisdiction of Alaska's intermediate appellate court, the Court of Appeal. Normally, appeals in criminal matters are directed to that court. In this bill, I have authorized automatic review by the supreme court. The amendment made in bill section 11 recognizes that exception to the Court of Appeal's jurisdiction.

Senator Paul Fischer
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Similarly, AS 22.07.020(b) directs that sentence appeals be first filed and considered by the Court of Appeal. The amendment made by bill section 12 recognizes the exception to the Court of Appeal's jurisdiction in sentence appeals involving imposition of the death penalty.

Though the substantive provisions of this Act are given an effective date of August 15, 1991, by bill section 17, you directed inclusion of a provision that calls for an advisory vote by the state's voters at the next statewide election (presumptively the state primary election of August, 1990) to determine whether there is public support for the proposed imposition of the death penalty. Bill section 13 authorizes the advisory vote and specifies the advisory question to be submitted.

As my December 15, 1988, memo transmitting the bill draft noted, there are several criminal court rules pertaining to sentencing and sentence appeals that currently guide the trial courts. The provisions of this bill operate independently of sentencing and sentences appeal practices and existing court rules. In my judgment, court rule change provisions are necessary. I have included two--one related to the applicability of the substantive changes to the Criminal Rules, in bill section 14, and one related to the applicability of the substantive changes to the Appellate Rules, in bill section 15. Note that I have referred to them in the bill title, as required by article IV, sec. 15, Alaska constitution, and Rule 39(e), Uniform Rules of the Alaska Legislature.

Finally, bill sections 16 and 17 provide effective dates. The advisory vote provision is given an immediate effective date; the remainder of the bill is to take effect August 15, 1991.

If this memo or the accompanying bill draft prompts questions, please contact me.

JC:lmb
L6/146