

HB 9

RELEVANT

LAW

(FILE 2)

MEMORANDUM

STATE OF ALASKA

Department of Law - Criminal Division

To: Members, House Judiciary Committee

Date: March 27, 2009

From: Susan S. McLean *SMC*
Chief Assistant Attorney General

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Subject: Statistics re: HB 9

On March 23, during a House Judiciary Committee meeting regarding HB 9, Representative Coghill requested statistics regarding the racial composition of the group of Alaska offenders who have been convicted of Murder in the First Degree. Although it was not possible within this time frame to compile statistics regarding all offenders who have ever been convicted of that crime, the Department of Corrections was able to gather that data as it applies to offenders who are currently serving sentences for that crime. The attached document contains those statistics and a short narrative summary.

ETHNICITY OF OFFENDERS IMPRISONED FOR FIRST DEGREE MURDER

Table 1, compiled by the Alaska Department of Corrections, contains data pertaining to offenders who are currently incarcerated, having been convicted in Alaska of the Murder in the First Degree. There are currently 248 offenders serving sentences for the crime of Murder in the First Degree.

Table 1: Prisoners Currently Incarcerated For Murder in the First Degree

ETHNICITY	MALE	FEMALE	TOTAL	PERCENTAGE
Alaska Native	49	2	51	20.6%
Asian/Pacific Island	5	1	6	2.4%
Black	30	0	30	12.1%
Caucasian	148	9	157	63.3%
Hispanic	4	0	4	1.6%
TOTAL	236	12	248	100%

Source: Alaska Department of Corrections

Table 2: U.S. Census Bureau - 2007 Population Estimate

	Alaska	USA
Population 2007 Estimate	683,478	301,621,157
American Indian And Alaska Native Persons, Percent, 2007	15.2%	1.0%
Asian/Pacific Islander, Percent, 2007	5.2%	4.6%
Black Persons, Percent, 2007	4.1%	12.8%
White Persons, Not Hispanic, Percent, 2007	66.1%	68.0%
Persons Of Hispanic Or Latino Origin, Percent, 2007	5.9%	15.1%
Persons Reporting Two Or More Races, Percent, 2007	4.7%	1.6%

Table 2 reflects population statistics published by the U.S. Census Bureau in 2007. There is not a significant difference between the percentage of Alaska Natives in the general population of Alaska and the percentage incarcerated for first-degree murder. 4.7% of the Alaska population reported two or more races. It is unknown whether this is relevant to the difference in the percentage of Alaska Natives incarcerated (20.6% of the incarcerated offenders as opposed to 15.2% of the Alaska population).

The percentage of white persons incarcerated for first-degree murder is not significantly lower than the percentage of white persons in the general population. Table 3 on the following page reveals that the number of white offenders serving life sentences for murder is actually higher than the percentage of white persons in the Alaska population.

The percentage of black offenders in prison for murder in the first degree is consistent with the percentage of black persons in the population of the United States. It is, however, greater than the percentage of blacks in the Alaska population.

The percentage of other minorities – Hispanics, Asians and Pacific Islanders – currently incarcerated for murder in the first degree is significantly lower than the percentage of those minorities in either the Alaska population or the United States population.

Absent statutory or judicial limitation on parole eligibility, offenders are normally entitled to release on parole after serving two-thirds of the sentence imposed. Therefore, a sentence in which the average offender would spend the remainder of his or her life in prison is a sentence in excess of 90 years. Courts typically reach the 90-year range in sentencing after concluding that an offense is deserving of a maximum sentence and it is therefore likely that most offenders in this range received 99-year sentences.

Table 3 reflects the length of the sentence which is being served by each of the 248 offenders convicted of murder in the first degree. 108 offenders are serving sentences of more than 90 years and 12 are serving sentences in excess of 100 years.

TABLE 3: LENGTH OF SENTENCES IMPOSED FOR MURDER IN THE FIRST DEGREE

ETHNICITY	SENTENCE LENGTH (YEARS)											UNKN	UNSENT	TOTAL
	5 - 19	20 - 29	30 - 39	40 - 49	50 - 59	60 - 69	70 - 79	80 - 89	90 - 99	100+				
Alaska Native	1	2	1	2	2	4	5	0	22	6	2	4	51	
Asian/Pacific Isl	0	0	0	0	2	1	1	0	2	0	0	0	6	
Black	3	1	0	0	3	1	2	3	6	3	2	16	30	
Caucasian	3	0	9	6	10	13	11	8	77	3	3	14	157	
Hispanic	0	0	0	0	1	0	1	1	1	0	0	0	4	
TOTAL	7	3	10	8	18	19	20	12	108	12	7	24	248	

Source: Alaska Department of Corrections

Source: Alaska Department of Corrections

Of the 108 inmates serving 90-99 year sentences, the ethnic composition is as follows

Alaska Native - 22	20.3 %
Asian/Pacific Islander - 2	1.8 %
Black - 6	5.5 %
White - 77	71.2 %
Hispanic - 1	0.9 %

Again, the percentage (by ethnic group) of total offenders serving 90-99 year sentences is closely related to the percentage of the population represented by that group.

Disproportion does exist within the group of 12 offenders who are serving sentences in excess of 100 years. In this group, 6 are Alaska native, 3 are white and 3 are black. Given the small number of people comprising the group, it is difficult to draw conclusions without looking at individual cases. Since the maximum sentence for first degree murder is 99 years, it follows that each of the offenders committed some crime in addition to the one murder. However, given time constraints, it was not possible to determine whether these offenders murdered more than one person, or received the sentence as a result of a second count other than first-degree murder. Furthermore, as a practical matter there is little difference between a sentence of 99 years and a sentence in excess of 100 years since, in either case, the offender is not likely to outlive the time until parole eligibility.

STATE OF ALASKA

DEPARTMENT OF LAW CRIMINAL DIVISION

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March 25, 2009

The Honorable Jay Ramras
Chair, House Judiciary Committee
Alaska State Legislature, Room 118
Juneau, AK 99801

Re: Response to testimony by Barbara Brink regarding HB 9

Dear Representative Ramras:

Assistant Attorney General John Novak testified regarding HB 9 on March 2, 2009. Mr. Novak began his testimony by stating that he wished to address the "simple point" that lengthy prison terms do not necessarily protect the public. He informed the committee that the purpose of his testimony was to offer examples which demonstrate that innocent people are still killed by offenders who are serving lengthy prison sentences in secure facilities.

On March 23, 2009 former Public Defender Barbara Brink testified in response to Mr. Novak's remarks. Capital punishment is an emotionally charged topic. It may be that as a result of her passionate opposition to the death penalty, Ms. Brink misunderstood the purpose of Mr. Novak's testimony. To the extent that Ms. Brink purported to express the motives of the Department of Law generally and Mr. Novak specifically, we wish to set the record straight.

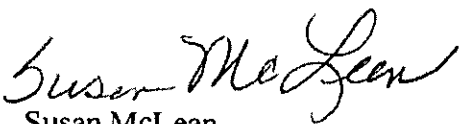
The recording of Mr. Novak's testimony speaks for itself. Contrary to Ms. Brink's opinion that the Department of Law's motive was to "create a false impression" regarding the applicability of the death penalty in the cases Mr. Novak described, Mr. Novak clearly *stated* his purpose. He did not say or imply that the offenders he described would have been candidates for the death penalty. He did not claim that Mr. Gustavson, Mr. Cheely or Mr. Abuhl was convicted of murder in the first degree. He clearly stated that Mr. Donnelly was tried and convicted in federal court in Alaska and was then imprisoned in South Carolina. What Mr. Novak *said* is that all of these offenders were convicted of murder and that the fact that they were in prison did not stop them from killing again. Those statements are unquestionably accurate and consistent with the stated sole purpose of his testimony.

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It is unfortunate that the members of this committee were urged to consider, as fact, one person's opinion of another person's reasons for speaking. I urge the members of this committee to review the recording of Mr. Novak's testimony before arriving at unwarranted and unfair conclusions regarding his professional integrity.

Sincerely,

RICHARD SVOBODNY
ACTING ATTORNEY GENERAL

By: 
Susan McLean
Acting Deputy Attorney General

cc: Members of the House Judiciary Committee:
Representative Nancy Dahlstrom, Vice Chair
Representative John Coghill
Representative Carl Gatto
Representative Bob Lynn
Representative Max Gruenburg
Representative Lindsey Holmes

John Novak
Barbara Brink

DISPOSITION OF FIRST DEGREE MURDER CHARGES DEPARTMENT OF LAW STATISTICS

A report run in CRIMES (criminal division case management system) for First Degree Murder charges between January 1, 2003 and December 21, 2008 shows the following statistics:

- The report does not include cases referred and not accepted for prosecution. This way, every case has both a DA file number and a court number.
- 159 Murder in the First Degree charges were referred and accepted for prosecution: (133-attempted murder charges were accepted for prosecution, but these were not analyzed because Attempted Murder is not included in HB 9).
- The average number of Murder 1 cases per year is 32
- On April 1, 2009, the following disposition had been made of these cases

Pending Trial

- 37 are pending trial or retrial -- 23.9%

Dismissed

- 33 were dismissed by the state -- 19.4%

REMAINING CHARGES (159 total minus 37 unresolved) -- 122 cases

Conviction of Lesser Offense or Acquitted

- 29 resolved by plea to a lesser offense -- 23.7 %
- 5 found not guilty at jury trial -- 4.1 %
- 5 no true bill by Grand Jury -- 4.1 %
- 4 convicted of lesser offense at jury trial -- 3.2 %
- 1 convicted of lesser offense at court trial -- .82%
- 1 tried on lesser charge at court trial -- .82%
- 1 judgment of acquittal -- .82%
- 1 dismissed by court -- .82%

Convicted as Charged

- 26 convicted of Murder 1 at jury trial -- 21.3 %
- 15 convicted by plea to Murder 1 -- 12.3 %
- 1 convicted as charged at court trial .82%
- 42 -- Total convicted as charged -- 34.4 %

Sec. 05.15.105. Persons prohibited from involvement.

(a) If a person has been convicted of a violation of a law of this state that is, or a law or ordinance of another jurisdiction that would be if it had been committed in this state, a felony, or a violation of a law or ordinance of this state or another jurisdiction that is a crime involving theft or dishonesty or a violation of gambling laws

(1) the department may not issue a license to the person;

(2) the department may not issue a license to, or register as a vendor, an applicant who employs the person in a managerial or supervisory capacity or uses the person as a fund raiser or consultant;

(3) the department may not issue a permit for an activity if the person is responsible for the operation of the activity;

(4) the person may not be employed in a managerial or supervisory capacity by a licensee or vendor or used as a fund raiser or consultant by a licensee or vendor;

(5) the person may not participate in charitable gaming as a permittee, licensee, or vendor.

(b) The department shall adopt regulations that provide that a disqualification of a person under (a) of this section based upon a conviction of that person for a violation

(1) of a law of this state that is, or a law or ordinance of another jurisdiction that would be if it was committed in this state, a class B felony other than extortion, a class C felony, or an unclassified felony described outside of AS 11, and that is not a crime of dishonesty or theft or a violation of gambling laws, terminates 10 years after the person's conviction;

(2) of a law or ordinance of this state or another jurisdiction that is a crime involving theft or dishonesty or a violation of gambling laws, and that is not, or would not be if it was committed in this state, an unclassified felony described in AS 11, a class A felony, or extortion, terminates 10 years after the person's conviction, if the department determines that the

(A) person is of good character, honesty, and integrity; and

(B) person's involvement in charitable gaming is not against the public interest.

History -

(Sec. 7 ch 70 SLA 1993)

Sec. 05.15.140. Proof necessary to qualify for permit.

(a) The department may not issue or renew a permit except upon satisfactory proof that the applicant is a municipality or qualified organization, the activity may be permitted under this chapter, and the issuance of a permit is not detrimental to the best interests of the public. Upon request of the department, the applicant shall prove conclusively each of these requirements before a permit may be issued or renewed.

(b) In an application for a permit, a municipality or qualified organization shall disclose the name and address of each person responsible for the operation of the activity and whether any person named

(1) has been convicted of a violation of a law of this state that is, or a law or ordinance of another state that would be if committed in this state, an unclassified felony described in AS 11, a Class A felony, extortion, or a violation of a law or ordinance of this state or another jurisdiction that is a crime involving theft or dishonesty or a violation of gambling laws; or

(2) has a prohibited financial interest, as defined in regulations adopted by the department, in the operation of the activity.

(c) [Repealed, Sec. 37 ch 70 SLA 1993].

(d) Application forms for permits must contain a notice that a false statement in the application is punishable by law.

Sec. 08.64.326. Grounds for imposition of disciplinary sanctions.

(a) The board may impose a sanction if the board finds after a hearing that a licensee

(1) secured a license through deceit, fraud, or intentional misrepresentation;
(2) engaged in deceit, fraud, or intentional misrepresentation while providing professional services or engaging in professional activities;
(3) advertised professional services in a false or misleading manner;
(4) has been convicted, including conviction based on a guilty plea or plea of nolo contendere, of

(A) a class A or unclassified felony or a crime in another jurisdiction with elements similar to a class A or unclassified felony in this jurisdiction;

(B) a class B or class C felony or a crime in another jurisdiction with elements similar to a class B or class C felony in this jurisdiction if the felony or other crime is substantially related to the qualifications, functions, or duties of the licensee; or

(C) a crime involving the unlawful procurement, sale, prescription, or dispensing of drugs;

(5) has procured, sold, prescribed, or dispensed drugs in violation of a law regardless of whether there has been a criminal action;

(6) intentionally or negligently permitted the performance of patient care by persons under the licensee's supervision that does not conform to minimum professional standards even if the patient was not injured;

(7) failed to comply with this chapter, a regulation adopted under this chapter, or an order of the board;

(8) has demonstrated

(A) professional incompetence, gross negligence, or repeated negligent conduct; the board may not base a finding of professional incompetence solely on the basis that a licensee's practice is unconventional or experimental in the absence of demonstrable physical harm to a patient;

(B) addiction to, severe dependency on, or habitual overuse of alcohol or other drugs that impairs the licensee's ability to practice safely;

(C) unfitness because of physical or mental disability;

(9) engaged in unprofessional conduct, in sexual misconduct, or in lewd or immoral conduct in connection with the delivery of professional services to patients; in this paragraph, "sexual misconduct" includes sexual contact, as defined by the board in regulations adopted under this chapter, or attempted sexual contact with a patient outside the scope of generally accepted methods of examination or treatment of the patient, regardless of the patient's consent or lack of consent, during the term of the physician-patient relationship, as defined by the board in regulations adopted under this chapter, unless the patient was the licensee's spouse at the time of the contact or, immediately preceding the physician-patient relationship, was in a dating, courtship, or engagement relationship with the licensee;

(10) has violated AS 18.16.010;

(11) has violated any code of ethics adopted by regulation by the board;

(12) has denied care or treatment to a patient or person seeking assistance from the physician if the only reason for the denial is the failure or refusal of the patient to agree to arbitrate as provided in AS 09.55.535(a); or

(13) has had a license or certificate to practice medicine in another state or territory of the United States, or a province or territory of Canada, denied, suspended, revoked, surrendered while under investigation for an alleged violation, restricted, limited, conditioned, or placed on probation unless the denial, suspension, revocation, or other action was caused by the failure of the licensee to pay fees to that state, territory, or province.

(b) In a case involving (a)(13) of this section, the final findings of fact, conclusions of law and order of the authority that suspended or revoked a license or certificate constitutes a prima facie case that the license or certificate was suspended or revoked and the grounds under which the suspension or revocation was granted.

Sec. 09.65.210. Damages resulting from commission of a felony or while under the influence of alcohol or drugs.

A person who suffers personal injury or death or the person's personal representative under AS 09.55.570 or 09.55.580 may not recover damages for the personal injury or death if the injury or death occurred while the person was

(1) engaged in the commission of a felony, the person has been convicted of the felony, including conviction based on a guilty plea or plea of nolo contendere, and the party defending against the claim proves by clear and convincing evidence that the felony substantially contributed to the personal injury or death;

(2) engaged in conduct that would constitute the commission of an unclassified felony, a class A felony, or a class B felony for which the person was not convicted and the party defending against the claim proves by clear and convincing evidence

(A) the felonious conduct; and

(B) that the felonious conduct substantially contributed to the personal injury or death;

(3) fleeing after the commission, by that person, of conduct that would constitute an unclassified felony, a class A felony, or a class B felony or being apprehended for conduct that would constitute an unclassified felony, a class A felony, or a class B felony if the party defending against the claim proves by clear and convincing evidence

(A) the felonious conduct; and

(B) that the conduct during the flight or apprehension substantially contributed to the injury or death;

(4) operating a vehicle, aircraft, or watercraft while under the influence of intoxicating liquor or any controlled substance in violation of AS 28.35.030, was convicted, including conviction based on a guilty plea or plea of nolo contendere, and the party defending against the claim proves by clear and convincing evidence that the conduct substantially contributed to the personal injury or death; or

(5) engaged in conduct that would constitute a violation of AS 28.35.030 for which the person was not convicted if the party defending against the claim proves by clear and convincing evidence

(A) the violation of AS 28.35.030; and

(B) that the conduct substantially contributed to the personal injury or death.

Sec. 11.31.100. Attempt.

(a) A person is guilty of an attempt to commit a crime if, with intent to commit a crime, the person engages in conduct which constitutes a substantial step toward the commission of that crime.

(b) In a prosecution under this section, it is not a defense that it was factually or legally impossible to commit the crime which was the object of the attempt if the conduct engaged in by the defendant would be a crime had the circumstances been as the defendant believed them to be.

(c) In a prosecution under this section, it is an affirmative defense that the defendant, under circumstances manifesting a voluntary and complete renunciation of the defendant's criminal intent, prevented the commission of the attempted crime.

(d) An attempt is

- (1) an unclassified felony if the crime attempted is murder in the first degree;
- (2) a class A felony if the crime attempted is an unclassified felony other than 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.

(e) If the crime attempted is an unclassified crime described in a state law which is not part of this title and no provision for punishment of an attempt to commit the crime is specified, the punishment for the attempt is imprisonment for a term of not more than half the maximum period prescribed as punishment for the unclassified crime, or a fine of not more than half the amount of the maximum fine prescribed as punishment for the unclassified crime, or both. If the crime attempted is punishable by an indeterminate or life term, the attempt is a class A felony.

Sec. 11.31.110. Solicitation.

(a) A person commits the crime of solicitation if, with intent to cause another to engage in conduct constituting a crime, the person solicits the other to engage in that conduct.

(b) In a prosecution under this section,

(1) it is not a defense

(A) that the defendant belongs to a class of persons who by definition are legally incapable in an individual capacity of committing the crime that is the object of the solicitation; or

(B) that a person whom the defendant solicits could not be guilty of the crime that is the object of the solicitation;

(2) it is an affirmative defense that the defendant, under circumstances manifesting a voluntary and complete renunciation of the defendant's criminal intent, after soliciting another person to engage in conduct constituting a crime, prevented the commission of the crime.

(c) Solicitation is

(1) an unclassified felony if the crime solicited is murder in the first degree;

(2) a class A felony if the crime solicited is an unclassified felony other than murder in the first degree;

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

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

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

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

(d) If the crime solicited is an unclassified crime described in a state law which is not part of this title and no provision for punishment of a solicitation to commit the crime is specified, the punishment for the solicitation is imprisonment for a term of not more than half the maximum period prescribed as punishment for the unclassified crime, or a fine of not more than half the maximum fine prescribed as punishment for the unclassified crime, or both. If the crime solicited is punishable by an indeterminate or life term, the solicitation is a class A felony.

Sec. 11.31.120. Conspiracy.

(a) An offender commits the crime of conspiracy if, with the intent to promote or facilitate a serious felony offense, the offender agrees with one or more persons to engage in or cause the performance of that activity and the offender or one of the persons does an overt act in furtherance of the conspiracy.

(b) If an offender commits the crime of conspiracy and knows that a person with whom the offender conspires to commit a serious felony offense has conspired or will conspire with another person or persons to commit the same serious felony offense, the offender is guilty of conspiring with that other person or persons to commit that crime whether or not the offender knows their identities.

(c) In a prosecution under this section, it is a defense that the defendant was merely present at the time that two or more other persons agreed to engage in or cause the performance of a serious felony offense.

(d) In a prosecution under this section, it is not a defense that a person with whom the defendant conspires could not be guilty of the crime that is the object of the conspiracy because of

- (1) lack of criminal responsibility or other legal incapacity or exemption;
- (2) belonging to a class of persons who by definition are legally incapable in an individual capacity of committing the crime that is the object of the conspiracy;
- (3) unawareness of the criminal nature of the conduct in question or of the criminal purpose of the defendant; or
- (4) any other factor precluding the culpable mental state required for the commission of the crime.

(e) If the offense that the conspiracy is intended to promote or facilitate is actually committed, a defendant may not be convicted of conspiring to commit that offense with another person for whose conduct the defendant is not legally accountable under AS 11.16.120(b).

(f) In a prosecution under this section, it is an affirmative defense that the defendant, under circumstances manifesting a voluntary and complete renunciation of the defendant's criminal intent, either (1) gave timely warning to law enforcement authorities; or (2) otherwise made proper effort that prevented the commission of the crime that was the object of the conspiracy. Renunciation by one conspirator does not affect the liability of another conspirator who does not join in the renunciation.

(g) Notwithstanding AS 22.10.030, venue in actions in which the crime of conspiracy is alleged to have been committed may not be based solely on the location of overt acts done in furtherance of the conspiracy.

(h) In this section,

(1) "overt act in furtherance of the conspiracy" means an act of such character that it manifests a purpose on the part of the actor that the object of the conspiracy be completed;

(2) "serious felony offense" means an offense

(A) against the person under AS 11.41, punishable as an unclassified or class A felony;

(B) involving controlled substances under AS 11.71, punishable as an unclassified, class A, or class B felony;

(C) that is criminal mischief in the first degree under AS 11.46.475; or

(D) that is terroristic threatening in the first degree under AS 11.56.807.

(i) Conspiracy is

(1) an unclassified felony if the object of the conspiracy is murder in the first degree;

(2) a class A felony if the object of the conspiracy is a crime punishable as an unclassified felony other than murder in the first degree;

(3) a class B felony if the object of the conspiracy is a crime punishable as a class A felony;

(4) a class C felony if the object of the conspiracy is a crime punishable as a class B felony.

connection with the enactment of this section, see 1993 Senate Journal at 611 - 612.

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;
 - (2) the person knowingly engages in conduct directed toward a child under the age of 16 and the person with criminal negligence inflicts serious physical injury on the child by at least two separate acts, and one of the acts results in the death of the child;
 - (3) acting alone or with one or more persons, the person commits or attempts to commit a sexual offense against or kidnapping of a child under 16 years of age and, in the course of or in furtherance of the offense or in immediate flight from that offense, any person causes the death of the child; in this paragraph, "sexual offense" means an offense defined in AS 11.41.410 - 11.41.470;
 - (4) acting alone or with one or more persons, the person commits or attempts to commit criminal mischief in the first degree under AS 11.46.475 and, in the course of or in furtherance of the offense or in immediate flight from that offense, any person causes the death of a person other than one of the participants; or
 - (5) acting alone or with one or more persons, the person commits terroristic threatening in the first degree under AS 11.56.807 and, in the course of or in furtherance of the offense or in immediate flight from that offense, any person causes the death of a person other than one of the participants.
- (b) Murder in the first degree is an unclassified felony and is punishable as provided in AS 12.55.

Sec. 12.30.020. Release before trial.

(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 an unclassified felony or 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 the alleged victim, other persons, or 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 the prosecuting attorney up to 48 hours to demonstrate that release of the person on the person's personal recognizance or upon the execution of an unsecured appearance bond will not reasonably assure the appearance of the person or will pose a danger to the alleged victim, other persons, or the community.

(b) If a judicial officer determines under (a) of this section that the release of a person will not reasonably assure the appearance of the person, or will pose a danger to the alleged victim, other persons, or the community, the judicial officer may

(1) place the person in the custody of a designated person or organization agreeing as a custodian to supervise the person; the court shall, personally and in writing, inform the custodian about the duties required of a custodian, and that failure to report immediately in accordance with the terms of the order that the person released has violated a condition of release may result in the custodian's being held criminally liable under AS 11.56.758;

(2) place restrictions on the travel, association, or place of abode of the person during the period of release;

(3) [Repealed, Sec. 8 ch 57 SLA 2006].

(4) require the execution of an appearance bond in a specified amount and the deposit in the registry of the court, in cash or other security, a sum not to exceed 10 percent of the amount of the bond; the deposit to be returned upon the performance of the condition of release;

(5) require the execution of a bail bond with sufficient solvent sureties or the deposit of cash;

(6) require the execution of a performance bond in a specified amount and the deposit in the registry of the court, in cash or other security; the performance bond must be imposed and enforced separately from any appearance bond, and the deposit to be returned upon the performance of the condition of release; or

(7) impose any other condition considered reasonably necessary to assure the defendant's appearance as required and the safety of the alleged victim, other persons, or the community.

(c) In determining the conditions of release under (b) of this section, the judicial officer shall take into account

(1) the nature and circumstances of the offense charged, including the effect of the offense upon the alleged victim;

(2) the weight of the evidence against the person;

(3) the person's family ties;

(4) the person's employment;

(5) the person's financial resources;

(6) the person's character and mental condition;
(7) the length of the person's residence in the community;
(8) the person's record of convictions;
(9) the person's record of appearance at court proceedings;
(10) the flight of the accused to avoid prosecution or the person's failure to appear at court proceedings; and
(11) threats the person has made, and the danger the person poses, to the alleged victim.

(d) A judicial officer authorizing the release of a person under this section shall issue an order containing a statement of the conditions imposed.

(e) The judicial officer shall inform the person of the penalties that may be imposed for a violation of the conditions of release and advise the person that a warrant for the person's arrest will be issued immediately upon a violation or that the person may be arrested without a warrant for a violation of conditions of release as set out in AS 12.25.030(b).

(f) A person who remains in custody 48 hours after appearing before a judicial officer because of inability to meet the conditions of release shall, upon application, be entitled to have the conditions reviewed by the judicial officer who imposed them. If the judicial officer who imposed the conditions of release is not available, any other judicial officer in the district may review the conditions. If the conditions are not amended and the person remains in custody, the judicial officer shall set out in writing the reasons for requiring the conditions imposed.

(g) A judicial officer who orders the release of a person on a condition specified in (b) of this section may at any time amend the order to impose additional or different conditions of release, or to release the person under (a) of this section.

(h) Information offered or introduced at a hearing before a judicial officer to determine the conditions of release need not conform to the rules governing the admissibility of evidence in a court of law.

(i) The court shall issue written or oral findings to demonstrate why conditions provided under (b)(1) of this section needed to be imposed.

(j) If a person remains in custody after review of conditions by a judicial officer under (f) of this section, a subsequent review of conditions may be held at the request of the person. Unless the prosecuting authority stipulates otherwise or a defendant has been incarcerated for a period equal to the maximum sentence for the most serious charge for which the defendant is being held, a judicial officer may not schedule a bail review hearing under this subsection unless

(1) the person provides to the court and the prosecuting authority a written statement that new information not considered at the previous review will be presented; the statement must include a description of the information and the reason the information was not presented at a previous hearing; in this paragraph, "new information" does not include the inability to post the required bail;

(2) the prosecuting authority has at least 48 hours' notice before the time set for the review requested under this subsection; and

(3) at least seven days have elapsed between the previous review and the time set for the review requested under this subsection.

Sec. 12.30.040. Release after conviction.

(a) A person who has been convicted of an offense and is awaiting sentence, or who has filed an appeal, shall be treated in accordance with the provisions of AS 12.30.020 unless the court has reason to believe that no one or more conditions of release will reasonably assure the appearance of the person as required or prevent the person from posing a danger to the victim, other persons, or the community. If that determination is made, the person may be remanded to custody. This section does not affect the right of a person appealing from a judgment of conviction from a district court to the superior court to be released on bail pending appeal under Rule 603(b) of the Rules of Appellate Procedure; however, the court shall consider the safety of the victim, other persons, and the community before the person is released under the rule. Before granting bail to a person convicted of an offense that is a crime under AS 11.41.420, 11.41.425, 11.41.436, 11.41.438, or 11.41.450 - 11.41.458, the court shall consider requiring the person to participate in an electronic monitoring program as a condition of release.

(b) Notwithstanding the provisions of (a) of this section, a person may not be released on bail either before sentencing or pending appeal if the person has been convicted of an offense that is

(1) an unclassified felony or a class A felony; or

(2) a class B or class C felony if the person has been previously convicted of an offense in this state that is an unclassified felony, a class A felony, or a violation of AS 11.41.260, 11.41.420 - 11.41.425, or 11.41.436 - 11.41.438 or of an offense in another jurisdiction with elements substantially similar to an offense of this state described in this paragraph.

(c) A person who has been convicted of an offense and who has filed an application for post-conviction relief may not be released on bail until the trial court or an appellate court enters an order vacating all convictions against the person. A person who has prevailed on an application for post-conviction relief may seek release before trial in accordance with the provisions of AS 12.30.020.

Sec. 12.47.110. Commitment on finding of incompetency.

(a) When the trial court determines by a preponderance of the evidence, in accordance with AS 12.47.100, that a defendant is so incompetent that the defendant is unable to understand the proceedings against the defendant or to assist in the defendant's own defense, the court shall order the proceedings stayed, except as provided in (d) of this section, and may commit the defendant to the custody of the commissioner of health and social services or the commissioner's authorized representative for further evaluation and treatment until the defendant is mentally competent to stand trial, or until the pending charges against the defendant are disposed of according to law, but in no event longer than 90 days.

(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.

(c) The defendant is not responsible for the expenses of hospitalization or transportation incurred as a result of the defendant's commitment under this section. Liability for payment under AS 47.30.910 does not apply to commitments under this section.

(d) A defendant receiving medication for either a physical or a mental condition may not be prohibited from standing trial, if the medication either enables the defendant to understand the proceedings and to properly assist in the defendant's defense or does not disable the defendant from understanding the proceedings and assisting in the defendant's own defense.

Sec. 12.50.101. Immunity of witnesses.

(a) If a witness refuses, on the basis of the privilege against self-incrimination, to testify or provide other information in a criminal proceeding before or ancillary to a court or grand jury of this state, and a judge issues an order under (b) of this section, the witness may not refuse to comply with the order on the basis of the privilege against self-incrimination. If the witness fully complies with the order, the witness may not be prosecuted for an offense about which the witness is compelled to testify, except in a prosecution based on perjury, giving a false statement or otherwise knowingly providing false information, or hindering prosecution.

(b) In the case of an individual who has been or may be called to testify or provide other information in a criminal proceeding before or ancillary to a court or a grand jury of this state, a superior or district court for the judicial district in which the proceeding is or may be held shall issue, upon the application of the attorney general or the attorney general's designee in accordance with (d) of this section, an order requiring the individual to give testimony or provide other information that the individual refuses to give or provide based on the privilege against self-incrimination.

(c) An order issued under (b) of this section is effective when communicated to the individual specified in the order.

(d) The attorney general or the attorney general's designee may apply for an order under (b) of this section when, in the judgment of the attorney general or the attorney general's designee,

(1) the testimony or other information may be necessary to the administration of criminal justice; and

(2) the individual who is the subject of the application has refused or is likely to refuse to testify or to provide other information on the basis of the privilege against self-incrimination.

(e) If a witness refuses, or there is reason to believe the witness will refuse, to testify or provide other information based on the privilege against self-incrimination, and if the attorney general or the attorney general's designee has not applied for an order under (b) of this section, the court shall inform the witness of the right to be represented by an attorney, and that an attorney will be appointed for the witness if the witness qualifies for counsel under AS 18.85. The court shall recess the proceeding to allow the witness to consult with the attorney for the witness.

(f) If the attorney general or the attorney general's designee declines to seek an order under (b) of this section after the witness has had an opportunity to consult with an attorney, and the witness continues to refuse to testify or provide other information, the court shall hold a hearing to determine the validity of the claim of privilege by the witness. The hearing shall be in camera.

(g) At the hearing under (f) of this section, the attorney for the witness, in the form of a proffer, shall describe the testimony or other information that the witness claims is privileged. The proffer must include a description of how the testimony or other information could connect the witness with a crime. The proffer is privileged and inadmissible for any other purpose. If the proffer establishes a factual basis that there is a real or substantial danger that the testimony or other information to be compelled would support a conviction or would furnish a link in the chain of evidence leading to conviction for a crime, the court may find that the witness has a valid claim of privilege.

(h) If the court finds that the witness has a valid claim of privilege, it shall advise an attorney designated by the attorney general of that finding and inform the attorney of the category or categories of offense to which the privilege applies: a higher-level felony, a lower-level felony, or a misdemeanor. If the designated attorney decides that granting immunity to the witness is appropriate, the designated attorney shall inform the prosecution of that decision, and shall deliver or cause to be delivered a letter to the witness, or an attorney for the witness, granting immunity to the witness. The designated attorney may not disclose the category of offense to anyone.

(i) In this section,

(1) "higher-level felony" means an unclassified or class A felony;

(2) "lower-level felony" means a class B or class C felony;

(3) "other information" means books, papers, documents, records, recordings, or other similar material;

(4) "proffer" means a written or oral statement by the attorney for the witness, stating the attorney's good faith belief of the substance of the witness's testimony or other information.

Sec. 12.55.025. Sentencing procedures.

(a) When imposing a sentence for conviction of a felony offense or a sentence of imprisonment exceeding 90 days or upon a conviction of a violation of AS 04, a regulation adopted under AS 04, or an ordinance adopted in conformity with AS 04.21.010, the court shall prepare, as a part of the record, a sentencing report that includes the following:

(1) a verbatim record of the sentencing hearing and any other in-court sentencing procedures;

(2) findings on material issues of fact and on factual questions required to be determined as a prerequisite to the selection of the sentence imposed;

(3) a clear statement of the terms of the sentence imposed; if a term of imprisonment is imposed, the statement must include

(A) the approximate minimum term the defendant is expected to serve before being released or placed on mandatory parole if the defendant is eligible for and does not forfeit good conduct deductions under AS 33.20.010; and

(B) if applicable, the approximate minimum term of imprisonment the defendant must serve before becoming eligible for release on discretionary parole;

(4) any recommendations as to the place of confinement or the manner of treatment; and

(5) in the case of a conviction for a felony offense, information assessing

(A) the financial, emotional, and medical effects of the offense on the victim;

(B) the need of the victim for restitution; and

(C) any other information required by the court.

(b) The sentencing report required under (a) of this section shall be furnished within 30 days after imposition of sentence to the Department of Law, the defendant, the Department of Corrections, the state Board of Parole if the defendant will be eligible for parole, and to the Alcoholic Beverage Control Board if the defendant is to be sentenced for a conviction of a violation of AS 04, a regulation adopted under AS 04, or an ordinance adopted under AS 04.21.010.

(c) Except as provided in (d) of this section, when a defendant is sentenced to imprisonment, the term of confinement commences on the date of imposition of sentence unless the court specifically provides that the defendant must report to serve the sentence on another date. If the court provides another date to begin the term of confinement, the court shall provide the defendant with written notice of the date, time, and location of the correctional facility to which the defendant must report. A defendant shall receive credit for time spent in custody pending trial, sentencing, or appeal, if the detention was in connection with the offense for which sentence was imposed. A defendant may not receive credit for more than the actual time spent in custody pending trial, sentencing, or appeal. The time during which a defendant is voluntarily absent from official detention after the defendant has been sentenced may not be credited toward service of the sentence.

(d) A sentence of imprisonment shall be stayed if an appeal is taken and the defendant is admitted to bail. If an appeal is taken and the defendant is not admitted to bail, the Department of Corrections shall designate the facility in which the defendant shall be detained pending appeal or admission to bail.

(e) [Repealed, Sec. 7 ch 125 SLA 2004].

(f) A sentence that the defendant pay money, either as a fine or in restitution or both, constitutes a lien in the same manner as a judgment for money entered in a civil action. Nothing in this section limits the authority of the court to otherwise enforce payment of a fine or restitution.

(g) [Repealed, Sec. 7 ch 125 SLA 2004].

(h) [Repealed, Sec. 7 ch 125 SLA 2004].

(i) Except as provided by AS 12.55.125(a)(3), 12.55.145(d), 12.55.155(f), and 12.55.165, the preponderance of the evidence standard of proof applies to sentencing proceedings.

(j) The approximate minimum terms provided under (a)(3) of this section in the sentencing report are for information purposes only. The approximate minimum terms are not part of the sentence imposed and do not form a basis for review or appeal of the sentence imposed or provide a defendant with a right to any specific term of imprisonment or supervised release on mandatory parole.

Sec. 12.55.125. Sentences of imprisonment for felonies.

(a) A defendant convicted of murder in the first degree or murder of an unborn child under AS 11.41.150(a)(1) shall be sentenced to a definite term of imprisonment of at least 20 years but not more than 99 years. A defendant convicted of murder in the first degree shall be sentenced to a mandatory term of imprisonment of 99 years when

(1) the defendant is convicted of the murder of a uniformed or otherwise clearly identified peace officer, fire fighter, or correctional employee who was engaged in the performance of official duties at the time of the murder;

(2) the defendant has been previously convicted of

(A) murder in the first degree under AS 11.41.100 or former AS 11.15.010 or 11.15.020;

(B) murder in the second degree under AS 11.41.110 or former AS 11.15.030; or

(C) homicide under the laws of another jurisdiction when the offense of which the defendant was convicted contains elements similar to first degree murder under AS 11.41.100 or second degree murder under AS 11.41.110;

(3) the court finds by clear and convincing evidence that the defendant subjected the murder victim to substantial physical torture;

(4) the defendant is convicted of the murder of and personally caused the death of a person, other than a participant, during a robbery; or

(5) the court finds by clear and convincing evidence that the defendant is a peace officer who used the officer's authority as a peace officer to facilitate the murder.

(b) A defendant convicted of attempted murder in the first degree, solicitation to commit murder in the first degree, conspiracy to commit murder in the first degree, kidnapping, or misconduct involving a controlled substance in the first degree shall be sentenced to a definite term of imprisonment of at least five years but not more than 99 years. A defendant convicted of murder in the second degree or murder of an unborn child under AS 11.41.150(a)(2) - (4) shall be sentenced to a definite term of imprisonment of at least 10 years but not more than 99 years. A defendant convicted of murder in the second degree shall be sentenced to a definite term of imprisonment of at least 20 years but not more than 99 years when the defendant is convicted of the murder of a child under 16 years of age and the court finds by clear and convincing evidence that the defendant (1) was a natural parent, a stepparent, an adopted parent, a legal guardian, or a person occupying a position of authority in relation to the child; or (2) caused the death of the child by committing a crime against a person under AS 11.41.200 - 11.41.530. In this subsection, "legal guardian" and "position of authority" have the meanings given in AS 11.41.470.

(c) Except as provided in (i) of this section, a defendant convicted of a class A felony may be sentenced to a definite term of imprisonment of not more than 20 years, and shall be sentenced to a definite term within the following presumptive ranges, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(1) if the offense is a first felony conviction and does not involve circumstances described in (2) of this subsection, five to eight years;

(2) if the offense is a first felony conviction

(A) and the defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury or death during the commission of the offense, or knowingly directed the conduct constituting the offense at a uniformed or otherwise

clearly identified peace officer, fire fighter, correctional employee, emergency medical technician, paramedic, ambulance attendant, or other emergency responder who was engaged in the performance of official duties at the time of the offense, seven to 11 years;

(B) and the conviction is for manufacturing related to methamphetamine under AS 11.71.020(a)(2)(A) or (B), seven to 11 years, if

(i) the manufacturing occurred in a building with reckless disregard that the building was used as a permanent or temporary home or place of lodging for one or more children under 18 years of age or the building was a place frequented by children; or

(ii) in the course of manufacturing or in preparation for manufacturing, the defendant obtained the assistance of one or more children under 18 years of age or one or more children were present;

(3) if the offense is a second felony conviction, 10 to 14 years;

(4) if the offense is a third felony conviction and the defendant is not subject to sentencing under (l) of this section, 15 to 20 years.

(d) Except as provided in (i) of this section, a defendant convicted of a class B felony may be sentenced to a definite term of imprisonment of not more than 10 years, and shall be sentenced to a definite term within the following presumptive ranges, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(1) if the offense is a first felony conviction and does not involve circumstances described in (2) of this subsection, one to three years; a defendant sentenced under this paragraph may, if the court finds it appropriate, be granted a suspended imposition of sentence under AS 12.55.085 if, as a condition of probation under AS 12.55.086, the defendant is required to serve an active term of imprisonment within the range specified in this paragraph, unless the court finds that a mitigation factor under AS 12.55.155 applies;

(2) if the offense is a first felony conviction,

(A) the defendant violated AS 11.41.130, and the victim was a child under 16 years of age, two to four years;

(B) two to four years if the conviction is for an attempt, solicitation, or conspiracy to manufacture related to methamphetamine under AS 11.31 and AS 11.71.020(a)(2)(A) or (B), and

(i) the attempted manufacturing occurred, or the solicited or conspired offense was to have occurred, in a building with reckless disregard that the building was used as a permanent or temporary home or place of lodging for one or more children under 18 years of age or the building was a place frequented by children; or

(ii) in the course of an attempt to manufacture, the defendant obtained the assistance of one or more children under 18 years of age or one or more children were present;

(3) if the offense is a second felony conviction, four to seven years;

(4) if the offense is a third felony conviction, six to 10 years.

(e) Except as provided in (i) of this section, a defendant convicted of a class C felony may be sentenced to a definite term of imprisonment of not more than five years, and shall be sentenced to a definite term within the following presumptive ranges, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(1) if the offense is a first felony conviction and does not involve circumstances described in (4) of this subsection, zero to two years; a defendant sentenced under this

paragraph may, if the court finds it appropriate, be granted a suspended imposition of sentence under AS 12.55.085, and the court may, as a condition of probation under AS 12.55.086, require the defendant to serve an active term of imprisonment within the range specified in this paragraph;

(2) if the offense is a second felony conviction, two to four years;

(3) if the offense is a third felony conviction, three to five years;

(4) if the offense is a first felony conviction, and the defendant violated AS 08.54.720(a)(15), one to two years.

(f) If a defendant is sentenced under (a) or (b) of this section,

(1) imprisonment for the prescribed minimum or mandatory term may not be suspended under AS 12.55.080;

(2) imposition of sentence may not be suspended under AS 12.55.085;

(3) imprisonment for the prescribed minimum or mandatory term may not be reduced, except as provided in (j) of this section.

(g) If a defendant is sentenced under (c), (d), (e), or (i) of this section, except to the extent permitted under AS 12.55.155 - 12.55.175,

(1) imprisonment may not be suspended under AS 12.55.080 below the low end of the presumptive range;

(2) and except as provided in (d)(1) or (e)(1) of this section, imposition of sentence may not be suspended under AS 12.55.085;

(3) terms of imprisonment may not be otherwise reduced.

(h) Nothing in this section or AS 12.55.135 limits the discretion of the sentencing judge except as specifically provided. Nothing in (a) of this section limits the court's discretion to impose a sentence of 99 years imprisonment, or to limit parole eligibility, for a person convicted of murder in the first or second degree in circumstances other than those enumerated in (a).

(i) A defendant convicted of

(1) sexual assault in the first degree, sexual abuse of a minor in the first degree, or promoting prostitution in the first degree under AS 11.66.110(a)(2) may be sentenced to a definite term of imprisonment of not more than 99 years and shall be sentenced to a definite term within the following presumptive ranges, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(A) if the offense is a first felony conviction, the offense does not involve circumstances described in (B) of this paragraph, and the victim was

(i) less than 13 years of age, 25 to 35 years;

(ii) 13 years of age or older, 20 to 30 years;

(B) if the offense is a first felony conviction and the defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury during the commission of the offense, 25 to 35 years;

(C) if the offense is a second felony conviction and does not involve circumstances described in (D) of this paragraph, 30 to 40 years;

(D) if the offense is a second felony conviction and the defendant has a prior conviction for a sexual felony, 35 to 45 years;

(E) if the offense is a third felony conviction and the defendant is not subject to sentencing under (F) of this paragraph or (l) of this section, 40 to 60 years;

(F) if the offense is a third felony conviction, the defendant is not subject to sentencing under (I) of this section, and the defendant has two prior convictions for sexual felonies, 99 years;

(2) attempt, conspiracy, or solicitation to commit sexual assault in the first degree, sexual abuse of a minor in the first degree, or promoting prostitution in the first degree under AS 11.66.110(a)(2) may be sentenced to a definite term of imprisonment of not more than 99 years and shall be sentenced to a definite term within the following presumptive ranges, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(A) if the offense is a first felony conviction, the offense does not involve circumstances described in (B) of this paragraph, and the victim was

(i) under 13 years of age, 20 to 30 years;

(ii) 13 years of age or older, 15 to 30 years;

(B) if the offense is a first felony conviction and the defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury during the commission of the offense, 25 to 35 years;

(C) if the offense is a second felony conviction and does not involve circumstances described in (D) of this paragraph, 25 to 35 years;

(D) if the offense is a second felony conviction and the defendant has a prior conviction for a sexual felony, 30 to 40 years;

(E) if the offense is a third felony conviction, the offense does not involve circumstances described in (F) of this paragraph, and the defendant is not subject to sentencing under (I) of this section, 35 to 50 years;

(F) if the offense is a third felony conviction, the defendant is not subject to sentencing under (I) of this section, and the defendant has two prior convictions for sexual felonies, 99 years;

(3) sexual assault in the second degree, sexual abuse of a minor in the second degree, unlawful exploitation of a minor, or distribution of child pornography may be sentenced to a definite term of imprisonment of not more than 99 years and shall be sentenced to a definite term within the following presumptive ranges, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(A) if the offense is a first felony conviction, five to 15 years;

(B) if the offense is a second felony conviction and does not involve circumstances described in (C) of this paragraph, 10 to 25 years;

(C) if the offense is a second felony conviction and the defendant has a prior conviction for a sexual felony, 15 to 30 years;

(D) if the offense is a third felony conviction and does not involve circumstances described in (E) of this paragraph, 20 to 35 years;

(E) if the offense is a third felony conviction and the defendant has two prior convictions for sexual felonies, 99 years;

(4) sexual assault in the third degree, incest, indecent exposure in the first degree, possession of child pornography, or attempt, conspiracy, or solicitation to commit sexual assault in the second degree, sexual abuse of a minor in the second degree, unlawful exploitation of a minor, or distribution of child pornography, may be sentenced to a definite term of imprisonment of not more than 99 years and shall be sentenced to a definite term within the following presumptive ranges, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

- (A) if the offense is a first felony conviction, two to 12 years;
- (B) if the offense is a second felony conviction and does not involve circumstances described in (C) of this paragraph, eight to 15 years;
- (C) if the offense is a second felony conviction and the defendant has a prior conviction for a sexual felony, 12 to 20 years;
- (D) if the offense is a third felony conviction and does not involve circumstances described in (E) of this paragraph, 15 to 25 years;
- (E) if the offense is a third felony conviction and the defendant has two prior convictions for sexual felonies, 99 years.

(j) A defendant sentenced to a (1) mandatory term of imprisonment of 99 years under (a) of this section may apply once for a modification or reduction of sentence under the Alaska Rules of Criminal Procedure after serving one-half of the mandatory term without consideration of good time earned under AS 33.20.010, or (2) definite term of imprisonment under (l) of this section may apply once for a modification or reduction of sentence under the Alaska Rules of Criminal Procedure after serving one-half of the definite term. A defendant may not file and a court may not entertain more than one motion for modification or reduction of a sentence subject to this subsection, regardless of whether or not the court granted or denied a previous motion.

(k) [Repealed, Sec. 32 ch 2 SLA 2005].

(l) Notwithstanding any other provision of law, a defendant convicted of an unclassified or class A felony offense, and not subject to a mandatory 99-year sentence under (a) of this section, shall be sentenced to a definite term of imprisonment of 99 years when the defendant has been previously convicted of two or more most serious felonies. If a defendant is sentenced to a definite term under this subsection,

(1) imprisonment for the prescribed definite term may not be suspended under AS 12.55.080;

(2) imposition of sentence may not be suspended under AS 12.55.085;

(3) imprisonment for the prescribed definite term may not be reduced, except as provided in (j) of this section.

(m) Notwithstanding (a)(4) and (f) of this section, if a court finds that imposition of a mandatory term of imprisonment of 99 years on a defendant subject to sentencing under (a)(4) of this section would be manifestly unjust, the court may sentence the defendant to a definite term of imprisonment otherwise permissible under (a) of this section.

(n) In imposing a sentence within a presumptive range under (c), (d), (e), or (i) of this section, the total term, made up of the active term of imprisonment plus any suspended term of imprisonment, must fall within the presumptive range, and the active term of imprisonment may not fall below the lower end of the presumptive range.

(o) Other than for convictions subject to a mandatory 99-year sentence, the court shall impose, in addition to an active term of imprisonment imposed under (i) of this section, a minimum period of (1) suspended imprisonment of five years and a minimum period of probation supervision of 15 years for conviction of an unclassified felony, (2) suspended imprisonment of three years and a minimum period of probation supervision of 10 years for conviction of a class A or class B felony, or (3) suspended imprisonment of two years and a minimum period of probation supervision of five years for conviction of a class C felony. The period of probation is in addition to any sentence received under

(i) of this section and may not be suspended or reduced. Upon a defendant's release from confinement in a correctional facility, the defendant is subject to this probation requirement and shall submit and comply with the terms and requirements of the probation.

Sec. 12.55.145. Prior convictions.

(a) For purposes of considering prior convictions in imposing sentence under

(1) AS 12.55.125(c), (d), or (e),

(A) a prior conviction may not be considered if a period of 10 or more years has elapsed between the date of the defendant's unconditional discharge on the immediately preceding offense and commission of the present offense unless the prior conviction was for an unclassified or class A felony;

(B) a conviction in this or another jurisdiction of an offense having elements similar to those of a felony defined as such under Alaska law at the time the offense was committed is considered a prior felony conviction;

(C) two or more convictions arising out of a single, continuous criminal episode during which there was no substantial change in the nature of the criminal objective are considered a single conviction unless the defendant was sentenced to consecutive sentences for the crimes; offenses committed while attempting to escape or avoid detection or apprehension after the commission of another offense are not part of the same criminal episode or objective;

(2) AS 12.55.125(l),

(A) a conviction in this or another jurisdiction of an offense having elements similar to those of a most serious felony is considered a prior most serious felony conviction;

(B) commission of and conviction for offenses relied on as prior most serious felony offenses must occur in the following order: conviction for the first offense must occur before commission of the second offense, and conviction for the second offense must occur before commission of the offense for which the defendant is being sentenced;

(3) AS 12.55.135(g),

(A) a prior conviction may not be considered if a period of five or more years has elapsed between the date of the defendant's unconditional discharge on the immediately preceding offense and commission of the present offense unless the prior conviction was for an unclassified or class A felony;

(B) a conviction in this or another jurisdiction of an offense having elements similar to those of a crime against a person or a crime involving domestic violence is considered a prior conviction;

(C) two or more convictions arising out of a single, continuous criminal episode during which there was no substantial change in the nature of the criminal objective are considered a single conviction unless the defendant was sentenced to consecutive sentences for the crimes; offenses committed while attempting to escape or avoid detection or apprehension after the commission of another offense are not part of the same criminal episode or objective;

(4) AS 12.55.125(i),

(A) a conviction in this or another jurisdiction of an offense having elements similar to those of a sexual felony is a prior conviction for a sexual felony;

(B) a felony conviction in another jurisdiction making it a crime to commit any lewd and lascivious act upon a child under the age of 16 years, with the intent of arousing, appealing to, or gratifying the sexual desires of the defendant or the victim is a prior conviction for a sexual felony;

(C) two or more convictions arising out of a single, continuous criminal episode during which there was no substantial change in the nature of the criminal objective are considered a single conviction unless the defendant was sentenced to consecutive sentences for the crimes; offenses committed while attempting to escape or avoid detection or apprehension after the commission of another offense are not part of the same criminal episode or objective.

(b) When sentence is imposed under this chapter, prior convictions not expressly admitted by the defendant must be proved by authenticated copies of court records served on the defendant or the defendant's counsel at least 20 days before the date set for imposition of sentence.

(c) The defendant shall file with the court and serve on the prosecuting attorney notice of denial, consisting of a concise statement of the grounds relied upon and that may be supported by affidavit or other documentary evidence, no later than 10 days before the date set for the imposition of sentence if the defendant

(1) denies

(A) the authenticity of a prior judgment of conviction;

(B) that the defendant is the person named in the judgment;

(C) that the elements of a prior offense committed in this or another jurisdiction are similar to those of a

(i) felony defined as such under Alaska law;

(ii) most serious felony, defined as such under Alaska law;

(iii) crime against a person or a crime involving domestic violence;

(D) that a prior conviction occurred within the period specified in (a)(1)(A) or (3)(A) of this section; or

(E) that a previous conviction occurred in the order required under (a)(2)(B) of this section; or

(2) alleges that two or more purportedly separate prior convictions should be considered a single conviction under (a)(1)(C) or (3)(C) of this section.

(d) Matters alleged in a notice of denial shall be heard by the court sitting without a jury. If the defendant introduces substantial evidence that the defendant is not the person named in a prior judgment of conviction, that the judgment is not authentic, that the conviction did not occur within the period specified in (a)(1)(A) or (3)(A) of this section, that a conviction should not be considered a prior felony conviction under (a)(1)(B) of this section, a prior most serious felony conviction under (a)(2)(A) of this section, or a prior crime against a person or a crime involving domestic violence conviction under (a)(3)(B) of this section, or that a previous conviction did not occur in the order required under (a)(2)(B) of this section, then the burden is on the state to prove the contrary beyond a reasonable doubt. The burden of proof that two or more convictions should be considered a single conviction under (a)(1)(C) or (3)(C) of this section is on the defendant by clear and convincing evidence.

(e) The authenticated judgments of courts of record of the United States, the District of Columbia, or of any state, territory, or political subdivision of the United States are prima facie evidence of conviction.

(f) Under this section, a prior conviction has occurred when a defendant has entered a plea of guilty, guilty but mentally ill, or nolo contendere, or when a verdict of guilty or guilty but mentally ill has been returned by a jury or by the court.

(g) In this section,

(1) "crime against a person" has the meaning given in AS 12.55.135;

(2) "crime involving domestic violence" has the meaning given in AS 18.66.990.

Sec. 12.55.155. Factors in aggravation and mitigation.

(a) Except as provided in (e) of this section, if a defendant is convicted of an offense and is subject to sentencing under AS 12.55.125(c), (d), (e), or (i) and

(1) the low end of the presumptive range is four years or less, the court may impose any sentence below the presumptive range for factors in mitigation or may increase the active term of imprisonment up to the maximum term of imprisonment for factors in aggravation;

(2) the low end of the presumptive range is more than four years, the court may impose a sentence below the presumptive range as long as the active term of imprisonment is not less than 50 percent of the low end of the presumptive range for factors in mitigation or may increase the active term of imprisonment up to the maximum term of imprisonment for factors in aggravation.

(b) Sentences under this section that are outside of the presumptive ranges set out in AS 12.55.125 shall be based on the totality of the aggravating and mitigating factors set out in (c) and (d) of this section.

(c) The following factors shall be considered by the sentencing court if proven in accordance with this section, and may allow imposition of a sentence above the presumptive range set out in AS 12.55.125:

(1) a person, other than an accomplice, sustained physical injury as a direct result of the defendant's conduct;

(2) the defendant's conduct during the commission of the offense manifested deliberate cruelty to another person;

(3) the defendant was the leader of a group of three or more persons who participated in the offense;

(4) the defendant employed a dangerous instrument in furtherance of the offense;

(5) the defendant knew or reasonably should have known that the victim of the offense was particularly vulnerable or incapable of resistance due to advanced age, disability, ill health, or extreme youth or was for any other reason substantially incapable of exercising normal physical or mental powers of resistance;

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

(7) a prior felony conviction considered for the purpose of invoking a presumptive range under this chapter was of a more serious class of offense than the present offense;

(8) the defendant's prior criminal history includes conduct involving aggravated or repeated instances of assaultive behavior;

(9) the defendant knew that the offense involved more than one victim;

(10) the conduct constituting the offense was among the most serious conduct included in the definition of the offense;

(11) the defendant committed the offense under an agreement that the defendant either pay or be paid for the commission of the offense, and the pecuniary incentive was beyond that inherent in the offense itself;

(12) the defendant was on release under AS 12.30.020 or 12.30.040 for another felony charge or conviction or for a misdemeanor charge or conviction having assault as a necessary element;

(13) the defendant knowingly directed the conduct constituting the offense at an active officer of the court or at an active or former judicial officer, prosecuting attorney,

law enforcement officer, correctional employee, fire fighter, emergency medical technician, paramedic, ambulance attendant, or other emergency responder during or because of the exercise of official duties;

(14) the defendant was a member of an organized group of five or more persons, and the offense was committed to further the criminal objectives of the group;

(15) the defendant has three or more prior felony convictions;

(16) the defendant's criminal conduct was designed to obtain substantial pecuniary gain and the risk of prosecution and punishment for the conduct is slight;

(17) the offense was one of a continuing series of criminal offenses committed in furtherance of illegal business activities from which the defendant derives a major portion of the defendant's income;

(18) the offense was a felony

(A) specified in AS 11.41 and was committed against a spouse, a former spouse, or a member of the social unit made up of those living together in the same dwelling as the defendant;

(B) specified in AS 11.41.410 - 11.41.458 and the defendant has engaged in the same or other conduct prohibited by a provision of AS 11.41.410 - 11.41.460 involving the same or another victim; or

(C) specified in AS 11.41 that is a crime involving domestic violence and was committed in the physical presence or hearing of a child under 16 years of age who was, at the time of the offense, living within the residence of the victim, the residence of the perpetrator, or the residence where the crime involving domestic violence occurred;

(19) the defendant's prior criminal history includes an adjudication as a delinquent for conduct that would have been a felony if committed by an adult;

(20) the defendant was on furlough under AS 33.30 or on parole or probation for another felony charge or conviction that would be considered a prior felony conviction under AS 12.55.145(a)(1)(B);

(21) the defendant has a criminal history of repeated instances of conduct violative of criminal laws, whether punishable as felonies or misdemeanors, similar in nature to the offense for which the defendant is being sentenced under this section;

(22) the defendant knowingly directed the conduct constituting the offense at a victim because of that person's race, sex, color, creed, physical or mental disability, ancestry, or national origin;

(23) the defendant is convicted of an offense specified in AS 11.71 and

(A) the offense involved the delivery of a controlled substance under circumstances manifesting an intent to distribute the substance as part of a commercial enterprise; or

(B) at the time of the conduct resulting in the conviction, the defendant was caring for or assisting in the care of a child under 10 years of age;

(24) the defendant is convicted of an offense specified in AS 11.71 and the offense involved the transportation of controlled substances into the state;

(25) the defendant is convicted of an offense specified in AS 11.71 and the offense involved large quantities of a controlled substance;

(26) the defendant is convicted of an offense specified in AS 11.71 and the offense involved the distribution of a controlled substance that had been adulterated with a toxic substance;

- (27) the defendant, being 18 years of age or older,
- (A) is legally accountable under AS 11.16.110(2) for the conduct of a person who, at the time the offense was committed, was under 18 years of age and at least three years younger than the defendant; or
- (B) is aided or abetted in planning or committing the offense by a person who, at the time the offense was committed, was under 18 years of age and at least three years younger than the defendant;
- (28) the victim of the offense is a person who provided testimony or evidence related to a prior offense committed by the defendant;
- (29) the defendant committed the offense for the benefit of, at the direction of, or in association with a criminal street gang;
- (30) the defendant is convicted of an offense specified in AS 11.41.410 - 11.41.455, and the defendant knowingly supplied alcohol or a controlled substance to the victim in furtherance of the offense with the intent to make the victim incapacitated; in this paragraph, "incapacitated" has the meaning given in AS 11.41.470;
- (31) the defendant's prior criminal history includes convictions for five or more crimes in this or another jurisdiction that are class A misdemeanors under the law of this state, or having elements similar to a class A misdemeanor; two or more convictions arising out of a single continuous episode are considered a single conviction; however, an offense is not a part of a continuous episode if committed while attempting to escape or resist arrest or if it is an assault upon a uniformed or otherwise clearly identified peace officer; notice and denial of convictions are governed by AS 12.55.145(b), (c), and (d);
- (32) the offense is a violation of AS 11.41 or AS 11.46.400 and the offense occurred on school grounds, on a school bus, at a school-sponsored event, or in the administrative offices of a school district if students are educated at that office; in this paragraph,
- (A) "school bus" has the meaning given in AS 11.71.900;
- (B) "school district" has the meaning given in AS 47.07.063;
- (C) "school grounds" has the meaning given in AS 11.71.900;
- (33) the offense was a felony specified in AS 11.41.410 - 11.41.455, the defendant had been previously diagnosed as having or having tested positive for HIV or AIDS, and the offense either (A) involved penetration, or (B) exposed the victim to a risk or a fear that the offense could result in the transmission of HIV or AIDS; in this paragraph, "HIV" and "AIDS" have the meanings given in AS 18.15.310;
- (34) the defendant committed the offense on, or to affect persons or property on, the premises of a recognized shelter or facility providing services to victims of domestic violence or sexual assault.
- (d) The following factors shall be considered by the sentencing court if proven in accordance with this section, and may allow imposition of a sentence below the presumptive range set out in AS 12.55.125:
- (1) the offense was principally accomplished by another person, and the defendant manifested extreme caution or sincere concern for the safety or well-being of the victim;
- (2) the defendant, although an accomplice, played only a minor role in the commission of the offense;

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

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

(5) the conduct of an aged defendant was substantially a product of physical or mental infirmities resulting from the defendant's age;

(6) in a conviction for assault under AS 11.41.200 - 11.41.220, the defendant acted with serious provocation from the victim;

(7) except in the case of a crime defined by AS 11.41.410 - 11.41.470, the victim provoked the crime to a significant degree;

(8) before the defendant knew that the criminal conduct had been discovered, the defendant fully compensated or made a good faith effort to fully compensate the victim of the defendant's criminal conduct for any damage or injury sustained;

(9) the conduct constituting the offense was among the least serious conduct included in the definition of the offense;

(10) the defendant was motivated to commit the offense solely by an overwhelming compulsion to provide for emergency necessities for the defendant's immediate family;

(11) after commission of the offense for which the defendant is being sentenced, the defendant assisted authorities to detect, apprehend, or prosecute other persons who committed an offense;

(12) the facts surrounding the commission of the offense and any previous offenses by the defendant establish that the harm caused by the defendant's conduct is consistently minor and inconsistent with the imposition of a substantial period of imprisonment;

(13) the defendant is convicted of an offense specified in AS 11.71 and the offense involved small quantities of a controlled substance;

(14) the defendant is convicted of an offense specified in AS 11.71 and the offense involved the distribution of a controlled substance, other than a schedule IA controlled substance, to a personal acquaintance who is 19 years of age or older for no profit;

(15) the defendant is convicted of an offense specified in AS 11.71 and the offense involved the possession of a small amount of a controlled substance for personal use in the defendant's home;

(16) in a conviction for assault or attempted assault or for homicide or attempted homicide, the defendant acted in response to domestic violence perpetrated by the victim against the defendant and the domestic violence consisted of aggravated or repeated instances of assaultive behavior;

(17) except in the case of an offense defined by AS 11.41 or AS 11.46.400, the defendant has been convicted of a class B or C felony, and, at the time of sentencing, has successfully completed a court-ordered treatment program as defined in AS 28.35.028 that was begun after the offense was committed;

(18) except in the case of an offense defined under AS 11.41 or AS 11.46.400 or a defendant who has previously been convicted of a felony, the defendant committed the offense while suffering from a mental disease or defect as defined in AS 12.47.130 that

was insufficient to constitute a complete defense but that significantly affected the defendant's conduct.

(e) If a factor in aggravation is a necessary element of the present offense, or requires the imposition of a sentence within the presumptive range under AS 12.55.125(c)(2), that factor may not be used to impose a sentence above the high end of the presumptive range. If a factor in mitigation is raised at trial as a defense reducing the offense charged to a lesser included offense, that factor may not be used to impose a sentence below the low end of the presumptive range.

(f) If the state seeks to establish a factor in aggravation at sentencing

(1) under (c)(7), (8), (12), (15), (19), (20), (21), or (31) of this section, or if the defendant seeks to establish a factor in mitigation at sentencing, written notice must be served on the opposing party and filed with the court not later than 10 days before the date set for imposition of sentence; the factors in aggravation listed in this paragraph and factors in mitigation must be established by clear and convincing evidence before the court sitting without a jury; all findings must be set out with specificity;

(2) other than one listed in (1) of this subsection, the factor shall be presented to a trial jury under procedures set by the court, unless the defendant waives trial by jury, stipulates to the existence of the factor, or consents to have the factor proven under procedures set out in (1) of this subsection; a factor in aggravation presented to a jury is established if proved beyond a reasonable doubt; written notice of the intent to establish a factor in aggravation must be served on the defendant and filed with the court

(A) 20 days before trial, or at another time specified by the court;

(B) within 48 hours, or at a time specified by the court, if the court instructs the jury about the option to return a verdict for a lesser included offense; or

(C) five days before entering a plea that results in a finding of guilt, or at another time specified by the court.

(g) Voluntary alcohol or other drug intoxication or chronic alcoholism or other drug addiction may not be considered an aggravating or mitigating factor.

(h) In this section, "serious provocation" has the meaning given in AS 11.41.115(f).

Sec. 12.55.185. Definitions.

In this chapter, unless the context requires otherwise,

- (1) "active term of imprisonment" has the meaning given in AS 12.55.127;
- (2) "building" has the meaning given in AS 11.81.900;
- (3) "crime against a person" has the meaning given in AS 33.30.901;
- (4) "criminal street gang" has the meaning given in AS 11.81.900(b);
- (5) "dangerous instrument" has the meaning given in AS 11.81.900;
- (6) "domestic violence" has the meaning given in AS 18.66.990;
- (7) "firearm" has the meaning given in AS 11.81.900;
- (8) "first felony conviction" means that the defendant has not been previously convicted of a felony;
- (9) "judicial officer" has the meaning given in AS 11.56.900;
- (10) "most serious felony" means
 - (A) arson in the first degree, promoting prostitution in the first degree under AS 11.66.110(a)(2), or any unclassified or class A felony prescribed under AS 11.41; or
 - (B) an attempt, or conspiracy to commit, or criminal solicitation under AS 11.31.110 of, an unclassified felony prescribed under AS 11.41;
- (11) "paramedic" means a mobile intensive care paramedic licensed under AS 08.64;
- (12) "peace officer" has the meaning given in AS 11.81.900;
- (13) "pecuniary gain" means the amount of money or value of property at the time of commission of the offense derived by the defendant from the commission of the offense, less the amount of money or value of property returned to the victim of the offense or seized by or surrendered to lawful authority before sentence is imposed;
- (14) "second felony conviction" means that the defendant previously has been convicted of a felony;
- (15) "serious physical injury" has the meaning given in AS 11.81.900;
- (16) "sexual felony" means sexual assault in the first degree, sexual abuse of a minor in the first degree, sexual assault in the second degree, sexual abuse of a minor in the second degree, unlawful exploitation of a minor, distribution of child pornography, sexual assault in the third degree, incest, indecent exposure in the first degree, possession of child pornography, and felony attempt, conspiracy, or solicitation to commit those crimes;
- (17) "third felony conviction" means that the defendant has been at least twice previously convicted of a felony;
- (18) "unconditional discharge" means that a defendant is released from all disability arising under a sentence, including probation and parole;
- (19) "victim" means
 - (A) a person against whom an offense has been perpetrated;
 - (B) one of the following, not the perpetrator, if the person specified in (A) of this paragraph is a minor, incompetent, or incapacitated:
 - (i) an individual living in a spousal relationship with the person specified in (A) of this paragraph; or
 - (ii) a parent, adult child, guardian, or custodian of the person;
 - (C) one of the following, not the perpetrator, if the person specified in (A) of this paragraph is dead:

(i) a person living in a spousal relationship with the deceased before the deceased died;

(ii) an adult child, parent, brother, sister, grandparent, or grandchild of the deceased; or

(iii) any other interested person, as may be designated by a person having authority in law to do so.

Sec. 22.07.020. Jurisdiction.

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

- (1) criminal prosecution;
- (2) post-conviction relief;
- (3) matters under AS 47.12, including waiver of jurisdiction over a minor under AS 47.12.100;
- (4) extradition;
- (5) habeas corpus;
- (6) probation and parole; and
- (7) bail.

(b) Except as limited in AS 12.55.120, the court of appeals has jurisdiction to hear appeals of unsuspended sentences of imprisonment exceeding two years for a felony offense or 120 days for a misdemeanor offense imposed by the superior court on the grounds that the sentence is excessive, or a sentence of any length on the grounds that it is too lenient. The court of appeals, in the exercise of this jurisdiction, may modify the sentence as provided by law and the state constitution.

(c) The court of appeals has jurisdiction to review (1) a final decision of the district court in an action or proceeding involving criminal prosecution, post-conviction relief, extradition, probation and parole, habeas corpus, or bail; and (2) the final decision of the district court on a sentence imposed by it if the sentence exceeds 120 days of unsuspended incarceration for a misdemeanor offense. In this subsection, "final decision" means a decision or order, other than dismissal by consent of all parties, that closes a matter in the district court.

(d) An appeal to the court of appeals is a matter of right in all actions and proceedings within its jurisdiction except that

(1) the right of appeal to the court of appeals is waived if an appellant chooses to appeal the final decision of the district court to the superior court; and

(2) the state's right of appeal in criminal cases is limited by the prohibitions against double jeopardy contained in the United States Constitution and the Alaska Constitution.

(e) The court of appeals may in its discretion (1) review a final decision of the superior court on an appeal from a district court in an action or proceeding involving criminal prosecution, post-conviction relief, extradition, probation and parole, habeas corpus or bail; (2) review the final decision of the superior court on appeal of a sentence imposed by the district court. In this subsection, "final decision" means a decision or order, other than a dismissal by consent of all parties, that closes a matter in the superior court.

(f) The court of appeals may issue injunctions, writs, and all other process necessary for the complete exercise of its jurisdiction.

(g) A final decision of the court of appeals is binding on the superior court and on the district court unless superseded by a decision of the supreme court.

Sec. 47.12.030. Provisions inapplicable.

(a) When a minor who was at least 16 years of age at the time of the offense is charged by complaint, information, or indictment with an offense specified in this subsection, this chapter and the Alaska Delinquency Rules do not apply to the offense for which the minor is charged or to any additional offenses joinable to it under the applicable rules of court governing criminal procedure. The minor shall be charged, held, released on bail, prosecuted, sentenced, and incarcerated in the same manner as an adult. If the minor is convicted of an offense other than an offense specified in this subsection, the minor may attempt to prove, by a preponderance of the evidence, that the minor is amenable to treatment under this chapter. If the court finds that the minor is amenable to treatment under this chapter, the minor shall be treated as though the charges had been heard under this chapter, and the court shall order disposition of the charges of which the minor is convicted under AS 47.12.120(b). The provisions of this subsection apply when the minor is charged by complaint, information, or indictment with an offense

(1) that is an unclassified felony or a class A felony and the felony is a crime against a person;

(2) of arson in the first degree;

(3) that is a class B felony and the felony is a crime against a person in which the minor is alleged to have used a deadly weapon in the commission of the offense and the minor was previously adjudicated as a delinquent or convicted as an adult, in this or another jurisdiction, as a result of an offense that involved use of a deadly weapon in the commission of a crime against a person or an offense in another jurisdiction having elements substantially identical to those of a crime against a person, and the previous offense was punishable as a felony; in this paragraph, "deadly weapon" has the meaning given in AS 11.81.900(b); or

(4) that is misconduct involving weapons in the first degree under

(A) AS 11.61.190(a)(1); or

(B) AS 11.61.190(a)(2) when the firearm was discharged under circumstances manifesting substantial and unjustifiable risk of physical injury to a person.

(b) When a minor is accused of violating a statute specified in this subsection, other than a statute the violation of which is a felony, this chapter and the Alaska Delinquency Rules do not apply and the minor accused of the offense shall be charged, prosecuted, and sentenced in the district court in the same manner as an adult; if a minor is charged, prosecuted, and sentenced for an offense under this subsection, the minor's parent, guardian, or legal custodian shall be present at all proceedings; the provisions of this subsection apply when a minor is accused of violating

(1) a traffic statute or regulation, or a traffic ordinance or regulation of a municipality;

(2) AS 11.76.105, relating to the possession of tobacco by a person under 19 years of age;

(3) a fish and game statute or regulation under AS 16;

(4) a parks and recreational facilities statute or regulation under AS 41.21;

(5) AS 04.16.050, relating to possession, control, or consumption of alcohol, except for conduct constituting habitual minor consuming or in possession or control under AS 04.16.050(d); and

(6) a municipal curfew ordinance, whether adopted under AS 29.35.085 or otherwise, unless the municipality provides for enforcement of its ordinance under AS 29.25.070(b) by the municipality; in place of any fine imposed for the violation of a municipal curfew ordinance, the court shall allow a defendant the option of performing community work; the value of the community work, which may not be lower than the amount of the fine, shall be determined under AS 12.55.055(c); in this paragraph, "community work" includes the work described in AS 12.55.055(b) or work that, on the recommendation of the municipal or borough assembly, city council, or traditional village council of the defendant's place of residence, would benefit persons within the municipality or village who are elderly or disabled.

(c) The provisions of AS 47.12.010 - 47.12.260 and the Alaska Delinquency Rules do not apply to driver's license proceedings under AS 28.15.185; the court shall impose a driver's license revocation under AS 28.15.185 in the same manner as adult driver's license revocations, except that a parent or legal guardian shall be present at all proceedings.

Sec. 47.12.100. Waiver of jurisdiction.

(a) If the court finds at a hearing on a petition that there is probable cause for believing that a minor is delinquent and finds that the minor is not amenable to treatment under this chapter, it shall order the case closed. After a case is closed under this subsection, the minor may be prosecuted as an adult.

(b) A minor is unamenable to treatment under this chapter if the minor probably cannot be rehabilitated by treatment under this chapter before reaching 20 years of age. In determining whether a minor is unamenable to treatment, the court may consider the seriousness of the offense the minor is alleged to have committed, the minor's history of delinquency, the probable cause of the minor's delinquent behavior, and the facilities available to the department for treating the minor.

(c) For purposes of making a determination under this section,

(1) the standard of proof is by a preponderance of the evidence; and

(2) the burden of proof that a minor is not amenable to treatment under this chapter is on the state; however, if the petition filed under AS 47.12.040 seeking to have the court declare a minor a delinquent is based on the minor's alleged commission of an offense that is an unclassified felony or class A felony and that is a crime against a person, the minor

(A) is rebuttably presumed not to be amenable to treatment under this chapter;
and

(B) has the burden of proof of showing that the minor is amenable to treatment under this chapter.

Rule 32. Sentence and Judgment.

(a) **Sentence.** Sentence shall be imposed without unreasonable delay. Sentencing in felony cases shall follow the procedures established in this rule and Rules 32.1 through 32.6. Sentencing in misdemeanor cases shall follow the procedures established in this rule and Rules 32.2, 32.3, 32.5, and 32.6. When imposing sentence, the judge or magistrate shall explain on the record the reasons for the sentence.

(b) **Other Counts.** At sentencing, the prosecuting attorney must announce the disposition of all counts brought under the same case number that are not addressed in the judgment or in a written notice of dismissal or deferred prosecution. The court will notify the Department of Public Safety of any counts dismissed on the record.

(c) **Judgment**

(1) *Conviction.* A judgment of conviction must, for each count, set forth the offense, including the statute or regulation violated, the defendant's plea, the verdicts or findings, and the sentence imposed. The judge or magistrate must sign the judgment.

(A) *Incarceration.* When the sentence includes a term of incarceration, the clerk promptly shall deliver a copy of the judgment to a peace officer or correctional facility. If the defendant does not appear at the correctional facility at the time specified, the peace officer or a representative of the correctional facility promptly shall notify the court by sworn statement on the record or by affidavit.

(B) *Restitution.* When the sentence includes a requirement that the defendant pay restitution, the judge shall order restitution as described in Rule 32.6. The judgment for restitution is enforceable in the same manner as a judgment in a civil action. If the defendant is placed on probation, the judgment of conviction shall include the payment of restitution as a condition of probation.

(C) *Conviction of a Corporation.* If a corporation is convicted of any criminal offense, the judge shall enter judgment against the corporation and the judgment shall be enforced in the same manner as a judgment in a civil action, or as otherwise provided by law.

(2) *Discharge.* If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly.

(d) **Judgment for Sex Offenses or Child Kidnapping.** When a defendant is convicted of a sex offense defined in AS 12.63.100 or child kidnapping as defined in AS 12.63.100, the written judgment must state the requirements of AS

12.63.010 and the period of registration required under AS 12.63 if the required period can be determined by the court.

(e) **Judgment for Crimes Involving Domestic Violence.** In a case in which the defendant is convicted of an offense listed in AS 18.66.990(3) and the prosecution claims at sentencing that the offense is a crime involving domestic violence, the written judgment must set forth whether the offense is a crime involving domestic violence as defined in AS 18.66.990(3) and (5). A factual and legal determination supporting this finding must be made on the record.

(f) **Judgment for Crime Against a Person.** In a case in which the defendant is convicted of a crime against a person as defined in AS 44.41.035(j), the written judgment must set out the requirements of AS 12.55.015(h).

(g) **Information To Be Included in Judgment.** If provided by the prosecuting authority in the charging document, the judgment must include the following information:

- (1) the defendant's full name, including middle name or initial;
- (2) the defendant's date of birth;
- (3) the defendant's Alaska Public Safety Information Network (APSIN) identification number;
- (4) the defendant's driver's license number or state identification number, including the issuing state and whether the license is a commercial driver's license;
- (5) the arrest tracking number (ATN) on the Criminal Case Intake and Disposition (CCID) form for each offense being addressed in the judgment;
- (6) the three-digit charge tracking number assigned on the CCID form for each offense being addressed in the judgment; and
- (7) the statute, regulation, or ordinance, as identified in the Uniform Offense Citation Table,** corresponding to each offense being addressed in the judgment. Regulations not listed in the Uniform Offense Citation Table must be cited by the regulation number.

** The Uniform Offense Citation table was developed by the Department of Public Safety. Changes to the table must be approved by the Department of Law or the appropriate municipal prosecuting authority. It is available at <http://www.dps.state.ak.us/statewide/uoct/>.

(Adopted by SCO 4 October 4, 1959; amended by SCO 157 effective February 15, 1973; by Amendment No. 5 to SCO 157 effective July 1, 1974; by SCO 330 effective January 1, 1979; by SCO 418 effective August 1, 1980; by SCO 436 effective October 21, 1980; by SCO 437 effective October 21, 1980; by SCO 550 effective February 1, 1983; by SCO 554 effective April 4, 1983; by SCO 603 effective September 14, 1984; by SCO 976 effective January 15, 1990; by SCO 979 effective August 28, 1989; by SCO 1028 effective July 15, 1990; by SCO 1049 effective January 15, 1991; by SCO 1092 effective July 15, 1992; repealed and reenacted by SCO 1136 effective July 15, 1993; amended by SCO 1204 effective July 15, 1995; by SCO 1289 effective January 15, 1998; by SCO 1341 effective September 10, 1998; by SCO 1343 effective January 1, 1999; by SCO 1464 effective March 5, 2002; and by SCO 1614 effective October 15, 2006)

Note to SCO 1204: The requirement that a judgment for conviction of a sex offense must set out the requirements of AS 12.63.010 was added by ch. 41 3 SLA 1994. Section 7 of this order is adopted for the sole reason that the legislature has mandated the amendments.

Note to SCO 1341: Paragraph (e) of Criminal Rule 32 was added by 11 ch. 95 SLA 1998. Section 3 of this order is adopted for the sole reason that the legislature has mandated the amendment.

Rule 32.1. Presentence Procedure for Felony Sentencings.

(a) Scheduling & Preliminary Filings.

(1) At the time guilt in a felony case is established by verdict or plea, the judge shall establish the date for a sentencing hearing and a presentencing hearing, if appropriate, and, except as provided in paragraph (g) of this rule, shall order a presentence investigation by the Department of Corrections. The judge may order a presentence investigation in a case in which an investigation is not required under paragraph (g). If the judge elects to schedule a single hearing, all of the procedures for the presentencing and sentencing hearings shall be applicable at the single hearing.

(2) At the time guilt is established as described in (a)(1) above, the parties shall be directed to make the following preliminary filings within ten days, unless otherwise ordered by the court:

(A) *Presumptive Sentencing.* The state shall file a notice indicating whether the defendant's sentence is governed by presumptive sentencing and, if so, listing the defendant's prior convictions that qualify as prior felony convictions under AS 12.45.145, as well as any other factor that triggers a specific presumptive term; and

(B) *Financial Statement.* In cases where restitution may be ordered, the defendant shall submit a financial statement on a form designated by the Administrative Director to the probation office.

(b) Presentence Investigation and Report.

(1) *Contents and Filing.* The Department of Corrections shall prepare a presentence report. The report shall be filed with the court and served on counsel at least 30 days before the sentencing hearing, or 30 days before the presentencing hearing, if one is scheduled. The report shall contain all of the defendant's prior criminal convictions and findings of delinquency and any other information about the defendant's characteristics, financial condition, and the circumstances affecting the defendant's behavior that may be helpful in fashioning the defendant's sentence, a victim impact statement, and any other information required by the judge. The presentence report shall comply with the Victims' Rights Act, AS 12.61.100 - .12.61.150 and AS 12.55.022.

(2) *Restitution Information.* In cases where the court may order the defendant to pay restitution, the presentence report must include:

(A) defendant's financial statement completed under subparagraph (a)(2)(B) of this rule; and

(B) information concerning the identity of any victims or other persons seeking restitution and, if known, whether any victim or other person expressly declines restitution, the nature and amount of any damages together with any supporting documentation, a restitution amount recommendation, and the names of any co-defendants and their case numbers.

(3) *Disclosure.* Unless the judge finds that providing specific portions of the report to the defendant would prove detrimental to the rehabilitation of the defendant or the safety of the public, the defense attorney may give a full copy of the report to the defendant. Unless otherwise ordered, or except as specifically allowed by other provisions of law, further disclosure of the report shall be limited to agents of the state's attorney or the defendant's attorney, any reviewing courts, and the agencies having charge of the defendant's rehabilitation.

(4) *Plea Agreements.*

(A) If the parties request preparation of a presentence report to aid them in reaching a plea agreement, the judge may order the department to prepare such a report prior to the time stated in this rule. If a report is prepared prior to entry of a verdict or plea of guilty or no contest, the report shall be submitted only to the parties and not to the judge.

(B) Notwithstanding subparagraph (b)(4)(A), the judge may use the presentence report to determine whether to accept a plea agreement under Criminal Rule 11.

(5) *Service.* The parties must serve the Department of Corrections with all filings relating to sentencing, and the court must distribute all orders related to sentencing to the department.

(c) Notice of Aggravating Factors, Extraordinary Circumstances, and Restitution. Within seven days after service of the presentence report on the parties:

(1) The state shall list the aggravating factors and describe the nature of any extraordinary circumstances on which the state intends to rely at sentencing. This notice shall include a written summary of the evidence that the state will rely on to establish each aggravating factor or extraordinary circumstance.

(2) The state shall give notice if it will seek restitution from the defendant in an amount different from the recommendation in the presentence report. The notice shall specify the amount of restitution sought and shall set forth the facts establishing the basis for this amount, and shall include information concerning the identity of any victims or other persons seeking restitution and, if known, whether any victim or other person expressly declines restitution, the nature and amount of any damages together with any supporting documentation, and the names of any co-defendants and their case numbers.

(3) The state shall give notice of any evidence on which it intends to rely at sentencing that is not contained in the presentence report. If the state intends to present any witness, the notice shall contain a brief summary of the witness's anticipated testimony. The notice need not include any information to be presented by a victim's oral or written statement.

(4) Notices under this rule shall be served by delivery to parties in the same community as the party making service, and by facsimile transmission ("fax") to parties in outlying communities. When service is made by fax, a paper copy of the notices shall also be mailed to the intended recipient.

(d) Notice of Mitigating Factors, Extraordinary Circumstances, and Responses to State's Notices. Within seven days after service of the notices required by paragraph (c):

(1) The defendant shall file a notice responding to each notice filed by the state under paragraphs (a)(2)(A) and (c)(1). The notice shall indicate whether the defendant concedes or disputes each felony conviction, aggravating factor and extraordinary circumstance and, if so, shall include a description of the basis for the opposition.

(2) The defendant shall list the mitigating factors and describe the nature of any extraordinary circumstances on which the defense intends to rely at sentencing. This notice shall include a written summary of the evidence that the defendant will rely on to establish each mitigating factor or extraordinary circumstance.

(3) If the defendant objects to any recommendation for restitution included in the presentence report or in a notice filed by the state under paragraph (c)(2), the defendant shall file a notice disputing the legal basis for restitution, the factual basis for restitution, or the amount sought. The notice shall set out the specific grounds for contesting the restitution or provide information that the victim or other person entitled to the restitution expressly declines restitution.

(4) The defendant shall give notice of any evidence on which the defendant intends to rely at sentencing that is not contained in the presentence report. If the defendant intends to present any witness, the notice shall contain a brief summary of the witness's anticipated testimony. The notice need not include any information to be presented in the defendant's allocution.

(5) The defendant shall give notice of any objection to any information contained in the presentence report or to any other material the judge or the state has identified as a source of information to be relied upon at sentencing. The notice shall state the basis for the defendant's objection. If the defendant objects to information as inaccurate, the notice shall include any information upon which the defendant intends to rely to refute the objected-to information.

(6) Notices under this rule shall be served by delivery to parties in the same community as the party making service, and by fax to parties in outlying communities. When service is made by fax, a paper copy of the notices shall also be mailed to the intended recipient.

(e) Disputing Mitigating Factors, Extraordinary Circumstances, and Objections to Restitution. Within seven days after service of the notices required by paragraph (d):

(1) The state shall file a notice responding to each notice filed by the defendant under paragraph (d)(2). The notice shall indicate whether the state concedes or disputes each mitigating factor and extraordinary circumstance, and shall include a description of the basis for the opposition.

(2) The state shall file a notice responding to each notice filed by the defendant under paragraph (d)(3). The notice shall indicate whether the state disagrees with the contention of the defendant concerning restitution and shall include a brief summary of the basis for its position.

(3) Notices under this rule shall be served by delivery to parties in the same community as the party making service, and by fax to parties in outlying communities. When service is made by fax, a paper copy of the notices shall also be mailed to the intended recipient.

(f) Adjudicating Disputed Factual and Legal Issues. The court shall give the parties the opportunity to present evidence and argument on the disputed factual and legal issues related to sentencing at the sentencing hearing or at any presentencing hearing or other supplemental evidentiary hearings that the court may order.

(1) The court shall enter findings regarding whether the defendant's sentence is governed by presumptive sentencing, the number of the defendant's prior felonies as defined in AS 12.55.145, and the existence of any other factor that triggers a specific presumptive term.

(2) The court shall enter findings regarding the aggravating factors, mitigating factors, and extraordinary circumstances raised by the parties. However, no finding is necessary if the court affirmatively determines that resolution of a disputed factor or extraordinary circumstance is immaterial to the imposition of a just sentence.

(3) If the sentencing judge believes that the parties have overlooked a prior felony conviction or any other factor triggering a specific presumptive term, or have overlooked an applicable aggravating or mitigating factor or extraordinary circumstance, the judge shall notify the parties of the court's belief. The judge shall inform the parties of the specific facts which the judge believes establish the

prior felony or presumptive sentencing factor, and the judge must allow the parties an opportunity to respond to the judge's information.

(4) The court shall resolve any factual disputes related to restitution.

(5) The court shall enter findings regarding any disputed assertion in the presentence report. Any assertion that has not been proved shall be deleted from the report; any assertion that has been proved only in part shall be modified in the report. Alternatively, if the court determines that the disputed assertion is not relevant to its sentencing decision so that resolution of the dispute is not warranted, the court shall delete the assertion from the report without making any finding. After the court has made the necessary deletions and modifications, the court's corrected copy shall be labeled the "approved version" of the presentence report. A copy of the approved version must be delivered to the Department of Corrections within seven days after sentencing.

(g) When Presentence Investigation Not Required. Unless the defendant may be sentenced to a presumptive term of imprisonment under AS 12.55.125(e)(1) or (2), or the court otherwise orders, a presentence investigation by the Department of Corrections is not required if the defendant is convicted of the following offenses:

(1) vehicle theft in the first degree in violation of AS 11.46.360;

(2) driving while intoxicated under AS 28.35.030(n); or

(3) refusal to submit to a chemical test under AS 28.35.032(p).

(h) Restitution Procedures When No Presentence Investigation.

(1) In cases where the court may order the defendant to pay restitution but no presentence investigation report is submitted, the prosecuting authority must file a notice concerning restitution at least ten days before the sentencing hearing, unless otherwise ordered by the court. The notice shall include information concerning the identity of any victims or other persons seeking restitution and, if known, whether any victim or other person expressly declines restitution, the nature and amount of any damages together with any supporting documentation, a restitution amount recommendation, and the names of any co-defendants and their case numbers.

(2) Unless otherwise ordered by the court, the defendant shall file any objections to the information submitted under paragraph (h)(1), or provide information that the victim or other person expressly declines restitution, at least five days before the sentencing hearing, together with defendant's financial statement on a form designated by the Administrative Director.

Rule 32.3 Judgments and Orders.

(a) **Effective Dates of Orders and Judgments.** Orders and judgments become effective the date they are entered.

(1) *Oral Orders.* The date of entry of an oral order is the date the order is put on the official electronic record by the judge unless otherwise specified by the judge. At the time the judge announces an oral order, the judge also shall announce on the record whether the order shall be reduced to writing. If the oral order is reduced to writing, the effective date shall be included in the written order.

(2) *Written Orders Not Preceded by Oral Orders.* The date of entry of a written order not preceded by an oral order is the date the written order is signed unless otherwise specified in the order.

(3) *Judgments.* The date of entry of a criminal judgment is the date the judgment is put on the official electronic record by the judge unless otherwise specified by the judge. All judgments shall be reduced to writing and the effective date shall be included in the written judgment.

(b) **Commencement of Time for Appeal, Review and Reconsideration.** The time within which a notice of appeal may be filed and reconsideration or review of orders and judgments may be requested begins running on the date of notice as defined below.

(c) **Date of Notice.**

(1) *Oral Orders.*

(i) As to the parties present when an oral order is announced, the date of notice is the date the judge announces the order on the official electronic record, unless at that time the judge announces that the order will be reduced to writing in which case the date of notice is the date shown in the clerk's certificate of distribution on the written order.

(ii) As to parties not present at the announcement of an oral order the date of notice is the date shown in the clerk's certificate of distribution of notice of the order. If, however, at the time the judge announces the oral order the judge announces that the order will be reduced to writing, the date of notice is the date shown in the clerk's certificate of distribution on the written order.

(2) *Written Orders.* The date of notice of a written order is the date shown in the clerk's certificate of distribution on the written order.

(3) *Judgments.* All judgments must be reduced to writing. The date of notice of a judgment is the date shown in the clerk's certificate of distribution on the written judgment.

(4) *Other Service Requirements.* These notice provisions apply to the notice of orders and judgments under Rule 44(c) and do not affect the service requirements of any other rule of criminal procedure.

(d) **Clerk's Certificate of Distribution.** Every written notice of an oral order and every written order and judgment shall include a clerk's certificate of distribution showing the date copies of the notice, order or judgment were distributed, to whom they were distributed, and the name or initials of the court employee who distributed them.

Rule 204. Appeal: Time--Notice--Bonds.

(a) When Taken - Appeals and Cross-Appeals.

(1) *Appeals.* The notice of appeal shall be filed within 30 days from the date shown in the clerk's certificate of distribution on the judgment appealed from, unless a shorter time for filing a notice of appeal applies as provided by Rules 216-220, or unless a different time applies as provided in AS 23.30.128(g).

(2) *Subsequent Appeals.* If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days of the filing of any timely notice of appeal by any other party, or within 30 days from the date shown in the clerk's certificate of distribution on the judgment, whichever period expires last.

(3) *Motions That Terminate Time for Filing Appeals in Civil Cases.* In a civil case, the running of the time for filing an appeal is terminated by a timely motion filed in the trial court pursuant to those rules of civil procedure enumerated in this section or by AS 23.30.128. The full time for an appeal by any party begins to run again on the date of notice, as defined in Civil Rule 58.1(c), of any of the following orders made on timely motion:

(A) Granting or denying a motion for judgment under Civil Rule 50(b);

(B) Granting or denying a motion to amend or make additional findings of fact under Civil Rule 52 (b) whether or not an alteration of the judgment would be required if the motion is granted;

(C) Granting or denying a motion to alter or amend a judgment under Civil Rule 59;

(D) Denying a new trial under Civil Rule 59; or

(E) Granting or denying a motion for reconsideration filed in the trial court under Civil Rule 77(k) on the date of notice as defined by Civil Rule 58.1(c) or on the date of denial of the motion pursuant to Civil Rule 77(k)(4), whichever is earlier;

(F) Granting or denying a request for reconsideration filed in the Alaska Workers' Compensation Appeals Commission under AS 23.30.128(f) or on the date the request is deemed denied pursuant to that section, whichever is earlier; or

(G) Granting or denying a petition for rehearing under Appellate Rule 506 in an appeal from an administrative agency other than the Alaska Workers' Compensation Appeals Commission.

(4) *Motions That Terminate Time for Filing Appeals in Criminal Cases.* In a criminal case, if a timely motion for a new trial or in arrest of judgment, or a timely

motion for reconsideration has been filed in the superior court, or if a motion for reduction, correction, or suspension of sentence under Criminal Rule 35 has been made within the 30-day period following the date shown in the clerk's certificate of distribution on the judgment, an appeal from a judgment may be filed within 30 days after the date of notice of the order deciding the motion. Date of notice is defined in Criminal Rule 32.3(c).

(5) Effect of Taxing of Costs and Prejudgment Interest and Awarding of Attorney's Fees.

(A) The running of the time for filing an appeal is not terminated by proceedings related to the taxing of costs pursuant to Civil Rule 79 or while awaiting calculation of prejudgment interest or proceedings related to the award of attorney's fees. However, the statement of points on appeal filed pursuant to Appellate Rule 204(e) and the designation of transcript filed pursuant to Appellate Rule 210(b)(1) may be amended by motion by an appellant or cross appellant to include the award or denial of costs and attorney's fees or prejudgment interest and pertinent portions of the electronic record. These subjects will thereafter be considered part of the appeal if covered in the brief of appellant or cross-appellant. If no appeal or cross-appeal is pending, the allowance of costs and attorney's fees or the award of prejudgment interest shall be considered a final judgment subject to separate appeal limited to the subject of costs, attorney's fees or prejudgment interest.

(B) Notwithstanding Rule 203, the pendency of an appeal shall not divest the trial court of jurisdiction to consider the matters of costs and attorney's fees pursuant to Civil Rules 79 and 82 or AS 23.30.008(d).

(6) *Premature Appeals.* If a notice of appeal is filed after the announcement of a decision but before the date shown in the clerk's certificate of distribution on the judgment, the notice of appeal shall be treated as filed on the date shown in the clerk's certificate of distribution on the judgment.

(b) **Appeal - How Taken.** A party may appeal from a final order or judgment by filing a notice of appeal with the clerk of the appellate courts. The notice of appeal must identify the party taking the appeal, the final order or judgment appealed from, and the court to which the appeal is taken. The party must file the original and one copy of the notice of appeal accompanied by the original and one copy of the documents listed below:

(1) a completed docketing statement in the form prescribed by these rules, which includes a list of the parties to the appeal;

(2) a copy of the final order or judgment from which the appeal is taken;

(3) a statement of points on appeal as required by Rule 204(e);

(4) unless the party is represented by court-appointed counsel, the party is the state or an agency thereof, or the party is a prisoner found by the court to be eligible to pay less than full fees under AS 09.19.010,

(A) the filing fee required by Administrative Rule 9(a);

(B) a motion for waiver of filing fee pursuant to Administrative Rule 9(f)(1); or

(C) a motion to appeal at public expense pursuant to Rule 209;

(5) unless the party is represented by court-appointed counsel, the party is the state, municipality, or officer or agency thereof, or the party is an employee appealing denial of compensation by the Alaska Workers' Compensation Appeals Commission or denial of benefits under AS 23.20 (Employment Security Act),

(A) the cost bond or deposit required by Rule 204(c)(1);

(B) a copy of a superior court order approving the party's supersedeas bond or other security in lieu of bond or a copy of the party's motion to the superior court for approval of a supersede-as bond or other security;

(C) a motion for waiver of cost bond; or

(D) a motion to appeal at public expense pursuant to Rule 209;

(6) a designation of transcript if the party intends to have portions of the electronic record transcribed pursuant to Rule 210(b); and

(7) proof of service of the notice of appeal and all required accompanying documents, except the filing fee, on all other parties to the appeal.

A party may move for an extension of time to file the statement of points on appeal and the designation of transcript. The clerk of the appellate courts shall refuse to accept for filing any notice of appeal not conforming to this paragraph and accompanied by the items specified in [1]-[7] or a motion to extend the time for filing item [3] or [6].

(c) Bond on Appeal.

(1) Unless a party is exempted by law, a bond for costs on appeal shall be filed with the notice of appeal in a civil case. The bond shall be in the sum of seven hundred fifty dollars (\$750.00), unless the superior court fixes a different amount or unless a supersedeas bond is filed, in which event no separate bond on appeal is required. The bond on appeal shall have sufficient surety and shall be conditioned to secure the payment of costs if the appeal is dismissed or the judgment affirmed, or such costs as the supreme court may award if the

judgment is modified. If a bond on appeal in the sum of seven hundred fifty dollars (\$750.00) is given, no approval thereof is necessary. After a bond on appeal is filed, an appellee may by motion raise objection to the form or amount of the bond or to the sufficiency of the surety which shall be determined by the superior court. In lieu of filing such cost bond, the appellant may deposit in the office of the clerk of the court from which the appeal is taken a sum of money reasonably sufficient to cover such costs, the amount thereof to be fixed by the superior court.

(2) Notwithstanding subparagraph (1), a bond for costs on appeal shall not be required in an appeal from a decision of the trial court in any criminal case or any civil case where an indigent party is entitled to court-appointed counsel, and a bond shall not be required from an employee appealing from a denial of compensation by the Alaska Workers' Compensation Appeals Commission or from a denial of a claim for benefits under AS 23.20 (Employment Security Act).

(d) **Supersedeas Bond.** Whenever in a civil case an appellant entitled thereto desires a stay on appeal, the appellant may present to the superior court for its approval a supersedeas bond which shall have such surety or sureties as the court requires. The bond shall be conditioned for the satisfaction of the judgment in full, together with costs and interest, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs and interest as the supreme court may adjudge and award. When the judgment is for the recovery of money not otherwise secured, the amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on the appeal, and interest, unless the superior court, after notice and hearing and for good cause shown, fixes a different amount or orders security other than the bond. When the judgment determines the disposition of the property in controversy as in real actions, replevin, and actions to foreclose mortgages or when such property is in the custody of the court or the state troopers or when the proceeds of such property of a bond for its value is in the custody or control of the court, the amount of the supersedeas bond shall be fixed at such sum only as will secure the amount recovered for the use and detention of the property, the cost of the action, costs on appeal, and interest, unless the superior court, after notice and hearing and for good cause shown, fixes a different amount or orders security other than the bond. A municipality or an officer or agent thereof desiring a stay on appeal is exempted from the requirement of posting supersedeas bond imposed by this subsection.

(e) **Statement of Points.** At the time of filing the notice of appeal, the appellant shall serve and file a concise statement of the points on which appellant intends to rely in the appeal. The appellate court will consider only points included in the statement, and points that the court can address effectively without reviewing untranscribed portions of the electronic record. On motion in the appellate court, and for cause, the statement of points may be supplemented.

(f) **Judgment Against Surety.** By entering into an appeal or supersedeas bond given pursuant to subdivisions (c) and (d) of this rule, the surety submits to the jurisdiction of the superior court and irrevocably appoints the clerk of that court as the surety's agent upon whom any papers affecting the surety's liability on the bond may be served. The surety's liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the superior court prescribed may be served on the clerk of the superior court who shall forthwith mail copies to the surety if the surety's address is known.

(g) **Parties to the Appeal.** All parties to the trial court proceeding when the final order or judgment was entered are parties to the appeal. A party who files a notice of appeal, whether separately or jointly, is an appellant under these rules. All other parties are deemed to be appellees, regardless of their status in the trial court. An appellee may elect at any time not to participate in the appeal by filing and serving a notice of non-participation. The filing of a notice of non-participation shall not affect whether the party is bound by the decision on appeal.

(h) **Service of Documents.** Papers filed or served in the appeal must be served on all parties, except appellees who have elected not to participate in the action.

(i) **Joint or Consolidated Appeals.** If two or more parties are entitled to appeal from a judgment or order of a court and their interests are such as to make joinder practical, they may file a joint notice of appeal. Appeals may be consolidated by order of the appellate court upon its own motion or upon motion of a party.

Rule 209. Appeals at Public Expense.

(a) Civil Matters.

(1) A party to a civil action may file in the supreme court a motion to appeal or to petition for review at public expense. The motion shall be accompanied by a sworn financial statement on a form provided by the clerk of the appellate courts.

(2) In considering the motion to appeal or petition for review at public expense, the court shall determine the indigence or nonindigence of the party.

(3) If the motion is granted:

[a] The court shall specify in the order granting the motion which of the following costs or partial costs are to be covered at public expense:

[1] Filing fees,

[2] Transcript fees,

[3] Costs of printing briefs,

[4] Other costs;

[b] Any costs and attorney fees awarded to the appellant or petitioner as a prevailing party in the supreme court shall accrue to the state to reimburse it for costs relating to the appeal or petition for review.

(4) Leave to file at public expense may be conditioned on repayment of costs to the state. The conditions may include the imposition of liens in favor of the state on costs, attorney fees and other recoveries awarded to the indigent appellant or petitioner.

(5) An appeal or petition for review at public expense will be allowed without additional motion in cases where the appellant is represented by court-appointed counsel.

(6) The provisions of this paragraph do not apply to the filing fees in a prisoner's appeal against the state or an officer, agent, employee, or former officer, agent, or employee of the state that is governed by the provisions of AS 09.19. A prisoner may request a filing fee reduction in an appeal governed by AS 09.19 by submitting an application which satisfies the requirements of AS 09.19.010 with the prisoner's notice of appeal and the items specified in Appellate Rule 204(b).

(b) Criminal Matters.

(1) In criminal matters the appellate court shall authorize appeals and petitions for review at public expense on behalf of defendants who are "indigent," as defined by statute, in accordance with the rules and decisions of the appellate courts of Alaska, and where such proceedings are required to be provided by state courts by decisions of the Supreme Court of the United States. Where an appeal or petition for review at public expense is authorized by the court, the costs which shall be borne at public expense include those of providing counsel and of preparing a transcript and briefs.

(2) If a defendant is allowed to proceed at public expense, the clerk of the appellate courts shall send the defendant a written notice and order, to the address provided under Appellate Rule 204(b), that

(A) advises defendant that, if the defendant's conviction is not reversed, the defendant will be ordered to repay the prosecuting authority for the cost of appointed appellate counsel, in accordance with the schedule of costs set out in subparagraph 209(b)(6); and

(B) orders the defendant to apply for permanent fund dividends every year in which the defendant qualifies for a dividend until the cost is paid in full.

(3) A defendant authorized to proceed at public expense in the trial court is presumed to be entitled to appeal or petition for review at public expense.

(4) Counsel appointed to represent a defendant in the trial court pursuant to Criminal Rule 39 shall remain as appointed counsel throughout an appeal or petition for review at public expense authorized under this paragraph and shall not be permitted to withdraw except upon the grounds authorized in Administrative Rule 12. An attorney appointed by the court under Administrative Rule 12(b)(1)(B) will be permitted to withdraw upon a showing that either the public defender agency or the office of public advocacy is able to represent the defendant in the appellate proceeding. If an appeal is to be taken, trial counsel will not be permitted to withdraw until the notice of appeal and the documents required to be filed with the appeal by Rule 204 have been accepted for filing by the clerk of the appellate courts.

(5) At the conclusion of the appellate proceeding, the clerk of the appellate courts shall enter judgment against the defendant for the cost of appointed appellate counsel unless the defendant's conviction was reversed by the appellate court. The amount of the judgment shall be determined by reference to the schedule in subparagraph 209(b)(6). Before entering judgment, the clerk shall mail, to the defendant's address of record, a notice that sets out the amount of the proposed judgment. The defendant may oppose entry of the judgment by filing a written opposition within 45 days after the date shown in the clerk's certificate of distribution on the notice. The opposition shall specifically set out the grounds for opposing entry of judgment. The prosecuting authority may oppose the amount

of the judgment by filing a written opposition within the same deadline. Criminal Rule 39(c)(1)(C) and (c)(2) shall apply to judgments entered under this subparagraph.

(6) The following schedule governs the cost of appointed appellate counsel:

Type of Appellate Proceeding	Misdemeanor	Felony
Sentence Appeal or Petition for Sentence Review	\$ 250	\$ 500
Merit Appeal or Appeal from Post-Conviction Relief Proceedings	\$ 750	\$ 1,500
Combined Merit Appeal and Sentence Appeal or Petition for Sentence Review	\$ 1,000	\$ 2,000
Other Appellate Actions (Petition for Review, Petition for Hearing, etc.)	\$ 500	\$ 1,000

(c) **Costs.** Costs, attorney's fees, damages, and interest may be allowed as in other cases, but the state shall not be liable for any of them.

Rule 210. Record on Appeal.

(a) **Composition of Record.** The record on appeal consists of the entire trial court file, including the original papers and exhibits filed in the trial court, the electronic record of proceedings before the trial court, and transcripts, if any, of the trial court proceedings. Except as otherwise ordered by the appellate court, the record does not include documents or exhibits filed after, or electronic records or transcripts of proceedings occurring after, the filing date of the notice of appeal, and does not include transcripts not designated under subsection (b)(1) of this rule unless those transcripts were filed with the trial court prior to the filing date of the notice of appeal. Filings, exhibits, electronic recordings, or transcripts presented to the trial court after the filing date of the notice of appeal may be added to the record on appeal only upon motion pursuant to subsection (i). Material never presented to the trial court may not be added to the record on appeal.

(b) **Preparation of Transcript.**

(1) *Designation of Parts of Record to be Transcribed.*

(A) At the time the notice of appeal is filed, the appellant shall file and serve on the other parties to the appeal a designation of the parts of the electronic record which appellant intends to transcribe. The appellant shall designate all parts which are essential to a determination of the issues on appeal. If appellant claims that the written findings of fact or conclusions of law are insufficient or erroneous, the designation shall include any oral findings of fact and conclusions of law. Within 10 days after service of appellant's designation, any other party to the appeal may file and serve a designation of additional parts of the electronic record to be transcribed.

(B) If a party designates an entire trial or hearing, the party's designation shall include only the nature and dates of the proceeding. If a party designates parts of a trial or hearing, the party's designation shall include the nature and dates of the proceeding, the CD or tape number and log numbers or time where these parts appear [CD (#), at Time 00:00:00 or Tape (#), at Log 00:00:00], and a narrative description of the portions requested. If a party designates a portion of a witness testimony, it must appear from the party's narrative description that part of the witness testimony has been omitted.

(2) *Preparation at Public Expense.* The clerk of the appellate courts shall arrange for preparation of the transcript in cases in which the transcript is prepared at public expense. The transcript shall include all parts of the electronic record designated by the parties to the appeal; however, the voir dire examination of jurors and jury instructions shall not be transcribed unless a party has specifically requested these portions of the trial.

(3) *Preparation Not at Public Expense.* In cases in which the transcript is not prepared at public expense, the appellant shall arrange for preparation of a transcript of all parts of the electronic record designated by the parties to the appeal. Upon request, the clerk of the trial courts shall provide to the transcriber a copy of the designations, a copy of the electronic record or parts thereof, a copy of the log notes and other information necessary for preparation of the transcript. Unless the parties agree otherwise by stipulation, or unless otherwise ordered by the appellate court, the person designated to prepare the transcript shall not be a relative, employee, or attorney of any of the parties, or a relative or employee of that attorney, or be financially interested in the action. Apart from contracting for the preparation of the transcript within a given period of time and at a given price, neither the party nor the party's attorney may exercise control over the preparation of the transcript.

(4) *Time for Completion.* Preparation of the transcript shall be completed within 40 days after filing of the notice of appeal. If the transcript is not being prepared at public expense and the transcriber is unable to complete the transcript within this time, the appellant shall move the appellate court for an extension of time. The motion shall comply with Appellate Rule 503, shall also be served on the clerk of the trial courts, and shall be considered a routine motion within the meaning of Rule 503(b).

(5) *Filing and Distribution.* Upon completion of the transcript, the transcriber shall promptly notify the parties that the transcript has been completed and shall file with the clerk of the appellate courts (i) the original and one copy of the transcript; and (ii) an electronic version of the transcript in the form and format prescribed by administrative bulletin.

(6) *Costs.* If the transcript is not being prepared at public expense, the cost of preparing the original transcript, the copy filed with the court and the computer diskette shall be paid by the appellant. This cost may be taxed as a cost in the case, but if any party causes parts of the electronic record to be transcribed unnecessarily, the court may impose the cost of transcribing such parts on that party.

(7) *Form of Transcript.* Transcripts shall be in the form and format prescribed by administrative bulletin.

(8) *Statement in Lieu of Transcript.* If there is no electronic recording from which a transcript can be prepared, the appellant may prepare a statement of the evidence of proceedings from the best available means, including the appellants recollection, for use instead of a stenographic or electronically recorded transcript. This statement shall be served on the appellee, who may serve objections or proposed amendments, and shall be submitted to the court from which the appeal is being taken for settlement and approval. As settled and

approved, the statement shall be filed with the clerk of that court and transmitted to the appellate court in lieu of a transcript.

(c) Excerpts of Record.

(1) Duty to Prepare.

(A) Each party shall file and serve an excerpt of record with the party's brief.

(B) In cases involving multiple appellants or appellees, each side shall prepare a single excerpt of record. In a case involving multiple appellants who are filing separate briefs, the appellant who filed the first notice of appeal shall prepare and file the excerpt for the appellants, unless the appellants otherwise agree. In a case involving multiple appellees who are filing separate briefs, the appellees shall decide among themselves which appellee shall prepare and file the excerpt for the appellees. Ten days prior to the date on which a side's briefs are due, the parties who are not responsible for preparation of the excerpt shall transmit to the responsible party a list of documents to be included in the excerpt. The responsible party shall include in the excerpt all documents which are specified by the other parties, provided such documents are in the record. A party who fails to transmit a list of documents to the responsible party by the 10 day deadline waives the right to designate documents for inclusion in the excerpt. The responsible party shall mail a copy of the excerpt to each of the other parties on that side six days before the date the briefs are due, or deliver a copy of the excerpt three days before the date the briefs are due, so that the other parties may include the appropriate citations in their briefs. The cost of copying and mailing the excerpt shall be borne equally by all parties on the side.

(C) A cross-appellant or cross-appellee who elects to file a single brief shall file a single excerpt with that brief. A cross-appellant who makes this election shall include in the excerpt those documents that are properly included in an appellee's excerpt under Rule 210(c)(2). A cross-appellant who elects to file separate briefs shall file and serve notice of this election within 10 days after service of the notice of the due date for appellant's brief. If a cross-appellant makes this election, the cross-appellant and the appellant shall be treated as co-appellants filing separate briefs and shall prepare and submit a combined excerpt as required by Rule 210(c)(1)(B). The cross-appellee and the appellee shall be treated as co-appellees filing separate briefs for purposes of that rule.

(2) Contents.

(A) *Appellant's Excerpt.* The appellant's excerpt of record must contain the following parts of the record:

(i) all charging documents, or the petition or complaint, counterclaim, crossclaim, and answer setting out the issues to be tried;

- (ii) the judgment or interlocutory order from which the appeal is taken;
- (iii) other orders or rulings sought to be reviewed;
- (iv) supporting opinions, findings of fact, conclusions of law, or other statements showing the reasoning of the trial court and, if appellant claims that the written findings of fact or conclusions of law are insufficient or erroneous, a copy of the pages of the transcript at which any relevant oral findings of fact and conclusions of law are recorded;
- (v) if the appeal is from the grant or denial of a motion, relevant portions of briefs, memoranda, and documents filed in support of and in opposition to the motion;
- (vi) if the appellant is challenging the admission or exclusion of evidence, the giving or failure to give a jury instruction, or another oral ruling or order, a copy of the pages of the transcript at which the evidence, offer of proof, ruling, or order and relevant discussion by the court, and any necessary objection are recorded;
- (vii) if the appeal is from a final decision in a child-in-need-of-aid proceeding under AS 47.10.080(c) or a case involving the termination of parental rights under AS 25.23.180, the predisposition report prepared in the case; and
- (viii) specific portions of other documents in the record, including documentary exhibits, that are referred to in appellant's brief and essential to the resolution of an issue on appeal.

(B) *Appellee's Excerpt.* The appellee's excerpt of record must contain those parts of the record required under (c)(2)(A) and relied on by appellee that were not included in the appellant's excerpt.

(C) *Portions of the Transcript.* Parties may also include in the excerpt selected pages of the transcript that are critical to the appeal.

(D) *Items Not to Be Included in the Excerpts.* Pages of the transcript and briefs and memoranda filed in the trial court may only be included in the excerpts if required under (c)(2)(A) or permitted under (c)(2)(C).

The fact that parts of the record are not included in the excerpts does not prevent the parties or the appellate court from relying on those parts.

(3) *Supplemental Excerpts.* Appellant may file and serve a supplemental excerpt of record with appellant's reply brief or within the time specified for filing a reply brief. No other supplemental excerpt may be filed except by leave of the appellate court granted on motion, or at the request of the appellate court. A supplemental excerpt may not include parts of the record that appear in another excerpt filed in the appeal.

(4) *Form, Filing and Service.* Each party's excerpt of record must be arranged in chronological order, must be bound separately from the party's brief, and must contain a table of contents at the beginning of the first volume. The excerpt and the table of contents must be in the form specified in the Clerk's Instructions for Preparation of Excerpts published in these rules. One copy of the excerpt must be filed and served with the party's original brief. Six copies of the excerpt must be filed with the bound copies of the brief, and one copy must be served on counsel for each party separately represented. The appellate court may specify the filing or service of a different number of copies than required by this rule.

(5) *Excerpts to be Abbreviated.* The parties shall include in the excerpts only those parts of the record which are essential to a determination of the questions presented on appeal. For any infraction of this rule, the appellate court may impose sanctions and withhold or impose costs as the circumstances of the case and discouragement of like conduct in the future may require.

(6) *Costs.* Subject to (c)(5), the prevailing party shall be entitled to recover the cost of copying its excerpt of record under Appellate Rule 508(d).

(d) **RESERVED.**

(e) **Preparation of the Trial Court File.**

(1) *Page Numbering.* Upon receiving the notice of appeal, the regional appeals clerk shall number the pages of the record, assembled in accordance with subsection (a) of this rule, in a single consecutive sequence throughout all volumes. Page numbering must be completed within 40 days after filing of the notice of appeal. In an appeal from the Alaska Workers' Compensation Appeals Commission, the commission's record should be numbered beginning with the number immediately following the number of the last page in the record prepared by the Workers' Compensation Board.

(2) *Confidential Materials.* Papers filed under seal in the trial court and exhibits submitted or introduced at closed hearings in the trial court shall be maintained under seal while they constitute part of a record on appeal, and access to them shall be governed by Rule 512.5(c).

(f) **Briefing Schedule.** Upon filing of the transcript and completion of the page numbering, the clerk of the trial courts shall notify the clerk of the appellate courts that the case is ready for briefing. Upon receiving this notice, the clerk of the appellate courts shall give notice of the due date for the appellant's brief.

(g) **Transmission of the Record.**

(1) *Transmission to Appellate Court.* Upon notification that briefing is complete, the clerk of the trial courts shall transmit the record, excluding physical exhibits,

to the clerk of the appellate courts. Physical exhibits shall be retained by the trial court unless specifically requested by the appellate court. As used in this paragraph, "physical exhibits" includes exhibits other than documents or photographs, and also includes documents or photographs of unusually large size or unusual bulk or weight.

(2) *Transfer to Other Court Locations.* The clerk of the appellate courts may direct that the record be temporarily transferred to another court location within the state for the accommodation of counsel in the preparation of briefs.

(h) **Several Appeals.** When more than one appeal is taken to the appellate court from the same judgment, there shall be a single record on appeal. In preparing the record, deadlines which run from filing of the notice of appeal shall run from filing of the last notice of appeal.

(i) **Power of Court to Correct, Modify, or Supplement.** It is not necessary for the record on appeal to be approved by the trial court or a judge thereof except as provided in paragraph (b)(8) and in Rule 211, but if any difference arises whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by that court and the record made to conform to that court's decision. If anything material to either party is omitted from the record on appeal by error or accident by court personnel, or is misstated therein, the parties by stipulation, the trial court, or the appellate court, on a proper suggestion or of its own initiative, may direct that the omission or misstatement shall be corrected. All other questions as to the content and form of the record shall be presented to the appellate court. Materials (including filings, exhibits, electronic recordings, or transcripts) filed with the trial court after the filing date of the notice of appeal may be added to the record on appeal only upon motion designating by title, description, and filing date the materials sought to be added, and are limited to the following:

- (1) materials pertaining to attorneys fees, costs, or prejudgment interest;
- (2) amended judgments, and all materials pertaining to those judgments;
- (3) oppositions or replies responding to, or orders determining, motions that were filed on or before the filing date of the notice of appeal, and materials pertaining to those documents;
- (4) any orders listed in Rule 204(a)(3), together with any motions, oppositions, and replies leading to such orders, and any materials pertaining to those documents;
- (5) materials to be added to the record upon entry of an order amending or supplementing the points on appeal; and

(6) materials to be added to the record for other good cause found by the appellate court.

On motion in the appellate court, and for cause, an excerpt of record may also be modified or supplemented to correct omissions by counsel.

Rule 212. Briefs.

(a) Filing and Serving Briefs.

(1) Initial Submission.

(A) *Time for Serving and Filing Briefs.* The appellant shall serve and file the appellant's brief within 30 days after the court gives notice under Rule 210(f) of the due date for appellant's brief. The appellee shall serve and file the appellee's brief within 30 days after service of the appellant's brief. Within 20 days after service of the appellee's brief, appellant shall serve and file either a reply brief or a notice that no reply brief will be filed. In cases involving multiple appellants or appellees who are filing separate briefs, including parties who are deemed to be co-parties under Rule 210(c)(1)(C), the time for filing these briefs shall be extended by 10 days if the parties are preparing excerpts of record in order to allow compliance with Rule 210(c)(1)(B).

(B) *Number of Copies.* On or before the date the party's brief is due, the party shall file with the clerk the original plus one copy of the brief, printed or written on only one side of each page, together with proof of service on all parties.

(C) *Compliance Check.* The court will review the brief for compliance with (b) and (c) of this rule and return the original to the party, with a notice of rejection, conditional acceptance, or acceptance, for correction or for duplication and binding.

(D) *Changes Not Permitted.* After a brief is returned for correction or binding, the party shall make no changes to the brief other than those required by the binding process or required by the court in any notice of rejection or conditional acceptance. The party may also correct spelling and typographical errors and correct and update citations for cases already cited in the originally submitted brief.

(2) Bound Copies of Briefs.

(A) *Time for Service; Number of Copies.* Within ten days after the clerk returns the brief, the party shall serve two bound copies on each party and shall file with the clerk eight bound copies in an appeal before the supreme court or seven bound copies in an appeal before the court of appeals. The clerk may specify a different number of copies or a different time period than required by this rule.

(B) *Form of Bound Copies.* Bound copies must be printed or written on both sides of the paper and securely bound along the left margin in a manner that does not obscure the text, and that permits the brief to lie reasonably flat when open. Unless otherwise permitted by the clerk, the copies must be bound using

comb or spiral binding, but not staples or metal fasteners. The copies must have a suitable cover consisting of heavy paper in the color indicated:

- brief of appellant - ivory or light tan;
- brief of appellee - blue;
- reply brief - green; and
- brief of intervenor or amicus curiae - red.

(b) **Form.** The form of a brief is governed by Rule 513.5(b)(1)-(5) and (c) and by this rule. The left and right margins of a brief must each be one inch. The front cover of a brief must contain: (1) the name of the court and the number of the case; (2) the title of the case; (3) the nature of the proceeding (e.g., appeal, petition for review); (4) the name of the court or agency below, the name of the individual who rendered the decision below, and the case number below; (5) the title of the document (e.g., brief of appellant); and (6) the names, addresses, telephone numbers, and bar numbers of counsel for the party concerned and the name of the law firm or organization with whom counsel is affiliated. In criminal cases, the front cover must also include a certificate indicating whether the brief contains information that is confidential under AS 12.61.100 through 12.61.150. The administrative director shall specify the form and content of the certificate.

(c) Substantive Requirements.

(1) *Brief of Appellant.* The brief of the appellant shall contain the following items under appropriate headings and in the order here indicated:

(A) A table of contents, including the titles and subtitles of all arguments, with page references.

(B) A table of cases alphabetically arranged, statutes, and other authorities cited, with references to the pages of the brief where they are cited.

(C) The constitutional provisions, statutes, court rules, ordinances, and regulations principally relied upon, set out verbatim or their pertinent provisions appropriately summarized.

(D) A jurisdictional statement of the date on which judgment was entered and of the legal authority of the appellate court to consider the appeal.

(E) A list of all parties to the case, without using "et al.," or any similar indication, unless the caption of the case on the cover of the brief contains the names of all parties. This list may be contained in a footnote.

(F) A statement of the issues presented for review. In cases of cross-appeal, the cross-appellant may present a statement of the issues presented for review which would require determination if the case is to be reversed and remanded for

further proceedings in the trial court. In the event that the decision is affirmed on the appeal, such issues on the cross-appeal may be deemed waived by the appellate court.

(G) A statement of the case, which shall provide a brief description of the case and a concise statement of the course of proceedings in, and the decision of, the trial court. Appellant shall state the facts relevant to each issue, with references to the record as required by paragraph (c)(8), in this section or in the appropriate argument sections.

(H) A discussion of the applicable standard of review. (If the brief concerns several issues with different standards of review, the discussion of each issue should be preceded by a discussion of the standard of review applicable to that issue).

(I) An argument section, which shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes, and parts of the record relied on. The section may be preceded by a summary. Each major contention shall be preceded by a heading indicating the subject matter. References to the record shall conform to the requirements of paragraph (c)(8).

(J) A short conclusion stating the precise relief sought.

(K) If the appeal concerns a property division in a divorce case, an appendix consisting of a table listing all assets and liabilities of the parties as reflected in the record, including the trial court's findings as to the nature (marital or individual), value, and disposition of each asset or liability.

(2) *Brief of Appellee.* The brief of the appellee shall conform to the requirements of subdivisions (1)(A) through (1)(J) except that a statement of jurisdiction, of the issues, or of the case need not be made unless the appellee is dissatisfied with the statement of the appellant, and a list of all parties need not be included.

(3) *Reply Brief.* The appellant may file a brief in reply to the brief of the appellee. The reply brief shall conform to the requirements of subdivisions (1)(A), (1)(B), (1)(C), (1)(I), and (1)(J). This brief may raise no contentions not previously raised in either the appellant's or appellee's briefs. If the appellee has cross-appealed and has not filed a single brief under (c)(6) of this rule, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross-appeal. No further briefs may be filed except with leave of the court.

(4) *Length.* Exclusive of appendices, the appellant's and appellee's briefs may not exceed 50 numbered pages each. Numbered pages for purposes of this paragraph begin with the jurisdictional statement required by (c)(1)(D) of this rule. The appellant's reply brief may not exceed 20 pages. A motion for leave to file a

brief longer than permitted by this paragraph must be accompanied by a copy of the over-length brief proposed to be filed.

(5) *Brief in Cases of Multiple Parties.* In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another.

(6) *Briefs in Cases Involving Cross-Appeals.*

(A) *Cross-Appellant.* An appellee who is also a cross-appellant may elect to file a single brief that both discusses the appellee's claims of error and answers the original appellant. Such a single brief shall be filed on the date the appellee's brief is due. It shall be divided into two sections: the first section shall contain the issues and arguments involved in the cross-appeal and shall be prepared in accordance with (c)(1) of this rule; the second section shall contain the answer to the brief of the appellant and shall be prepared in accordance with (c)(2) of this rule. The single brief may not exceed 50 numbered pages. If the cross-appellant elects to file a single brief, the right to file a reply brief to the answer to the cross-appeal is waived. If the cross-appellant does not elect to file a single brief, the schedule and form for filing briefs in the cross-appeal shall be in accordance with the procedures for an original appeal.

(B) *Cross-Appellee.* If the appellee/ cross-appellant elects to file a single brief under [a], the appellant/cross-appellee may file a single brief containing its reply on the appeal and its response to the cross-appeal. This combined brief may not exceed 50 numbered pages. The portions of the combined brief that comprise the reply may not exceed 20 numbered pages. The combined brief must be filed within 30 days of the appellee/cross-appellant's single brief.

(7) *References in Briefs and in Oral Arguments to Parties.* In briefs and oral arguments, counsel are expected to minimize references to parties by such designations as "appellant" and "appellee." It promotes clarity to use the designations used in the trial court or in the agency proceedings, or the actual names of parties, or descriptive terms such as "the employee," the "injured person," "the taxpayer," and so forth.

(8) *References in Briefs to the Record.*

(A) *References in Cases in Which Excerpts are Prepared.* References in the briefs to parts of the record reproduced in an excerpt shall be to the pages of the excerpt at which those parts appear. The form for references to pages of the excerpt is [Exc. ____]. Briefs may reference parts of the record not reproduced in an excerpt. The form for references to pages of the transcript is [Tr. ____] and to pages of the trial court file is [R. ____]. The form for references to untranscribed

portions of the electronic record is [CD (#), at Time 00:00:00 or Tape (#), at Log 00:00:00].

(B) *References to be Included.* If reference is made to evidence of which the admissibility is in controversy, reference shall be made to the pages of the transcript at which the evidence was identified, offered, and received or rejected. Appellant's brief shall indicate the pages of the record where each point on appeal was raised in the trial court. If the point on appeal was not raised in the trial court, the brief shall explain why the point is raised for the first time on appeal. Failure to comply with the requirements of this paragraph may result in return of the brief as provided in paragraph 11 of this subdivision.

(9) *Brief of an Amicus Curiae.* A brief of an amicus curiae may be filed only if accompanied by written consent of all the parties, or by leave of the appellate court granted on motion, or at the request of the appellate court. The brief may be conditionally filed with the motion for leave. A motion for leave shall identify the interest of the applicant and shall state the reasons why a brief of an amicus curiae is desirable. Unless all parties otherwise consent, any amicus curiae shall file its brief within the time allowed to the party whose position as to affirmance or reversal the amicus brief will support, unless the court for cause shown shall grant leave for later filing, in which event it shall specify within what period an opposing party may answer. The brief shall be in the form prescribed by this rule and shall be duplicated and served pursuant to the requirements of Rule 212(a)(2). A motion of an amicus curiae to participate in the oral argument will be granted only for extraordinary reasons.

(10) *Failure to File Brief.* When the appellant's opening brief is not filed as required, Rule 511.5 shall apply. When the appellee's brief is not filed as required, appellee will not be heard at oral argument except on consent of the appellant, or by request of the court.

(11) *Defective Briefs.* When a brief fails to comply with the requirements of these rules, the appellate court, on application of any party or on its own motion, and with or without notice as it may determine appropriate, may:

(A) Order the brief to be returned to counsel for correction by interlineation, cancellation, revisions or replacement in whole or in part, and to be refiled with the clerk within a time specified in the order; or

(B) Order the brief stricken from the files, with leave to file a new brief within a specified time; or

(C) Disregard defects and consider the brief as if it were properly prepared.

The authority to return briefs under this section may be exercised by the clerk of court pursuant to Rule 102 (f).

(12) *Citation of Supplemental Authorities.* When pertinent authorities come to the attention of a party after the party's brief has been filed, or after oral argument but before decision, the party may promptly advise the clerk of the court, by letter, with a copy to adversary counsel, setting forth the citations.

There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall contain no argument or explanations. Any response shall be made promptly and shall be similarly limited.



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**** STATUTES CURRENT THROUGH 2008 REGULAR SESSION AND 2008 GENERAL ELECTION ****
***** ANNOTATIONS CURRENT THROUGH OCTOBER 2, 2008 *****

TITLE 10. CRIMINAL PROCEDURE
CHAPTER 10.95. CAPITAL PUNISHMENT -- AGGRAVATED FIRST DEGREE MURDER

GO TO REVISED CODE OF WASHINGTON ARCHIVE DIRECTORY

Rev. Code Wash. (ARCW) § 10.95.010 (2008)

§ 10.95.010. Court rules

No rule promulgated by the supreme court of Washington pursuant to RCW 2.04.190 and 2.04.200, now or in the future, shall be construed to supersede or alter any of the provisions of this chapter.

HISTORY: 1981 c 138 § 1.

JUDICIAL DECISIONS

CONSTRUCTION WITH OTHER LAW.

Since RCW 10.95.040 and CR 5 both deal with the service of a notice after an attorney has appeared in a case, CR 5 is instructive as to the meaning of service in RCW 10.95.040. This section, which provides that the death penalty statute may not be varied by court rule, is not violated by this interpretation as the court rule does not vary the requirements of chapter 10.95 RCW but gives some guidance as to the meaning of the statute. *State v. Clark*, 129 Wn.2d 805, 920 P.2d 187 (1996).

RESEARCH REFERENCES

WASHINGTON LAW REVIEW.

Capital Punishment, Proportionality Review, and Claims of Fairness (With Lessons from Washington State), 79 Wash. L. Rev. 775 (2004).

NOTES APPLICABLE TO ENTIRE TITLE

CROSS REFERENCES.

Criminal justice training commission -- Education and training boards: Chapter 43.101 RCW.
Criminal rules for superior court: Rules of court: Superior Court Criminal Rules (CrR).
Justice without unnecessary delay: State Constitution Art. 1 § 10.
Mental illness -- Financial responsibility: Chapter 71.02 RCW.
Oaths and mode of administering: State Constitution Art. 1 § 6.
Traffic violations: Chapters 46.63, 46.64 RCW.
Victims of crimes, compensation: Chapter 7.68 RCW.

TEXTBOOKS AND TREATISES.

The Law of Evidence in Washington; Robert H. Aronson (Michie).

Washington Criminal Practice in Courts of Limited Jurisdiction; Linda S. Portnoy, Eileen P. Farley (Michie).

NOTES APPLICABLE TO ENTIRE CHAPTER

CROSS REFERENCES.

Homicide: Chapter 9A.32 RCW.

CONSTITUTIONALITY.

Defendant's argument that this chapter creates a mandatory death penalty formula held without merit; the Supreme Court of the United States has repeatedly held that the requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence. *Campbell v. Wood*, 18 F.3d 662 (9th Cir. 1994), cert. denied, 511 U.S. 1119, 114 S. Ct. 2125, 128 L. Ed. 2d 682 (1994).

CONSTRUCTION.

The Sentencing Reform Act (SRA, chapter 9.94A RCW) and this chapter serve two separate functions and are consistent. The SRA does not purport to govern or guide penalty phase juries in their sentencing decisions. This function is served by this chapter, which guides and channels the jury's discretion in reaching an individualized sentencing decision for each defendant convicted of a capital offense. *State v. Brett*, 126 Wn.2d 136, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996).

PROPORTIONALITY.

The legislative guidelines contained in this chapter ensure the proportionality in the first instance by focusing the jury on the crime and the defendant. On review, RCW 10.95.130 requires the court to determine whether the death sentence is "disproportionate" based on the broad range of "similar cases," as defined by the legislature. *State v. Brett*, 126 Wn.2d 136, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996).

GONZAGA LAW REVIEW.

Campbell v. Wood: the death penalty in Washington state: "hanging" on to a method of execution. 30 Gonz. L. Rev. 163.

SEATTLE UNIV. LAW REVIEW.

Mitigation evidence and capital cases in Washington: Proposals for change. 26 Seattle U.L. Rev. 241 (2002).

TEXTBOOKS AND TREATISES.

The Law of Evidence in Washington; Robert H. Aronson (Michie).

Washington Criminal Practice in Courts of Limited Jurisdiction; Linda S. Portnoy, Eileen P. Farley (Michie).



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** STATUTES CURRENT THROUGH 2008 REGULAR SESSION AND 2008 GENERAL ELECTION **

*** ANNOTATIONS CURRENT THROUGH OCTOBER 2, 2008 ***

TITLE 10. CRIMINAL PROCEDURE

CHAPTER 10.95. CAPITAL PUNISHMENT -- AGGRAVATED FIRST DEGREE MURDER

GO TO REVISED CODE OF WASHINGTON ARCHIVE DIRECTORY

Rev. Code Wash. (ARCW) § 10.95.020 (2008)

§ 10.95.020. Definition

A person is guilty of aggravated first degree murder, a class A felony, if he or she commits first degree murder as defined by RCW 9A.32.030(1)(a), as now or hereafter amended, and one or more of the following aggravating circumstances exist:

(1) The victim was a law enforcement officer, corrections officer, or firefighter who was performing his or her official duties at the time of the act resulting in death and the victim was known or reasonably should have been known by the person to be such at the time of the killing;

(2) At the time of the act resulting in the death, the person was serving a term of imprisonment, had escaped, or was on authorized or unauthorized leave in or from a state facility or program for the incarceration or treatment of persons adjudicated guilty of crimes;

(3) At the time of the act resulting in death, the person was in custody in a county or county-city jail as a consequence of having been adjudicated guilty of a felony;

(4) The person committed the murder pursuant to an agreement that he or she would receive money or any other thing of value for committing the murder;

(5) The person solicited another person to commit the murder and had paid or had agreed to pay money or any other thing of value for committing the murder;

(6) The person committed the murder to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group;

(7) The murder was committed during the course of or as a result of a shooting where the discharge of the firearm, as defined in RCW 9.41.010, is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge;

(8) The victim was:

(a) A judge; juror or former juror; prospective, current, or former witness in an adjudicative proceeding; prosecuting attorney; deputy prosecuting attorney; defense attorney; a member of the indeterminate sentence review board; or a probation or parole officer; and

(b) The murder was related to the exercise of official duties performed or to be performed by the victim;

(9) The person committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime, including, but specifically not limited to, any attempt to avoid prosecution as a persistent offender as defined in RCW 9.94A.030;

(10) There was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the person;

(11) The murder was committed in the course of, in furtherance of, or in immediate flight from one of the following crimes:

(a) Robbery in the first or second degree;

(b) Rape in the first or second degree;

(c) Burglary in the first or second degree or residential burglary;

(d) Kidnapping in the first degree; or

(e) Arson in the first degree;

(12) The victim was regularly employed or self-employed as a newsreporter and the murder was committed to obstruct or hinder the investigative, research, or reporting activities of the victim;

(13) At the time the person committed the murder, there existed a court order, issued in this or any other state, which prohibited the person from either contacting the victim, molesting the victim, or disturbing the peace of the victim, and the person had knowledge of the existence of that order;

(14) At the time the person committed the murder, the person and the victim were "family or household members" as that term is defined in *RCW 10.99.020(1), and the person had previously engaged in a pattern or practice of three or more of the following crimes committed upon the victim within a five-year period, regardless of whether a conviction resulted:

(a) Harassment as defined in RCW 9A.46.020; or

(b) Any criminal assault.

HISTORY: 2003 c 53 § 96; 1998 c 305 § 1. Prior: 1995 c 129 § 17 (Initiative Measure No. 159); 1994 c 121 § 3; 1981 c 138 § 2.

NOTES:

*REVISER'S NOTE: RCW 10.99.020 was amended by 2004 c 18 § 2, changing subsection (1) to subsection (3).

INTENT -- EFFECTIVE DATE -- 2003 C 53: See notes following RCW 2.48.180.

FINDINGS AND INTENT -- SHORT TITLE -- SEVERABILITY -- CAPTIONS NOT LAW -- 1995 C 129: See notes following RCW 9.94A.510.

EFFECT OF AMENDMENTS.

2003 c 53 § 96, effective July 1, 2004, inserted "a class A felony" in the undesignated introductory paragraph.

JUDICIAL DECISIONS

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CONSTITUTIONALITY.

-- IN GENERAL.

Death penalty statute was not unconstitutional. *State v. Jeffries*, 105 Wn.2d 398, 717 P.2d 722, cert. denied, 479 U.S. 922, 107 S. Ct. 328, 93 L. Ed. 2d 301 (1986).

-- CLASS OF PERSONS.

RCW 10.95.020, the aggravated murder statute, genuinely narrows the class of persons subject to the death penalty as constitutionally required. *State v. Bushey*, 46 Wn. App. 579, 731 P.2d 553, review denied, 108 Wn.2d 1014 (1987).

-- EQUAL PROTECTION.

State's decision to charge defendant with first degree murder with the aggravating circumstance of second degree burglary rather than charging him separately with the less serious felonies of first degree murder and second degree burglary did not violate equal protection. *State v. Howland*, 66 Wn. App. 586, 832 P.2d 1339 (1992), review denied, 121 Wn.2d 1006, 848 P.2d 1263 (1993).

The elements of solicitation to commit murder are not the same as the elements of premeditated murder committed with the aggravated circumstance of solicitation, and thus defendant was not denied equal protection when charged with the latter crime rather than the former. *State v. Kron*, 63 Wn. App. 688, 821 P.2d 1248, review denied, 119 Wn.2d 1004, 832 P.2d 487 (1992).

There is no equal protection problem with the aggravated first degree murder statute. Varying punishments for the same crime classification may rest upon rational distinctions between motives and methods. *State v. Bushey*, 46 Wn. App. 579, 731 P.2d 553, review denied, 108 Wn.2d 1014 (1987).

Fact that prosecutor could have charged defendant with murder in the first degree or felony murder, but instead charged him with aggravated first degree murder, did not violate equal protection. *State v. Carey*, 42 Wn. App. 840, 714 P.2d 708, review denied, 106 Wn.2d 1003 (1986).

-- OVERBREADTH.

RCW 10.95.020 is not overbroad under the First Amendment because it is content neutral and does not intrude on constitutionally protected rights; section 10.95.020(6) merely requires an enhanced punishment for committing murder if the murder was committed to obtain, maintain, or advance one's position in the hierarchy of an organization, association, or identifiable group. That a political or other viewpoint was expressed through the particular murder or that the murder furthered the exercise of the murderer's association rights does not alter or shield the criminal act: the First Amendment does not protect violence; violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact are entitled to no constitutional protection. *State v. Monschke*, 133 Wn. App. 313, 135 P.3d 966 (2006).

-- VAGUENESS.

Term "group" in RCW 10.95.020(6) is not too vague to satisfy due process notice requirements because the term is not ambiguous and its plain dictionary meaning includes white supremacy. A person of ordinary intelligence would

understand that committing murder to advance one's position as a white supremacist is prohibited by RCW 9A.32.030, 10.95.020(6). *State v. Monschke*, 133 Wn. App. 313, 135 P.3d 966 (2006).

The "committing a murder to conceal a crime" or the "common scheme or plan" aggravating circumstances of this statute are not unconstitutionally vague. *Jeffries v. Blodgett*, 771 F. Supp. 1520 (W.D. Wash. 1991), *aff'd*, 974 F.2d 1179 (9th Cir. 1992), *rev'd on other grounds*, 988 F.2d 923 (9th Cir. 1993).

ACCOMPLICES.

Major participation by a defendant in the acts giving rise to the homicide is required in order to execute a defendant convicted solely as an accomplice to premeditated first degree murder. Merely satisfying the minimal requirements of RCW 9A.08.020, the accomplice liability statute, is insufficient to impose the death penalty under this section, the Eighth and Fourteenth Amendments, and the cruel punishment clause of the Washington State Constitution. *State v. Roberts*, 142 Wn.2d 471, 14 P.3d 713 (2000).

CLOSING ARGUMENT.

Prosecuting attorney did not commit prejudicial misconduct when, in closing argument of penalty phase of murder trial, he referred to the defendant's right to appeal. *In re Jeffries*, 110 Wn.2d 326, 752 P.2d 1338, *cert. denied*, 488 U.S. 948, 109 S. Ct. 379, 102 L. Ed. 2d 368 (1988).

COMMON SCHEME.

Although defendant, who murdered two prostitutes, argued that the trial court substantially lowered the State's burden of proof by improperly defining in a jury instruction the aggravating circumstance of RCW 10.95.020(10), commission of the murders as part of a common scheme or plan, the trial court's instruction properly defined the phrase "common scheme or plan"; any rational trier of fact could have found that defendant's murders of the prostitutes were part of a common scheme or plan. *State v. Yates*, 161 Wn.2d 714, 168 P.3d 359 (2007).

Defendant claimed that there was insufficient evidence to convict him of conspiracy to commit murder in the first degree. He asserted that there was not enough evidence of an agreement between himself and his co-conspirators, and that his conspiracy conviction was invalid because the substantive offense could not be committed without cooperative action; however, a formal agreement was not required for a conviction, and first-degree murder did not require cooperative action. *State v. Anderson*, -- Wn. App. --, -- P.3d -- (Aug. 29, 2005).

Where the jury could have reasonably found that defendant was prepared to kill anyone who interfered with his plan to kill a particular victim and himself, the murders of other victims were sufficiently connected to his overall plan to apply the common scheme aggravator. *State v. Finch*, 137 Wn.2d 792, 975 P.2d 967 (1999), *cert. denied*, 528 U.S. 922, 120 S. Ct. 285, 145 L. Ed. 2d 239 (1999).

Jury's special finding that victims died as the result of a common scheme or plan, an aggravating factor for premeditated murder in the first degree, was reconciled with defendant's acquittal on the second count of first degree murder since aggravated first degree murder requires that the jury find the defendant committed first degree premeditated murder and the existence of an aggravating circumstance. *State v. Baruso*, 72 Wn. App. 603, 865 P.2d 512 (1993), *review denied*, 124 Wn.2d 1008, 879 P.2d 292 (1994).

The phrase "common scheme or plan" does not need to be defined in jury instructions. *State v. Peerson*, 62 Wn. App. 755, 816 P.2d 43 (1991), *review denied*, 118 Wn.2d 1012, 824 P.2d 491 (1992).

Substantial evidence existed for trier of fact to find that a common scheme or plan existed to kill both victims. *State v. Guloy*, 104 Wn.2d 412, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S. Ct. 1208, 89 L. Ed. 2d 321 (1986).

The phrase "common scheme or plan" are words of common understanding, thus instruction as to the meaning of the phrase was unnecessary. *State v. Guloy*, 104 Wn.2d 412, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S. Ct. 1208, 89 L. Ed. 2d 321 (1986).

Where the state charged defendant with aggravated first degree murder, specifically relying on the aggravating factor of the killing of more than one victim as part of a scheme to promote gambling, failure of the state to charge a criminal conspiracy did not deny defendant notice of the charges against him. *State v. Dictado*, 102 Wn.2d 277, 687 P.2d 172 (1984).

CONCEALMENT.

Evidence was sufficient for jury to find defendant committed kidnapping and murder to conceal his identity; if robbery had been the only goal there would have been no reason to kidnap and murder victim. *State v. Boot*, 89 Wn. App. 780, 950 P.2d 964, *review denied*, 135 Wn.2d 1015, 960 P.2d 939 (1998).

Even though RCW 9.94A.390(2) does not list efforts to conceal a crime as grounds for imposition of an exceptional sentence, in contrast to subsection (9) of this section, the list of factors in 9.94A.390 is not exhaustive; thus, where the crime could have constituted aggravated first degree murder had the victim not survived despite the injuries, the trial court's reliance on defendant's efforts to conceal the crime as a reason to impose an exceptional sentence upward was not an abuse of discretion. *State v. Smith*, 82 Wn. App. 153, 916 P.2d 960 (1996).

The correct standard in applying the aggravating factor of concealment is to require the jury to follow the statutory language and find that the murder was committed for the purpose of concealing the identity of a person who committed a crime and that the underlying crime was not the murder. *State v. Gentry*, 125 Wn.2d 570, 888 P.2d 1105, cert. denied, 516 U.S. 843, 116 S. Ct. 131, 133 L. Ed. 2d 79 (1995).

There is no requirement that the prosecution prove that a defendant charged with aggravated first degree murder intended to conceal a particular crime. *Jeffries v. Blodgett*, 771 F. Supp. 1520 (W.D. Wash. 1991), aff'd, 974 F.2d 1179 (9th Cir. 1992), rev'd on other grounds, 988 F.2d 923 (9th Cir. 1993).

In murder trial, sufficient circumstantial evidence existed of first-degree kidnapping and first or second degree robbery to support a finding beyond a reasonable doubt of the aggravating circumstance that the murder was committed to conceal a crime or the identity of a person committing a crime. *State v. Longworth*, 52 Wn. App. 453, 761 P.2d 67 (1988), review denied, 112 Wn.2d 1006 (1989).

In aggravated first-degree murder trial, trial court did not err in failing to specify in the jury instructions or in special interrogatories to the jury the crime that the murder allegedly was committed to conceal. *State v. Longworth*, 52 Wn. App. 453, 761 P.2d 67 (1988), review denied, 112 Wn.2d 1006 (1989).

Trial court was not required to instruct jury as to what crime the defendant was attempting to conceal under the first aggravating circumstance of this statute or what the common scheme or plan was under the second aggravating circumstance. *State v. Jeffries*, 105 Wn.2d 398, 717 P.2d 722, cert. denied, 479 U.S. 922, 107 S. Ct. 328, 93 L. Ed. 2d 301 (1986).

CONSTRUCTION.

This section does not amend or revise RCW 9A.32.030(1)(a). *In re Lord*, 123 Wn.2d 296, 868 P.2d 835, modified on other grounds, 123 Wn.2d 737, 870 P.2d 964 (1994).

White supremacy falls within the meaning of RCW 10.95.020(6) because under the statute's plain language, white supremacy is an "identifiable group" with a "hierarchy." *State v. Monschke*, 133 Wn. App. 313, 135 P.3d 966 (2006).

CONTRACTING FOR MURDER.

Where murder defendant's alleged aggravating act was contracting for murder with his codefendant, the codefendant's subsequent acquittal of the same aggravating act did not require dismissal of defendant's aggravated murder charge. *State v. Harris*, 106 Wn.2d 784, 725 P.2d 975 (1986), cert. denied, 480 U.S. 940, 107 S. Ct. 1592, 94 L. Ed. 2d 781 (1987).

State, by charging defendant with both aggravated first degree murder and first degree felony murder, and by instructing on both offenses, did not deny defendant a fair trial and violate double jeopardy principles; the two offenses had different statutory elements and were not different means for committing the same offense or greater or lesser offenses, such that the state did not have to charge the two offenses as alternatives. *State v. Meas*, 118 Wn. App. 297, 75 P.3d 998 (2003), review denied, 151 Wn.2d 1020, 91 P.3d 95 (2004).

DUTIES OF OFFICER.

Whether officer may have made an incorrect judgment regarding one or more of a suspect's constitutional rights in no way determines whether that officer was killed while performing his official duties. *State v. Hoffman*, 116 Wn.2d 51, 804 P.2d 577 (1991).

In prosecution for the aggravated first degree murder of a policeman, failure of trial court to instruct the jury that to convict defendant it must find that defendant knew the victim was performing his official duties at the time of the murder was not error. *State v. Hughes*, 106 Wn.2d 176, 721 P.2d 902 (1986).

ENHANCEMENT OF PENALTY.

The statutory aggravating circumstances which, when present, raise premeditated first degree murder to aggravated first degree murder punishable by death or mandatory life imprisonment are "aggravation of penalty" factors which enhance the penalty for the offense, and are not elements of a crime as such; accordingly, it is unnecessary that the aggravating circumstances alleged to exist be set forth as elements of the offense in the "to convict" instruction on the underlying murder charge. *State v. Kincaid*, 103 Wn.2d 304, 692 P.2d 823 (1985).

ERROR HARMLESS.

There is no such crime as conspiracy to commit aggravated murder, but defendant's conviction on that charge was tantamount to conviction of conspiracy to commit first degree murder with aggravating circumstances, thus any error was harmless. *State v. Kron*, 63 Wn. App. 688, 821 P.2d 1248, review denied, 119 Wn.2d 1004, 832 P.2d 487 (1992).

EVIDENCE INSUFFICIENT.

In a capital murder case, the evidence was insufficient to establish the aggravating factor that defendant committed the murders of two prostitutes to conceal the crime of patronizing a prostitute; if defendant had killed every prostitute he patronized, one could rationally infer that defendant intended to eliminate any evidence that he had committed the misdemeanor of patronizing prostitutes, but as the defense showed, defendant patronized other prostitutes without killing them. *State v. Yates*, 161 Wn.2d 714, 168 P.3d 359 (2007).

EVIDENCE SUFFICIENT.

In a capital murder case, the evidence was sufficient to establish that defendant murdered two prostitutes in furtherance of robbery; the jury could have reasonably believed that defendant negotiated the price of a sexual act, paid up front, murdered the women, and then took their money, disturbing or taking articles of clothing in which the women were likely to have concealed their money. *State v. Yates*, 161 Wn.2d 714, 168 P.3d 359 (2007).

Although petitioner challenged the sufficiency of the evidence that he premeditated the killing of his mother or committed it in the course or furtherance of a robbery, there was considerable circumstantial evidence petitioner used force, at least in part, to obtain his mother's cashbox; petitioner had financial difficulties shortly before the murder, and the mother's husband testified that on the day of the murder the cashbox held approximately \$ 1,500. *State v. Allen*, 159 Wn.2d 1, 147 P.3d 581 (2006).

Since the evidence supported a rational inference that defendant was voluntarily intoxicated, that defendant intentionally shot and killed a deputy, knowing the nature and quality of that act, and that defendant knew the shooting was wrong, a rational trier of fact could have found that defendant failed to prove, by a preponderance of the evidence, that he was insane as a defense to the charge of first degree aggravated murder. *State v. Matthews*, 132 Wn. App. 936, 135 P.3d 495 (2006).

Evidence was sufficient such that a rational trier of fact could find that defendant murdered the victim to advance his position as a white supremacist because (1) defendant was the member of a white supremacist subgroup; (2) defendant wanted to advance his position in the subgroup and open his own local chapter; (3) acts of violence elevated a member's status in many white supremacist subgroups; (4) defendant sought to elevate a co-defendant's status by helping her obtain "red shoelaces," which defendant believed were earned by violent acts against "inferior" people; (5) defendant had previously advanced his own position in the subgroup through violent acts and wore red shoelaces and white suspenders as an indication of his advancement; (6) defendant and his co-defendants were underneath an interstate looking to "do" someone inferior; (7) the victim was viewed as inferior by defendant and his co-defendants; (8) the victim's murder elevated a co-defendant's status; and (9) defendant wondered aloud whether the victim's murder would elevate his status with God. *State v. Monschke*, 133 Wn. App. 313, 135 P.3d 966 (2006).

Sufficient evidence supported defendant's conviction for first-degree aggravated murder in violation of RCW 10.95.020 based on the trial court's finding that defendant committed first-degree murder in the course of a burglary and in violation of a no-contact order as provided in RCW 10.95.020(1)(c) and RCW 10.95.020(13). Based on the evidence, a rational trier of fact could have found beyond a reasonable doubt that defendant unlawfully entered the victim's apartment through a broken window or through an unlocked front door, and at the very least, a rational trier of fact could have found that even if the victim permitted defendant to enter the apartment, defendant remained unlawfully because a no-contact order had previously barred him from entering those premises. *State v. Mason*, 127 Wn. App. 554, 110 P.3d 245 (2005).

In trial of defendant for aggravated first-degree murder in which he was sentenced to death, evidence supported finding of aggravated circumstances, jury instructions concerning unanimity were proper, and jury instructions concerning aggravating and mitigating circumstances were proper. *Jeffries v. Blodgett*, 988 F.2d 923 (9th Cir. 1993), modified on other grounds, 5 F.3d 1180 (9th Cir. 1993), cert. denied, 510 U.S. 1191, 114 S. Ct. 1294, 127 L. Ed. 2d 647 (1994).

Evidence was sufficient to establish premeditation: killing was committed with a knife and multiple wounds were inflicted, victim was struck in the face with something other than the knife, defensive wounds on victim indicated a prolonged struggle, and defendant's act of obtaining the knife from victim's kitchen could reasonably indicate deliberation. *State v. Ortiz*, 119 Wn.2d 294, 831 P.2d 1060 (1992).

There was substantial evidence from which the jury could have found that defendants knew or reasonably should have known that the homicide victim was a law enforcement officer engaged in official duties at the time of the homicide. *State v. Hoffman*, 116 Wn.2d 51, 804 P.2d 577 (1991).

Evidence was sufficient to sustain jury's finding of aggravating circumstances in two counts of aggravated first degree murder. *State v. Jeffries*, 105 Wn.2d 398, 717 P.2d 722, cert. denied, 479 U.S. 922, 107 S. Ct. 328, 93 L. Ed. 2d 301 (1986).

GUIDELINES.

A county prosecutor is not required to publish guidelines regarding when aggravated murder will be charged. *State v. Martin*, 41 Wn. App. 133, 703 P.2d 309, review denied, 104 Wn.2d 1016 (1985).

"IN THE COURSE OF."

Evidence did not support a charge that defendant killed his wife in the course of the arson, and therefore defendant's sentence of life in prison under RCW 10.95.020(11)(e) was reversed, because the murder was complete before the arson and the murder did not further the arson; rather defendant used the arson to cover up the murder. *State v. Hacheney*, 160 Wn.2d 503, 158 P.3d 1152 (2007).

Where defendant was charged with first degree aggravated murder, proof that a burglary was committed in the course of the murder was only an element of the charge, and defendant's statement that he was not invited to enter the trailer could be used to prove the existence of this aggravator. *State v. Finch*, 137 Wn.2d 792, 975 P.2d 967 (1999), cert. denied, 528 U.S. 922, 120 S. Ct. 285, 145 L. Ed. 2d 239 (1999).

Evidence held sufficient to find that the murder committed by the defendant was committed in furtherance of, in the course of, or in immediate flight from rape, robbery, and kidnapping as prescribed in (11). *State v. Brown*, 132 Wn.2d 529, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007, 118 S. Ct. 1192, 140 L. Ed. 2d 322 (1998).

INCLUDED OFFENSES.

Counsel was not ineffective for failing to dismiss the aggravating factor of rape under RCW 10.95.020(11)(b) because the process to dismiss prosecution is not applicable to aggravating factors alleged in murder prosecutions. In re *Pers. Restraint of Woods*, 154 Wn.2d 400, 114 P.3d 607 (2005).

First degree felony murder is not a lesser included offense of aggravated first degree murder. *State v. Pirtle*, 127 Wn.2d 628, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026, 116 S. Ct. 2568, 135 L. Ed. 2d 1084 (1996).

The definition of first degree felony murder includes attempted crimes (RCW 9A.32.030(1)(c)), whereas the aggravating factor defined in subsection (9) does not. In re *Lord*, 123 Wn.2d 296, 868 P.2d 835, modified on other grounds, 123 Wn.2d 737, 870 P.2d 964 (1994).

Where defendant was charged in the alternative with felony murder and aggravated first degree murder, and admitted being an accomplice to the first degree burglary upon which the felony murder charge was predicated, trial court did not err in refusing to grant instructions on the lesser included offenses of second degree murder and first and second degree manslaughter. *State v. Bowerman*, 115 Wn.2d 794, 802 P.2d 116 (1990), review denied, *State v. Hutcheson*, 118 Wn.2d 1020, 827 P.2d 1012 (1992).

INFORMATION.

An information charging first-degree murder that clearly stated "the defendant committed the murder to conceal ... the identity of the person committing a crime" set forth the required elements of the crime. *State v. Elmore*, 139 Wn.2d 250, 985 P.2d 289 (1999), cert. denied, 531 U.S. 837, 121 S. Ct. 98, 148 L. Ed. 2d 57 (2000).

Information alleging murder was committed in the "course of or furtherance of robbery," rather than the crime of robbery, was sufficient; the information cited to subsection (9)(a), which lists the crime of robbery in the first or second degree as an aggravating factor. *State v. Brett*, 126 Wn.2d 136, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996).

Aggravated first degree murder and first degree felony murder are not different means of committing the same offense, nor are they greater and lesser offenses of each other; thus, for the jury to be instructed on both offenses, the state must include both charges in the information. In re *Lord*, 123 Wn.2d 296, 868 P.2d 835, modified on other grounds, 123 Wn.2d 737, 870 P.2d 964 (1994).

INSTRUCTIONS.

General unanimity instruction in aggravated first degree murder trial was sufficient to protect defendant's right to a unanimous verdict. *Jeffries v. Blodgett*, 771 F. Supp. 1520 (W.D. Wash. 1991), *aff'd*, 974 F.2d 1179 (9th Cir. 1992), *rev'd* on other grounds, 988 F.2d 923 (9th Cir. 1993).

INTENT.

Conviction of defendant for first degree murder with the aggravated circumstance of second degree burglary was proper regardless of whether defendant had a separate intent to commit the burglary. *State v. Howland*, 66 Wn. App. 586, 832 P.2d 1339 (1992), review denied, 121 Wn.2d 1006, 848 P.2d 1263 (1993).

It is not necessary to show that an accomplice had the intent that the victim would be killed in order to convict the accomplice of aggravated murder. *State v. Guloy*, 104 Wn.2d 412, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 106 S. Ct. 1208, 89 L. Ed. 2d 321 (1986).

JURY.

-- DEATH-OPPOSED.

In capital cases, exclusion of all jurors opposed to capital punishment is permitted under the United States Constitution and the Washington Constitution. *State v. Kron*, 63 Wn. App. 688, 821 P.2d 1248, review denied, 119 Wn.2d 1004, 832 P.2d 487 (1992).

Exclusion of "death-opposed" juror from the guilt phase of trial for aggravated first degree murder did not deny defendant due process of law. *State v. Jeffries*, 105 Wn.2d 398, 717 P.2d 722, cert. denied, 479 U.S. 922, 107 S. Ct. 328, 93 L. Ed. 2d 301 (1986).

-- FINDINGS.

Jury must find the defendant guilty of first degree murder before finding the defendant guilty of aggravated first degree murder. *Jeffries v. Wood*, 114 F.3d 1484 (9th Cir. 1997).

-- INSTRUCTIONS.

In aggravated first degree murder trial, jury instruction regarding aggravating circumstances did not allow conviction for murder based solely upon statutory aggravating factors or violate the defendants' rights by creating a mandatory presumption. *State v. Hoffman*, 116 Wn.2d 51, 804 P.2d 577 (1991).

In aggravated first degree murder trial, trial court's justifiable homicide and self-defense instructions correctly stated the law and allowed defendants to argue their defense theories to the jury. *State v. Hoffman*, 116 Wn.2d 51, 804 P.2d 577 (1991).

Trial court properly instructed the jury that it could consider alternative means of committing aggravated first degree murder; the verdict forms that were used adequately established jury unanimity. *In re Jeffries*, 110 Wn.2d 326, 752 P.2d 1338, cert. denied, 488 U.S. 948, 109 S. Ct. 379, 102 L. Ed. 2d 368 (1988).

Trial court did not err in instructing the jury that if it did not unanimously find sufficient mitigating circumstances to merit leniency, then the sentence would be life imprisonment without the possibility of parole. *State v. Jeffries*, 105 Wn.2d 398, 717 P.2d 722, cert. denied, 479 U.S. 922, 107 S. Ct. 328, 93 L. Ed. 2d 301 (1986).

Instruction adequately informed jury that state had burden of proof in showing that there were not sufficient mitigating circumstances to merit leniency. *State v. Jeffries*, 105 Wn.2d 398, 717 P.2d 722, cert. denied, 479 U.S. 922, 107 S. Ct. 328, 93 L. Ed. 2d 301 (1986).

-- REQUIREMENTS.

In aggravated murder trial, trial court did not err in refusing to either require the jury to describe in a special jury form the common scheme or plan it did find, or to find, as a prerequisite to finding the aggravating circumstance, that the state proved the specific scheme or plan alleged in its bill of particulars. *State v. Pearson*, 62 Wn. App. 755, 816 P.2d 43 (1991), review denied, 118 Wn.2d 1012, 824 P.2d 491 (1992).

-- RESPONSE.

In aggravated first-degree murder trial, the jury's special interrogatory response that they did not unanimously find that the victim was murdered in the course of first-degree kidnapping or first- or second-degree robbery was not inconsistent with the response that the jurors unanimously found that the victim had been murdered with the intent to conceal the commission of a crime or to protect or conceal the identity of a person committing a crime. *State v. Longworth*, 52 Wn. App. 453, 761 P.2d 67 (1988), review denied, 112 Wn.2d 1006 (1989).

-- VERDICTS.

Before a penalty for aggravated murder can be imposed, there must first be jury unanimity as to the premeditation means of committing first degree murder; under Washington law, therefore, it is not possible for a defendant to receive a sentence for aggravated first degree murder without jury unanimity as to the underlying premeditated murder. *State v. Fortune*, 77 Wn. App. 628, 893 P.2d 670 (1995), *aff'd*, 128 Wn.2d 464, 909 P.2d 930 (1996).

Because the general verdict and special verdict were consistent with a jury finding of second degree murder and the jury had an instruction to support that finding, the verdicts were reconcilable. *State v. Baruso*, 72 Wn. App. 603, 865 P.2d 512 (1993), *review denied*, 124 Wn.2d 1008, 879 P.2d 292 (1994).

Although jury returned general verdicts finding defendant guilty of first degree aggravated murder on both counts and special verdicts indicating that only one victim was murdered as part of a common scheme or plan, the general and special verdicts were not so irreconcilably inconsistent as to require reversal of the general verdicts. *State v. Pearson*, 62 Wn. App. 755, 816 P.2d 43 (1991), *review denied*, 118 Wn.2d 1012, 824 P.2d 491 (1992).

MULTIPLE VICTIMS.

In order to find aggravated murder for multiple victims, a jury must necessarily find that at least one murder was first degree, and the other was murder in the first or second degree. *State v. Baruso*, 72 Wn. App. 603, 865 P.2d 512 (1993), *review denied*, 124 Wn.2d 1008, 879 P.2d 292 (1994).

'MURDERS.'

In statutory aggravating circumstance number 8 which reads "more than one victim and the murders were part of a common scheme or plan or the result of a single act", the reference to "murders" is a reference to either murder in the first degree or murder in the second degree. *State v. Kincaid*, 103 Wn.2d 304, 692 P.2d 823 (1985).

PRESUMPTION.

Argument that Washington's capital punishment statute creates a mandatory presumption in favor of the death penalty and places the burden on the defendant to prove there are sufficient mitigating circumstances to merit leniency was rejected. *Campbell v. Kincheloe*, 829 F.2d 1453 (9th Cir. 1987), *cert. denied*, 488 U.S. 948, 109 S. Ct. 380, 102 L. Ed. 2d 369 (1988).

PRIOR CONVICTION.

Where petitioner's prior manslaughter conviction, entered upon a plea of guilty, was admitted in the penalty phase of his aggravated murder trial, the petitioner could not rely solely on the state's asserted failure to prove the validity of the prior conviction, but instead had to show some infirmity in fact existed in that conviction. *In re Harris*, 111 Wn.2d 691, 763 P.2d 823 (1988), *cert. denied*, 490 U.S. 1075, 109 S. Ct. 2088, 104 L. Ed. 2d 651 (1989).

PUNISHMENT.

In a capital case, the jury is to consider not each count separately but all crimes the defendant has been convicted of in deciding whether death is the appropriate punishment. *State v. Jeffries*, 105 Wn.2d 398, 717 P.2d 722, *cert. denied*, 479 U.S. 922, 107 S. Ct. 328, 93 L. Ed. 2d 301 (1986).

RELATION TO OFFICIAL DUTY.

Plain language of subsection (8) supports the conclusion that a defendant is not required to be a party in the proceeding in which the victim was, or was going to be, a prospective witness. *State v. Goldberg*, 149 Wn.2d 888, 72 P.3d 1083 (2003).

SENTENCING.

United States Supreme Court was not persuaded to depart from the state supreme court's determination that a juror misstated Washington's sentencing law because the sole reason the juror expressed for imposing the death penalty, in a case where defendant opposed it, was whether defendant could have been released and would recommit, and the juror's reason was equivalent to treating the risk of recidivism as the sole aggravating factor, rather than treating lack of future dangerousness as a possible mitigating consideration, under RCW 10.95.020, 10.95.070. *Uttecht v. Brown*, -- U.S. --, 127 S. Ct. 2218, 167 L. Ed. 2d 1014 (June 4, 2007).

Aggravating factors are not elements of aggravated first-degree murder. The crime is premeditated murder in the first-degree accompanied by one or more of the aggravating factors. The elements of premeditated first-degree murder do not include the elements of first-degree kidnapping. *State v. Anderson*, -- Wn. App. --, -- P.3d -- (Aug. 29, 2005).

Life without parole is a proper sentence for aggravated first degree murder. *State v. Kron*, 63 Wn. App. 688, 821 P.2d 1248, review denied, 119 Wn.2d 1004, 832 P.2d 487 (1992).

'SINGLE ACT.'

Multiple murders caused by consecutive gun shots can be the result of a "single act" within the meaning of this statute. *State v. Guloy*, 104 Wn.2d 412, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 106 S. Ct. 1208, 89 L. Ed. 2d 321 (1986).

Defendant's contention that an allegation under the "single act" portion of this statute deprived him of notice of what act the state would rely on to satisfy the statute was rejected since the state's theory was not concealed from the defendant. *State v. Dictado*, 102 Wn.2d 277, 687 P.2d 172 (1984).

SEATTLE UNIV. LAW REVIEW.

Comparative proportionality review: will the ends, will the means. 18 Seattle U. L. Rev. 593.

RESEARCH REFERENCES

ALR.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that defendant committed murder while under sentence of imprisonment, in confinement at correctional custody, and the like -- post-Gregg cases. 67 ALR4th 917.

Sufficiency of evidence, for death penalty purposes, to establish statutory aggravating circumstance that murder was committed in course of committing, attempting, or fleeing from other offense, and the like -- post-Gregg cases. 67 ALR4th 887.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that in committing murder, defendant created risk of death or injury to more than one person, to many persons, and the like -- post-Gregg cases. 64 ALR4th 837.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that murder was committed to avoid arrest or prosecution to effect escape from custody, to hinder governmental function or enforcement of law, and the like -- post-Gregg cases. 64 ALR4th 755.

USER NOTE: For more generally applicable notes, see notes under the first section of this heading, part, article, chapter or title.



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** STATUTES CURRENT THROUGH 2008 REGULAR SESSION AND 2008 GENERAL ELECTION **
*** ANNOTATIONS CURRENT THROUGH OCTOBER 2, 2008 ***

TITLE 10. CRIMINAL PROCEDURE
CHAPTER 10.95. CAPITAL PUNISHMENT -- AGGRAVATED FIRST DEGREE MURDER

GO TO REVISED CODE OF WASHINGTON ARCHIVE DIRECTORY

Rev. Code Wash. (ARCW) § 10.95.030 (2008)

§ 10.95.030. Sentences for aggravated first degree murder

(1) Except as provided in subsection (2) of this section, any person convicted of the crime of aggravated first degree murder shall be sentenced to life imprisonment without possibility of release or parole. A person sentenced to life imprisonment under this section shall not have that sentence suspended, deferred, or commuted by any judicial officer and the indeterminate sentence review board or its successor may not parole such prisoner nor reduce the period of confinement in any manner whatsoever including but not limited to any sort of good-time calculation. The department of social and health services or its successor or any executive official may not permit such prisoner to participate in any sort of release or furlough program.

(2) If, pursuant to a special sentencing proceeding held under RCW 10.95.050, the trier of fact finds that there are not sufficient mitigating circumstances to merit leniency, the sentence shall be death. In no case, however, shall a person be sentenced to death if the person was mentally retarded at the time the crime was committed, under the definition of mental retardation set forth in (a) of this subsection. A diagnosis of mental retardation shall be documented by a licensed psychiatrist or licensed psychologist designated by the court, who is an expert in the diagnosis and evaluation of mental retardation. The defense must establish mental retardation by a preponderance of the evidence and the court must make a finding as to the existence of mental retardation.

(a) "Mentally retarded" means the individual has: (i) Significantly subaverage general intellectual functioning; (ii) existing concurrently with deficits in adaptive behavior; and (iii) both significantly subaverage general intellectual functioning and deficits in adaptive behavior were manifested during the developmental period.

(b) "General intellectual functioning" means the results obtained by assessment with one or more of the individually administered general intelligence tests developed for the purpose of assessing intellectual functioning.

(c) "Significantly subaverage general intellectual functioning" means intelligence quotient seventy or below.

(d) "Adaptive behavior" means the effectiveness or degree with which individuals meet the standards of personal independence and social responsibility expected for his or her age.

(e) "Developmental period" means the period of time between conception and the eighteenth birthday.

HISTORY: 1993 c 479 § 1; 1981 c 138 § 3.

JUDICIAL DECISIONS

ANALYSIS

Aggravating circumstances

Construction

Death penalty

Evidence

Life imprisonment without parole

--Constitutionality

--Commutation

--Proper

--Resentencing

AGGRAVATING CIRCUMSTANCES.

Evidence did not support a charge that defendant killed his wife in the course of the arson, and therefore defendant's sentence of life in prison under RCW 10.95.020(11)(e) was reversed, because the murder was complete before the arson and the murder did not further the arson; rather defendant used the arson to cover up the murder. *State v. Hacheney*, 160 Wn.2d 503, 158 P.3d 1152 (2007).

From the face of the information, defendant was charged with aggravated first-degree murder, for which the maximum penalty was life imprisonment with no possibility of parole, or death if there are no mitigating circumstances to merit leniency. The underlying elements or details of the aggravating factors would not have changed his maximum

penalty and same were not required to be included in the information. *State v. Anderson*, -- Wn. App. --, -- P.3d -- (Aug. 29, 2005).

The statutory aggravating circumstances which, when present, raise premeditated first degree murder to aggravated first degree murder punishable by death or mandatory life imprisonment are "aggravation of penalty" factors which enhance the penalty for the offense, and are not elements of a crime as such; accordingly, it is unnecessary that the aggravating circumstances alleged to exist be set forth as elements of the offense in the "to convict" instruction on the underlying murder charge. *State v. Kincaid*, 103 Wn.2d 304, 692 P.2d 823 (1985).

CONSTRUCTION.

Aggravating factors are not elements of aggravated first-degree murder. The crime is premeditated murder in the first-degree accompanied by one or more of the aggravating factors. The elements of premeditated first-degree murder do not include the elements of first-degree kidnapping. *State v. Anderson*, -- Wn. App. --, -- P.3d -- (Aug. 29, 2005).

Defendant's claim that the trial court had the option to sentence him on either of his two convictions failed, as this section did not give trial courts an option in sentencing defendants convicted of aggravated first degree murder. *State v. Meas*, 118 Wn. App. 297, 75 P.3d 998 (2003), review denied, 151 Wn.2d 1020, 91 P.3d 95 (2004).

DEATH PENALTY.

Evidence was sufficient to support the imposition of the death penalty based on defendant's conviction on three counts of aggravated first-degree murder of his wife and two of his daughters, because defendant had a history of domestic violence and brutally killed three family members and held another daughter against her will for many hours, although defendant offered four mitigating factors: his near-lack of criminal history, the "extreme mental disturbance" he was under at the time, the fact he was unlikely to be a danger to others in the future, and his underlying mental disease or defect. *State v. Cross*, 156 Wn.2d 580, 132 P.3d 80 (2006).

In prosecution for four counts of aggravated first-degree murder, while it was the judge who pronounced death sentence, he had no discretion under Washington law; once the jury found insufficient mitigating circumstances to recommend leniency, the death sentence was mandatory. *Rice v. Wood*, 77 F.3d 1138 (9th Cir. 1996).

Prosecutor's closing argument for the death sentence at penalty phase of murder trial in which he referred to (1) the potential harm to other persons in prison; (2) the potential harm to trial witnesses; and (3) the theory of societal self-defense, did not render the jury's verdict, that there were not sufficient mitigating circumstances to merit leniency, unconstitutional. *Campbell v. Kincheloe*, 829 F.2d 1453 (9th Cir. 1987), cert. denied, 488 U.S. 948, 109 S. Ct. 380, 102 L. Ed. 2d 369 (1988).

Argument that Washington's capital punishment statute creates a mandatory presumption in favor of the death penalty and places the burden on the defendant to prove there are sufficient mitigating circumstances to merit leniency was rejected. *Campbell v. Kincheloe*, 829 F.2d 1453 (9th Cir. 1987), cert. denied, 488 U.S. 948, 109 S. Ct. 380, 102 L. Ed. 2d 369 (1988).

Death penalty statute adequately guards against arbitrary infliction of the death penalty. *State v. Rupe*, 101 Wn.2d 664, 683 P.2d 571 (1984).

The death penalty is not per se unconstitutional under the state constitution. *State v. Rupe*, 101 Wn.2d 664, 683 P.2d 571 (1984).

Giving defendant a choice between two methods of execution is not unconstitutional. *State v. Rupe*, 101 Wn.2d 664, 683 P.2d 571 (1984).

EVIDENCE.

Admission of evidence of murder defendant's gun collection in sentencing phase of trial was irrelevant, prejudicial, and violative of his due process rights, requiring remand for new sentencing proceeding. *State v. Rupe*, 101 Wn.2d 664, 683 P.2d 571 (1984).

LIFE IMPRISONMENT WITHOUT PAROLE.

-- CONSTITUTIONALITY.

Under a former version of this section (in former chapter 10.94 RCW), defendants who went to trial could receive a sentence of death or life imprisonment without possibility of parole, while defendants who pled guilty could receive no more than life with the possibility of parole; the former statute unconstitutionally penalized a defendant who chose to go to trial. *Grisby v. Blodgett*, 130 F.3d 365 (9th Cir. 1997).

As a matter of law, a sentence of life without the possibility of parole is significantly different from a sentence of life with the possibility of parole. *Grisby v. Blodgett*, 130 F.3d 365 (9th Cir. 1997).

Where defendant's death sentence imposed under the 1975 version of the penalty statute was vacated after the death penalty portion of the statute was held unconstitutional, and life imprisonment without parole was imposed instead, the life without parole sentence was valid under the 1975 savings clause; the 1975 statute did not suffer from the same constitutional infirmities which rendered the entire 1977 version unconstitutional. *Snook v. Wood*, 89 F.3d 605 (9th Cir. 1996).

Defendant's conviction by a jury of aggravated first degree murder under the 1975 murder statute and his sentence of life without possibility of parole pursuant to the alternative sentencing provision of that statute were constitutional. In re *Snook*, 67 Wn. App. 714, 840 P.2d 207 (1992).

A sentence of life imprisonment without possibility of parole is unconstitutional when pursuant to statute it cannot be imposed following a guilty plea. Such a sentence is unconstitutional because it penalizes a defendant's assertion of the right to a trial by jury. *Robtoy v. Kincheloe*, 871 F.2d 1478 (9th Cir. 1989), cert. denied, 494 U.S. 1031, 110 S. Ct. 1483, 108 L. Ed. 2d 619, 494 U.S. 1061, 110 S. Ct. 1538, 108 L. Ed. 2d 777 (1990).

Mandatory statutory sentence of life imprisonment without possibility of parole, entered on a charge of aggravated murder in the first degree, did not amount to an unconstitutional restriction of the judiciary's sentencing power. *State v. Hughes*, 106 Wn.2d 176, 721 P.2d 902 (1986).

Sentence of life imprisonment without the possibility of parole did not violate equal protection or public policy. *State v. Cummings*, 44 Wn. App. 146, 721 P.2d 545, review denied, 106 Wn.2d 1017 (1986).

The penalty of life imprisonment without the possibility of parole is constitutional. *State v. Anderson*, 41 Wn. App. 85, 702 P.2d 481 (1985), review denied, 106 Wn.2d 1001, 720 P.2d 782 (1986), rev'd on other grounds, 107 Wn.2d 745, 733 P.2d 517 (1987).

Imposition of a sentence of life imprisonment without the possibility of release or parole for defendants who plead guilty to or are convicted of aggravated murder in the first degree is constitutionally valid. *Tripp v. Scott*, 29 Wn. App. 869, 631 P.2d 973 (1981), overruled on other grounds, *Baker v. Leonard*, 120 Wn.2d 538, 843 P.2d 1050 (1993).

A sentence of life without possibility of parole reserved solely for those who chose to go to trial and not imposable on those pleading guilty is unconstitutional under *United States v. Jackson*, 390 U.S. 570, 88 S. Ct. 1209, 20, L. Ed. 2d 138 (1968). *Norman v. Ducharme*, 871 F.2d 1483 (9th Cir. 1989), cert. denied, 494 U.S. 1031, 110 S. Ct. 1483, 108 L. Ed. 2d 619, 494 U.S. 1061, 110 S. Ct. 1538, 108 L. Ed. 2d 777 (1990).

-- COMMUTATION.

The Governor has the power to commute a sentence of life imprisonment without the possibility of parole. *State v. Rupe*, 108 Wn.2d 734, 743 P.2d 210 (1987), cert. denied, 486 U.S. 1061, 108 S. Ct. 2834, 100 L. Ed. 2d 934 (1988).

-- PROPER.

Life without parole is a proper sentence for aggravated first degree murder. *State v. Kron*, 63 Wn. App. 688, 821 P.2d 1248, review denied, 119 Wn.2d 1004, 832 P.2d 487 (1992).

-- RESENTENCING.

The maximum sentence on a plea of guilty to first degree murder of any kind under the first degree murder sentencing scheme in effect in 1980 was life with the possibility of parole; thus petitioner's 1980 sentence, on plea of guilty, to life without possibility of parole, necessitated remand for resentencing to life with the possibility of parole. In re *Moore*, 116 Wn.2d 30, 803 P.2d 300 (1991).

A defendant has standing to challenge his sentence of life imprisonment without possibility of parole under *United States v. Jackson*, 390 U.S. 570, 88 S. Ct. 1209, 20, L. Ed. 2d 138 (1968), even though the defendant actually did exercise his right to a jury trial. *Jackson* applies to statutes that penalize the right to a jury trial as well as those that chill that right. *Robtoy v. Kincheloe*, 871 F.2d 1478 (9th Cir. 1989), cert. denied, 494 U.S. 1031, 110 S. Ct. 1483, 108 L. Ed. 2d 619, 494 U.S. 1061, 110 S. Ct. 1538, 108 L. Ed. 2d 777 (1990).

OPINIONS OF THE ATTORNEY GENERAL

PLEA OF GUILTY.

Sentencing upon plea of guilty to first degree murder under aggravating circumstances. AGO 1979 No. 10; 1979 Op. Atty Gen. Wash. No. 10.

RESEARCH REFERENCES

UNIVERSITY OF PUGET SOUND LAW REVIEW.

Unbridled prosecutorial discretion and standard less death penalty policies: the unconstitutionality of the Washington capital punishment statutory scheme. 7 U. Puget Sound L. Rev. 299.

WASHINGTON LAW REVIEW.

The death penalty in Washington: an historical perspective. 57 Wash. L. Rev. 525.

USER NOTE: For more generally applicable notes, see notes under the first section of this heading, part, article, chapter or title.



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** STATUTES CURRENT THROUGH 2008 REGULAR SESSION AND 2008 GENERAL ELECTION **
*** ANNOTATIONS CURRENT THROUGH OCTOBER 2, 2008 ***

TITLE 10. CRIMINAL PROCEDURE
CHAPTER 10.95. CAPITAL PUNISHMENT -- AGGRAVATED FIRST DEGREE MURDER

GO TO REVISED CODE OF WASHINGTON ARCHIVE DIRECTORY

Rev. Code Wash. (ARCW) § 10.95.040 (2008)

§ 10.95.040. Special sentencing proceeding -- Notice -- Filing -- Service

(1) If a person is charged with aggravated first degree murder as defined by RCW 10.95.020, the prosecuting attorney shall file written notice of a special sentencing proceeding to determine whether or not the death penalty should be imposed when there is reason to believe that there are not sufficient mitigating circumstances to merit leniency.

(2) The notice of special sentencing proceeding shall be filed and served on the defendant or the defendant's attorney within thirty days after the defendant's arraignment upon the charge of aggravated first degree murder unless the court, for good cause shown, extends or reopens the period for filing and service of the notice. Except with the consent of the prosecuting attorney, during the period in which the prosecuting attorney may file the notice of special sentencing proceeding, the defendant may not tender a plea of guilty to the charge of aggravated first degree murder nor may the court accept a plea of guilty to the charge of aggravated first degree murder or any lesser included offense.

(3) If a notice of special sentencing proceeding is not filed and served as provided in this section, the prosecuting attorney may not request the death penalty.

HISTORY: 1981 c 138 § 4.

JUDICIAL DECISIONS

ANALYSIS

Constitutionality

Bifurcate
 Construction with other law
 Discretion of prosecutor
 Disqualification
 Good cause
 Included offenses
 Legislative intent
 Notice
 Purpose
 Sentence not disproportionate

CONSTITUTIONALITY.

Argument that Washington's capital punishment statute is unconstitutional because it vests unbridled discretion in the prosecution to decide when to seek the death penalty was rejected. *Campbell v. Kincheloe*, 829 F.2d 1453 (9th Cir. 1987), cert. denied, 488 U.S. 948, 109 S. Ct. 380, 102 L. Ed. 2d 369 (1988).

BIFURCATE.

It was not an abuse of discretion for the trial court to refuse to bifurcate defendant's trial because evidence of defendant's white supremacist beliefs was relevant to show that he had a motive for the victim's murder and that he premeditated and intended to cause an "inferior" person's death. *State v. Monschke*, 133 Wn. App. 313, 135 P.3d 966 (2006).

CONSTRUCTION WITH OTHER LAW.

Since this section and CR 5 both deal with the service of a notice after an attorney has appeared in a case, CR 5 is instructive as to the meaning of service in this section. RCW 10.95.010, which provides that the death penalty statute may not be varied by court rule, is not violated by this interpretation as the court rule does not vary the requirements of chapter 10.95 RCW but gives some guidance as to the meaning of the statute. *State v. Clark*, 129 Wn.2d 805, 920 P.2d 187 (1996).

The manner of serving a notice of special sentencing proceeding is governed by CR 5. While service of the notice on the defendant's attorney in the manner prescribed in CR 5 is a substantial deviation from the rigid service requirements set forth in RCW 4.28.080, it is calculated to give notice to a defendant over whom the trial court already has jurisdiction and who is represented by an attorney. *State v. Cronin*, 130 Wn.2d 392, 923 P.2d 694 (1996).

DISCRETION OF PROSECUTOR.

Prosecutor's discretion to seek either the death penalty or life imprisonment does not usurp the trial court's sentencing function and therefore does not violate the separation of powers doctrine. *State v. Carey*, 42 Wn. App. 840, 714 P.2d 708, review denied, 106 Wn.2d 1003 (1986).

Special sentencing proceeding which gives the prosecutor discretion to request the death penalty does not violate equal protection, does not violate separation of powers, and is not unconstitutionally vague. *State v. Campbell*, 103 Wn.2d 1, 691 P.2d 929 (1984), cert. denied, 471 U.S. 1094, 105 S. Ct. 2169, 85 L. Ed. 2d 526 (1985).

DISQUALIFICATION.

Where prosecuting attorney represented the defendant in a prior criminal case before becoming a prosecutor, the prosecuting attorney and his staff were disqualified from handling the prosecution of the defendant for the crime of aggravated murder in the first degree where the death penalty was sought. *State v. Stenger*, 111 Wn.2d 516, 760 P.2d 357 (1988).

GOOD CAUSE.

Mere inadvertence in filing notice on the part of the prosecutor does not constitute good cause. *State v. Luvene*, 127 Wn.2d 690, 903 P.2d 960 (1995).

To show good cause, the state must first provide an external factor for its default. *State v. Dearbone*, 125 Wn.2d 173, 883 P.2d 303 (1994).

The two-step standard for proving good cause is: first, the state must show an external impediment which prevented it from complying with the requirements of this section, second, the state must establish that the delay in filing or serving notice did not prejudice the preparation of defendant's case. *State v. Dearbone*, 125 Wn.2d 173, 883 P.2d 303 (1994).

Good cause requires a reason external to the prosecutor for his failure to serve notice. *State v. Dearbone*, 125 Wn.2d 173, 883 P.2d 303 (1994).

Substantial compliance with this section is insufficient proof of good cause. *State v. Dearbone*, 125 Wn.2d 173, 883 P.2d 303 (1994).

INCLUDED OFFENSES.

Since felony murder is not a lesser included offense of aggravated first degree murder, a defendant charged with both felony murder and aggravated first degree murder may plead guilty to felony murder when arraigned for the first time; however, such a plea would not preclude the prosecutor from pursuing the companion charge of premeditated first degree murder and from seeking the death penalty upon proof of aggravating circumstances. *State v. Thompson*, 60 Wn. App. 662, 806 P.2d 1251 (1991).

LEGISLATIVE INTENT.

The legislature could have required that notice under this section be served only on a defendant and that such service be personal, but it did not do so. *State v. Cronin*, 130 Wn.2d 392, 923 P.2d 694 (1996).

NOTICE.

Where the state timely filed the statutorily mandated notice after defendant's first arraignment, it was not required to file another notice after his rearraignment on an amended information. *State v. Woods*, 143 Wn.2d 561, 23 P.3d 1046, cert. denied, 534 U.S. 964, 122 S. Ct. 374, 151 L. Ed. 2d 285 (2001).

The time limitation for the notice of special sentencing in this section is a procedural right which may be waived by defense counsel for tactical reasons. *State v. Finch*, 137 Wn.2d 792, 975 P.2d 967 (1999), cert. denied, 528 U.S. 922, 120 S. Ct. 285, 145 L. Ed. 2d 239 (1999).

This section requires the state to serve a defendant with the notice of special sentencing proceedings, but does not require proof of service. *State v. Brown*, 132 Wn.2d 529, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007, 118 S. Ct. 1192, 140 L. Ed. 2d 322 (1998).

The statutory death notice requirement under this section is not an element of the crime of aggravated murder. Instead, the notice simply informs the accused of the penalty that may be imposed upon conviction of the crime. While formal notice is required to the accused by information of the criminal charges to satisfy the federal sixth amendment and Wa. Const., Art. I, § 22, such constitutional notice is not extended to the penalty exacted for conviction of the crime. Due process in sentencing requires only adequate notice of the possibility of the death penalty. *State v. Clark*, 129 Wn.2d 805, 920 P.2d 187 (1996).

Notice of special sentencing proceeding was timely served and filed for purposes of this section because the statutory service on defense counsel was in accordance with CR 5. *State v. Clark*, 129 Wn.2d 805, 920 P.2d 187 (1996).

Sentence of death was overturned based upon the state's failure to file notice of intent to seek the death penalty within the thirty-day period required by subsection (2). *State v. Luvene*, 127 Wn.2d 690, 903 P.2d 960 (1995).

Where, on the day notice was due, a deputy prosecutor notified defense counsel by voice mail, and later in person, of the state's intent to seek the death penalty, but the deputy prosecutor did not serve a copy of the notice on defense counsel until after the time limit had expired, good cause did not exist to reopen the period for service. *State v. Dearbone*, 125 Wn.2d 173, 883 P.2d 303 (1994).

There is no statutory requirement that the prosecutor file a second notice of a special sentencing proceeding when a defendant's conviction is upheld on appeal but the case is remanded for a new sentencing proceeding. *State v. Rupe*, 108 Wn.2d 734, 743 P.2d 210 (1987), cert. denied, 486 U.S. 1061, 108 S. Ct. 2834, 100 L. Ed. 2d 934 (1988).

PURPOSE.

The purpose of proportionality review is not to second-guess evidentiary determinations or value judgments inherent in prosecutors' charging decisions or juries' verdicts in other cases; the purpose is instead to ensure that a death sentence is not affirmed where death sentences have not generally been imposed in similar cases, or where it has been wantonly and freakishly imposed. In *re Jeffries*, 114 Wn.2d 485, 789 P.2d 731 (1990).

SENTENCE NOT DISPROPORTIONATE.

Defendant's death sentence was neither excessive nor disproportionate. In *re Jeffries*, 114 Wn.2d 485, 789 P.2d 731 (1990).

Murder defendant's contention that his death sentence was disproportionate to the prison terms imposed in numerous aggravated first degree murder cases in which the state did not seek the death penalty was rejected. *In re Jeffries*, 114 Wn.2d 485, 789 P.2d 731 (1990).

RESEARCH REFERENCES

WASHINGTON LAW REVIEW.

Capital Punishment, Proportionality Review, and Claims of Fairness (With Lessons from Washington State), 79 Wash. L. Rev. 775 (2004).

ALR.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that murder was committed for pecuniary gain, as consideration in expectation of receiving something of monetary value, and the like -- post-Gregg cases. 66 ALR4th 417.

USER NOTE: For more generally applicable notes, see notes under the first section of this heading, part, article, chapter or title.



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TITLE 10. CRIMINAL PROCEDURE CHAPTER 10.95. CAPITAL PUNISHMENT -- AGGRAVATED FIRST DEGREE MURDER

GO TO REVISED CODE OF WASHINGTON ARCHIVE DIRECTORY

Rev. Code Wash. (ARCW) § 10.95.050 (2008)

§ 10.95.050. Special sentencing proceeding -- When held -- Jury to decide matters presented -- Waiver -- Reconvening same jury -- Impanelling new jury -- Peremptory challenges

(1) If a defendant is adjudicated guilty of aggravated first degree murder, whether by acceptance of a plea of guilty, by verdict of a jury, or by decision of the trial court sitting without a jury, a special sentencing proceeding shall be held if a notice of special sentencing proceeding was filed and served as provided by RCW 10.95.040. No sort of plea, admission, or agreement may abrogate the requirement that a special sentencing proceeding be held.

(2) A jury shall decide the matters presented in the special sentencing proceeding unless a jury is waived in the discretion of the court and with the consent of the defendant and the prosecuting attorney.

(3) If the defendant's guilt was determined by a jury verdict, the trial court shall reconvene the same jury to hear the special sentencing proceeding. The proceeding shall commence as soon as practicable after completion of the trial at which the defendant's guilt was determined. If, however, unforeseen circumstances make it impracticable to reconvene the same jury to hear the special sentencing proceeding, the trial court may dismiss that jury and convene a jury pursuant to subsection (4) of this section.

(4) If the defendant's guilt was determined by plea of guilty or by decision of the trial court sitting without a jury, or if a retrial of the special sentencing proceeding is necessary for any reason including but not limited to a mistrial in a previous special sentencing proceeding or as a consequence of a remand from an appellate court, the trial court shall impanel a jury of twelve persons plus whatever alternate jurors the trial court deems necessary. The defense and prosecution shall each be allowed to peremptorily challenge twelve jurors. If there is more than one defendant, each defendant shall be allowed an additional peremptory challenge and the prosecution shall be allowed a like number of additional challenges. If alternate jurors are selected, the defense and prosecution shall each be allowed one peremptory challenge for each alternate juror to be selected and if there is more than one defendant each defendant shall be allowed an additional peremptory challenge for each alternate juror to be selected and the prosecution shall be allowed a like number of additional challenges.

HISTORY: 1981 c 138 § 5.

JUDICIAL DECISIONS

ANALYSIS

Challenges

Closing argument

Commutation of sentence

Invalid sentence

Jury

CHALLENGES.

In light of two additional peremptory challenges granted, defendant was not denied a fair and impartial jury even if the court erred by denying two challenges for cause. *State v. Rupe*, 108 Wn.2d 734, 743 P.2d 210 (1987), cert. denied, 486 U.S. 1061, 108 S. Ct. 2834, 100 L. Ed. 2d 934 (1988) (see however, *State v. Fire*, 145 Wn.3d 152, 34 P.3d 1218 (2001)).

CLOSING ARGUMENT.

Prosecutor's closing argument for the death sentence at penalty phase of murder trial in which he referred to (1) the potential harm to other persons in prison; (2) the potential harm to trial witnesses; and (3) the theory of societal self defense did not render the jury's verdict, that there were not sufficient mitigating circumstances to merit leniency, unconstitutional. *Campbell v. Kincheloe*, 829 F.2d 1453 (9th Cir. 1987), cert. denied, 488 U.S. 948, 109 S. Ct. 380, 102 L. Ed. 2d 369 (1988).

COMMUTATION OF SENTENCE.

After the penalty phase of an aggravated murder has been remanded to the trial court for a new jury deliberation solely on the death penalty issue, the prosecuting attorney does not have the authority to commute defendant's sentence to life without the possibility of parole and bypass the jury and penalty phase of the trial, but he does have the right to appear before the jury and ask for mitigation and the sparing of defendant's life. *State v. Bartholomew*, 104 Wn.2d 844, 710 P.2d 196 (1985).

INVALID SENTENCE.

Invalidation of a sentence due to the statutory review process does not automatically result in imposition of a sentence of life imprisonment without parole. *Rupe v. Wood*, 863 F. Supp. 1315 (W.D. Wash. 1994), aff'd, 93 F.3d 1434 (9th Cir. 1996), cert. denied, 519 U.S. 1142, 117 S. Ct. 1017, 136 L. Ed. 2d 894 (1997).

JURY.

Absent a showing that a trial court's withholding of assent to waiver of a jury in a special sentencing proceeding in a capital case was an abuse of discretion, i.e. that it was clearly untenable or manifestly unreasonable or that the defendant was prejudiced by having his cause heard by a jury, there was no reversible error. *State v. Rupe*, 108 Wn.2d 734, 743 P.2d 210 (1987), cert. denied, 486 U.S. 1061, 108 S. Ct. 2834, 100 L. Ed. 2d 934 (1988).

Trial court did not err in refusing to impanel a new jury for the penalty phase of a murder trial where, at the guilt phase of the trial, the jury heard evidence of the defendant's involvement in a committed but uncharged crime as well as

about the planning of other crimes which were never committed. *State v. Kwan Fai Mak*, 105 Wn.2d 692, 718 P.2d 407, cert. denied, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986).

RESEARCH REFERENCES

GONZAGA LAW REVIEW.

Refinement of Washington's death penalty act. 17 Gonz. L. Rev. 715.

USER NOTE: For more generally applicable notes, see notes under the first section of this heading, part, article, chapter or title.



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**** STATUTES CURRENT THROUGH 2008 REGULAR SESSION AND 2008 GENERAL ELECTION ****
***** ANNOTATIONS CURRENT THROUGH OCTOBER 2, 2008 *****

TITLE 10. CRIMINAL PROCEDURE CHAPTER 10.95. CAPITAL PUNISHMENT -- AGGRAVATED FIRST DEGREE MURDER

GO TO REVISED CODE OF WASHINGTON ARCHIVE DIRECTORY

Rev. Code Wash. (ARCW) § 10.95.060 (2008)

§ 10.95.060. Special sentencing proceeding -- Jury instructions -- Opening statements -- Evidence -- Arguments -- Question for jury

(1) At the commencement of the special sentencing proceeding, the trial court shall instruct the jury as to the nature and purpose of the proceeding and as to the consequences of its decision, as provided in RCW 10.95.030.

(2) At the special sentencing proceeding both the prosecution and defense shall be allowed to make an opening statement. The prosecution shall first present evidence and then the defense may present evidence. Rebuttal evidence may be presented by each side. Upon conclusion of the evidence, the court shall instruct the jury and then the prosecution and defense shall be permitted to present argument. The prosecution shall open and conclude the argument.

(3) The court shall admit any relevant evidence which it deems to have probative value regardless of its admissibility under the rules of evidence, including hearsay evidence and evidence of the defendant's previous criminal activity regardless of whether the defendant has been charged or convicted as a result of such activity. The defendant shall be accorded a fair opportunity to rebut or offer any hearsay evidence.

In addition to evidence of whether or not there are sufficient mitigating circumstances to merit leniency, if the jury sitting in the special sentencing proceeding has not heard evidence of the aggravated first degree murder of which the defendant stands convicted, both the defense and prosecution may introduce evidence concerning the facts and circumstances of the murder.

(4) Upon conclusion of the evidence and argument at the special sentencing proceeding, the jury shall retire to deliberate upon the following question: "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?"

In order to return an affirmative answer to the question posed by this subsection, the jury must so find unanimously.

HISTORY: 1981 c 138 § 6.

JUDICIAL DECISIONS

ANALYSIS

Constitutionality
 Circumstances of crime
 Commutation of sentence
 Competency hearing
 Evidence
 --Constitutionality
 --Aggravating
 --Circumstantial
 --Competency of counsel
 --Execution impact
 --Mitigating
 --No denial of right
 --Previous crimes
 --Relevant
 --Resentencing trial
 --Review
 --Victim impact statements
 Factors
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 --Mitigating
 Jury
 --Consideration of evidence
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 Opening statement
 Polygraph examination
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CONSTITUTIONALITY.

Habeas petitioner failed in any way to show that the Washington Supreme Court's decision concerning the constitutionality of RCW 10.95.060(4) was contrary to, or an unreasonable application of, clearly established federal law. *Gentry v. Sinclair*, -- F. Supp. 2d -- (W.D. Wash. Sept. 15, 2008).

This section is not unconstitutionally vague, nor does it improperly place the burden of proving mitigating circumstances on the defendant. *In re Gentry*, 137 Wn.2d 379, 972 P.2d 1250 (1999).

Subsection (4) is constitutional. *State v. Gentry*, 125 Wn.2d 570, 888 P.2d 1105, cert. denied, 516 U.S. 843, 116 S. Ct. 131, 133 L. Ed. 2d 79 (1995).

This statute, providing a mandatory sentence of life imprisonment without the possibility of parole in noncapital aggravated murder cases does not violate due process of equal protection. *State v. Dictado*, 102 Wn.2d 277, 687 P.2d 172 (1984).

CIRCUMSTANCES OF CRIME.

In death penalty cases, the jury must focus on the circumstances of the crime itself. As a general matter, then, these circumstances are properly included in the prosecutor's argument to the jury subject to the following caveats: argument must be restricted to the evidence presented in the case and even argument that is conducted on proper subjects may still

be improper if it is presented in an inflammatory manner. *State v. Rice*, 110 Wn.2d 577, 757 P.2d 889 (1988), cert. denied, 491 U.S. 910, 109 S. Ct. 3200, 105 L. Ed. 2d 707 (1989).

COMMUTATION OF SENTENCE.

Trial court did not err in permitting the prosecution to ask defendant during cross examination at sentencing phase of capital sentencing jury about the possibility that his sentence might be commuted, since the question was in response to a misleading impression left by the defense that the defendant could never be released into society. *State v. Rupe*, 108 Wn.2d 734, 743 P.2d 210 (1987), cert. denied, 486 U.S. 1061, 108 S. Ct. 2834, 100 L. Ed. 2d 934 (1988).

COMPETENCY HEARING.

At beginning of sentencing phase of capital murder trial, defense counsel's request for a hearing to determine if defendant was competent to proceed was properly denied because defense counsel did not meet threshold burden of establishing doubt as to defendant's competency. *State v. Lord*, 117 Wn.2d 829, 822 P.2d 177 (1991), cert. denied, 506 U.S. 856, 113 S. Ct. 164, 121 L. Ed. 2d 112 (1992).

EVIDENCE.

-- CONSTITUTIONALITY.

Provisions of the capital punishment statute allowing the jury to consider evidence regardless of its admissibility under the Rules of Evidence, including hearsay evidence, and evidence of defendant's prior criminal activity regardless of whether defendant was charged or convicted as a result of such activity, were unconstitutional. *State v. Bartholomew*, 101 Wn.2d 631, 683 P.2d 1079 (1984).

-- AGGRAVATING.

The prosecution may present at the sentencing phase any evidence relating to the aggravating factors set forth in the capital punishment statute if it would have been admissible at the guilt phase of the trial. *State v. Bartholomew*, 101 Wn.2d 631, 683 P.2d 1079 (1984).

-- CIRCUMSTANTIAL.

In aggravated first-degree murder trial, refusal of the court to admit at the penalty phase circumstantial evidence from which it could be inferred that a codefendant and a third party, rather than defendant, planned the murders was constitutional error. *Kwan Fai Mak v. Blodgett*, 970 F.2d 614 (9th Cir. 1992), cert. denied, 507 U.S. 951, 113 S. Ct. 1363, 122 L. Ed. 2d 742 (1993).

-- COMPETENCY OF COUNSEL.

Counsel's failure to submit jury instructions limiting the definition of "relevant factors" was professionally reasonable, where defendant had not shown that failure to submit such instructions fell below reasonable standards of competence. *Rupe v. Wood*, 863 F. Supp. 1315 (W.D. Wash. 1994), aff'd, 93 F.3d 1434 (9th Cir. 1996), cert. denied, 519 U.S. 1142, 117 S. Ct. 1017, 136 L. Ed. 2d 894 (1997).

The court must determine whether, in light of all the circumstances, trial counsel's failure to consult an expert and present expert testimony on the reliability of co-conspirator's polygraph results at the second penalty trial was not outside professionally competent assistance. *Rupe v. Wood*, 863 F. Supp. 1315 (W.D. Wash. 1994), aff'd, 93 F.3d 1434 (9th Cir. 1996), cert. denied, 519 U.S. 1142, 117 S. Ct. 1017, 136 L. Ed. 2d 894 (1997).

When a lawyer fails to present evidence in the penalty phase of a capital case, the conclusion that his performance is deficient does not always follow. *Harris ex rel. Ramseyer v. Blodgett*, 853 F. Supp. 1239 (W.D. Wash. 1994), aff'd, 64 F.3d 1432 (9th Cir. 1995).

-- EXECUTION IMPACT.

Evidence of the impact of the defendant's execution on third parties, including his family members, is not relevant evidence on the issue of mitigation, and it was not error for the trial court to exclude it. *State v. Stenson*, 132 Wn.2d 668, 940 P.2d 1239 (1997).

-- MITIGATING.

The defendant in a capital case had a constitutional right to present all relevant mitigating evidence related to his character or the circumstances of the offense at the sentencing phase of his trial. *Rupe v. Wood*, 863 F. Supp. 1315

(W.D. Wash. 1994), *aff'd*, 93 F.3d 1434 (9th Cir. 1996), *cert. denied*, 519 U.S. 1142, 117 S. Ct. 1017, 136 L. Ed. 2d 894 (1997).

The authority provided by the section to consider "any relevant evidence" must be limited to mitigating evidence only. *State v. Bartholomew*, 101 Wn.2d 631, 683 P.2d 1079 (1984).

The prosecution is entitled to rebut mitigating evidence produced by defendant, but only if the rebuttal value of the evidence outweighs its prejudicial effect. *State v. Bartholomew*, 101 Wn.2d 631, 683 P.2d 1079 (1984).

-- NO DENIAL OF RIGHT.

Refusal of trial court to allow aggravated murder defendant, at the end of the penalty phase of the trial, to present evidence before the jury which would be uncrossexamined, unsworn, un rebuttable and unanswerable by argument did not deny defendant his right to allocution. *State v. Kwan Fai Mak*, 105 Wn.2d 692, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986).

-- PREVIOUS CRIMES.

Defense counsel's decision not to object to admission of certified copies of a judgment and sentence indicating an exceptional sentence, verdict forms, and municipal court docket entries to prove defendant's prior criminal activity did not fall below an objective standard of reasonableness under prevailing professional norms because defendant could not show that any objection would have been granted by the trial court. Admission of these documents at the penalty phase of defendant's trial was proper, because the certified copies of the prior adjudication were sufficiently reliable to warrant admission. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 101 P.3d 1 (2004).

Neither the washout provisions of RCW 9.94A.360(2) nor the ER 403 balancing requirement apply in death penalty cases. *State v. Elmore*, 139 Wn.2d 250, 985 P.2d 289 (1999), *cert. denied*, 531 U.S. 837, 121 S. Ct. 98, 148 L. Ed. 2d 57 (2000).

Where defendant's prior molestation of the victim played a significant role in the circumstances of the murder, its consideration by the jury was proper and necessary. *State v. Elmore*, 139 Wn.2d 250, 985 P.2d 289 (1999), *cert. denied*, 531 U.S. 837, 121 S. Ct. 98, 148 L. Ed. 2d 57 (2000).

ER 609 does not apply when prior convictions are admissible as substantive evidence; the rule relates only to impeachment by evidence of a conviction. *State v. Gentry*, 125 Wn.2d 570, 888 P.2d 1105, *cert. denied*, 516 U.S. 843, 116 S. Ct. 131, 133 L. Ed. 2d 79 (1995).

-- RELEVANT.

Where there was no question that the co-conspirator's polygraph evidence was "relevant" was because it related to the "circumstances of the offense," and specifically, it was relevant to defendant's relative culpability, a factor specifically recognized as relevant under Washington law, RCW 10.95.070(4), polygraph evidence was admitted. *Rupe v. Wood*, 863 F. Supp. 1315 (W.D. Wash. 1994), *aff'd*, 93 F.3d 1434 (9th Cir. 1996), *cert. denied*, 519 U.S. 1142, 117 S. Ct. 1017, 136 L. Ed. 2d 894 (1997).

Evidence which is not probative or not relevant is excluded at the sentencing phase. *State v. Kwan Fai Mak*, 105 Wn.2d 692, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986).

-- RESENTENCING TRIAL.

Trial court did not err in admitting evidence at a resentencing trial of the facts and circumstances of the crime. *State v. Rupe*, 108 Wn.2d 734, 743 P.2d 210 (1987), *cert. denied*, 486 U.S. 1061, 108 S. Ct. 2834, 100 L. Ed. 2d 934 (1988).

-- REVIEW.

In reviewing an evidentiary ruling by trial court in penalty phase of capital murder trial, supreme court employs the abuse of discretion standard, although it more carefully reviews the factual basis for the ruling than it would in a noncapital case. *State v. Lord*, 117 Wn.2d 829, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856, 113 S. Ct. 164, 121 L. Ed. 2d 112 (1992).

-- VICTIM IMPACT STATEMENTS.

In light of the addition of the victims' rights amendment to the Washington constitution, the classes of relevant evidence which may constitutionally be admitted are expanded to also include victim impact evidence. *State v. Gentry*, 125 Wn.2d 570, 888 P.2d 1105, *cert. denied*, 516 U.S. 843, 116 S. Ct. 131, 133 L. Ed. 2d 79 (1995).

FACTORS.

-- IN GENERAL.

In a capital murder case in which defendant had killed two prostitutes, there was sufficient evidence to justify the affirmative finding to the question posed by RCW 10.95.060(4); a rational jury could have been convinced beyond a reasonable doubt that the circumstances of defendant's crimes outweighed the mitigating factors. *State v. Yates*, 161 Wn.2d 714, 168 P.3d 359 (2007).

In penalty phase of capital murder trial, defense witnesses may be cross-examined concerning anything relevant raised in mitigation by the defendant; defendant's character witnesses may be cross-examined about personal knowledge of specific incidents of misconduct. *State v. Lord*, 117 Wn.2d 829, 822 P.2d 177 (1991), cert. denied, 506 U.S. 856, 113 S. Ct. 164, 121 L. Ed. 2d 112 (1992).

-- MITIGATING.

The mere presence of mitigating factors does not require a jury to grant leniency, so long as it is convinced beyond a reasonable doubt that any mitigating factors are outweighed by the circumstances of the crime. *State v. Rice*, 110 Wn.2d 577, 757 P.2d 889 (1988), cert. denied, 491 U.S. 910, 109 S. Ct. 3200, 105 L. Ed. 2d 707 (1989).

Failure of court to define "mitigating circumstance" for jury at sentencing phase of murder trial was not a constitutional error. *State v. Bartholomew*, 101 Wn.2d 631, 683 P.2d 1079 (1984).

The burden of proving the absence of mitigating circumstances is on the State. *State v. Rupe*, 101 Wn.2d 664, 683 P.2d 571 (1984).

JURY.

-- CONSIDERATION OF EVIDENCE.

Washington prisoner who was sentenced to death under RCW 10.95.060(4) upon conviction for aggravated first-degree murder was entitled to 28 U.S.C.S. § 2254 habeas relief based on a violation of due process rights under U.S. Const. amend. XIV; structural error resulted from the trial court's exclusion for cause of a juror in the absence of evidence that the juror would not follow the law with regard to the death penalty. *Brown v. Lambert*, 451 F.3d 946 (2006).

Washington's death penalty statute is a "non-weighting" statute; the statute does not require the jury to weigh specified aggravating factors against mitigating factors, but allows it to consider all evidence presented during both the guilt and penalty phases, including non-statutory aggravating factors. *State v. Brown*, 132 Wn.2d 529, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007, 118 S. Ct. 1192, 140 L. Ed. 2d 322 (1998).

-- INSTRUCTIONS.

The giving of leniency instructions is consistent with Washington's statutory scheme. *State v. Brett*, 126 Wn.2d 136, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996).

Trial court did not err by instructing the jury that the defendant could be convicted of aggravated murder in the first degree based on an accomplice theory. *State v. Kwan Fai Mak*, 105 Wn.2d 692, 718 P.2d 407, cert. denied, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986).

Penalty phase instructions in aggravated murder trial did not amount to reversible error, either individually or collectively. *State v. Kwan Fai Mak*, 105 Wn.2d 692, 718 P.2d 407, cert. denied, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986).

-- UNANIMITY.

Where nothing in the court's instruction said or implied that the defendant could only avoid the death penalty if the jury unanimously answered "no" to the statutory question in subsection (4), there was no reasonable likelihood this defendant's jury would have been confused either as to the consequence of a non-unanimous verdict or as to its ability to report such a verdict; the challenged instruction was not, therefore, constitutionally infirm. *In re Benn*, 134 Wn.2d 868, 952 P.2d 116 (1998).

In penalty phase of aggravated first-degree murder trial, jury instructions and verdict form combined to improperly emphasize to the jury that unanimous agreement was required not to impose that death penalty. *Kwan Fai Mak v. Blodgett*, 970 F.2d 614 (9th Cir. 1992), cert. denied, 507 U.S. 951, 113 S. Ct. 1363, 122 L. Ed. 2d 742 (1993).

OPENING STATEMENT.

Trial court did not err in allowing a deputy prosecuting attorney to make an opening statement to the jury at the penalty phase of the trial. *State v. Kwan Fai Mak*, 105 Wn.2d 692, 718 P.2d 407, cert. denied, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986).

In most cases, the opening statement by the prosecution in the sentencing phase of the trial may only consist of defendant's criminal record and evidence which would have been admissible at the guilt phase of the trial, except that if the jury at the sentencing phase is different from the jury at the guilt phase, evidence of the facts and circumstances of the murder may also be presented. *State v. Bartholomew*, 101 Wn.2d 631, 683 P.2d 1079 (1984).

POLYGRAPH EXAMINATION.

Subject to certain restrictions, polygraph examination results are admissible by the defense at the sentencing phase of capital cases. *State v. Bartholomew*, 101 Wn.2d 631, 683 P.2d 1079 (1984).

PRESUMPTION.

Argument that Washington's capital punishment statute creates a mandatory presumption in favor of the death penalty and places the burden on the defendant to prove there are sufficient mitigating circumstances to merit leniency was rejected. *Campbell v. Kincheloe*, 829 F.2d 1453 (9th Cir. 1987), cert. denied, 488 U.S. 948, 109 S. Ct. 380, 102 L. Ed. 2d 369 (1988).

RESEARCH REFERENCES

WASHINGTON LAW REVIEW.

Capital Punishment, Proportionality Review, and Claims of Fairness (With Lessons from Washington State)., 79 Wash. L. Rev. 775 (2004).

ALR.

Victim impact evidence in capital sentencing hearings -- post- *Payne v. Tennessee*. 79 ALR5th 33.

USER NOTE: For more generally applicable notes, see notes under the first section of this heading, part, article, chapter or title.



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** STATUTES CURRENT THROUGH 2008 REGULAR SESSION AND 2008 GENERAL ELECTION **
*** ANNOTATIONS CURRENT THROUGH OCTOBER 2, 2008 ***

TITLE 10. CRIMINAL PROCEDURE
CHAPTER 10.95. CAPITAL PUNISHMENT -- AGGRAVATED FIRST DEGREE MURDER

GO TO REVISED CODE OF WASHINGTON ARCHIVE DIRECTORY

Rev. Code Wash. (ARCW) § 10.95.070 (2008)

§ 10.95.070. Special sentencing proceeding -- Factors which jury may consider in deciding whether leniency merited

In deciding the question posed by RCW 10.95.060(4), the jury, or the court if a jury is waived, may consider any relevant factors, including but not limited to the following:

- (1) Whether the defendant has or does not have a significant history, either as a juvenile or an adult, of prior criminal activity;
- (2) Whether the murder was committed while the defendant was under the influence of extreme mental disturbance;
- (3) Whether the victim consented to the act of murder;
- (4) Whether the defendant was an accomplice to a murder committed by another person where the defendant's participation in the murder was relatively minor;
- (5) Whether the defendant acted under duress or domination of another person;
- (6) Whether, at the time of the murder, the capacity of the defendant to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired as a result of mental disease or defect. However, a person found to be mentally retarded under RCW 10.95.030(2) may in no case be sentenced to death;
- (7) Whether the age of the defendant at the time of the crime calls for leniency; and
- (8) Whether there is a likelihood that the defendant will pose a danger to others in the future.

HISTORY: 1993 c 479 § 2; 1981 c 138 § 7.

JUDICIAL DECISIONS

ANALYSIS

Constitutionality

In general

Closing arguments

Criminal history

Factors

--Aggravating

--Mitigating

CONSTITUTIONALITY.

This section does not violate the Eighth and Fourteenth Amendments to the United States Constitution on the basis that the word "relevant" in the statute is vague when interpreted in the context of defendant's "prior criminal activity". In re Brown, 143 Wn.2d 431, 21 P.3d 687 (2001).

It is not unconstitutional for the jury to consider the circumstances of the crime for which the defendant was convicted. State v. Brown, 132 Wn.2d 529, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007, 118 S. Ct. 1192, 140 L. Ed. 2d 322 (1998).

IN GENERAL.

The Sentencing Reform Act does not govern the sentencing of capital defendants. State v. Stenson, 132 Wn.2d 668, 940 P.2d 1239 (1997).

CLOSING ARGUMENTS.

Prosecutor's closing argument for the death sentence at penalty phase of murder trial in which he referred to (1) the potential harm to other persons in prison, (2) the potential harm to trial witnesses, and (3) the theory of societal self-defense did not render the jury's verdict, that there were not sufficient mitigating circumstances to merit leniency, unconstitutional. Campbell v. Kincheloe, 829 F.2d 1453 (9th Cir. 1987), cert. denied, 488 U.S. 948, 109 S. Ct. 380, 102 L. Ed. 2d 369 (1988).

CRIMINAL HISTORY.

Defense counsel's decision not to object to admission of certified copies of a judgment and sentence indicating an exceptional sentence, verdict forms, and municipal court docket entries to prove defendant's prior criminal activity did not fall below an objective standard of reasonableness under prevailing professional norms because defendant could not show that any objection would have been granted by the trial court. Admission of these documents at the penalty phase of defendant's trial was proper, because the certified copies of the prior adjudication were sufficiently reliable to warrant admission. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 101 P.3d 1 (2004).

Following the conviction of defendant for aggravated first degree murder, first degree kidnapping, and first degree rape, admission during the sentencing phase of a police statement concerning his previous false imprisonment conviction, over and above the mere judgment and sentence for that crime, was unfairly prejudicial. *State v. Clark*, 143 Wn.2d 731, 24 P.3d 1006, cert. denied, 534 U.S. 1000, 122 S. Ct. 475, 151 L. Ed. 2d 389 (2001).

A sentencing jury is not limited to considering only those convictions which existed prior to the date of the crime for which a defendant is being tried. It is sufficient if the prior conviction occurred before the sentencing procedure has been completed. *In re Brown*, 143 Wn.2d 431, 21 P.3d 687 (2001).

Because the defendant offered no specific reasons why his Canadian convictions were constitutionally defective or unreliable, the convictions were properly admitted under this section. *State v. Roberts*, 142 Wn.2d 471, 14 P.3d 713 (2000).

The defendant's prior criminal convictions, both felony and misdemeanor, are admissible in the penalty phase. *State v. Stenson*, 132 Wn.2d 668, 940 P.2d 1239 (1997).

Juvenile convictions for both misdemeanors and felonies may be admitted as nonstatutory aggravating evidence in the sentencing phase of a capital trial. *State v. Pirtle*, 127 Wn.2d 628, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026, 116 S. Ct. 2568, 135 L. Ed. 2d 1084 (1996).

Additional facts contained in information about a prior conviction did not cause undue prejudice to the defendant. The information informed the jury that assault resulted in substantial bodily harm and involved the use of a deadly weapon. *State v. Pirtle*, 127 Wn.2d 628, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026, 116 S. Ct. 2568, 135 L. Ed. 2d 1084 (1996).

Admission of prior convictions does not necessitate a balancing test because such evidence is reasonably objective and reliable. *State v. Brett*, 126 Wn.2d 136, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996).

ER 609 does not apply when prior convictions are admissible as substantive evidence; the rule relates only to impeachment by evidence of a conviction. *State v. Gentry*, 125 Wn.2d 570, 888 P.2d 1105, cert. denied, 516 U.S. 843, 116 S. Ct. 131, 133 L. Ed. 2d 79 (1995).

Juvenile court adjudications of guilt are treated as "convictions" for several purposes, including criminal history. *In re Lord*, 123 Wn.2d 296, 868 P.2d 835, modified on other grounds, 123 Wn.2d 737, 870 P.2d 964 (1994).

FACTORS.

-- AGGRAVATING.

Defendant's argument that because defendant's future dangerousness is an aggravating factor rather than a mitigating factor, any argument regarding that issue at special sentencing proceeding was improper was rejected. *Campbell v. Kincheloe*, 829 F.2d 1453 (9th Cir. 1987), cert. denied, 488 U.S. 948, 109 S. Ct. 380, 102 L. Ed. 2d 369 (1988).

The prosecution may present at the sentencing phase any evidence relating to the aggravating factors set forth in the capital punishment statute if it would have been admissible at the guilt phase of the trial. *State v. Bartholomew*, 101 Wn.2d 631, 683 P.2d 1079 (1984).

-- MITIGATING.

Counsel was not ineffective for failing to present evidence of the inmate's mental deficiencies during sentencing because he made a strategic decision not to do so based on the potential for damaging rebuttal evidence, which was almost certain after the inmate admitted his deviant sexual feelings toward young girls. In addition, the expert witnesses did not agree on whether, or to what extent, the inmate's mental deficiencies affected his ability to conform to lawful behavior. *In re Pers. Restraint of Elmore*, 162 Wn.2d 236, 172 P.3d 335 (2007).

Evidence of the impact of the defendant's execution on third parties, including his family members, is not relevant evidence on the issue of mitigation, and it was not error for the trial court to exclude it. *State v. Stenson*, 132 Wn.2d 668, 940 P.2d 1239 (1997).

Regarding mitigating circumstances in capital cases, only those factors asserted by the defendant to be relevant should be included in the instruction to the jury. *State v. Gentry*, 125 Wn.2d 570, 888 P.2d 1105, cert. denied, 516 U.S. 843, 116 S. Ct. 131, 133 L. Ed. 2d 79 (1995).

Jury instruction adequately guided the jury as to the nature and function of "mitigating circumstances" even though the term itself was not specifically defined. *State v. Harris*, 106 Wn.2d 784, 725 P.2d 975 (1986), cert. denied, 480 U.S. 940, 107 S. Ct. 1592, 94 L. Ed. 2d 781 (1987).

Where defendant requested that the trial court not give the eight illustrative examples of mitigating circumstances provided in the statute, it was not error not to give them. *State v. Jeffries*, 105 Wn.2d 398, 717 P.2d 722, cert. denied, 479 U.S. 922, 107 S. Ct. 328, 93 L. Ed. 2d 301 (1986).

This statute, incorporated in jury instruction as a standard for mitigation, gave proper guidance to the jury, did not impose additional aggravating factors, and did not represent an unconstitutional evidentiary comment by the judge. *State v. Campbell*, 103 Wn.2d 1, 691 P.2d 929 (1984), cert. denied, 471 U.S. 1094, 105 S. Ct. 2169, 85 L. Ed. 2d 526 (1985).

Failure of court to define "mitigating circumstance" for jury at sentencing phase of murder trial was not a constitutional error. *State v. Bartholomew*, 101 Wn.2d 631, 683 P.2d 1079 (1984).

The prosecution is entitled to rebut mitigating evidence produced by defendant, but only if the rebuttable value of the evidence outweighs its prejudicial effect. *State v. Bartholomew*, 101 Wn.2d 631, 683 P.2d 1079 (1984).

The authority under this section to consider "any relevant factors" is limited to mitigating factors only. *State v. Bartholomew*, 101 Wn.2d 631, 683 P.2d 1079 (1984).

RESEARCH REFERENCES

WASHINGTON LAW REVIEW.

Capital Punishment, Proportionality Review, and Claims of Fairness (With Lessons from Washington State)., 79 Wash. L. Rev. 775 (2004).

ALR.

Vulnerability of victim as aggravating factor under state sentencing guidelines. 73 ALR5th 383.

USER NOTE: For more generally applicable notes, see notes under the first section of this heading, part, article, chapter or title.



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TITLE 10. CRIMINAL PROCEDURE
CHAPTER 10.95. CAPITAL PUNISHMENT -- AGGRAVATED FIRST DEGREE MURDER

GO TO REVISED CODE OF WASHINGTON ARCHIVE DIRECTORY

Rev. Code Wash. (ARCW) § 10.95.080 (2008)

§ 10.95.080. When sentence to death or sentence to life imprisonment shall be imposed

(1) If a jury answers affirmatively the question posed by RCW 10.95.060(4), or when a jury is waived as allowed by RCW 10.95.050(2) and the trial court answers affirmatively the question posed by RCW 10.95.060(4), the defendant shall be sentenced to death. The trial court may not suspend or defer the execution or imposition of the sentence.

(2) If the jury does not return an affirmative answer to the question posed in RCW 10.95.060(4), the defendant shall be sentenced to life imprisonment as provided in RCW 10.95.030(1).

HISTORY: 1981 c 138 § 8.

JUDICIAL DECISIONS

ANALYSIS

Constitutionality
Juveniles

CONSTITUTIONALITY.

Washington's death penalty statutes are constitutional, do not violate equal protection guarantees and are not void for vagueness. *State v. Rice*, 110 Wn.2d 577, 757 P.2d 889 (1988), cert. denied, 491 U.S. 910, 109 S. Ct. 3200, 105 L. Ed. 2d 707 (1989).

Mandatory statutory sentence of life imprisonment without possibility of parole, entered on a charge of aggravated murder in the first degree, did not amount to an unconstitutional restriction of the judiciary's sentencing power. *State v. Hughes*, 106 Wn.2d 176, 721 P.2d 902 (1986).

JUVENILES.

Neither the declination statute nor the death penalty statute authorizes imposition of the death penalty for crimes committed by juveniles. Without such authorization, a death sentence following conviction of aggravated first degree murder of a juvenile must be overturned. *State v. Furman*, 122 Wn.2d 440, 858 P.2d 1092 (1993).

RESEARCH REFERENCES

ALR.

Application of death penalty to nonhomicide cases. 62 ALR5th 121.

USER NOTE: For more generally applicable notes, see notes under the first section of this heading, part, article, chapter or title.



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TITLE 10. CRIMINAL PROCEDURE

CHAPTER 10.95. CAPITAL PUNISHMENT -- AGGRAVATED FIRST DEGREE MURDER

GO TO REVISED CODE OF WASHINGTON ARCHIVE DIRECTORY

Rev. Code Wash. (ARCW) § 10.95.090 (2008)

§ 10.95.090. Sentence if death sentence commuted, held invalid, or if death sentence established by chapter held invalid

If any sentence of death imposed pursuant to this chapter is commuted by the governor, or held to be invalid by a final judgment of a court after all avenues of appeal have been exhausted by the parties to the action, or if the death penalty established by this chapter is held to be invalid by a final judgment of a court which is binding on all courts in the state, the sentence for aggravated first degree murder if there was an affirmative response to the question posed by RCW 10.95.060(4) shall be life imprisonment as provided in RCW 10.95.030(1).

HISTORY: 1981 c 138 § 9.

JUDICIAL DECISIONS

EVIDENTIARY ERROR.

A sentence that is found to be the product of "passion or prejudice" because of a garden variety evidentiary error should not be commuted to life imprisonment if a further proceeding could cure that error. *Rupe v. Wood*, 93 F.3d 1434 (9th Cir. 1996), cert. denied, 519 U.S. 1142, 117 S. Ct. 1017, 136 L. Ed. 2d 894 (1997).

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GO TO REVISED CODE OF WASHINGTON ARCHIVE DIRECTORY

Rev. Code Wash. (ARCW) § 10.95.100 (2008)

§ 10.95.100. Mandatory review of death sentence by supreme court -- Notice -- Transmittal -- Contents of notice -- Jurisdiction

Whenever a defendant is sentenced to death, upon entry of the judgment and sentence in the trial court the sentence shall be reviewed on the record by the supreme court of Washington.

Within ten days of the entry of a judgment and sentence imposing the death penalty, the clerk of the trial court shall transmit notice thereof to the clerk of the supreme court of Washington and to the parties. The notice shall include the caption of the case, its cause number, the defendant's name, the crime or crimes of which the defendant was convicted,

the sentence imposed, the date of entry of judgment and sentence, and the names and addresses of the attorneys for the parties. The notice shall vest with the supreme court of Washington the jurisdiction to review the sentence of death as provided by this chapter. The failure of the clerk of the trial court to transmit the notice as required shall not prevent the supreme court of Washington from conducting the sentence review as provided by chapter 138, Laws of 1981.

HISTORY: 1981 c 138 § 10.

JUDICIAL DECISIONS

ANALYSIS

Constitutionality

Waiver

CONSTITUTIONALITY.

Statutory procedure set forth in RCW 10.95, which requires appellate review of a death sentence but does not require a general appeal, meets constitutional standards. *State v. Dodd*, 120 Wn.2d 1, 838 P.2d 86 (1992).

WAIVER.

A defendant may, consistent with RCW 10.95, waive his right of general review but may not waive statutory sentence review. *State v. Dodd*, 120 Wn.2d 1, 838 P.2d 86 (1992).

RESEARCH REFERENCES

WASHINGTON LAW REVIEW.

Capital Punishment, Proportionality Review, and Claims of Fairness (With Lessons from Washington State), 79 Wash. L. Rev. 775 (2004).

Washington's comparative proportionality review: toward effective appellate review of death penalty cases under the Washington State Constitution. 64 Wash. L. Rev. 111.

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GO TO REVISED CODE OF WASHINGTON ARCHIVE DIRECTORY

Rev. Code Wash. (ARCW) § 10.95.110 (2008)

§ 10.95.110. Verbatim report of trial proceedings -- Preparation -- Transmittal to supreme court -- Clerk's papers -- Receipt

(1) Within ten days after the entry of a judgment and sentence imposing the death penalty, the clerk of the trial court shall cause the preparation of a verbatim report of the trial proceedings to be commenced.

(2) Within five days of the filing and approval of the verbatim report of proceedings, the clerk of the trial court shall transmit such verbatim report of proceedings together with copies of all of the clerk's papers to the clerk of the supreme court of Washington. The clerk of the supreme court of Washington shall forthwith acknowledge receipt of these documents by providing notice of receipt to the clerk of the trial court, the defendant or his or her attorney, and the prosecuting attorney.

HISTORY: 1981 c 138 § 11.

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GO TO REVISED CODE OF WASHINGTON ARCHIVE DIRECTORY

Rev. Code Wash. (ARCW) § 10.95.120 (2008)

§ 10.95.120. Information report -- Form -- Contents -- Submission to supreme court, defendant, prosecuting attorney

In all cases in which a person is convicted of aggravated first degree murder, the trial court shall, within thirty days after the entry of the judgment and sentence, submit a report to the clerk of the supreme court of Washington, to the defendant or his or her attorney, and to the prosecuting attorney which provides the information specified under subsections (1) through (8) of this section. The report shall be in the form of a standard questionnaire prepared and supplied by the supreme court of Washington and shall include the following:

- (1) Information about the defendant, including the following:
 - (a) Name, date of birth, gender, marital status, and race and/or ethnic origin;
 - (b) Number and ages of children;
 - (c) Whether his or her parents are living, and date of death where applicable;
 - (d) Number of children born to his or her parents;
 - (e) The defendant's educational background, intelligence level, and intelligence quotient;
 - (f) Whether a psychiatric evaluation was performed, and if so, whether it indicated that the defendant was:

- (i) Able to distinguish right from wrong;
- (ii) Able to perceive the nature and quality of his or her act; and
- (iii) Able to cooperate intelligently with his or her defense;
- (g) Any character or behavior disorders found or other pertinent psychiatric or psychological information;
- (h) The work record of the defendant;
- (i) A list of the defendant's prior convictions including the offense, date, and sentence imposed; and
- (j) The length of time the defendant has resided in Washington and the county in which he or she was convicted.

(2) Information about the trial, including:

- (a) The defendant's plea;
- (b) Whether defendant was represented by counsel;
- (c) Whether there was evidence introduced or instructions given as to defenses to aggravated first degree murder, including excusable homicide, justifiable homicide, insanity, duress, entrapment, alibi, intoxication, or other specific defense;
- (d) Any other offenses charged against the defendant and tried at the same trial and whether they resulted in conviction;
- (e) What aggravating circumstances were alleged against the defendant and which of these circumstances was found to have been applicable; and
- (f) Names and charges filed against other defendant(s) if tried jointly and disposition of the charges.

(3) Information concerning the special sentencing proceeding, including:

- (a) The date the defendant was convicted and date the special sentencing proceeding commenced;
- (b) Whether the jury for the special sentencing proceeding was the same jury that returned the guilty verdict, providing an explanation if it was not;
- (c) Whether there was evidence of mitigating circumstances;
- (d) Whether there was, in the court's opinion, credible evidence of the mitigating circumstances as provided in RCW 10.95.070;
- (e) The jury's answer to the question posed in RCW 10.95.060(4);
- (f) The sentence imposed.

(4) Information about the victim, including:

- (a) Whether he or she was related to the defendant by blood or marriage;
- (b) The victim's occupation and whether he or she was an employer or employee of the defendant;
- (c) Whether the victim was acquainted with the defendant, and if so, how well;
- (d) The length of time the victim resided in Washington and the county;
- (e) Whether the victim was the same race and/or ethnic origin as the defendant;
- (f) Whether the victim was the same sex as the defendant;
- (g) Whether the victim was held hostage during the crime and if so, how long;
- (h) The nature and extent of any physical harm or torture inflicted upon the victim prior to death;
- (i) The victim's age; and
- (j) The type of weapon used in the crime, if any.

- (5) Information about the representation of the defendant, including:
- (a) Date counsel secured;
 - (b) Whether counsel was retained or appointed, including the reason for appointment;
 - (c) The length of time counsel has practiced law and nature of his or her practice; and
 - (d) Whether the same counsel served at both the trial and special sentencing proceeding, and if not, why not.
- (6) General considerations, including:
- (a) Whether the race and/or ethnic origin of the defendant, victim, or any witness was an apparent factor at trial;
 - (b) What percentage of the county population is the same race and/or ethnic origin of the defendant;
 - (c) Whether members of the defendant's or victim's race and/or ethnic origin were represented on the jury;
 - (d) Whether there was evidence that such members were systematically excluded from the jury;
 - (e) Whether the sexual orientation of the defendant, victim, or any witness was a factor in the trial;
 - (f) Whether any specific instruction was given to the jury to exclude race, ethnic origin, or sexual orientation as an issue;
 - (g) Whether there was extensive publicity concerning the case in the community;
 - (h) Whether the jury was instructed to disregard such publicity;
 - (i) Whether the jury was instructed to avoid any influence of passion, prejudice, or any other arbitrary factor when considering its verdict or its findings in the special sentencing proceeding;
 - (j) The nature of the evidence resulting in such instruction; and
 - (k) General comments of the trial judge concerning the appropriateness of the sentence considering the crime, defendant, and other relevant factors.
- (7) Information about the chronology of the case, including the date that:
- (a) The defendant was arrested;
 - (b) Trial began;
 - (c) The verdict was returned;
 - (d) Post-trial motions were ruled on;
 - (e) Special sentencing proceeding began;
 - (f) Sentence was imposed;
 - (g) Trial judge's report was completed; and
 - (h) Trial judge's report was filed.
- (8) The trial judge shall sign and date the questionnaire when it is completed.

HISTORY: 1981 c 138 § 12.

JUDICIAL DECISIONS

ANALYSIS

Abuse of writ

Contesting report

Errors

Review

ABUSE OF WRIT.

Inmate's third personal restraint petition (PRP) was dismissed under the abuse of writ doctrine because the inmate's prior attorneys had the requisite amount of experience, despite never having done a PRP case, and there was no newly discovered evidence, since all of the reports filed with the Washington supreme court under RCW 10.95.120 were considered. *In re Pers. Restraint of Stenson*, 153 Wn.2d 137, 102 P.3d 151 (2004).

CONTESTING REPORT.

When a trial court imposes the death penalty but that penalty is overturned, or the case is remanded for resentencing by an appellate court, the report of the trial judge is not required to be updated to reflect the change in the sentencing status of that defendant. *State v. Woods*, 143 Wn.2d 561, 23 P.3d 1046, cert. denied, 534 U.S. 964, 122 S. Ct. 374, 151 L. Ed. 2d 285 (2001).

Defendant's rights were not violated by not giving him the opportunity to contest the report required by this section. *State v. Jeffries*, 105 Wn.2d 398, 717 P.2d 722, cert. denied, 479 U.S. 922, 107 S. Ct. 328, 93 L. Ed. 2d 301 (1986).

ERRORS.

Even assuming trial judge's report required by this section contained errors or omissions, it did not prejudice defendant. *Jeffries v. Blodgett*, 771 F. Supp. 1520 (W.D. Wash. 1991), aff'd, 974 F.2d 1179 (9th Cir. 1992), rev'd on other grounds, 988 F.2d 923 (9th Cir. 1993).

REVIEW.

In conducting a proportionality review, RCW 10.95.130(2) indicates that the Washington Supreme Court is obligated to compare a case only to cases in which reports have been filed with the supreme court under RCW 10.95.120. *In re Pers. Restraint of Stenson*, 153 Wn.2d 137, 102 P.3d 151 (2004).

RESEARCH REFERENCES**WASHINGTON LAW REVIEW.**

Capital Punishment, Proportionality Review, and Claims of Fairness (With Lessons from Washington State)., 79 Wash. L. Rev. 775 (2004).

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TITLE 10. CRIMINAL PROCEDURE
CHAPTER 10.95. CAPITAL PUNISHMENT -- AGGRAVATED FIRST DEGREE MURDER

GO TO REVISED CODE OF WASHINGTON ARCHIVE DIRECTORY

Rev. Code Wash. (ARCW) § 10.95.130 (2008)

§ 10.95.130. Questions posed for determination by Supreme Court in death sentence review -- Review in addition to appeal -- Consolidation of review and appeal

(1) The sentence review required by RCW 10.95.100 shall be in addition to any appeal. The sentence review and an appeal shall be consolidated for consideration. The defendant and the prosecuting attorney may submit briefs within the time prescribed by the court and present oral argument to the court.

(2) With regard to the sentence review required by chapter 138, Laws of 1981, the supreme court of Washington shall determine:

(a) Whether there was sufficient evidence to justify the affirmative finding to the question posed by RCW 10.95.060(4); and

(b) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. For the purposes of this subsection, "similar cases" means cases reported in the Washington Reports or Washington Appellate Reports since January 1, 1965, in which the judge or jury considered the imposition of capital punishment regardless of whether it was imposed or executed, and cases in which reports have been filed with the supreme court under RCW 10.95.120;

(c) Whether the sentence of death was brought about through passion or prejudice; and

(d) Whether the defendant was mentally retarded within the meaning of RCW 10.95.030(2).

HISTORY: 1993 c 479 § 3; 1981 c 138 § 13.

JUDICIAL DECISIONS

ANALYSIS

Constitutionality

Applicability

Arbitrariness

Criminal history

Evidence

Evidentiary error

Proportionality

Review

--Questions

--Waiver

Sentence

--Illustrative cases

--Not arbitrary

--Not excessive

--Proportionality

--Victim impact statement

CONSTITUTIONALITY.

The proportionality review mandated by subsection (2)(b) of this section is not void for vagueness under either the Eighth or Fourteenth Amendments to the United States Constitution, nor under Wa. Const., Art. I, §§ 3 and 14. *State v. Brown*, 132 Wn.2d 529, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007, 118 S. Ct. 1192, 140 L. Ed. 2d 322 (1998).

In aggravated first degree murder trial, failure to require the jury to articulate what mitigating circumstances it found and how they were weighed against the aggravating factors did not violate defendant's constitutional rights. *Jeffries v. Blodgett*, 771 F. Supp. 1520 (W.D. Wash. 1991), aff'd, 974 F.2d 1179 (9th Cir. 1992), rev'd on other grounds, 988 F.2d 923 (9th Cir. 1993).

Statutory procedure set forth in RCW 10.95, which requires appellate review of a death sentence but does not require a general appeal, meets constitutional standards. *State v. Dodd*, 120 Wn.2d 1, 838 P.2d 86 (1992).

APPLICABILITY.

Proportionality is a special statutory proceeding that is conducted by the supreme court and there is no authority for a trial court to engage in a proportionality review in lieu of a special sentencing proceeding. *State v. Elmore*, 139 Wn.2d 250, 985 P.2d 289 (1999), cert. denied, 531 U.S. 837, 121 S. Ct. 98, 148 L. Ed. 2d 57 (2000).

ARBITRARINESS.

Death penalty statute adequately guards against arbitrary infliction of the death penalty. *State v. Rupe*, 101 Wn.2d 664, 683 P.2d 571 (1984).

CRIMINAL HISTORY.

A lack of criminal history does not by itself render a death sentence disproportionate. *State v. Rice*, 110 Wn.2d 577, 757 P.2d 889 (1988), cert. denied, 491 U.S. 910, 109 S. Ct. 3200, 105 L. Ed. 2d 707 (1989).

EVIDENCE.

The test to be applied in determining the sufficiency of the evidence to support the jury's verdict is whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found sufficient evidence to justify the affirmative finding beyond a reasonable doubt. *State v. Rice*, 110 Wn.2d 577, 757 P.2d 889 (1988), cert. denied, 491 U.S. 910, 109 S. Ct. 3200, 105 L. Ed. 2d 707 (1989).

Sufficient evidence justified jury's affirmative answer to the question whether the members of the jury were convinced beyond a reasonable doubt that there were not sufficient mitigating circumstances to merit leniency. *State v. Rupe*, 108 Wn.2d 734, 743 P.2d 210 (1987), cert. denied, 486 U.S. 1061, 108 S. Ct. 2834, 100 L. Ed. 2d 934 (1988).

EVIDENTIARY ERROR.

A sentence that is found to be the product of "passion or prejudice" because of a garden variety evidentiary error should not be commuted to life imprisonment if a further proceeding could cure that error. *Rupe v. Wood*, 93 F.3d 1434 (9th Cir. 1996), cert. denied, 519 U.S. 1142, 117 S. Ct. 1017, 136 L. Ed. 2d 894 (1997).

PROPORTIONALITY.

In conducting a proportionality review, RCW 10.95.130(2) indicates that the Washington supreme court is obligated to compare a case only to cases in which reports have been filed with the supreme court under RCW 10.95.120. In re Pers. Restraint of Stenson, 153 Wn.2d 137, 102 P.3d 151 (2004).

Defendant's death sentence was not disproportionate where the nature of the crime was as brutal and heinous as any considered by the court, his criminal history was extensive and demonstrated a pattern of violence, the jury found numerous aggravating factors, and his mitigating evidence did not convince the jury that he merited leniency. *State v. Brown*, 132 Wn.2d 529, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007, 118 S. Ct. 1192, 140 L. Ed. 2d 322 (1998).

The legislative guidelines contained in this chapter ensure proportionality in the first instance by focusing the jury on the crime and the defendant. On review, this section requires the court to determine whether the death sentence is "disproportionate" based on the broad range of "similar cases," as defined by the legislature. *State v. Brett*, 126 Wn.2d 136, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996).

Because there are no guidelines or procedures for carrying out the proportionality of sentence review, the defendant's due process rights were violated because he could not fully participate in this review; defendant's review failed to meet the due process requirements of U.S. Const., Amend. 14. *Harris ex rel. Ramseyer v. Blodgett*, 853 F. Supp. 1239 (W.D. Wash. 1994), aff'd, 64 F.3d 1432 (9th Cir. 1995).

Proportionality requires that a death sentence must not be affirmed where death sentences have not generally been imposed in similar cases, nor where the sentence has been wantonly and freakishly imposed. Occasional aberrational outcomes do not require a reversal, however, so long as the death sentence has been imposed generally in similar cases. *State v. Rice*, 110 Wn.2d 577, 757 P.2d 889 (1988), cert. denied, 491 U.S. 910, 109 S. Ct. 3200, 105 L. Ed. 2d 707 (1989).

REVIEW.

-- QUESTIONS.

Defendant's death sentence withstood the three appellate review questions mandated by this statute. *State v. Campbell*, 103 Wn.2d 1, 691 P.2d 929 (1984), cert. denied, 471 U.S. 1094, 105 S. Ct. 2169, 85 L. Ed. 2d 526 (1985).

-- WAIVER.

The absence of a record fully developed through the adversarial process, as the result of defendant's guilty plea and waiver of the right to a general appeal, did not preclude the Supreme Court from making a reasoned decision on the statutory review questions. *State v. Sagastegui*, 135 Wn.2d 67, 954 P.2d 1311 (1998).

A defendant may, consistent with RCW 10.95, waive his right of general review but may not waive statutory sentence review. *State v. Dodd*, 120 Wn.2d 1, 838 P.2d 86 (1992).

SENTENCE.

-- ILLUSTRATIVE CASES.

Statutory review performed in the inmate's direct appeal satisfied RCW 10.95.130 where the inmate failed to show that the court's review was so flawed that a complete miscarriage of justice occurred; the inmate had contended that the review was flawed because neither he nor the court had been provided accurate information about the pool of other similar cases and that at least 18 cases were missing; the court held that because precision was not required, the large number of cases that were available provided the court with a sufficient number to enable it to complete a valid and meaningful review. *In re Pers. Restraint of Elmore*, 162 Wn.2d 236, 172 P.3d 335 (2007).

In a capital murder case in which defendant had killed two prostitutes, the jury could have rationally found the mitigating circumstances insufficient to justify a grant of leniency; the jurors may well have shared the State's viewpoint that defendant's postarrest religious conversion was self-serving and his allocution offensively self-indulgent. *State v. Yates*, 161 Wn.2d 714, 168 P.3d 359 (2007).

In light of the circumstances of the defendant's brutal murder of his stepdaughter, the jury's death sentence was affirmed. *State v. Elmore*, 139 Wn.2d 250, 985 P.2d 289 (1999), cert. denied, 531 U.S. 837, 121 S. Ct. 98, 148 L. Ed. 2d 57 (2000).

Evidence showing that defendant premeditatively and viciously assaulted, raped, and murdered a three-year-old boy and then shot and killed the child's mother and her friend justified the imposition of the death penalty. *State v. Sagastegui*, 135 Wn.2d 67, 954 P.2d 1311 (1998).

Death sentence sustained where the evidence showed that the defendant had a normal childhood, had high average intelligence, did not suffer from a brain dysfunction, and that the murders were committed in a brutal, calculated manner and the sole motive appeared to be financial gain. *State v. Stenson*, 132 Wn.2d 668, 940 P.2d 1239 (1997).

Considering the heinous nature of the crime, a rational trier of fact could have concluded that a difficult childhood and troubled family life did not constitute sufficient mitigation to deserve leniency. *State v. Brown*, 132 Wn.2d 529, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007, 118 S. Ct. 1192, 140 L. Ed. 2d 322 (1998).

In a brutal murder of a 12-year old child, there was sufficient evidence for a rational trier of fact to have found that leniency was not merited. *State v. Gentry*, 125 Wn.2d 570, 888 P.2d 1105, cert. denied, 516 U.S. 843, 116 S. Ct. 131, 133 L. Ed. 2d 79 (1995).

-- NOT ARBITRARY.

From record of defendant's case and proportionality evaluation of that record, court concluded that death penalty imposed upon defendant for double murder was not arbitrary nor imposed in wanton or freakish manner. *State v. Benn*, 120 Wn.2d 631, 845 P.2d 289, cert. denied, 510 U.S. 944, 114 S. Ct. 382, 126 L. Ed. 2d 331 (1993).

-- NOT EXCESSIVE.

Death sentence was not excessive or disproportionate. *State v. Lord*, 117 Wn.2d 829, 822 P.2d 177 (1991), cert. denied, 506 U.S. 856, 113 S. Ct. 164, 121 L. Ed. 2d 112 (1992).

Death sentence was not excessive or disproportionate to the penalty imposed in similar cases for defendant who murdered two bank tellers for the purpose of protecting or concealing his identity as part of a common scheme or plan during the course of a robbery. *State v. Rupe*, 108 Wn.2d 734, 743 P.2d 210 (1987), cert. denied, 486 U.S. 1061, 108 S. Ct. 2834, 100 L. Ed. 2d 934 (1988).

Death penalty for contract killing was not excessive or disproportionate. *State v. Harris*, 106 Wn.2d 784, 725 P.2d 975 (1986), cert. denied, 480 U.S. 940, 107 S. Ct. 1592, 94 L. Ed. 2d 781 (1987).

Defendant's death sentence was not excessive or disproportionate to the penalty imposed in similar cases or to the penalty of life imprisonment imposed upon his codefendant. *State v. Kwan Fai Mak*, 105 Wn.2d 692, 718 P.2d 407, cert. denied, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986).

-- PROPORTIONALITY.

In a capital murder case in which defendant had killed two prostitutes, consideration of defendant's prior crimes and his personal history did not suggest that his death sentence was excessive or disproportionate to the penalty imposed in similar cases. *State v. Yates*, 161 Wn.2d 714, 168 P.3d 359 (2007).

The existence of an analytically flawed federal district court decision holding that application of the statutorily required proportionality review procedure violates due process, was not a compelling reason to vacate defendant's death sentence, or to reconsider the proportionality review in his case. *In re Benn*, 134 Wn.2d 868, 952 P.2d 116 (1998); *State v. Woods*, 143 Wn.2d 561, 23 P.3d 1046, cert. denied, 534 U.S. 964, 122 S. Ct. 374, 151 L. Ed. 2d 285 (2001).

-- VICTIM IMPACT STATEMENT.

Victim impact evidence is not irrelevant to the jury's decision in the penalty phase of a capital case and such evidence is subject to an ER 403 balancing test by the trial court. *State v. Gentry*, 125 Wn.2d 570, 888 P.2d 1105, cert. denied, 516 U.S. 843, 116 S. Ct. 131, 133 L. Ed. 2d 79 (1995).

SEATTLE UNIV. LAW REVIEW.

Comparative proportionality review: will the ends, will the means. 18 Seattle U. L. Rev. 593.

RESEARCH REFERENCES

WASHINGTON LAW REVIEW.

Capital Punishment, Proportionality Review, and Claims of Fairness (With Lessons from Washington State), 79 Wash. L. Rev. 775 (2004).

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GO TO REVISED CODE OF WASHINGTON ARCHIVE DIRECTORY

Rev. Code Wash. (ARCW) § 10.95.140 (2008)

§ 10.95.140. Invalidation of sentence, remand for resentencing -- Affirmation of sentence, remand for execution

Upon completion of a sentence review:

(1) The supreme court of Washington shall invalidate the sentence of death and remand the case to the trial court for resentencing in accordance with RCW 10.95.090 if:

(a) The court makes a negative determination as to the question posed by RCW 10.95.130(2)(a); or

(b) The court makes an affirmative determination as to any of the questions posed by RCW 10.95.130(2) (b), (c), or (d).

(2) The court shall affirm the sentence of death and remand the case to the trial court for execution in accordance with RCW 10.95.160 if:

(a) The court makes an affirmative determination as to the question posed by RCW 10.95.130(2)(a); and

(b) The court makes a negative determination as to the questions posed by RCW 10.95.130(2) (b), (c), and (d).

HISTORY: 1993 c 479 § 4; 1981 c 138 § 14.

JUDICIAL DECISIONS

EVIDENTIARY ERROR.

A sentence that is found to be the product of "passion or prejudice" because of a garden variety evidentiary error should not be commuted to life imprisonment if a further proceeding could cure that error. *Rupe v. Wood*, 93 F.3d 1434 (9th Cir. 1996), cert. denied, 519 U.S. 1142, 117 S. Ct. 1017, 136 L. Ed. 2d 894 (1997).

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TITLE 10. CRIMINAL PROCEDURE
CHAPTER 10.95. CAPITAL PUNISHMENT -- AGGRAVATED FIRST DEGREE MURDER

GO TO REVISED CODE OF WASHINGTON ARCHIVE DIRECTORY

Rev. Code Wash. (ARCW) § 10.95.150 (2008)

§ 10.95.150. Time limit for appellate review of death sentence and filing opinion

In all cases in which a sentence of death has been imposed, the appellate review, if any, and sentence review to or by the supreme court of Washington shall be decided and an opinion on the merits shall be filed within one year of receipt by the clerk of the supreme court of Washington of the verbatim report of proceedings and clerk's papers filed under RCW 10.95.110. If this time requirement is not met, the chief justice of the supreme court of Washington shall state on the record the extraordinary and compelling circumstances causing the delay and the facts supporting such circumstances. A failure to comply with the time requirements of this subsection shall in no way preclude the ultimate execution of a sentence of death.

HISTORY: 1988 c 202 § 17; 1981 c 138 § 15.

NOTES:

SEVERABILITY -- 1988 C 202: See note following RCW 2.24.050.

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Rev. Code Wash. (ARCW) § 10.95.160 (2008)

§ 10.95.160. Death warrant -- Issuance -- Form -- Time for execution of judgment and sentence

(1) If a death sentence is affirmed and the case remanded to the trial court as provided in RCW 10.95.140(2), a death warrant shall forthwith be issued by the clerk of the trial court, which shall be signed by a judge of the trial court and attested by the clerk thereof under the seal of the court. The warrant shall be directed to the superintendent of the state penitentiary and shall state the conviction of the person named therein and the judgment and sentence of the court, and shall appoint a day on which the judgment and sentence of the court shall be executed by the superintendent, which day shall not be less than thirty nor more than ninety days from the date the trial court receives the remand from the supreme court of Washington.

(2) If the date set for execution under subsection (1) of this section is stayed by a court of competent jurisdiction for any reason, the new execution date is automatically set at thirty judicial days after the entry of an order of termination or vacation of the stay by such court unless the court invalidates the conviction, sentence, or remands for further judicial proceedings. The presence of the inmate under sentence of death shall not be required for the court to vacate or terminate the stay according to this section.

HISTORY: 1990 c 263 § 1; 1981 c 138 § 16.

JUDICIAL DECISIONS

ANALYSIS

Appeal
Date of execution
Stay of execution
Validity

APPEAL.

Trial court's order issuing death warrant did not affect substantial rights other than those adjudicated by the judgment imposing the death sentence, and thus appeal of the order was dismissed. *State v. Campbell*, 112 Wn.2d 186, 770 P.2d 620 (1989).

Appeal from death sentence suspends issuance of death warrant until the judgment is affirmed. *State ex rel. Bird v. Superior Court*, 30 Wn.2d 110, 190 P.2d 762 (1948).

Appeal from order of lower court setting day of execution affords no ground for stay of execution of the death sentence. *State v. Seaton*, 27 Wash. 120, 67 P. 572 (1902).

DATE OF EXECUTION.

Once a death warrant has issued and an initial date for execution is set, no further action need be taken by the trial court in order to reset this date. The date of execution will be reset automatically once the stay is lifted. *In re Lord*, 123 Wn.2d 737, 870 P.2d 964, cert. denied, 513 U.S. 849, 115 S. Ct. 146, 130 L. Ed. 2d 86 (1994).

The department of corrections will set a new execution date once a stay is lifted. No further judicial action is necessary for this date to be set. *In re Lord*, 123 Wn.2d 737, 870 P.2d 964, cert. denied, 513 U.S. 849, 115 S. Ct. 146, 130 L. Ed. 2d 86 (1994).

STAY OF EXECUTION.

The supreme court has broad discretion as to when an order lifting a stay should be entered. *In re Lord*, 123 Wn.2d 737, 870 P.2d 964, cert. denied, 513 U.S. 849, 115 S. Ct. 146, 130 L. Ed. 2d 86 (1994).

VALIDITY.

Warrant valid if issued on date authorizing act becomes effective. *In re Boyce*, 25 Wash. 612, 66 P. 54 (1901).

Death warrant is valid although issued under a law which be invalidated before execution. *State ex rel. Campbell v. Superior Court*, 25 Wash. 271, 65 P. 183 (1901).

Presence of date of execution in the death sentence will not affect the validity of the judgment. *Timmerman v. Territory*, 3 Wn. Terr. 445, 17 P. 624 (1888).

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Rev. Code Wash. (ARCW) § 10.95.170 (2008)

§ 10.95.170. Imprisonment of defendant

The defendant shall be imprisoned in the state penitentiary within ten days after the trial court enters a judgment and sentence imposing the death penalty and shall be imprisoned both prior to and subsequent to the issuance of the death warrant as provided in RCW 10.95.160. During such period of imprisonment, the defendant shall be confined in the segregation unit, where the defendant may be confined with other prisoners not under sentence of death, but prisoners under sentence of death shall be assigned to single-person cells.

HISTORY: 1983 c 255 § 1; 1981 c 138 § 17.

NOTES:

SEVERABILITY -- 1983 C 255: See RCW 72.74.900.

CROSS REFERENCES.

Convicted female persons, commitment and procedure as to death sentences: RCW 72.02.250.

JUDICIAL DECISIONS

LOCATION OF CONFINEMENT.

Washington law does not provide a protected liberty interest regarding the location of a death row inmate's confinement. *Jeffries v. Reed*, 631 F. Supp. 1212 (E.D. Wash. 1986).

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Rev. Code Wash. (ARCW) § 10.95.180 (2008)

§ 10.95.180. Death penalty -- How executed

(1) The punishment of death shall be supervised by the superintendent of the penitentiary and shall be inflicted by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until the defendant is dead, or, at the election of the defendant, by hanging by the neck until the defendant is dead. In any case, death shall be pronounced by a licensed physician.

(2) All executions, for both men and women, shall be carried out within the walls of the state penitentiary.

HISTORY: 1996 c 251 § 1; 1986 c 194 § 1; 1981 c 138 § 18.

NOTES:

SEVERABILITY -- 1996 C 251: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected."
[1996 c 251 § 2.]

JUDICIAL DECISIONS**ANALYSIS**

Constitutionality

Options

Presumption of validity

Religious principles

CONSTITUTIONALITY.

Hanging is not cruel and unusual simply because it causes death, or because there may be some pain associated with death. *Campbell v. Wood*, 18 F.3d 662 (9th Cir. 1994), cert. denied, 511 U.S. 1119, 114 S. Ct. 2125, 128 L. Ed. 2d 682 (1994).

Execution by hanging does not involve the unnecessary and wanton infliction of pain. *Campbell v. Wood*, 18 F.3d 662 (9th Cir. 1994), cert. denied, 511 U.S. 1119, 114 S. Ct. 2125, 128 L. Ed. 2d 682 (1994).

Argument that Washington death penalty violates the Eighth Amendment prohibition against cruel and unusual punishment because it forces the defendant to choose the method of his own death, either by hanging or lethal injection, was rejected. *Campbell v. Blodgett*, 978 F.2d 1502 (9th Cir. 1994).

Giving defendant a choice between two methods of execution is not unconstitutional. *State v. Rupe*, 101 Wn.2d 664, 683 P.2d 571 (1984).

OPTIONS.

Defendant's refusal to exercise the option of lethal injection insures that death warrant will be fulfilled by judicial hanging. *Campbell v. Wood*, 18 F.3d 662 (9th Cir. 1994), cert. denied, 511 U.S. 1119, 114 S. Ct. 2125, 128 L. Ed. 2d 682 (1994).

Defendant is not required to make any choice or to participate in the selection of the method to be employed in his execution. *Campbell v. Wood*, 18 F.3d 662 (9th Cir. 1994), cert. denied, 511 U.S. 1119, 114 S. Ct. 2125, 128 L. Ed. 2d 682 (1994).

Death by hanging is not an unconstitutional punishment; moreover, the defendant would not be hanged if he selected the lethal injection alternative which is constitutional. *In re Lord*, 123 Wn.2d 296, 868 P.2d 835, modified on other grounds, 123 Wn.2d 737, 870 P.2d 964 (1994).

PRESUMPTION OF VALIDITY.

Traditional methods of execution selected by a state's legislature are presumed to be valid. *Rupe v. Wood*, 863 F. Supp. 1307 (W.D. Wash. 1994), aff'd in part and vacated in part, 93 F.3d 1434 (9th Cir. 1996), cert. denied, 519 U.S. 1142, 117 S. Ct. 1017, 136 L. Ed. 2d 894 (1997).

RELIGIOUS PRINCIPLES.

Argument by defendant that this statute, permitting him to choose lethal injection instead of hanging as the method of execution, violated his religious principles by requiring him to participate in the decision on how he would die was rejected. *State v. Campbell*, 112 Wn.2d 186, 770 P.2d 620 (1989).

RESEARCH REFERENCES**GONZAGA LAW REVIEW.**

Campbell v. Wood: the death penalty in Washington state: "hanging" on to a method of execution. 30 Gonz. L. Rev. 163.

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Rev. Code Wash. (ARCW) § 10.95.185 (2008)

§ 10.95.185. Witnesses

(1) Not less than twenty days prior to a scheduled execution, judicial officers, law enforcement representatives, media representatives, representatives of the families of the victims, and representatives from the family of the defendant who wish to attend and witness the execution, must submit an application to the superintendent. Such application must designate the relationship and reason for wishing to attend.

(2) Not less than fifteen days prior to the scheduled execution, the superintendent shall designate the total number of individuals who will be allowed to attend and witness the planned execution. The superintendent shall determine the number of witnesses that will be allowed in each of the following categories:

(a) No less than five media representatives with consideration to be given to news organizations serving communities affected by the crimes or by the commission of the execution of the defendant.

(b) Judicial officers.

(c) Representatives of the families of the victims.

(d) Representatives from the family of the defendant.

(e) Up to two law enforcement representatives. The chief executive officer of the agency that investigated the crime shall designate the law enforcement representatives.

After the list is composed, the superintendent shall serve this list on all parties who have submitted an application pursuant to this section. The superintendent shall develop and implement procedures to determine the persons within each of the categories listed in this subsection who will be allowed to attend and witness the execution.

(3) Not less than ten days prior to the scheduled execution, the superintendent shall file the witness list with the superior court from which the conviction and death warrant was issued with a petition asking that the court enter an order certifying this list as a final order identifying the witnesses to attend the execution. The final order of the court certifying the witness list shall not be entered less than five days after the filing of the petition.

(4) Unless a show cause petition is filed with the superior court from which the conviction and death warrant was issued within five days of the filing of the superintendent's petition, the superintendent's list, by order of the superior court, becomes final, and no other party has standing to challenge its appropriateness.

(5) In no case may the superintendent or the superior court order or allow more than seventeen individuals other than required staff to witness a planned execution.

(6) All witnesses must adhere to the search and security provisions of the department of corrections' policy regarding the witnessing of an execution.

(7) The superior court from which the conviction and death warrant was issued is the exclusive court for seeking judicial process for the privilege of attending and witnessing an execution.

(8) For purposes of this section:

(a) "Judicial officer" means: (i) The superior court judge who signed the death warrant issued pursuant to RCW 10.95.160 for the execution of the individual, (ii) the current prosecuting attorney or a deputy prosecuting attorney of the county from which the final judgment and sentence and death warrant were issued, and (iii) the most recent attorney of record representing the individual sentenced to death.

(b) "Law enforcement representatives" means those law enforcement officers responsible for investigating the crime for which the defendant was sentenced to death.

(c) "Media representatives" means representatives from news organizations of all forms of media serving the state.

(d) "Representatives of the families of the victims" means representatives from the immediate families of the victim(s) of the individual sentenced to death, including victim advocates of the immediate family members. Victim advocates shall include any person working or volunteering for a recognized victim advocacy group or a prosecutor-based or law enforcement-based agency on behalf of victims or witnesses.

(e) "Representative from the family of the defendant" means a representative from the immediate family of the individual sentenced to death.

(f) "Superintendent" means the superintendent of the Washington state penitentiary.

HISTORY: 1999 c 332 § 1; 1993 c 463 § 2.

NOTES:

POLICY -- 1993 C 463: "The legislature declares that, to the extent that the attendance of witnesses can be accommodated without compromising the security or the orderly operation of the Washington state penitentiary, it is the policy of the state of Washington to provide authorized individuals the opportunity to attend and witness the execution of an individual sentenced to death pursuant to chapter 10.95 RCW. Further, it is the policy of the state of Washington to provide for access to the execution to credentialed members of the media." [1993 c 463 § 1.]

SEVERABILITY -- 1993 C 463: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1993 c 463 § 3.]

RESEARCH REFERENCES

ALR.

Validity of rules and regulations concerning viewing of execution of death penalty. 107 ALR5th 291.

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Rev. Code Wash. (ARCW) § 10.95.190

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Rev. Code Wash. (ARCW) § 10.95.190 (2008)

§ 10.95.190. Death warrant -- Record -- Return to trial court

(1) The superintendent of the state penitentiary shall keep in his or her office as part of the public records a book in which shall be kept a copy of each death warrant together with a complete statement of the superintendent's acts pursuant to such warrants.

(2) Within twenty days after each execution of a sentence of death, the superintendent of the state penitentiary shall return the death warrant to the clerk of the trial court from which it was issued with the superintendent's return thereon showing all acts and proceedings done by him or her thereunder.

HISTORY: 1981 c 138 § 19.

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Rev. Code Wash. (ARCW) § 10.95.200 (2008)

§ 10.95.200. Proceedings for failure to execute on day named

Whenever the day appointed for the execution of a defendant shall have passed, from any cause, other than the issuance of a stay by a court of competent jurisdiction, without the execution of such defendant having occurred, the trial court which issued the original death warrant shall issue a new death warrant in accordance with RCW 10.95.160. The defendant's presence before the court is not required. However, nothing in this section shall be construed as restricting the defendant's right to be represented by counsel in connection with issuance of a new death warrant.

HISTORY: 1990 c 263 § 2; 1987 c 286 § 1; 1981 c 138 § 20.

JUDICIAL DECISIONS

ANALYSIS

Appeal

Fixing new day

APPEAL.

Trial court's order issuing death warrant did not affect substantial rights other than those adjudicated by the judgment imposing the death sentence, thus appeal of the order was dismissed. *State v. Campbell*, 112 Wn.2d 186, 770 P.2d 620 (1989).

Orders concerning restraining execution are not appealable after passage of date set for execution. *Grossi v. Long*, 136 Wash. 133, 238 P. 983 (1925), overruled on other grounds, *State v. Harris*, 114 Wn.2d 419, 789 P.2d 60 (1990); *State ex rel. Bird v. Superior Court*, 30 Wn.2d 110, 190 P.2d 762 (1948).

FIXING NEW DAY.

Superior court judge may fix a new day when time of execution is passed. *Craemer v. Washington State*, 168 U.S. 124, 18 S. Ct. 1, 42 L. Ed. 407 (1897); *State ex rel. Campbell v. Superior Court*, 25 Wash. 271, 65 P. 183 (1901).

OPINIONS OF THE ATTORNEY GENERAL

ANALYSIS

Resentencing

RESENTENCING.

Resentencing following death sentence reprieve. AGO 1933-34, p. 296 (1934), AGO 1945-46, p. 428 (1945).

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Rev. Code Wash. (ARCW) § 10.95.900

Rev. Code Wash. (ARCW) § 10.95.900 (2008)

§ 10.95.900. Severability -- 1981 c 138

If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

HISTORY: 1981 c 138 § 22.

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LEGISLATIVE RESEARCH REPORT

FEBRUARY 23, 2009



REPORT NUMBER 09.135

CAPITAL PUNISHMENT IN THE U.S. AND IN ALASKA

PREPARED FOR REPRESENTATIVE MIKE CHENAULT

BY PATRICIA YOUNG, MANAGER

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You asked for information on capital punishment in the United States and in Alaska. Specifically, you wished to know which states authorize capital punishment and by what methods, what crimes are capital offenses, and under what circumstances convictions may be appealed. You also asked for a history of the death penalty in both the Territory and State of Alaska, including information on when capital punishment was abolished and what attempts have been made to restore it in this state.

CAPITAL PUNISHMENT IN THE U.S.

DEATH PENALTY STATES

Thirty-six states, the U.S. military, and the U.S. government allow for capital punishment. States that authorize capital punishment are Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming.

CAPITAL CRIMES—PUNISHABLE BY DEATH

As documented by the Death Penalty Information Center (DPIC), the death penalty in this country is almost exclusively reserved for the crime of first-degree murder—most often accompanied by aggravating circumstances, which vary by state.¹ Although a number of states list various other crimes as punishable by death, no one has been executed for a non-murder offense since the death penalty was reinstated in 1976.²

In addition to first-degree murder, laws in seven states authorize the death penalty for the rape of a child. In 2008, however, the U.S. Supreme Court held that the Eighth Amendment's cruel and unusual punishment clause prohibits the death penalty for the rape of a child where the crime did not result, and was not intended to result, in death.³

The DPIC identifies the following other non-murder offenses listed in state law as capital crimes:

- Treason (Arkansas, California, Colorado, Georgia, Illinois, Louisiana, Mississippi, Missouri, Washington)
- Aggravated kidnapping (Colorado, Idaho, Illinois, Missouri, Montana)
- Rape of a child (Florida, Georgia, Louisiana, Montana, Oklahoma, South Carolina, Texas)
- Drug trafficking (Florida, Missouri)
- Aircraft hijacking (Georgia, Missouri)
- Placing a bomb near a bus terminal (Missouri)
- Espionage (New Mexico)

¹ The Death Penalty Information Center is a non-profit organization tracking all aspects of the capital punishment issue. The organization website, www.deathpenaltyinfo.org, contains extensive information.

² Alison M. Smith, "Capital Punishment: Constitutionality for Non-Homicide Crimes Such as Child Rape," Congressional Research Service Report, March 21, 2008.

³ The decision in *Kennedy v. Louisiana*, 128 S.Ct. 2641 (2008), was a five-four split: Justice Kennedy delivered the majority opinion which was joined by Justices Stevens, Souter, Ginsburg, and Breyer; Justices Alito, Roberts, Scalia, and Thomas joined in a dissenting opinion.

- Aggravated assault by incarcerated, persistent felons or murderers (Montana).

METHODS OF EXECUTION

Thirty-five of the capital punishment states, the U.S. military and U.S. government authorize lethal injection as the method of execution; only one capital punishment state does not authorize the use of lethal injection.⁴ A few states also authorize the use of other methods—electrocution, gas chamber, hanging, and firing squad. Nevertheless, lethal injection is by far the method most commonly used: in 2008, for example, of the 37 executions, 36 were carried out by lethal injection; only one was carried out by electrocution.⁵

Table 1: Authorized Methods of Execution

Method	Executions Since 1976	Authorization	Jurisdiction
Lethal Injection	974	35 states + U.S. Military and U.S. Government	Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wyoming, U.S. Military, U.S. Government
Electrocution	155	9 states	Alabama, Arkansas, Florida, [Illinois], Kentucky, [Oklahoma], South Carolina, Tennessee, Virginia
Gas Chamber	11	5 states (all have lethal injection as an alternative method)	Arizona, California, Maryland, Missouri, [Wyoming]
Hanging	3	2 states (all have lethal injection as an alternative method)	New Hampshire, Washington
Firing Squad	2	2 states (all have lethal injection as an alternative method)	Idaho, [Oklahoma], Utah** ** Utah offers the firing squad only for inmates who chose this method prior to its elimination as an option.

¹Notes: States in [brackets] authorize the listed method only if a current method is found to be unconstitutional.
In Nebraska, electrocution was the sole method until the Nebraska Supreme Court ruled the method to be unconstitutional in February 2008. Currently, no other method is authorized.
Source: Bureau of Justice Statistics, Capital Punishment 2006; updated by Death Penalty Information Center.

In 2007, the U.S. Supreme Court agreed to hear a case from Kentucky on whether lethal injection violates the Eighth Amendment ban on cruel and unusual treatment. Because lethal injection is so

⁴ Electrocution is the only method authorized in Nebraska, and its use has been declared unconstitutional. Last year, the state supreme court ruled that electrocution violates the prohibition against cruel and unusual punishment. *State v. Mata*, 745 N.W.2d 229 (Nebraska, 2008).

⁵ The Bureau of Justice Statistics reports that in 2008, nine states executed 37 prisoners (Texas—18; Virginia—4; Georgia and South Carolina each executed 3; Ohio, Florida, Mississippi, and Oklahoma each executed 2; and Kentucky executed 1 prisoner.) Of these executions, 36 were carried out by lethal injection; only one, in South Carolina, was carried out by electrocution. Bureau of Justice Statistics, "Advance Count of Executions: January 1, 2008 – November 30, 2008," www.ojp.usdoj.gov/bjs/pub/html/cp/2007/tables/cp07sta.htm.

commonly the method of choice, many capital punishment states unofficially instituted a moratorium on imposing the death penalty pending a decision in that case.⁶ On April 16, 2008, the Court affirmed the constitutionality of Kentucky's three-drug protocol for carrying out lethal injections, finding that the procedure does not amount to cruel and unusual punishment under the Eighth Amendment. Although the Court's seven member majority decision is likely to lift the moratorium, the issue appears not fully resolved. As Justice Paul Stevens, noted in his concurring opinion,

I assumed that our decision would bring the debate about lethal injection as a method of execution to a close. It now seems clear that it will not. The question whether a similar three-drug protocol may be used in other States remains open, and may well be answered differently in a future case on the basis of a more complete record. Instead of ending the controversy, I am now convinced that this case will generate debate not only about the constitutionality of the three-drug protocol, and specifically about the justification for the use of the paralytic agent, pancuronium bromide, but also about the justification for the death penalty itself.⁷

The decision in *Baze*, which upholds this aspect of states' abilities to carry out capital punishment, is a noted departure from recent decisions that have tended to narrow application of the death penalty. For example, in 2002, the Court found that executions of mentally retarded criminals constitute cruel and unusual punishment prohibited by the Eighth Amendment.⁸ In 2005, the Court ruled that the death penalty for persons having committed capital crimes while under the age of 18 constitutes cruel and unusual punishment and is, likewise, constitutionally prohibited.⁹ And, as mentioned earlier, in 2008, the Court held that the death penalty for the rape of a child where the crime did not result, and was not intended to result, in death is constitutionally prohibited.

CONVICTION AND APPEALS

The U.S. Supreme Court has long held the death penalty should be reserved for only the worst criminals, and because of the seriousness and irreversibility of the penalty, capital cases require special consideration and handling, with procedural and substantive protections that go far beyond those required for non-capital defendants. Capital cases involve separate proceedings for establishing guilt and for determining punishment with exhaustive review of both aggravating and mitigating factors. Following a decision in the trial court, direct appeal, post-conviction appellate review, and habeas corpus review at the federal level are all part of death penalty process. Appellate reviews based on due process rights, the right to effective assistance of counsel, and newly discovered evidence are the most common, and individual cases typically take several years to resolve.

RECENT STATE ACTION

As you know, the death penalty is a perennially hot topic, with fervid debate and passionately argued rationale and counter argument. It is not, therefore, surprising that state legislatures regularly consider measures on the issue, including contradictory measures. According to the Death Penalty Information Center, lawmakers in at least five states—Alaska, Georgia, New Hampshire, Virginia, and Utah—are in the process of considering bills to adopt or expand capital

⁶ *Baze v. Rees*, 128 S.Ct. 1520 (U.S. 2008).

⁷ Justice Stevens, concurring in the judgment, but writing separately, *Baze v. Rees*, 128 S.Ct. 1520, at 1542-43.

⁸ *Atkins v. Virginia*, 122 S.Ct. 2242 (U.S. 2002).

⁹ *Roper v. Simmons*, 125 S.Ct. 1183 (U.S. 2005).

punishment provisions. Lawmakers in at least 15 states are considering bills to limit or abolish capital punishment. Among those states, bills in Colorado, Kansas, Maryland, Missouri, Montana, Nebraska, New Hampshire, New Mexico, and Washington would abolish the death penalty. The Death Penalty Information Center notes that the extreme cost of the death penalty is a factor for many of these states.

HISTORY OF CAPITAL PUNISHMENT IN ALASKA

SUMMARY

Although records are incomplete, it appears that capital punishment was condoned, if not legal, in Alaska from the time of its purchase from Russia in 1867. The available historical records suggest that seven persons were hanged by the army or miners' courts between 1869 and 1899. After 1900, when criminal and civil codes had been established for the Territory, another eight persons were hanged for crimes deemed to warrant death. In 1957, the Territorial Legislature abolished capital punishment, citing concern that innocent persons could be executed.

Since that time, Alaska lawmakers in 11 Legislatures have considered 23 bills pertaining to the issue. Nineteen bills died without reaching a floor vote. Four passed to the other chamber where all died in committee. The bill advancing the furthest was SB 60 (1997), calling for a statewide advisory vote. After passing the Senate, the House Judiciary Committee offered a substitute that would provide the voters with a comparison of the estimated total costs of a capital trial through execution with those of a similar case resulting in life imprisonment without parole. The bill died with a failed attempt to discharge it from the House Finance Committee. Outside of the legislature, a ballot initiative was certified by the Division of Elections in 1985, but it failed to make the ballot because of insufficient public support.

CAPITAL PUNISHMENT IN ALASKA

After its purchase from Russia in 1867, Alaska was administered by the U.S. Army and later by the U.S. Navy until passage of the Organic Act of 1884, by which Congress extended the mining laws of the United States and the Oregon Code of Laws, "so far as they may be applicable" to the district of Alaska.¹⁰ According to Carter's Annotated Alaska Codes published in 1907, the laws regarding death warrants and designating the procedures for execution came from the laws of Oregon—presumably by virtue of the Organic Act. The Organic Act also provided for a governor and a court system. The more pertinent death penalty laws, however—those providing that an individual found guilty of murder in the first degree, or murder occasioned by obstruction of, or damage to, a railroad would be put to death unless the jury returned a verdict specifically qualifying that the sentence should be "without capital punishment"—appear to have been derived from laws in Ohio, and the exact date of their incorporation is uncertain.¹¹ We know, however, that Congress made provisions

¹⁰ Information from Robert DeArmond's, "Alaska: 1867-1959," in *Alaska: Blue Book 1973*, first edition, 141-154.

¹¹ See Attachment A, which includes pertinent sections from the following sources: Compilation of the Acts of Congress and Treaties Relating to Alaska from March 30, 1867 to March 3, 1905 (known as the Charlton Code), published in 1906; Carter's Annotated Alaska Codes (known as the Carter Code), published in 1907; Compiled Laws of Alaska (CLA) 1913; Compiled Laws of Alaska, 1933; the Alaska Compiled Laws Annotated (ACLA), 1949; and Chapter 132 Session Laws of Alaska, 1957.

for the rights-of-way for railroads in Alaska in 1898; in 1899, a criminal code was established; and in 1900, a civil code.

Regardless of the exact source or date of inception, the death penalty was used early in Alaska's history. Although records are sketchy and informal, it appears that capital punishment was condoned, if not legal, in Alaska from the time of its purchase from Russia in 1867. The available historical records suggest that seven persons were hanged by the army or miners' courts between 1869 and 1899.¹² Another eight persons were hanged for crimes deemed to warrant death between the advent of criminal and civil codes in Alaska and the abolition of capital punishment in 1957.¹³

The Legislative Library has no record of the debate on the elimination of the death penalty. An Associated Press article published following the bill's passage in the House in 1957, however, suggests that Warren Taylor, the bill's primary sponsor, was concerned about the possibility of individuals being unjustly executed. According to a more recent news article, a "significant basis" for the bill was the uneven application of the penalty—"three-fourths of the people hanged in Alaska this century were members of racial minorities, even though minorities accounted for only about one-fourth of the murders."¹⁴

Table 2, on the following page, represents a compilation of the historical information available on executions in Alaska. The information has been derived from documents provided by the Historical Collections within the Alaska State Library and from information found in William R. Hunt's *Golden Places: The History of Alaska-Yukon Mining*, published by the National Park Service.

¹² Attachment B contains three items. Items compiled by the Historical Collections of the Alaska State Library include a letter from Alaska Superior Court Judge Gerald Williams dated May 23, 1977, regarding hangings prior to 1900, and a list of hangings in Alaska by date, source unknown. The third document—and excerpt from William R. Hunt's *Golden Places: The History of Alaska-Yukon Mining, With Particular Reference to Alaska's National Parks* (Anchorage: National Park Service, 1990), chapter 16—describes the hanging of Martin Severts by miners isolated in Lituya Bay during the winter of 1899. The incident became the basis for Jack London's "The Unexpected," first published in 1906.

¹³ Attachment C contains two items compiled by the Historical Collections of the Alaska State Library: a letter from Charles J. Zibulka to the curator of the Alaska State Museum and Historical Library, dated August 10, 1965, and a table listing executed persons from 1902 forward, source unknown.

¹⁴ Attachment D contains an Associated Press news article, "House Votes to Abolish Alaska Death Penalty," published February 22, 1957; a transcript of that article; and Averil Lerman's, "Death's Double Standard: Territorial Alaska's Experience with Capital Punishment Showed Race and Money Mattered," published May 1, 1994, in the *Anchorage Daily News*.

Table 2: Executions in Alaska

Date	Name	Race	Sex	Location
1869	Scutdoo	Indian	male	Wrangell
1869	unknown	Indian	male	Wrangell
1877	Boyd	Caucasian	male	Wrangell
1882	Sad Kajun	Indian	male	Juneau
1882	Kakusakuch Kajun	Indian	male	Juneau
1898	unknown	unknown	male	Valdez
1899	Martin Severts	Caucasian	male	Lituya Bay
1902	Fred Hardy	Caucasian	male	Nome
1903	Homer Bird	Caucasian	male	Sitka
1921	Mailo P. Segura	Immigrated from Montenegro; presumed Caucasian	male	Fairbanks
1921	Hamilton	Indian	male	Fairbanks
1929	Constantine Beaver	Indian	male	Fairbanks
1939	Nelson Charles	Indian	male	Juneau
1948	Austin A. Nelson	African-American	male	Juneau
1950	Eugene LaMoore	African-American	male	Juneau

Sources: Holdings of the Alaska State Library, Historical Collections; and information in William R. Hunt's *Golden Places: The History of Alaska-Yukon Mining, With Particular Reference to Alaska's National Parks* (Anchorage: National Park Service, 1990), chapter 16.

EFFORTS TO REINSTITUTE THE DEATH PENALTY IN ALASKA

Since 1957, lawmakers in 11 Alaska Legislatures have considered 23 bills pertaining to the issue. The first attempt to reinstate capital punishment came in 1974; the most recent was in 1999. Seven bills proposed placing an advisory vote before the public asking whether the legislature should enact a death penalty law.¹⁵ All 16 of the bills to authorize the death penalty specified murder in the first degree as a capital felony; three of those would also have authorized the death penalty for the murder of a child under certain aggravating circumstances.

Of the 23 bills introduced, 18 died in committee without a floor vote of the originating body (13 died without a hearing or in the first committee; six died in the second committee). Of the five bills that reached a floor vote, one failed (HB 675 in 1974) and four passed the originating body but failed to reach the floor of the other body.¹⁶ Three of the bills that passed one chamber proposed only that advisory votes be placed before the public. The following table provides a brief overview of these bills.

¹⁵ Several of the other bills contained provisions for advisory votes, but in those, the advisory vote concerned the effective date of the reinstitution of capital punishment.

¹⁶ House Bill 675 failed to pass the House in 1974. Bills that passed out of their originating bodies were HB 235 in 1983; CSSB 17 (Jud)(ct rules & efds fld) in 1990; CSSSB 52 (Jud) in 1996; and HB 60 in 1997. In both 1990 and 1997, attempts to discharge the bills from committees failed.

Table 3: Bills to Reinstate the Death Penalty, 1959 - 2008

Legislature	Bill	Sponsors	Provisions	Final Status
8th Legislature 1973-1974	HB 675	SAYLORS	Authorizing death penalty for certain murders	failed House
12th Legislature 1981-1982	SB 73	BRADLEY	Classifying 1st degree murder as a capital felony and establishing sentencing procedures	(S) STA
	HB 458	HURLBERT	Authorizing capital punishment, classifying murder in the 1st degree as a capital felony, and establishing sentencing procedures	(H) JUD
	SB 121	PETTYJOHN, Kelly, Fischer P, Faiks	Authorizing capital punishment, classifying murder in the 1st degree as a capital felony, and establishing sentencing procedures	(S) JUD
13th Legislature 1983-1984	HB 140	PESTINGER, Ward, Flood, Liska, Shultz	Authorizing capital punishment, classifying murder in the 1st degree as a capital felony, and establishing sentencing procedures	(H) FIN
	HB 235	BUSSELL, Uehling, Liska, Shultz	Authorizing an advisory vote on the death penalty for 1st degree murder	(S) STA
14th Legislature 1985-1986	SB 119	FISCHER, P, Kelly, DeVries, Coghill, Faiks, Abood	Authorizing capital punishment, classifying murder in the 1st degree as a capital felony, and establishing sentencing procedures	(S) HESS
	HB 163	PETTYJOHN, Jenkins, Shultz, Taylor, Marrou, Gruenberg	Authorizing capital punishment, classifying murder in the 1st degree as a capital felony, and establishing sentencing procedures	(H) HESS
15th Legislature 1987-1988	SB 7	ABOOD, Kelly, Faiks, Fischer, P	Authorizing capital punishment, classifying murder in the 1st degree as a capital felony, and establishing sentencing procedures	(S) JUD
	SB 31	FISCHER, P, Kelly, Faiks	Authorizing capital punishment, classifying murder in the 1st degree as a capital felony, and establishing sentencing procedures	(S) HESS
16th Legislature 1989-1990	SB 17	FISCHER, P, Kelly, Pearce, Halford, Faiks	Authorizing capital punishment, classifying murder in the 1st degree as a capital felony, and establishing sentencing procedures; directing an advisory vote on whether the capital punishment law should take effect	(H) JUD
17th Legislature 1991-1992	SB 13	FISCHER, P, Frank, Pearce, Halford	Providing for an advisory vote on capital punishment	(S) FIN
18th Legislature 1993-1994	SB 127	(S) Judiciary	Authorizing capital punishment, classifying 1st degree murder as a capital felony; establishing sentencing procedures; authorizing an advisory vote on instituting capital punishment	(S) JUD
	HB 162	SANDERS, Olberg, Bunde, Kott, Vezey, James	Authorizing capital punishment, classifying 1st degree murder as a capital felony; establishing sentencing procedures; authorizing an advisory vote on instituting capital punishment	(H) FIN
	SB 52	TAYLOR, Pearce, Rokeberg, Kohring	Providing for an advisory vote on capital punishment	(H) FIN
19th Legislature 1995-1996	HB 45	SANDERS, Kohring	Authorizing capital punishment, classifying 1st degree murder as a capital felony, and establishing sentencing procedures; authorizing an advisory vote on instituting capital punishment	(H) STA
	HB 481	MASEK, Kohring, Ogan	Authorizing capital punishment, classifying 1st degree murder as a capital felony, and allowing the imposition of the death penalty when certain of those murders are committed against children; establishing sentencing procedures; and amending certain Rules of Criminal and Appellate Procedure	(H) JUD
	SB 60	TAYLOR, Pearce	Providing for an advisory vote on capital punishment	(H) FIN
20th Legislature 1997-1998	HB 131	SANDERS, Rokeberg, Kohring	Providing for an advisory vote on capital punishment	(H) JUD
	HB 166	MASEK, Kohring	Authorizing capital punishment, classifying 1st degree murder as a capital felony, and allowing the imposition of the death penalty when certain of those murders are committed against children; establishing sentencing procedures; and amending certain Rules of Criminal and Appellate Procedure	(H) JUD
	HB 20	KOHRING	Providing for an advisory vote on capital punishment	(H) STA
21st Legislature 1999-2000	HB 48	SANDERS	Providing for an advisory vote on capital punishment	(H) STA
	HB 75	MASEK, Kohring	Relating to murder; authorizing capital punishment, classifying 1st degree murder as a capital felony, and allowing the imposition of the death penalty when certain of those murders are committed against children; establishing sentencing procedures; and amending certain Rules of Criminal and Appellate Procedure	(H) JUD

Source: House and Senate Journals and Final Status of Bills and Resolutions, various years.

Table 4, on the following page, is a more detailed description of bills that have been before the Alaska legislature. It shows the measures introduced and provides a brief synopsis and the major provisions of each bill. Identical bills introduced in 1981 (HB 458 and SB 73) served as the basis for most of the subsequent proposals.

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

We hope you find this information to be useful. If you have questions, need additional information, or would like copies of the various measures, please let us know.

Table 4: ALASKA BILLS PERTAINING TO CAPITAL PUNISHMENT, Details (1959-2008)

Eighth Legislature, 1973 - 1974

House Bill 675

Prime Sponsor: A.M. Saylor

Referred to House Judiciary; committee substitute passed Judiciary; failed to pass House.

(CS made minor text changes).

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

Twelfth Legislature, 1981 - 1982

Senate Bill 73

Prime Sponsor: Brad Bradley

Referred to Senate State Affairs and Judiciary; did not pass out of State Affairs.

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

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

Prime Sponsor: Vern Hurlbert

Referred to House Judiciary; did not pass out of committee.

Table 4: ALASKA BILLS PERTAINING TO CAPITAL PUNISHMENT, Details (1959-2008)

Thirteenth Legislature, 1983 - 1984

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

Prime Sponsor: Fritz Pettyjohn

Co-Sponsors: Tim Kelly, Paul Fischer, and Jan Faiks

Referred to Senate Judiciary and Finance; did not pass out of Judiciary.

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

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

Prime Sponsor: Sam Pestinger

Co-Sponsors: Jerry Ward, Joe Flood, John Liska, Dick Shultz

Referred to House Judiciary and Finance; committee substitute passed Judiciary; did not pass out of Finance.

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

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

House Bill 235

Prime Sponsor: Charlie Bussell

Co-Sponsors: Rick Uehling, John Liska, Dick Shultz

Passed the House; referred to Senate State Affairs and Judiciary; did not pass out of Senate State Affairs.

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

Table 4: ALASKA BILLS PERTAINING TO CAPITAL PUNISHMENT, Details (1959-2008)

Fourteenth Legislature, 1985 - 1986

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

Prime Sponsor: Paul Fischer

Co-Sponsors: Tim Kelly, Ann DeVries, Jack Coghill, Jan Faiks, and Mitch Abood

Referred to Health, Education, and Social Services, Judiciary and Finance; did not pass out of Health, Education, and Social Services.

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

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

Prime Sponsor: Fritz Pettyjohn

Co-Sponsors: Roger Jenkins, Dick Shultz, Robin Taylor, Andre Marrou, Max Gruenberg

Referred to House Health, Education, and Social Services, Judiciary and Finance; did not pass out of Health Education, and Social Services.

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

Fifteenth Legislature, 1987 - 1988

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

Prime Sponsor: Mitch Abood

Co-Sponsors: Tim Kelly, Jan Faiks, Paul Fischer

Referred to Senate Health, Education, and Social Services, Judiciary, and Finance; did not pass out of Judiciary.

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

Table 4: ALASKA BILLS PERTAINING TO CAPITAL PUNISHMENT, Details (1959-2008)

Fifteenth Legislature (continued)

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

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

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

Prime Sponsor: Paul Fischer

Co-Sponsors: Tim Kelly and Jan Faiks

Referred to Senate Health, Education, and Social Services, Judiciary and Finance; did not pass out of Health, Education, and Social Services.

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

Sixteenth Legislature, 1989 - 1990

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

Prime Sponsor: Paul Fischer

Co-Sponsors: Tim Kelly, Drue Pearce, Rick Halford and Jan Faiks

CSSB 17 (Jud) (ct rules & efds fld) passed the Senate; referred to House Judiciary and Finance; failed to pass Judiciary.

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

CSSB 17 (Jud)

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

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

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

Table 4: ALASKA BILLS PERTAINING TO CAPITAL PUNISHMENT, Details (1959-2008)

Seventeenth Legislature, 1991 - 1992

Senate Bill 13

Prime Sponsor: Paul Fischer

Co-Sponsors: Steve Frank, Drue Pearce and Rick Halford

Referred to Senate Judiciary and Finance; did not pass out of Finance.

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

Eighteenth Legislature, 1993 - 1994

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

Prime Sponsor: Jerry Sanders

Co-Sponsor: Harley Olberg

Referred to House Judiciary and Finance; did not pass out of Finance.

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

Table 4: ALASKA BILLS PERTAINING TO CAPITAL PUNISHMENT, Details (1959-2008)

Eighteenth Legislature (continued)

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

Prime Sponsor: Senate Judiciary Committee

Referred to Senate Judiciary and Finance; did not pass out of Judiciary.

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

Nineteenth Legislature, 1995 - 1996

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

Prime Sponsor: Jerry Sanders

Co-Sponsor: Vic Kohring

Referred to House State Affairs, Judiciary, and Finance; did not pass out of State Affairs.

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

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

Prime Sponsor: Robin Taylor

Co-Sponsor: Drew Pearce

Referred to Judiciary and Finance; committee substitute for sponsor substitute passed Senate; referred to House Judiciary and Finance; did not pass out of Finance.

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

SSSB 52 *Text became identical to HB 45.*

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

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

Prime Sponsor: Beverly Masek

Co-Sponsors: Vic Kohring and Scott Ogan

Referred to House State Affairs and Judiciary; did not pass out of Judiciary.

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

Table 4: ALASKA BILLS PERTAINING TO CAPITAL PUNISHMENT, Details (1959-2008)

Twentieth Legislature, 1997 - 1998

House Bill 131 *Called for an advisory vote on capital punishment for 1st degree murder with imposition procedures consistent with the US Constitution as interpreted by the US Supreme Court.*

Prime Sponsor: Jerry Sanders

Co-Sponsors: Norm Rokeberg and Vic Kohring

Referred to Judiciary and Finance; died in Judiciary.

House Bill 166 *Classified 1st degree murder as a capital felony and allowed death penalty for murder of a child under certain circumstances. Made changes to rules of criminal and appellate procedure, and established sentencing procedures for capital felonies.*

Prime Sponsor: Beverly Masek

Co-Sponsors: Vic Kohring

Referred to Judiciary and Finance; died without a hearing.

Senate Bill 60 *Originally identical to HB 131. The House Judiciary Committee substitute inserted information comparing the costs of implementing the death penalty to those for 99 years of incarceration, and required the Lt. Governor to calculate the ratio between those costs to be published on the ballot for the advisory vote.*

Prime Sponsor: Robin Taylor

Co-Sponsors: Drue Pearce

The original version passed the Senate on a vote of 13 to 6; the House Judiciary Committee offered a CS and moved the bill to the Finance Committee where it died after a vote to discharge it from the committee failed 30 to 1.

Twenty-first Legislature, 1999 - 2000

House Bill 20 *Called for a statewide advisory vote on the death penalty. It adopted the requirement for the fiscal comparison of capital punishment and life imprisonment (99 years) without parole contained in HCS SB 60 (1997).*

Prime Sponsor: Vic Kohring

Co-Sponsors:

The bill died without a hearing.

House Bill 48 *Called for an advisory vote with language identical to HB 131 (1997).*

Prime Sponsor: Jerry Sanders

Co-Sponsors:

The bill died without a hearing.

House Bill 75 *Identical to HB 166 (1997).*

Prime Sponsor: Beverly Masek

Co-Sponsors: Vic Kohring

The bill died in the first committee of referral after two hearings.

Notes: No bills regarding capital punishment were introduced in the 22nd through the 25th Legislatures (2001 - 2008).

Sources: Bill texts, bill histories, *Final Status of Bills and Resolutions*, 1975 - 1992; and Bill Action and Status Inquiry System (B

The distinguishing features of a criminal trial are what are known in the language of the law as the presumption of innocence and the burden of proof beyond a reasonable doubt. The law presumes a defendant to be innocent of crime. Thus, a defendant, although accused, begins the trial with a clean slate -- with no evidence favoring conviction. The presumption of innocence alone is sufficient to acquit a defendant, unless you are satisfied beyond a reasonable doubt of the defendant's guilt, after careful and impartial consideration of all the evidence in the case.

This last-mentioned requirement, that you be satisfied beyond a reasonable doubt of the defendant's guilt, is what is called the burden of proof. It is not required that the prosecution prove guilt beyond all possible doubt, for it is rarely possible to prove anything to an absolute certainty. Rather, the test is one of reasonable doubt. A reasonable doubt is a doubt based upon reason and common sense. Proof beyond a reasonable doubt must be proof of such a convincing character that, after consideration, you would be willing to rely and act upon it without hesitation in your important affairs. A defendant is never to be convicted on mere suspicion or conjecture.

The burden of proving the defendant guilty beyond a reasonable doubt always rests upon the prosecution. This burden never shifts throughout the trial, for the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence. A defendant has the absolute right not to testify, and

you must not draw any inference against the defendant for not testifying. Thus a reasonable doubt may arise not only from the evidence produced, but also from a lack of evidence. Since the burden is upon the prosecution to prove every essential element of the crime charged, beyond a reasonable doubt, a defendant has the right to rely upon the failure of the prosecution to establish such proof. A defendant may also rely upon evidence brought out on cross-examination of witnesses for the prosecution.

USE NOTE

McCurry v. State, 538 P.2d 100 (Alaska 1975); Davenport v. State, 519 P.2d 452 (Alaska 1974).

Comment [sf1]: insert at
approximately 6
"

This instruction is usually given twice, once at the beginning of trial and once with the closing instructions.

MEMORANDUM

STATE OF ALASKA

Department of Law - Criminal Division

To: Members, House Judiciary Committee

Date: February 24, 2009

From: Susan S. McLean *SSM*
Acting Deputy Attorney General

Tel No: (907) 269-6379

Fax: (907) 269-6305

Subject: Statistics and Constitutional
Law – HB 9

The attached documents are provided in response to questions raised yesterday during the initial hearing regarding HB 9. Attached are:

1. DOC statistics pertaining to the length of sentences being served by those convicted of Murder in the First Degree, which reflects those serving more than 90 years.
2. Copies of the following U.S. Supreme Court cases pertaining to capital punishment:
 - a. *Roper v. Simmons*, 543 U.S. 551 (2004) (juvenile offenders)
 - b. *Kennedy v. Louisiana*, 128 S.Ct. 2641 (2008) and 129 S.Ct. 1 (modifying original opinion) (offenders convicted of raping a child)
 - c. *Coker v. Georgia*, 433 U.S. 584 (1977) (offenders convicted of raping an adult)
 - d. *Atkins v. Virginia*, 536 U.S. 304 (2002) (offender who is diagnosed as "mentally retarded")

STATISTICS ON MURDER 1 INMATES 12/31/2008

INTAKE YEAR	COUNT
1972	1
1973	1
1976	1
1977	2
1978	1
1980	2
1981	4
1982	2
1983	6
1984	7
1985	2
1986	14
1987	13
1988	7
1989	4
1990	10
1991	4
1992	7
1993	8
1994	6
1995	13
1996	6
1997	16
1998	12
1999	2
2000	5
2001	9
2002	7
2003	9
2004	4
2005	16
2006	10
2007	20
2008	17
TOTAL	248

AGE GROUP	WHITE	BLACK	TOTAL
19 AND UNDER	0	2	2
20 - 24	1	11	12
25 - 29	0	28	28
30 - 34	0	32	32
35 - 39	3	25	28
40 - 44	2	26	28
45 - 49	6	36	42
50 - 54	0	23	23
55 - 59	0	26	26
60 - 64	0	15	15
65 AND OVER	0	12	12
TOTAL	12	236	248

SENT/UNSENT	COUNT
SENTENCED	224
UNSENTENCED	24
TOTAL	248

SENTENCE LENGTH	F	M	TOTAL
LESS THAN 20 YRS	0	8	8
20 - 29 YRS	0	3	3
30 - 39 YRS	0	10	10
40 - 49 YRS	0	8	8
50 - 59 YRS	1	16	17
60 - 69 YRS	0	19	19
70 - 79 YRS	1	19	20
80 - 89 YRS	2	9	11
90 - 99 YRS	4	101	105
100 YRS AND OVER	0	12	12
UNKNOWN	4	31	35
TOTAL	12	236	248

AVERAGE SENTENCE LENGTH
86 YEARS

COURT LOCATION	COUNT
JUNEAU	3
KETCHIKAN	6
BARROW	2
KOTZEBUE	1
NOME	2
ANCHORAGE	85
DILLINGHAM	3
KENAI	10
KODIAK	3
NAKNEK	1
PALMER	5
VALDEZ	1
BETHEL	6
FAIRBANKS	36
UNKNOWN	84
TOTAL	248

P

Supreme Court of the United States
 Donald P. ROPER, Superintendent, Potosi Correctional
 Center, Petitioner,
 v.
 Christopher SIMMONS.
 No. 03-633.

Argued Oct. 13, 2004.
 Decided March 1, 2005.

Background: Defendant convicted after he turned 18 of committing first-degree murder when he was 17, and sentenced to death, 944 S.W.2d 165, petitioned for writ of habeas corpus. The Missouri Supreme Court, Laura Den- vir Stith, J., 112 S.W.3d 397, granted relief. Certiorari was granted.

Holding: The Supreme Court, Justice Kennedy, held that execution of individuals who were under 18 years of age at time of their capital crimes is prohibited by Eighth and Fourteenth Amendments; abrogating Stanford v. Ken- nucky, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306.

Affirmed.

Justice Stevens concurred and filed opinion in which Justice Ginsburg joined.

Justice O'Connor dissented and filed opinion.

Justice Scalia dissented and filed opinion in which Chief Justice Rehnquist and Justice Thomas joined.

West Headnotes

[1] Sentencing and Punishment 350H 1482

350H Sentencing and Punishment

350HVII Cruel and Unusual Punishment in General

350HVII(E) Excessiveness and Proportionality of Sentence

350Hk1482 k. Proportionality. Most Cited Cases

Court must refer to evolving standards of decency that mark progress of maturing society when determining

which punishments are so disproportionate as to be "cruel and unusual," within meaning of Eighth Amendment prohibition. U.S.C.A. Const. Amend. 8.

[2] Sentencing and Punishment 350H 1618

350H Sentencing and Punishment

350HVIII The Death Penalty

350HVIII(A) In General

350Hk1613 Requirements for Imposition

350Hk1618 k. Narrowing Class of Eligible Offenders. Most Cited Cases

Sentencing and Punishment 350H 1667

350H Sentencing and Punishment

350HVIII The Death Penalty

350HVIII(D) Factors Related to Offense

350Hk1666 Nature or Degree of Offense

350Hk1667 k. In General. Most Cited Cases Capital punishment must be limited to those offenders who commit narrow category of most serious crimes and whose extreme culpability makes them most deserving of execution.

[3] Sentencing and Punishment 350H 1625

350H Sentencing and Punishment

350HVIII The Death Penalty

350HVIII(A) In General

350Hk1622 Validity of Statute or Regulatory Provision

350Hk1625 k. Aggravating or Mitigating Circumstances. Most Cited Cases

Sentencing and Punishment 350H 1652

350H Sentencing and Punishment

350HVIII The Death Penalty

350HVIII(C) Factors Affecting Imposition in General

350Hk1652 k. Aggravating Circumstances in General. Most Cited Cases State must give narrow and precise definition to aggravating factors that can result in capital sentence.

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543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1, 73 USLW 4153, 05 Cal. Daily Op. Serv. 1735, 18 Fla. L. Weekly Fed.

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(Cite as: 543 U.S. 551, 125 S.Ct. 1183)

[4] Sentencing and Punishment 350H 1665**350H Sentencing and Punishment****350HVIII The Death Penalty****350HVIII(D) Factors Related to Offense****350Hk1665 k. In General. Most Cited Cases****Sentencing and Punishment 350H 1702****350H Sentencing and Punishment****350HVIII The Death Penalty****350HVIII(E) Factors Related to Offender****350Hk1702 k. Offender's Character in General.****Most Cited Cases**

In any capital case, defendant has wide latitude to raise as mitigating factor any aspect of his or her character or record and any circumstances of offense that defendant proffers as basis for sentence less than death.

[5] Constitutional Law 92 4743**92 Constitutional Law****92XXVII Due Process****92XXVII(H) Criminal Law****92XXVII(H)6 Judgment and Sentence****92k4741 Capital Punishment; Death Penalty****92k4743 k. Persons Eligible. Most Cited****Cases**

(Formerly 92k270(1))

Sentencing and Punishment 350H 1643**350H Sentencing and Punishment****350HVIII The Death Penalty****350HVIII(B) Persons Eligible****350Hk1643 k. Juveniles. Most Cited Cases**

Eighth and Fourteenth Amendments forbid imposition of death penalty on offenders who were under age of 18 when their crimes were committed; abrogating Stanford v. Kentucky, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306, U.S.C.A. Const.Amends. 8, 14.

****1184 *551 Syllabus ^{FN*}**

^{FN*} The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

At age 17, respondent Simmons planned and committed a capital murder. After he had turned 18, he was sentenced to death. His direct appeal and subsequent petitions for state and federal postconviction relief were rejected. This Court then held, in Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335, that the Eighth Amendment, applicable to the States through the Fourteenth Amendment, prohibits the execution of a mentally retarded person. Simmons filed a new petition for state postconviction relief, arguing that Atkins' reasoning established that the Constitution prohibits the execution of a juvenile who was under 18 when he committed his crime. The Missouri Supreme Court agreed and set aside Simmons' death sentence in favor of life imprisonment without eligibility for release. It held that, although Stanford v. Kentucky, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306, rejected the proposition that the Constitution bars capital punishment for juvenile offenders younger than 18, a national consensus has developed against the execution of those offenders since Stanford.

Held: The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed. Pp. 1190-1200.

(a) The Eighth Amendment's prohibition against "cruel and unusual punishments" must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design. To implement this framework this Court has established the propriety and affirmed the necessity of referring to "the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be "cruel and unusual." Trop v. Dulles, 356 U.S. 86, 100-101, 78 S.Ct. 590, 2 L.Ed.2d 630. In 1988, in Thompson v. Oklahoma, 487 U.S. 815, 818-838, 108 S.Ct. 2687, 101 L.Ed.2d 702, a plurality determined that national standards of decency did not permit the execution of any offender under age 16 at the **1185 time of the crime. The next year, in Stanford, a 5-to-4 Court referred to contemporary standards of decency, but concluded the Eighth and Fourteenth Amendments did not proscribe the execution of offenders over 15 but under 18 because 22 of 37 death penalty States permitted that penalty for 16-year-old offenders, and 25 permitted it for 17-year-olds, thereby indicating there was no national consensus. 492 U.S., at 370-371, 109 S.Ct. 2969. A plurality*552 also "emphatically reject[ed]" the suggestion that the Court should

bring its own judgment to bear on the acceptability of the juvenile death penalty. *Id.*, at 377-378, 109 S.Ct. 2969. That same day the Court held, in *Penry v. Lynaugh*, 492 U.S. 302, 334, 109 S.Ct. 2934, 106 L.Ed.2d 256, that the Eighth Amendment did not mandate a categorical exemption from the death penalty for mentally retarded persons because only two States had enacted laws banning such executions. Three Terms ago in *Atkins*, however, the Court held that standards of decency had evolved since *Penry* and now demonstrated that the execution of the mentally retarded is cruel and unusual punishment. The *Atkins* Court noted that objective indicia of society's standards, as expressed in pertinent legislative enactments and state practice, demonstrated that such executions had become so truly unusual that it was fair to say that a national consensus has developed against them. 536 U.S., at 314-315, 122 S.Ct. 2242. The Court also returned to the rule, established in decisions predating *Stanford*, that the Constitution contemplates that the Court's own judgment be brought to bear on the question of the acceptability of the death penalty. 536 U.S., at 312, 122 S.Ct. 2242. After observing that mental retardation diminishes personal culpability even if the offender can distinguish right from wrong, *id.*, at 318, 122 S.Ct. 2242, and that mentally retarded offenders' impairments make it less defensible to impose the death penalty as retribution for past crimes or as a real deterrent to future crimes, *id.*, at 319-320, 122 S.Ct. 2242, the Court ruled that the death penalty constitutes an excessive sanction for the entire category of mentally retarded offenders, and that the Eighth Amendment places a substantive restriction on the State's power to take such an offender's life, *id.*, at 321, 122 S.Ct. 2242. Just as the *Atkins* Court reconsidered the issue decided in *Penry*, the Court now reconsiders the issue decided in *Stanford*. Pp. 1190-1192.

(b) Both objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question, and the Court's own determination in the exercise of its independent judgment, demonstrate that the death penalty is a disproportionate punishment for juveniles. Pp. 1192-1198.

(1) As in *Atkins*, the objective indicia of national consensus here—the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice—provide sufficient evidence that today society views juveniles, in the words *Atkins* used respecting the mentally retarded, as “categorically less culpable than the average criminal,” 536 U.S.,

at 316, 122 S.Ct. 2242. The evidence of such consensus is similar, and in some respects parallel, to the evidence in *Atkins*: 30 States prohibit the juvenile death penalty, including 12 that have rejected it altogether and 18 that maintain it but, by express provision*553 or judicial interpretation, exclude juveniles from its reach. Moreover, even in the 20 States without a formal prohibition, the execution of juveniles is infrequent. Although, by contrast to *Atkins*, the rate of change in reducing the incidence of the juvenile death penalty, or **1186 in taking specific steps to abolish it, has been less dramatic, the difference between this case and *Atkins* in that respect is counterbalanced by the consistent direction of the change toward abolition. Indeed, the slower pace here may be explained by the simple fact that the impropriety of executing juveniles between 16 and 18 years old gained wide recognition earlier than the impropriety of executing the mentally retarded. Pp. 1192-1194.

(2) Rejection of the imposition of the death penalty on juvenile offenders under 18 is required by the Eighth Amendment. Capital punishment must be limited to those offenders who commit “a narrow category of the most serious crimes” and whose extreme culpability makes them “the most deserving of execution.” *Atkins, supra*, at 319, 122 S.Ct. 2242. Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. Juveniles' susceptibility to immature and irresponsible behavior means “their irresponsible conduct is not as morally reprehensible as that of an adult.” *Thompson v. Oklahoma*, 487 U.S. 815, 835, 108 S.Ct. 2687, 101 L.Ed.2d 702. Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. See *Stanford, supra*, at 395, 109 S.Ct. 2969. The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. The *Thompson* plurality recognized the import of these characteristics with respect to juveniles under 16. 487 U.S., at 833-838, 108 S.Ct. 2687. The same reasoning applies to all juvenile offenders under 18. Once juveniles' diminished culpability is recognized, it is evident that neither of the two penological justifications for the death penalty—retribution and deterrence of capital crimes by prospective offenders, e.g., *Atkins, supra*, at 319, 122 S.Ct. 2242—provides adequate justification for imposing that penalty on juveniles. Although the Court cannot deny or overlook the brutal crimes too many juvenile offenders have committed, it

disagrees with petitioner's contention that, given the Court's own insistence on individualized consideration in capital sentencing, it is arbitrary and unnecessary to adopt a categorical rule barring imposition of the death penalty on an offender under 18. An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's *554 objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death. When a juvenile commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity. While drawing the line at 18 is subject to the objections always raised against categorical rules, that is the point where society draws the line for many purposes between childhood and adulthood and the age at which the line for death eligibility ought to rest. *Stanford* should be deemed no longer controlling on this issue. Pp. 1194-1198.

(c) The overwhelming weight of international opinion against the juvenile death penalty is not controlling here, but provides respected and significant confirmation for the Court's determination that the penalty is disproportionate punishment for offenders under 18. See, e.g., **1187 *Thompson, supra*, at 830-831, and n. 31, 108 S.Ct. 2687. The United States is the only country in the world that continues to give official sanction to the juvenile penalty. It does not lessen fidelity to the Constitution or pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples underscores the centrality of those same rights within our own heritage of freedom. Pp. 1198-1200.

112 S.W.3d 397, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined. STEVENS, J., filed a concurring opinion, in which GINSBURG, J., joined, *post*, p. 1205. O'CONNOR, J., filed a dissenting opinion, *post*, p. 1206. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C.J., and THOMAS, J., joined, *post*, p. 1217.

James R. Layton, Jefferson City, MO, for petitioner.

Seth P. Waxman, Washington, DC, for respondent.

Jennifer Herndon, Counsel of Record, St. Louis, MO,

Seth P. Waxman, David W. Ogden, Danielle Spinelli, Wilmer, Cutler, Pickering, Hale and Dorr, LLP, Washington, DC, for Respondent.

Jeremiah W. (Jay) Nixon, Attorney General of Missouri, James R. Layton, State Solicitor, Stephen D. Hawke, Counsel of Record, Evan J. Buchheim, Assistant Attorneys General, Jefferson City, MO, for Petitioner.

For U.S. Supreme Court briefs, see:2004 WL 903158 (Pet.Brief)2004 WL 1947812 (Resp.Brief)

Justice KENNEDY delivered the opinion of the Court.

*555 This case requires us to address, for the second time in a decade and a half, whether it is permissible under the Eighth and Fourteenth Amendments to the Constitution of the United States to execute a juvenile offender who was older *556 than 15 but younger than 18 when he committed a capital crime. In *Stanford v. Kentucky*, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989), a divided Court rejected the proposition that the Constitution bars capital punishment for juvenile offenders in this age group. We reconsider the question.

I

At the age of 17, when he was still a junior in high school, Christopher Simmons, the respondent here, committed murder. About nine months later, after he had turned 18, he was tried and sentenced to death. There is little doubt that Simmons was the instigator of the crime. Before its commission Simmons said he wanted to murder someone. In chilling, callous terms he talked about his plan, discussing it for the most part with two friends, Charles Benjamin and John Tessmer, then aged 15 and 16 respectively. Simmons proposed to commit burglary and murder by breaking and entering, tying up a victim, and throwing the victim off a bridge. Simmons assured his friends they could "get away with it" because they were minors.

The three met at about 2 a.m. on the night of the murder, but Tessmer left before the other two set out. (The State later charged Tessmer with conspiracy, but dropped the charge in exchange for his testimony against Simmons.) Simmons and Benjamin entered the home of the victim, Shirley Crook, after reaching through an open window and unlocking the **1188 back door. Simmons turned on a hallway light. Awakened, Mrs. Crook called out, "Who's there?" In response Simmons entered Mrs.

Crook's bedroom, where he recognized her from a previous car accident involving them both. Simmons later admitted this confirmed his resolve to murder her.

Using duct tape to cover her eyes and mouth and bind her hands, the two perpetrators put Mrs. Crook in her minivan and drove to a state park. They reinforced the bindings, covered her head with a towel, and walked her to a railroad*557 trestle spanning the Meramec River. There they tied her hands and feet together with electrical wire, wrapped her whole face in duct tape and threw her from the bridge, drowning her in the waters below.

By the afternoon of September 9, Steven Crook had returned home from an overnight trip, found his bedroom in disarray, and reported his wife missing. On the same afternoon fishermen recovered the victim's body from the river. Simmons, meanwhile, was bragging about the killing, telling friends he had killed a woman "because the bitch seen my face."

The next day, after receiving information of Simmons' involvement, police arrested him at his high school and took him to the police station in Fenton, Missouri. They read him his *Miranda* rights. Simmons waived his right to an attorney and agreed to answer questions. After less than two hours of interrogation, Simmons confessed to the murder and agreed to perform a videotaped reenactment at the crime scene.

The State charged Simmons with burglary, kidnaping, stealing, and murder in the first degree. As Simmons was 17 at the time of the crime, he was outside the criminal jurisdiction of Missouri's juvenile court system. See Mo.Rev.Stat. §§ 211.021 (2000) and 211.031 (Supp.2003). He was tried as an adult. At trial the State introduced Simmons' confession and the videotaped reenactment of the crime, along with testimony that Simmons discussed the crime in advance and bragged about it later. The defense called no witnesses in the guilt phase. The jury having returned a verdict of murder, the trial proceeded to the penalty phase.

The State sought the death penalty. As aggravating factors, the State submitted that the murder was committed for the purpose of receiving money; was committed for the purpose of avoiding, interfering with, or preventing lawful arrest of the defendant; and involved depravity of mind and was outrageously and wantonly vile, horrible, and inhuman. *558 The State called Shirley Crook's husband, daughter, and two sisters, who presented moving

evidence of the devastation her death had brought to their lives.

In mitigation Simmons' attorneys first called an officer of the Missouri juvenile justice system, who testified that Simmons had no prior convictions and that no previous charges had been filed against him. Simmons' mother, father, two younger half brothers, a neighbor, and a friend took the stand to tell the jurors of the close relationships they had formed with Simmons and to plead for mercy on his behalf. Simmons' mother, in particular, testified to the responsibility Simmons demonstrated in taking care of his two younger half brothers and of his grandmother and to his capacity to show love for them.

During closing arguments, both the prosecutor and defense counsel addressed Simmons' age, which the trial judge had instructed the jurors they could consider as a mitigating factor. Defense counsel reminded the jurors that juveniles of Simmons' age cannot drink, serve on juries, or even see certain movies, because "the legislatures**1189 have wisely decided that individuals of a certain age aren't responsible enough." Defense counsel argued that Simmons' age should make "a huge difference to [the jurors] in deciding just exactly what sort of punishment to make." In rebuttal, the prosecutor gave the following response: "Age, he says. Think about age. Seventeen years old. Isn't that scary? Doesn't that scare you? Mitigating? Quite the contrary I submit. Quite the contrary."

The jury recommended the death penalty after finding the State had proved each of the three aggravating factors submitted to it. Accepting the jury's recommendation, the trial judge imposed the death penalty.

Simmons obtained new counsel, who moved in the trial court to set aside the conviction and sentence. One argument was that Simmons had received ineffective assistance at trial. To support this contention, the new counsel called *559 as witnesses Simmons' trial attorney, Simmons' friends and neighbors, and clinical psychologists who had evaluated him.

Part of the submission was that Simmons was "very immature," "very impulsive," and "very susceptible to being manipulated or influenced." The experts testified about Simmons' background including a difficult home environment and dramatic changes in behavior, accompanied by poor school performance in adolescence. Simmons was absent from home for long periods, spending time

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 (Cite as: 543 U.S. 551, 125 S.Ct. 1183)

using alcohol and drugs with other teenagers or young adults. The contention by Simmons' postconviction counsel was that these matters should have been established in the sentencing proceeding.

The trial court found no constitutional violation by reason of ineffective assistance of counsel and denied the motion for postconviction relief. In a consolidated appeal from Simmons' conviction and sentence, and from the denial of postconviction relief, the Missouri Supreme Court affirmed. State v. Simmons, 944 S.W.2d 165, 169 (en banc); cert. denied, 522 U.S. 953, 118 S.Ct. 376, 139 L.Ed.2d 293 (1997). The federal courts denied Simmons' petition for a writ of habeas corpus. Simmons v. Bowersox, 235 F.3d 1124, 1127(CA8), cert. denied, 534 U.S. 924, 122 S.Ct. 280, 151 L.Ed.2d 206 (2001).

After these proceedings in Simmons' case had run their course, this Court held that the Eighth and Fourteenth Amendments prohibit the execution of a mentally retarded person. Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). Simmons filed a new petition for state postconviction relief, arguing that the reasoning of Atkins established that the Constitution prohibits the execution of a juvenile who was under 18 when the crime was committed.

The Missouri Supreme Court agreed. State ex rel. Simmons v. Roper, 112 S.W.3d 397 (2003) (en banc). It held that since Stanford,

"a national consensus has developed against the execution of juvenile offenders, as demonstrated by the fact that eighteen states now bar such executions for juveniles,*560 that twelve other states bar executions altogether, that no state has lowered its age of execution below 18 since Stanford, that five states have legislatively or by case law raised or established the minimum age at 18, and that the imposition of the juvenile death penalty has become truly unusual over the last decade." 112 S.W.3d, at 399.

On this reasoning it set aside Simmons' death sentence and resentenced him to "life imprisonment without eligibility for probation, parole, or release except by act of the Governor." Id., at 413.

**1190 We granted certiorari, 540 U.S. 1160, 124 S.Ct. 1171, 157 L.Ed.2d 1204 (2004), and now affirm.

II

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The provision is applicable to the States through the Fourteenth Amendment. Furman v. Georgia, 408 U.S. 238, 239, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)(*per curiam*); Robinson v. California, 370 U.S. 660, 666-667, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962); Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 463, 67 S.Ct. 374, 91 L.Ed. 422 (1947) (plurality opinion). As the Court explained in Atkins, the Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions. The right flows from the basic "precept of justice that punishment for crime should be graduated and proportioned to [the] offense." 536 U.S., at 311, 122 S.Ct. 2242 (quoting Weems v. United States, 217 U.S. 349, 367, 30 S.Ct. 544, 54 L.Ed. 793 (1910)). By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons.

[1] The prohibition against "cruel and unusual punishments," like other expansive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design. To implement this *561 framework we have established the propriety and affirmed the necessity of referring to "the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be cruel and unusual. Trop v. Dulles, 356 U.S. 86, 100-101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (plurality opinion).

In Thompson v. Oklahoma, 487 U.S. 815, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988), a plurality of the Court determined that our standards of decency do not permit the execution of any offender under the age of 16 at the time of the crime. Id., at 818-838, 108 S.Ct. 2687 (opinion of STEVENS, J., joined by Brennan, Marshall, and Blackmun, JJ.). The plurality opinion explained that no death penalty State that had given express consideration to a minimum age for the death penalty had set the age lower than 16. Id., at 826-829, 108 S.Ct. 2687. The plurality also observed that "[t]he conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading

members of the Western European community.” *Id.*, at 830, 108 S.Ct. 2687. The opinion further noted that juries imposed the death penalty on offenders under 16 with exceeding rarity; the last execution of an offender for a crime committed under the age of 16 had been carried out in 1948, 40 years prior. *Id.*, at 832-833, 108 S.Ct. 2687.

Bringing its independent judgment to bear on the permissibility of the death penalty for a 15-year-old offender, the *Thompson* plurality stressed that “[t]he reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.” *Id.*, at 835, 108 S.Ct. 2687. According to the plurality, the lesser culpability of offenders under 16 made the death penalty inappropriate as a form of retribution, while the low likelihood that *1191 offenders under 16 engaged in “the kind of cost-benefit analysis that *562 attaches any weight to the possibility of execution” made the death penalty ineffective as a means of deterrence. *Id.*, at 836-838, 108 S.Ct. 2687. With Justice O’CONNOR concurring in the judgment on narrower grounds, *id.*, at 848-859, 108 S.Ct. 2687, the Court set aside the death sentence that had been imposed on the 15-year-old offender.

The next year, in *Stanford v. Kentucky*, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989), the Court, over a dissenting opinion joined by four Justices, referred to contemporary standards of decency in this country and concluded the Eighth and Fourteenth Amendments did not proscribe the execution of juvenile offenders over 15 but under 18. The Court noted that 22 of the 37 death penalty States permitted the death penalty for 16-year-old offenders, and, among these 37 States, 25 permitted it for 17-year-old offenders. These numbers, in the Court’s view, indicated there was no national consensus “sufficient to label a particular punishment cruel and unusual.” *Id.*, at 370-371, 109 S.Ct. 2969. A plurality of the Court also “emphatically reject[ed]” the suggestion that the Court should bring its own judgment to bear on the acceptability of the juvenile death penalty. *Id.*, at 377-378, 109 S.Ct. 2969 (opinion of SCALIA, J., joined by REHNQUIST, C.J., and White and KENNEDY, JJ.); see also *id.*, at 382, 109 S.Ct. 2969 (O’CONNOR, J., concurring in part and concurring in judgment) (criticizing the plurality’s refusal “to judge whether the ‘nexus between the punishment imposed and the defendant’s blameworthiness’ is proportional”).

The same day the Court decided *Stanford*, it held that the Eighth Amendment did not mandate a categorical exemp-

tion from the death penalty for the mentally retarded. *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). In reaching this conclusion it stressed that only two States had enacted laws banning the imposition of the death penalty on a mentally retarded person convicted of a capital offense. *Id.*, at 334, 109 S.Ct. 2934. According to the Court, “the two state statutes prohibiting execution of the mentally retarded, even when added to the 14 States that have rejected capital punishment completely, *563 [did] not provide sufficient evidence at present of a national consensus.” *Ibid.*

Three Terms ago the subject was reconsidered in *Atkins*. We held that standards of decency have evolved since *Penry* and now demonstrate that the execution of the mentally retarded is cruel and unusual punishment. The Court noted objective indicia of society’s standards, as expressed in legislative enactments and state practice with respect to executions of the mentally retarded. When *Atkins* was decided only a minority of States permitted the practice, and even in those States it was rare. 536 U.S., at 314-315, 122 S.Ct. 2242. On the basis of these indicia the Court determined that executing mentally retarded offenders “has become truly unusual, and it is fair to say that a national consensus has developed against it.” *Id.*, at 316, 122 S.Ct. 2242.

The inquiry into our society’s evolving standards of decency did not end there. The *Atkins* Court neither repeated nor relied upon the statement in *Stanford* that the Court’s independent judgment has no bearing on the acceptability of a particular punishment under the Eighth Amendment. Instead we returned to the rule, established in decisions predating *Stanford*, that “the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth *1192 Amendment.” 536 U.S., at 312, 122 S.Ct. 2242 (quoting *Coker v. Georgia*, 433 U.S. 584, 597, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977) (plurality opinion)). Mental retardation, the Court said, diminishes personal culpability even if the offender can distinguish right from wrong. 536 U.S., at 318, 122 S.Ct. 2242. The impairments of mentally retarded offenders make it less defensible to impose the death penalty as retribution for past crimes and less likely that the death penalty will have a real deterrent effect. *Id.*, at 319-320, 122 S.Ct. 2242. Based on these considerations and on the finding of national consensus against executing the mentally retarded, the Court ruled that the death penalty constitutes an excessive sanction for the entire category of mentally retarded offenders,*564 and that the Eighth Amendment “

'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." *Id.*, at 321, 122 S.Ct. 2242 (quoting *Ford v. Wainwright*, 477 U.S. 399, 405, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986)).

Just as the *Atkins* Court reconsidered the issue decided in *Penry*, we now reconsider the issue decided in *Stanford*. The beginning point is a review of objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question. These data give us essential instruction. We then must determine, in the exercise of our own independent judgment, whether the death penalty is a disproportionate punishment for juveniles.

III

A

The evidence of national consensus against the death penalty for juveniles is similar, and in some respects parallel, to the evidence *Atkins* held sufficient to demonstrate a national consensus against the death penalty for the mentally retarded. When *Atkins* was decided, 30 States prohibited the death penalty for the mentally retarded. This number comprised 12 that had abandoned the death penalty altogether, and 18 that maintained it but excluded the mentally retarded from its reach. 536 U.S., at 313-315, 122 S.Ct. 2242. By a similar calculation in this case, 30 States prohibit the juvenile death penalty, comprising 12 that have rejected the death penalty altogether and 18 that maintain it but, by express provision or judicial interpretation, exclude juveniles from its reach. See Appendix A, *infra*. *Atkins* emphasized that even in the 20 States without formal prohibition, the practice of executing the mentally retarded was infrequent. Since *Penry*, only five States had executed offenders known to have an IQ under 70. 536 U.S., at 316, 122 S.Ct. 2242. In the present case, too, even in the 20 States without a formal prohibition on executing juveniles, the practice is infrequent. Since *Stanford*, six States have executed prisoners for crimes committed as juveniles.*565 In the past 10 years, only three have done so: Oklahoma, Texas, and Virginia. See V. Streib, *The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes*, January 1, 1973-December 31, 2004, No. 76, p. 4 (2005), available at <http://www.law.onu.edu/faculty/streib/documents/JuvDeathDec2004.pdf> (last updated Jan. 31, 2005) (as visited Feb. 25, 2005, and available in Clerk of Court's case file). In December 2003 the Governor of Kentucky decided to spare the life of

Kevin Stanford, and commuted his sentence to one of life imprisonment without parole, with the declaration that "[w]e ought not be executing people who, legally, were children." *Lexington Herald Leader*, Dec. 9, 2003, p. B3, 2003 WL 65043346. By this act the Governor ensured Kentucky would not add itself to the list of **1193 States that have executed juveniles within the last 10 years even by the execution of the very defendant whose death sentence the Court had upheld in *Stanford v. Kentucky*.

There is, to be sure, at least one difference between the evidence of consensus in *Atkins* and in this case. Impressive in *Atkins* was the rate of abolition of the death penalty for the mentally retarded. Sixteen States that permitted the execution of the mentally retarded at the time of *Penry* had prohibited the practice by the time we heard *Atkins*. By contrast, the rate of change in reducing the incidence of the juvenile death penalty, or in taking specific steps to abolish it, has been slower. Five States that allowed the juvenile death penalty at the time of *Stanford* have abandoned it in the intervening 15 years—four through legislative enactments and one through judicial decision. Streib, *supra*, at 5, 7; *State v. Furman*, 122 Wash.2d 440, 858 P.2d 1092 (1993) (en banc).

Though less dramatic than the change from *Penry* to *Atkins* ("telling," to borrow the word *Atkins* used to describe this difference, 536 U.S., at 315, n. 18, 122 S.Ct. 2242), we still consider the change from *Stanford* to this case to be significant. As noted in *Atkins*, with respect to the States that had abandoned*566 the death penalty for the mentally retarded since *Penry*, "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change." 536 U.S., at 315, 122 S.Ct. 2242. In particular we found it significant that, in the wake of *Penry*, no State that had already prohibited the execution of the mentally retarded had passed legislation to reinstate the penalty. 536 U.S., at 315-316, 122 S.Ct. 2242. The number of States that have abandoned capital punishment for juvenile offenders since *Stanford* is smaller than the number of States that abandoned capital punishment for the mentally retarded after *Penry*; yet we think the same consistency of direction of change has been demonstrated. Since *Stanford*, no State that previously prohibited capital punishment for juveniles has reinstated it. This fact, coupled with the trend toward abolition of the juvenile death penalty, carries special force in light of the general popularity of anticrime legislation, *Atkins, supra*, at 315, 122 S.Ct. 2242, and in light of the particular trend in recent years toward cracking down on

juvenile crime in other respects, see H. Snyder & M. Sickmund, National Center for Juvenile Justice, *Juvenile Offenders and Victims: 1999 National Report* 89, 133 (Sept.1999); Scott & Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J.Crim. L. & C. 137, 148 (1997). Any difference between this case and *Atkins* with respect to the pace of abolition is thus counterbalanced by the consistent direction of the change.

The slower pace of abolition of the juvenile death penalty over the past 15 years, moreover, may have a simple explanation. When we heard *Penry*, only two death penalty States had already prohibited the execution of the mentally retarded. When we heard *Stanford*, by contrast, 12 death penalty States had already prohibited the execution of any juvenile under 18, and 15 had prohibited the execution of any juvenile under 17. If anything, this shows that the impropriety of executing juveniles between 16 and 18 years of age *567 gained wide recognition earlier than the impropriety of executing the mentally retarded. In the words of the Missouri Supreme Court: "It would be the ultimate in irony if the very fact that the inappropriateness of the death penalty for juveniles was broadly recognized sooner than it was recognized for the mentally retarded were to become a reason to continue the execution **1194 of juveniles now that the execution of the mentally retarded has been barred." 112 S.W.3d, at 408, n. 10.

Petitioner cannot show national consensus in favor of capital punishment for juveniles but still resists the conclusion that any consensus exists against it. Petitioner supports this position with, in particular, the observation that when the Senate ratified the International Covenant on Civil and Political Rights (ICCPR), Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976), it did so subject to the President's proposed reservation regarding Article 6(5) of that treaty, which prohibits capital punishment for juveniles. Brief for Petitioner 27. This reservation at best provides only faint support for petitioner's argument. First, the reservation was passed in 1992; since then, five States have abandoned capital punishment for juveniles. Second, Congress considered the issue when enacting the Federal Death Penalty Act in 1994, and determined that the death penalty should not extend to juveniles. See 18 U.S.C. § 3591. The reservation to Article 6(5) of the ICCPR provides minimal evidence that there is not now a national consensus against juvenile executions.

As in *Atkins*, the objective indicia of consensus in this

case—the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice—provide sufficient evidence that today our society views juveniles, in the words *Atkins* used respecting the mentally retarded, as "categorically less culpable than the average criminal." 536 U.S., at 316, 122 S.Ct. 2242.

*568 B

A majority of States have rejected the imposition of the death penalty on juvenile offenders under 18, and we now hold this is required by the Eighth Amendment.

[2][3][4] Because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force. *Thompson*, 487 U.S., at 856, 108 S.Ct. 2687 (O'CONNOR, J., concurring in judgment). Capital punishment must be limited to those offenders who commit "a narrow category of the most serious crimes" and whose extreme culpability makes them "the most deserving of execution." *Atkins*, *supra*, at 319, 122 S.Ct. 2242. This principle is implemented throughout the capital sentencing process. States must give narrow and precise definition to the aggravating factors that can result in a capital sentence. *Godfrey v. Georgia*, 446 U.S. 420, 428–429, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) (plurality opinion). In any capital case a defendant has wide latitude to raise as a mitigating factor "any aspect of [his or her] character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (plurality opinion); *Eddings v. Oklahoma*, 455 U.S. 104, 110–112, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); see also *Johnson v. Texas*, 509 U.S. 350, 359–362, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993) (summarizing the Court's jurisprudence after *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (*per curiam*), with respect to a sentencer's consideration of aggravating and mitigating factors). There are a number of crimes that beyond question are severe in absolute terms, yet the death penalty may not be imposed for their commission. *Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977) (rape of an adult woman); *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) (felony murder where **1195 defendant did not kill, attempt to kill, or intend to kill). The death penalty may not be imposed on certain classes of offenders, such as juveniles under 16, the insane, and the mentally retarded, no matter how heinous

the crime. *Thompson v. Oklahoma, supra*; *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986); *Atkins, supra*. These rules vindicate the underlying principle*569 that the death penalty is reserved for a narrow category of crimes and offenders.

[5] Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. First, as any parent knows and as the scientific and sociological studies respondent and his amici cite tend to confirm, “[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.” *Johnson, supra*, at 367, 113 S.Ct. 2658; see also *Eddings, supra*, at 115-116, 102 S.Ct. 869 (“Even the normal 16-year-old customarily lacks the maturity of an adult”). It has been noted that “adolescents are overrepresented statistically in virtually every category of reckless behavior.” Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 *Developmental Rev.* 339 (1992). In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent. See Appendixes B-D, *infra*.

The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. *Eddings, supra*, at 115, 102 S.Ct. 869 (“[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage”). This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment. See Steinberg & Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 *Am. Psychologist* 1009, 1014 (2003) (hereinafter Steinberg & Scott) (“[A]s legal minors, [juveniles] lack the freedom that adults have to extricate themselves from a criminogenic setting”).

*570 The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed. See generally E. Erikson, *Identity: Youth and Crisis* (1968).

These differences render suspect any conclusion that a juvenile falls among the worst offenders. The susceptibility of juveniles to immature and irresponsible behavior means “their irresponsible conduct is not as morally reprehensible as that of an adult.” *Thompson, supra*, at 835, 108 S.Ct. 2687 (plurality opinion). Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. See *Stanford*, 492 U.S., at 395, 109 S.Ct. 2969 (Brennan, J., dissenting). The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will **1196 be reformed. Indeed, “[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuosity and recklessness that may dominate in younger years can subside.” *Johnson, supra*, at 368, 113 S.Ct. 2658; see also Steinberg & Scott 1014 (“For most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood”).

In *Thompson*, a plurality of the Court recognized the import of these characteristics with respect to juveniles under 16, and relied on them to hold that the Eighth Amendment prohibited the imposition of the death penalty on juveniles *571 below that age. 487 U.S., at 833-838, 108 S.Ct. 2687. We conclude the same reasoning applies to all juvenile offenders under 18.

Once the diminished culpability of juveniles is recognized, it is evident that the penological justifications for the death penalty apply to them with lesser force than to adults. We have held there are two distinct social purposes served by the death penalty: “retribution and deterrence of capital crimes by prospective offenders.” *Atkins*, 536 U.S., at 319, 122 S.Ct. 2242 (quoting *Gregg v. Georgia*, 428 U.S. 153, 183, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.)). As for retribution, we remarked in *Atkins* that “[i]f the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded

offender surely does not merit that form of retribution.” 536 U.S., at 319, 122 S.Ct. 2242. The same conclusions follow from the lesser culpability of the juvenile offender. Whether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult. Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.

As for deterrence, it is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles, as counsel for petitioner acknowledged at oral argument. Tr. of Oral Arg. 48. In general we leave to legislatures the assessment of the efficacy of various criminal penalty schemes, see Harmelin v. Michigan, 501 U.S. 957, 998-999, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (KENNEDY, J., concurring in part and concurring in judgment). Here, however, the absence of evidence of deterrent effect is of special concern because the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence. In particular, as the plurality observed in *572 Thompson, “[t]he likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent.” 487 U.S., at 837, 108 S.Ct. 2687. To the extent the juvenile death penalty might have residual deterrent effect, it is worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person.

In concluding that neither retribution nor deterrence provides adequate justification for imposing the death penalty on juvenile offenders, we cannot deny or overlook the brutal crimes too many juvenile offenders have committed. See Brief for **1197 Alabama et al. as Amici Curiae. Certainly it can be argued, although we by no means concede the point, that a rare case might arise in which a juvenile offender has sufficient psychological maturity, and at the same time demonstrates sufficient depravity, to merit a sentence of death. Indeed, this possibility is the linchpin of one contention pressed by petitioner and his amici. They assert that even assuming the truth of the observations we have made about juveniles' diminished culpability in general, jurors nonetheless should be allowed to consider mitigating arguments related to youth on a case-by-case basis, and in some cases to impose the

death penalty if justified. A central feature of death penalty sentencing is a particular assessment of the circumstances of the crime and the characteristics of the offender. The system is designed to consider both aggravating and mitigating circumstances, including youth, in every case. Given this Court's own insistence on individualized consideration, petitioner maintains that it is both arbitrary and unnecessary to adopt a categorical rule barring imposition of the death penalty on any offender under 18 years of age.

We disagree. The differences between juvenile and adult offenders are too marked and well understood to risk allowing *573 a youthful person to receive the death penalty despite insufficient culpability. An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death. In some cases a defendant's youth may even be counted against him. In this very case, as we noted above, the prosecutor argued Simmons' youth was aggravating rather than mitigating. *Supra*, at 1188-1189. While this sort of overreaching could be corrected by a particular rule to ensure that the mitigating force of youth is not overlooked, that would not address our larger concerns.

It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption. See Steinberg & Scott 1014-1016. As we understand it, this difficulty underlies the rule forbidding psychiatrists from diagnosing any patient under 18 as having antisocial personality disorder, a disorder also referred to as psychopathy or sociopathy, and which is characterized by callousness, cynicism, and contempt for the feelings, rights, and suffering of others. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 701-706 (4th ed. text rev.2000); see also Steinberg & Scott 1015. If trained psychiatrists with the advantage of clinical testing and observation refrain, despite diagnostic expertise, from assessing any juvenile under 18 as having antisocial personality disorder, we conclude that States should refrain from asking jurors to issue a far graver condemnation—that a juvenile offender merits the death penalty. When a juvenile offender commits a heinous crime, the State can exact forfeiture of some *574 of the most basic liberties, but the State cannot extinguish his

life and his potential to attain a mature understanding of his own humanity.

Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach. For the **1198 reasons we have discussed, however, a line must be drawn. The plurality opinion in *Thompson* drew the line at 16. In the intervening years the *Thompson* plurality's conclusion that offenders under 16 may not be executed has not been challenged. The logic of *Thompson* extends to those who are under 18. The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.

These considerations mean *Stanford v. Kentucky* should be deemed no longer controlling on this issue. To the extent *Stanford* was based on review of the objective indicia of consensus that obtained in 1989, 492 U.S., at 370-371, 109 S.Ct. 2969, it suffices to note that those indicia have changed. *Supra*, at 1192-1194. It should be observed, furthermore, that the *Stanford* Court should have considered those States that had abandoned the death penalty altogether as part of the consensus against the juvenile death penalty, 492 U.S., at 370, n. 2, 109 S.Ct. 2969; a State's decision to bar the death penalty altogether of necessity demonstrates a judgment that the death penalty is inappropriate for all offenders, including juveniles. Last, to the extent *Stanford* was based on a rejection of the idea that this Court is required to bring its independent judgment to bear on the proportionality of the death penalty for a particular class of crimes or offenders, *id.*, at 377-378, 109 S.Ct. 2969 (plurality opinion), it suffices to note that this rejection was inconsistent with prior Eighth Amendment decisions, *575 *Thompson*, 487 U.S., at 833-838, 108 S.Ct. 2687 (plurality opinion); *Enmund*, 458 U.S., at 797, 102 S.Ct. 3368; *Coker*, 433 U.S., at 597, 97 S.Ct. 2861 (plurality opinion). It is also inconsistent with the premises of our recent decision in *Atkins*, 536 U.S., at 312-313, 317-321, 122 S.Ct. 2242.

In holding that the death penalty cannot be imposed upon juvenile offenders, we take into account the circumstance that some States have relied on *Stanford* in seeking the death penalty against juvenile offenders. This consideration, however, does not outweigh our conclusion that *Stanford* should no longer control in those few pending

cases or in those yet to arise.

IV

Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty. This reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility. Yet at least from the time of the Court's decision in *Trop*, the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of "cruel and unusual punishments." 356 U.S., at 102-103, 78 S.Ct. 590 (plurality opinion) ("The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime"); see also *Atkins*, *supra*, at 317, n. 21, 122 S.Ct. 2242 (recognizing that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved"); *Thompson*, *supra*, at 830-831, and n. 31, 108 S.Ct. 2687 (plurality opinion) (noting the abolition of the juvenile death penalty "by other nations that share our Anglo-American heritage, and by the leading members of the Western European community," and observing that "[w]e have previously recognized the relevance of the views of the international community*576 in determining whether a punishment is cruel **1199 and unusual"); *Enmund*, *supra*, at 796-797, n. 22, 102 S.Ct. 3368 (observing that "the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe"); *Coker*, *supra*, at 596, n. 10, 97 S.Ct. 2861 (plurality opinion) ("It is... not irrelevant here that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue").

As respondent and a number of amici emphasize, Article 37 of the United Nations Convention on the Rights of the Child, which every country in the world has ratified save for the United States and Somalia, contains an express prohibition on capital punishment for crimes committed by juveniles under 18. United Nations Convention on the Rights of the Child, Art. 37, Nov. 20, 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1448, 1468-1470 (entered into force Sept. 2, 1990); Brief for Respondent 48; Brief for European Union et al. as Amici Curiae 12-13; Brief for President James Earl Carter, Jr., et al. as Amici Curiae 9;

Brief for Former U.S. Diplomats Morton Abramowitz et al. as *Amici Curiae* 7; Brief for Human Rights Committee of the Bar of England and Wales et al. as *Amici Curiae* 13-14. No ratifying country has entered a reservation to the provision prohibiting the execution of juvenile offenders. Parallel prohibitions are contained in other significant international covenants. See ICCPR, Art. 6(5), 999 U.N.T.S., at 175 (prohibiting capital punishment for anyone under 18 at the time of offense) (signed and ratified by the United States subject to a reservation regarding Article 6(5), as noted, *supra*, at 1194); American Convention on Human Rights: Pact of San Jose, Costa Rica, Art. 4(5), Nov. 22, 1969, 1144 U.N.T.S. 146 (entered into force July 19, 1978) (same); African Charter on the Rights and Welfare of the Child, Art. 5(3), OAU Doc. CAB/LEG/ 24.9/49 (1990) (entered into force Nov. 29, 1999) (same).

*577 Respondent and his *amici* have submitted, and petitioner does not contest, that only seven countries other than the United States have executed juvenile offenders since 1990: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China. Since then each of these countries has either abolished capital punishment for juveniles or made public disavowal of the practice. Brief for Respondent 49-50. In sum, it is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty.

Though the international covenants prohibiting the juvenile death penalty are of more recent date, it is instructive to note that the United Kingdom abolished the juvenile death penalty before these covenants came into being. The United Kingdom's experience bears particular relevance here in light of the historic ties between our countries and in light of the Eighth Amendment's own origins. The Amendment was modeled on a parallel provision in the English Declaration of Rights of 1689, which provided: "[E]xcessive Bail ought not to be required nor excessive Fines imposed; nor cruel and unusual Punishments inflicted." 1 W. & M., ch. 2, § 10, in 3 Eng. Stat. at Large 441 (1770); see also *Trop, supra*, at 100, 78 S.Ct. 590 (plurality opinion). As of now, the United Kingdom has abolished the death penalty in its entirety; but, decades before it took this step, it recognized the disproportionate nature of the juvenile death penalty; and it abolished that penalty as a separate matter. In 1930 an official committee recommended that the minimum age for execution be raised to 21. House of Commons Report from the Select Committee on Capital Punishment (1930), **1200 193, p. 44. Parliament then enacted the Children

and Young Person's Act of 1933, 23 Geo. 5, ch. 12, which prevented execution of those aged 18 at the date of the sentence. And in 1948, Parliament enacted the Criminal Justice Act, 11 & 12 Geo. 6, ch. 58, prohibiting the execution of any person under 18 at the time of the offense. In the 56 years that have passed *578 since the United Kingdom abolished the juvenile death penalty, the weight of authority against it there, and in the international community, has become well established.

It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime. See Brief for Human Rights Committee of the Bar of England and Wales et al. as *Amici Curiae* 10-11. The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.

Over time, from one generation to the next, the Constitution has come to earn the high respect and even, as Madison dared to hope, the veneration of the American people. See *The Federalist* No. 49, p. 314 (C. Rossiter ed.1961). The document sets forth, and rests upon, innovative principles original to the American experience, such as federalism; a proven balance in political mechanisms through separation of powers; specific guarantees for the accused in criminal cases; and broad provisions to secure individual freedom and preserve human dignity. These doctrines and guarantees are central to the American experience and remain essential to our present-day self-definition and national identity. Not the least of the reasons we honor the Constitution, then, is because we know it to be our own. It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.

* * *

The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed. The judgment *579 of the Missouri Supreme Court setting aside the sentence of death imposed upon Christopher Simmons is affirmed.

It is so ordered.

APPENDIX A TO OPINION OF THE COURT

STATES THAT PERMIT THE IMPOSITION OF THE
DEATH PENALTY ON JUVENILES

Alabama	Ala.Code § 13A-6-2(c) (West 2004) (no express minimum age)
Arizona	Ariz.Rev.Stat. Ann. § 13-703(A) (West Supp.2004) (same)
Arkansas	Ark.Code Ann. § 5-4-615 (Michie 1997) (same)
Delaware	Del.Code Ann. Tit.11 § 4101 (Lexis 1995) (same)
Florida	Fla. Stat. § 985.225(1) (2003) (same)
Georgia	Ga.Code Ann. § 17-9-3 (Lexis 2004) (same)
Idaho	Idaho Code § 18-4004 (Michie 2004) (same)
Kentucky	Ky.Rev.Stat. Ann. § 640.040(1) (Lexis 1999) (minimum age of 16)
Louisiana	La. Stat. Ann. § 14:30(C) (West Supp.2005) (no express minimum age)
Mississippi	Miss.Code Ann. § 9-3-21 (Lexis 2000) (same)
Missouri	Mo.Rev.Stat. Ann. § 565.020 (2000) (minimum age of 16)
Nevada	Nev.Rev.Stat. § 176.025 (2003) (minimum age of 16)
New Hampshire	N.H.Rev.Stat. Ann. § 630:1(V) (West 1996) (minimum age of 17)
North Carolina	N.C. Gen.Stat. § 14-17 (Lexis 2003) (minimum age of 17, except that those under 17 who commit murder while serving a prison sentence for a previous murder may receive the death penalty)
Oklahoma	Okla. Stat. Ann., Tit. 21, § 701.10 (West 2002) (no express minimum age)
Pennsylvania	18 Pa. Cons.Stat. § 1102 (2002) (same)
South Carolina	S.C.Code Ann. § 16-3-20 (West Supp.2004 and main ed.) (same)
Texas	Tex. Penal Code Ann. § 9.07(c) (West Supp.2004-2005) (minimum age of 17)
Utah	Utah Code Ann. § 76-3-206(1) (Lexis 2003) (no express minimum age)
Virginia	Va.Code Ann. § 18-2-10(a) (Lexis 2004) (minimum age of 16)

**1201

STATES THAT RETAIN THE DEATH PENALTY
BUT SET THE MINIMUM AGE AT 18

California	Cal.Penal Code Ann. § 190.5 (West 1999)
Colorado	Colo.Rev.Stat. § 18-14-102(1)(a) (Lexis 2004)
Connecticut	Conn. Gen.Stat. § 53a-46a(h) (2005)
Illinois	Ill. Comp.Stat. ch. 720, § 9-1(b) (West Supp.2003)
Indiana	Ind.Code Ann. § 35-50-2-3 (2004)
Kansas	Kan.Stat. Ann. § 21-4622(d) (1995)
Maryland	Md.Crim. Law Code Ann. § 2-202(b)(2)(i) (Lexis 2002)
Montana	Mont. Code Ann. § 45-5-102 (2003) (same)
Nebraska	Neb.Rev.Stat. § 28-105.01(1) (Supp.2004)

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New Jersey	N.J. Stat. Ann. § 2C:11-3(c) (West Supp. 2003)
New Mexico	N.M. Stat. Ann. § 31-18-14(A) (2000)
New York	N.Y. Penal Law Ann. § 125.27 (West 2004)
Ohio	Ohio Rev. Code Ann. § 2929.02(A) (Lexis 2003)
Oregon	Ore. Rev. Stat. § 61.620, 167.707(2) (2003)
South Dakota	S.D. Codified Laws § 23A-27A-42 (West 2004)
Tennessee	Tenn. Code Ann. § 37-1-134(a)(1) (1996)
Washington	Minimum age of 18 established by judicial decision. <i>State v. Furman</i> , 122 Wash.2d 440, 858 P.2d 1092 (1993)
Wyoming	Wyo. Stat. § 6-2-101(b) (Lexis Supp. 2004)

* * *

During the past year, decisions by the highest courts of Kansas and New York invalidated provisions in those States' death penalty statutes. *State v. Marsh*, 278 Kan. 520, 102 P.3d 445 (2004) (invalidating provision that required imposition of the death penalty if aggravating and mitigating circumstances were found to be in equal balance); *People v. LaValle*, 3 N.Y.3d 88, 783 N.Y.S.2d 485, 817 N.E.2d 341 (2004) (invalidating mandatory requirement to instruct the jury that, in the case of jury deadlock as to the appropriate sentence in a capital case, the defendant would receive a sentence of life imprisonment with parole eligibility after serving a minimum of 20 to 25 years). Due to these decisions, it would appear that in these States the death penalty remains on the books, but that as a practical matter it might not be imposed on anyone until there is a change of course in these decisions, or until the respective state legislatures remedy the problems the courts have identified. *Marsh, supra*, at 524-526, 544-546, 102 P.3d, at 452, 464; *LaValle, supra*, at 99, 783 N.Y.S.2d 485, 817 N.E.2d, at 344.

STATES WITHOUT THE DEATH PENALTY

Alaska
Hawaii
Iowa
Maine
Massachusetts
Michigan
Minnesota
North Dakota
Rhode Island
Vermont
West Virginia
Wisconsin

**1202 APPENDIX B TO OPINION OF THE COURT

STATE STATUTES ESTABLISHING A MINIMUM AGE TO VOTE

STATE	AGE STATUTE
Alabama	18 Ala. Const., Amdt. No. 579

543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1, 73 USLW 4153, 05 Cal. Daily Op. Serv. 1735, 18 Fla. L. Weekly Fed. S 131

(Cite as: 543 U.S. 551, 125 S.Ct. 1183)

Alaska	18	Alaska Const., Art. V, § 1; Alaska Stat. § 15-05-010 (Lexis 2004)
Arizona	18	Ariz. Const., Art. VII, § 2; Ariz. Rev. Stat. § 16-101 (West 2001)
Arkansas	18	Ark. Code Ann. § 9-25-101 (Lexis 2002)
California	18	Cal. Const., Art. 2, § 2
Colorado	18	Colo. Rev. Stat. § 1-2-101 (Lexis 2004)
Connecticut	18	Conn. Const., Art. 6, § 1; Conn. Gen. Stat. § 9-12 (2005)
Delaware	18	Del. Code Ann. Tit. 15, § 1701 (Michie Supp. 2004)
District of Columbia	18	D.C. Code § 1-1001.02(2)(B) (West Supp. 2004)
Florida	18	Fla. Stat. ch. 97-041 (2003)
Georgia	18	Ga. Const., Art. 2, § 1, ¶ 2; Ga. Code Ann. § 21-2-216 (Lexis 2003)
Hawaii	18	Haw. Const., Art. II, § 1; Haw. Rev. Stat. § 11-12 (1995)
Idaho	18	Idaho Code § 34-402 (Michie 2001)
Illinois	18	Ill. Const., Art. III, § 1; Ill. Comp. Stat., ch. 10, § 5-3-1 (West 2002)
Indiana	18	Ind. Code Ann. § 3-7-13-1 (2004)
Iowa	18	Iowa Code § 48A-5 (2003)
*582 Kansas	18	Kan. Const., Art. 5, § 1
Kentucky	18	Ky. Const. § 145
Louisiana	18	La. Const., Art. I, § 10; La. Rev. Stat. Ann. § 18:101 (West 2004)
Maine	18	Me. Const., Art. II, § 1 (West Supp. 2004); Me. Rev. Stat. Ann., Tit. 21-A, § 1114:1-A (West 1993 and Supp. 2004)
Maryland	18	Md. Elec. Law Code Ann. § 3-102 (Lexis 2002)
Massachusetts	18	Mass. Gen. Laws Ann., ch. 51, § 1 (West Supp. 2005)
Michigan	18	Mich. Comp. Laws Ann. § 168.492 (West 1989)
Minnesota	18	Minn. Stat. § 201.014(h)(a) (2004)
Mississippi	18	Miss. Const., Art. 12, § 241
Missouri	18	Mo. Const., Art. VIII, § 2
Montana	18	Mont. Const., Art. IV, § 2; Mont. Code Ann. § 13-1-111 (2003)
Nebraska	18	Neb. Const., Art. VI, § 1; Neb. Rev. Stat. § 32-110 (2004)
Nevada	18	Nev. Rev. Stat. § 293.485 (2003)
New Hampshire	18	N.H. Const., Part I, Art. III, § 1
New Jersey	18	N.J. Const., Art. II, § 1, ¶ 3
New Mexico	18	No provision other than U.S. Const., Amend. XXVII
New York	18	N.Y. Elec. Law Ann. § 5-102 (West 1998)
North Carolina	18	N.C. Gen. Stat. Ann. § 163-55 (Lexis 2003)
North Dakota	18	N.D. Const., Art. II, § 1
Ohio	18	Ohio Const., Art. V, § 1; Ohio Rev. Code Ann. § 3503.01 (Anderson 1996)
Oklahoma	18	Okla. Const., Art. III, § 1
Oregon	18	Ore. Const., Art. II, § 2
Pennsylvania	18	25 Pa. Cons. Stat. Ann. § 2811 (1994)
Rhode Island	18	R.I. Gen. Laws § 1-2-15 (Lexis 2003)
South Carolina	18	S.C. Code Ann. § 7-5-610 (West Supp. 2004)
South Dakota	18	S.D. Const., Art. VII, § 2; S.D. Codified Laws Ann. § 12-3-1 (West 2004)

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Tennessee	18 Tenn.Code Ann. § 2-2-102 (2003)
Texas	18 Tex. Elec. Code Ann. § 11-002 (West 2003)
Utah	18 Utah Const., Art. IV, § 2; Utah Code Ann. § 20A-2-101 (Lexis 2003)
Vermont	18 Vt. Stat. Ann. Tit. 17, § 2121 (Lexis 2002)
*583 Virginia	18 Va. Const., Art. II, § 1
Washington	18 Wash. Const. Art. V, § 1
West Virginia	18 W. Va. Code § 3-1-3 (Lexis 2002)
Wisconsin	18 Wis. Const. Art. III, § 1; Wis. Stat. § 6.02 (West 2004)
Wyoming	18 Wyo. Stat. Ann. §§ 22-1-102, 22-3-102 (Lexis Supp.2004)

* * *

The Twenty-Sixth Amendment to the Constitution of the United States provides that "[t]he right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age."

APPENDIX C TO OPINION OF THE COURT

**1203.

STATE STATUTES ESTABLISHING A MINIMUM AGE FOR JURY SERVICE	
STATE	AGE
Alabama	19 Ala.Code § 12-16-60(a)(1) (West 1995)
Alaska	18 Alaska Stat. § 09.20.010(a)(3) (Lexis 2004)
Arizona	18 Ariz.Rev.Stat. § 21-301(D) (West 2002)
Arkansas	18 Ark.Code Ann. §§ 16-21-101, 16-32-302 (Lexis Supp.2003)
California	18 Cal. Civ. Proc. § 203(a)(2) (West Supp.2005)
Colorado	18 Colo.Rev.Stat. § 13-71-105(2)(a) (Lexis 2004)
Connecticut	18 Conn. Gen.Stat. § 51-217(a) (2005)
Delaware	18 Del.Code Ann. Title 10, § 4509(b)(2) (Michie 1999)
District of Columbia	18 D.C.Code § 11-1906(b)(1)(C) (West 2001)
Florida	18 Fla. Stat. § 407.01 (2005)
Georgia	18 Ga.Code Ann. §§ 15-12-60, 15-12-163 (Lexis 2001)
Hawaii	18 Haw.Rev.Stat. § 612-4(a)(1) (Supp.2004)
Idaho	18 Idaho Code § 2-209(2)(a) (Michie 2004)
Illinois	18 Ill.Comp.Stat. ch. 705, § 305/2 (West 2002)
Indiana	18 Ind.Code § 33-28-4-8 (2004)
Iowa	18 Iowa Code § 607A.4(1)(a) (2003)
Kansas	18 Kan. Stat. Ann. § 43-156 (2000) (jurors must be qualified to be electors); Kan. Const., Art. 5, § 1 (person must be 18 to be qualified elector)
*584 Kentucky	18 Ky.Rev.Stat. Ann. § 29A.080(2)(a) (Lexis Supp.2004)
Louisiana	18 La.Code Crim. Proc. Ann., Art. 401(A)(2) (West 2003)
Maine	18 Me.Rev.Stat. Ann. Tit. 14, § 1211 (West 1980)

(Cite as: 543 U.S. 551, 125 S.Ct. 1183)

Maryland	18 Md. Cts. & Jud. Proc.Code Ann. § 8-104 (Lexis 2002)
Massachusetts	18 Mass. Gen. Laws Ann. ch. 234, § 1 (West 2000) (jurors must be qualified to vote); ch. 241, § 11 (West Supp. 2005) (person must be 18 to vote)
Michigan	18 Mich. Comp. Laws Ann. § 600.1307a(1)(a) (West Supp. 2004)
Minnesota	18 Minn. Dist. Ct. Rule 803(b)(2) (2004)
Mississippi	21 Miss.Code Ann. § 13-5-1 (Lexis 2002)
Missouri	21 Mo. Rev. Stat. § 494.423(C) (2000)
Montana	18 Mont.Code Ann. § 3-15-301 (2003)
Nebraska	19 Neb. Rev. Stat. § 25-1601 (Supp. 2004)
Nevada	18 Nev. Rev. Stat. § 6.010 (2003) (juror must be qualified elector); § 293.485 (person must be 18 to vote)
New Hampshire	18 N.H. Rev. Stat. Ann. § 500-A:7-a(4) (Lexis Supp. 2004)
New Jersey	18 N.J. Stat. Ann. § 2B:20-1(a) (West 2004 Pamphlet)
New Mexico	18 N.M. Stat. Ann. § 33-5-1 (1998)
New York	18 N.Y. Jud. Law Ann. § 510(2) (West 2003)
North Carolina	18 N.C. Gen. Stat. Ann. § 9-3 (Lexis 2003)
North Dakota	18 N.D. Cent. Code § 27-09.1-08(2)(b) (Lexis Supp. 2003)
Ohio	18 Ohio Rev. Code Ann. § 23-13-42 (Anderson 2001)
Oklahoma	18 Okla. Stat. Ann., Tit. 38, § 28 (West Supp. 2005)
Rhode Island	18 R.I. Gen. Laws § 9-9-1-1(a)(2) (Lexis Supp. 2005)
South Carolina	18 S.C. Code Ann. § 14-7-130 (West Supp. 2004)
South Dakota	18 S.D. Codified Laws § 16-13-10 (2004)
Tennessee	18 Tenn. Code Ann. § 22-1-101 (1994)
Texas	18 Tex. Govt. Code Ann. § 62-102(d) (West 1998)
Utah	18 Utah Code Ann. § 78-46-7(1)(b) (Lexis 2002)
Vermont	18 Vt. Stat. Ann., Tit. 4, § 962(a)(1) (Lexis 1999) (jurors must have attained age of majority); Tit. 1, § 1-73 (Lexis 2003) (age of majority is 18)
*585 Virginia	18 Va. Code Ann. § 8.01-337 (Lexis 2000)
Washington	18 Wash. Rev. Code Ann. § 2-36-070 (West 2004)
West Virginia	18 W. Va. Code § 52-1-8(b)(1) (Lexis 2000)
Wisconsin	18 Wis. Stat. § 56.02 (West 2001)
Wyoming	18 Wyo. Stat. Ann. § 1-11-101 (Lexis 2003) (jurors must be adults); § 14-1-101 (person becomes an adult at 18)

APPENDIX D TO OPINION OF THE COURT

**1204.

STATE STATUTES ESTABLISHING A MINIMUM AGE FOR MARRIAGE WITHOUT PARENTAL OR JUDICIAL CONSENT	
STATE	AGE STATUTE
Alabama	18 Ala. Code § 30-1-5 (West Supp. 2004)

Alaska	18 Alaska Stat. §§ 25.05.011, 25.05.171 (Lexis 2004)
Arizona	18 Ariz.Rev.Stat. Ann. § 25-102 (West Supp. 2004)
Arkansas	18 Ark.Code Ann. §§ 9-11-102, 9-11-208 (Lexis 2002)
California	18 Cal.Fam.Code Ann. § 301 (West 2004)
Colorado	18 Colo.Rev.Stat. Ann. § 14-2-106 (Lexis 2004)
Connecticut	18 Conn.Gen.Stat. § 46b-30 (2005)
Delaware	18 Del.Code Ann., Tit. 13, § 123 (Lexis 1999)
District of Columbia	18 D.C.Code § 46-411 (West 2001)
Florida	18 Fla. Stat. §§ 741.04, 741.0405 (2003)
Georgia	18 Ga.Code Ann. §§ 19-2-2, 19-2-3 (Lexis 2004) (those under 18 must obtain parental consent unless female applicant is pregnant or both applicants are parents of a living child in which case minimum age to marry without consent is 16)
Hawaii	18 Haw.Rev.Stat. § 572-2 (1993)
Idaho	18 Idaho Code § 32-202 (Michie 1996)
Illinois	18 Ill. Comp. Stat., ch. 750, § 5/203 (West 2002)
Indiana	18 Ind.Code Ann. §§ 31-11-1-1, 31-11-1-3, 31-11-2-1, 31-11-2-3 (2004)
Iowa	18 Iowa Code § 595.2 (2003)
Kansas	18 Kan.Stat. Ann. § 23-106 (Supp. 2003)
Kentucky	18 Ky.Rev.Stat. Ann. §§ 402.020, 402.210 (Lexis 1999)
Louisiana	18 La.Children's Code Ann. Arts. 545, 547 (West 2004) (minors may not marry without 586 consent) La.Civ.Code Ann. Art. 29 (West 1999) (age of majority is 18)
Maine	18 Me.Rev.Stat. Ann., Tit. 19-A, § 652 (West 1998 and Supp. 2004)
Maryland	18 Md.Fam.Law Code Ann. § 2-301 (Lexis 2004) (those under 18 must obtain parental consent unless female applicant can present proof of pregnancy or a child in which case minimum age to marry without consent is 16)
Massachusetts	18 Mass. Gen. Laws Ann., ch. 207, §§ 7, 24, 25 (West 1998)
Michigan	18 Mich. Comp. Laws Ann. § 551-103 (West 2005)
Minnesota	18 Minn.Stat. § 517.02 (2004)
Mississippi	18 Miss.Code Ann. § 93-1-5 (Lexis 2004) (female applicants must be 16; male applicants must be 17)
Missouri	18 Mo.Rev.Stat. § 451.090 (2000)
Montana	18 Mont.Code Ann. §§ 40-1-202, 40-1-213 (2003)
Nebraska	19 Neb.Rev.Stat. § 42-105 (2004) (minors must have parental consent to marry); § 43-2101 (defining "minor" as a person under 19)
Nevada	18 Nev.Rev.Stat. § 122-020 (2003)
New Hampshire	18 N.H.Rev.Stat. Ann. § 457:5 (West 1992)
New Jersey	18 N.J. Stat. Ann. § 37-1-6 (West 2002)
New Mexico	18 N.M. Stat. Ann. § 40-1-6 (1999)
New York	18 N.Y.Dom.Rel. Law Ann. § 1-5 (West Supp. 2003)
North Carolina	18 N.C. Gen.Stat. Ann. § 51-2 (Lexis 2003)
North Dakota	18 N.D. Cent.Code § 14-03-02 (Lexis 2004)

Ohio	18 Ohio Rev.Code Ann. § 3101.01 (2003)
Oklahoma	18 Okla. Stat. Ann., Tit. 43, § 3 (West Supp. 2005)
Oregon	18 Ore.Rev.Stat. § 106.060 (2003)
Pennsylvania	18 23 Pa. Cons. Stat. § 1304 (1997)
Rhode Island	18 R.I. Gen. Laws § 15-2-11 (Supp.2004)
South Carolina	18 S.C. Code Ann. § 20-1-250 (West Supp. 2004)
South Dakota	18 S.D. Codified Laws § 25-1-9 (West 2004)
Tennessee	18 Tenn. Code Ann. § 36-3-106 (1996)
Texas	18 Tex. Fam.Code Ann. §§ 2.101-2.103 (West 1998)
Utah	18 Utah Code Ann. § 20-1-9 (West Supp. 2004)
Vermont	18 Vt. Stat. Ann., Tit. 18, § 5142 (Lexis 2000)
Virginia	18 Va. Code Ann. §§ 20-45.1, 20-48, 20-49 (Lexis 2004)
Washington	18 Wash. Rev.Code Ann. § 26.04.210 (West 2005)
West Virginia	18 W. Va. Code § 48-2-301 (Lexis 2004)
Wisconsin	18 Wis. Stat. § 765.02 (2001)
Wyoming	18 Wyo. Stat. Ann. § 20-1-102 (Lexis 2003)

Justice STEVENS, with whom Justice GINSBURG joins, concurring.

Perhaps even more important than our specific holding today is our reaffirmation of the basic principle that informs the Court's interpretation of the Eighth Amendment. If the meaning of that Amendment had been frozen when it was originally drafted, it would impose no impediment to the execution of 7-year-old children today. See *Stanford v. Kentucky*, 492 U.S. 361, 368, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989) (describing the common law at the time of the Amendment's adoption). The evolving standards of decency that have driven our construction of this critically important part of the Bill of Rights foreclose any such reading of the Amendment. In the best tradition of the common law, the pace of that evolution is a matter for continuing debate; but that our understanding of the Constitution does change from time to time has been settled since John Marshall breathed life into its text. If great lawyers of his day—Alexander Hamilton, for example—were sitting with us today, I would expect them to join Justice KENNEDY's opinion for the Court. In all events, I do so without hesitation.

****1206** Justice O'CONNOR, dissenting.

The Court's decision today establishes a categorical rule forbidding the execution of any offender for any crime committed before his 18th birthday, no matter how deliberate, wanton, or cruel the offense. Neither the objective evidence of contemporary societal values, nor the Court's moral proportionality analysis, nor the two in tandem suf-

fice to justify this ruling.

***588** Although the Court finds support for its decision in the fact that a majority of the States now disallow capital punishment of 17-year-old offenders, it refrains from asserting that its holding is compelled by a genuine national consensus. Indeed, the evidence before us fails to demonstrate conclusively that any such consensus has emerged in the brief period since we upheld the constitutionality of this practice in *Stanford v. Kentucky*, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989).

Instead, the rule decreed by the Court rests, ultimately, on its independent moral judgment that death is a disproportionately severe punishment for any 17-year-old offender. I do not subscribe to this judgment. Adolescents *as a class* are undoubtedly less mature, and therefore less culpable for their misconduct, than adults. But the Court has adduced no evidence impeaching the seemingly reasonable conclusion reached by many state legislatures: that at least *some* 17-year-old murderers are sufficiently mature to deserve the death penalty in an appropriate case. Nor has it been shown that capital sentencing juries are incapable of accurately assessing a youthful defendant's maturity or of giving due weight to the mitigating characteristics associated with youth.

On this record—and especially in light of the fact that so little has changed since our recent decision in *Stanford-I*—would not substitute our judgment about the moral propri-

ety of capital punishment for 17-year-old murderers for the judgments of the Nation's legislatures. Rather, I would demand a clearer showing that our society truly has set its face against this practice before reading the Eighth Amendment categorically to forbid it.

I

A

Let me begin by making clear that I agree with much of the Court's description of the general principles that guide our Eighth Amendment jurisprudence. The Amendment *589 bars not only punishments that are inherently " 'barbaric,' " but also those that are " 'excessive' in relation to the crime committed." Coker v. Georgia, 433 U.S. 584, 592, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977) (plurality opinion). A sanction is therefore beyond the State's authority to inflict if it makes "no measurable contribution" to acceptable penal goals or is "grossly out of proportion to the severity of the crime." Ibid. The basic "precept of justice that punishment for crime should be ... proportioned to [the] offense," Weems v. United States, 217 U.S. 349, 367, 30 S.Ct. 544, 54 L.Ed. 793 (1910), applies with special force to the death penalty. In capital cases, the Constitution demands that the punishment be tailored both to the nature of the crime itself and to the defendant's "personal responsibility and moral guilt." Enmund v. Florida, 458 U.S. 782, 801, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982); see also id., at 825, 102 S.Ct. 3368 (O'CONNOR, J., dissenting); Tison v. Arizona, 481 U.S. 137, 149, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987); Eddings v. Oklahoma, 455 U.S. 104, 111-112, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

It is by now beyond serious dispute that the Eighth Amendment's prohibition of "cruel and unusual punishments" is not a static command. Its mandate would be **1207 little more than a dead letter today if it barred only those sanctions-like the execution of children under the age of seven-that civilized society had already repudiated in 1791. See ante, at 1205 (STEVENS, J., concurring); cf. Stanford, supra, at 368, 109 S.Ct. 2969 (discussing the common law rule at the time the Bill of Rights was adopted). Rather, because "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man," the Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 100-101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (plurality opinion). In discerning those standards, we look to

"objective factors to the maximum possible extent." Coker, supra, at 592, 97 S.Ct. 2861 (plurality opinion). Laws enacted by the Nation's legislatures provide the "clearest and most reliable objective evidence of contemporary values." Penry v. Lynaugh, 492 U.S. 302, 331, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). *590 And data reflecting the actions of sentencing juries, where available, can also afford " 'a significant and reliable objective index' " of societal mores. Coker, supra, at 596, 97 S.Ct. 2861 (plurality opinion) (quoting Gregg v. Georgia, 428 U.S. 153, 181, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.)).

Although objective evidence of this nature is entitled to great weight, it does not end our inquiry. Rather, as the Court today reaffirms, see ante, at 1191-1192, 1197-1198, "the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment," Coker, supra, at 597, 97 S.Ct. 2861 (plurality opinion). "[P]roportionality-at least as regards capital punishment-not only requires an inquiry into contemporary standards as expressed by legislators and jurors, but also involves the notion that the magnitude of the punishment imposed must be related to the degree of the harm inflicted on the victim, as well as to the degree of the defendant's blameworthiness." Enmund, supra, at 815, 102 S.Ct. 3368 (O'CONNOR, J., dissenting). We therefore have a "constitutional obligation" to judge for ourselves whether the death penalty is excessive punishment for a particular offense or class of offenders. See Stanford, 492 U.S., at 382, 109 S.Ct. 2969 (O'CONNOR, J., concurring in part and concurring in judgment); see also Enmund, supra, at 797, 102 S.Ct. 3368 ("[I]t is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty").

B

Twice in the last two decades, the Court has applied these principles in deciding whether the Eighth Amendment permits capital punishment of adolescent offenders. In Thompson v. Oklahoma, 487 U.S. 815, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988), a plurality of four Justices concluded that the Eighth Amendment barred capital punishment of an offender for a crime committed before the age of 16. I concurred in that judgment on narrower grounds. At the time, 32 state legislatures had "definitely concluded that no 15-year-old should be exposed to the threat *591 of execution," and no legislature had affirmatively endorsed such a practice. Id., at 849, 108 S.Ct. 2687

(O'CONNOR, J., concurring in judgment). While acknowledging that a national consensus forbidding the execution of 15-year-old offenders "very likely" did exist, I declined to adopt that conclusion as a matter of constitutional law without clearer evidentiary support. *Ibid.* Nor, in my view, could the issue be decided based on moral proportionality arguments of the type advanced **1208 by the Court today. Granting the premise "that adolescents are generally less blameworthy than adults who commit similar crimes," I wrote, "it does not necessarily follow that all 15-year-olds are incapable of the moral culpability that would justify the imposition of capital punishment." *Id.*, at 853, 108 S.Ct. 2687. Similarly, we had before us no evidence "that 15-year-olds as a class are inherently incapable of being deterred from major crimes by the prospect of the death penalty." *Ibid.* I determined instead that, in light of the strong but inconclusive evidence of a national consensus against capital punishment of under-16 offenders, concerns rooted in the Eighth Amendment required that we apply a clear statement rule. Because the capital punishment statute in *Thompson* did not specify the minimum age at which commission of a capital crime would be punishable by death, I concluded that the statute could not be read to authorize the death penalty for a 15-year-old offender. *Id.*, at 857-858, 108 S.Ct. 2687.

The next year, in *Stanford v. Kentucky, supra*, the Court held that the execution of 16- or 17-year-old capital murderers did not violate the Eighth Amendment. I again wrote separately, concurring in part and concurring in the judgment. At that time, 25 States did not permit the execution of under-18 offenders, including 13 that lacked the death penalty altogether. See *id.*, at 370, 109 S.Ct. 2969. While noting that "[t]he day may come when there is such general legislative rejection of the execution of 16- or 17-year-old capital murderers that a clear national consensus can be said to have developed," I concluded that that day had not yet arrived. *592*Id.*, at 381-382, 109 S.Ct. 2969. I reaffirmed my view that, beyond assessing the actions of legislatures and juries, the Court has a constitutional obligation to judge for itself whether capital punishment is a proportionate response to the defendant's blameworthiness. *Id.*, at 382, 109 S.Ct. 2969. Nevertheless, I concluded that proportionality arguments similar to those endorsed by the Court today did not justify a categorical Eighth Amendment rule against capital punishment of 16- and 17-year-old offenders. See *ibid.* (citing *Thompson, supra*, at 853-854, 108 S.Ct. 2687 (O'CONNOR, J., concurring in judgment)).

The Court has also twice addressed the constitutionality of capital punishment of mentally retarded offenders. In *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), decided the same year as *Stanford*, we rejected the claim that the Eighth Amendment barred the execution of the mentally retarded. At that time, only two States specifically prohibited the practice, while 14 others did not have capital punishment at all. 492 U.S., at 334, 109 S.Ct. 2934. Much had changed when we revisited the question three Terms ago in *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). In *Atkins*, the Court reversed *Penry* and held that the Eighth Amendment forbids capital punishment of mentally retarded offenders. 536 U.S., at 321, 122 S.Ct. 2242. In the 13 years between *Penry* and *Atkins*, there had been a wave of legislation prohibiting the execution of such offenders. By the time we heard *Atkins*, 30 States barred the death penalty for the mentally retarded, and even among those States theoretically permitting such punishment, very few had executed a mentally retarded offender in recent history. 536 U.S., at 314-316, 122 S.Ct. 2242. On the basis of this evidence, the Court determined that it was "fair to say that a national consensus ha[d] developed against" the practice. *Id.*, at 316, 122 S.Ct. 2242.

**1209 But our decision in *Atkins* did not rest solely on this tentative conclusion. Rather, the Court's independent moral judgment was dispositive. The Court observed that mentally retarded persons suffer from major cognitive and behavioral*593 deficits, i.e., "subaverage intellectual functioning" and "significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18." *Id.*, at 318, 122 S.Ct. 2242. "Because of their impairments, [such persons] by definition ... have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." *Ibid.* We concluded that these deficits called into serious doubt whether the execution of mentally retarded offenders would measurably contribute to the principal penological goals that capital punishment is intended to serve—retribution and deterrence. *Id.*, at 319-321, 122 S.Ct. 2242. Mentally retarded offenders' impairments so diminish their personal moral culpability that it is highly unlikely that such offenders could ever deserve the ultimate punishment, even in cases of capital murder. *Id.*, at 319, 122 S.Ct. 2242. And these same impairments made it very improbable that the threat of the death penalty would deter mentally retarded persons from committing capital crimes. *Id.*, at 319-320, 122 S.Ct. 2242. Having concluded that capital punishment of the

mentally retarded is inconsistent with the Eighth Amendment, the Court "le[ft] to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Id.*, at 317, 122 S.Ct. 2242 (quoting *Ford v. Wainwright*, 477 U.S. 399, 416-417, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986)).

II

A

Although the general principles that guide our Eighth Amendment jurisprudence afford some common ground, I part ways with the Court in applying them to the case before us. As a preliminary matter, I take issue with the Court's failure to reprove, or even to acknowledge, the Supreme Court of Missouri's unabashed refusal to follow our *594 controlling decision in *Stanford*. The lower court concluded that, despite *Stanford's* clear holding and historical recency, our decision was no longer binding authority because it was premised on what the court deemed an obsolete assessment of contemporary values. Quite apart from the merits of the constitutional question, this was clear error.

Because the Eighth Amendment "draw[s] its meaning from ... evolving standards of decency," *Trop*, 356 U.S., at 101, 78 S.Ct. 590 (plurality opinion), significant changes in societal mores over time may require us to reevaluate a prior decision. Nevertheless, it remains "this Court's prerogative alone to overrule one of its precedents." *State Oil Co. v. Khan*, 522 U.S. 3, 20, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997) (emphasis added). That is so even where subsequent decisions or factual developments may appear to have "significantly undermined" the rationale for our earlier holding. *United States v. Hatter*, 532 U.S. 557, 567, 121 S.Ct. 1782, 149 L.Ed.2d 820 (2001); see also *State Oil Co.*, *supra*, at 20, 118 S.Ct. 275; *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989). The Eighth Amendment provides no exception to this rule. On the contrary, clear, predictable, and uniform constitutional standards are especially desirable in this sphere. By affirming the lower court's judgment without so **1210 much as a slap on the hand, today's decision threatens to invite frequent and disruptive reassessments of our Eighth Amendment precedents.

B

In determining whether the juvenile death penalty comports with contemporary standards of decency, our inquiry begins with the "clearest and most reliable objective evidence of contemporary values"—the actions of the Nation's legislatures. *Penry*, *supra*, at 331, 109 S.Ct. 2934. As the Court emphasizes, the overall number of jurisdictions that currently disallow the execution of under-18 offenders is the same as the number that forbade the execution of mentally retarded offenders when *Atkins* was decided. *595 *Ante*, at 1192. At present, 12 States and the District of Columbia do not have the death penalty, while an additional 18 States and the Federal Government authorize capital punishment but prohibit the execution of under-18 offenders. See *ante*, at 1201-1202 (Appendix A). And here, as in *Atkins*, only a very small fraction of the States that permit capital punishment of offenders within the relevant class has actually carried out such an execution in recent history: Six States have executed under-18 offenders in the 16 years since *Stanford*, while five States had executed mentally retarded offenders in the 13 years prior to *Atkins*. See *Atkins*, 536 U.S., at 316, 122 S.Ct. 2242; V. Streib, *The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes*, January 1, 1973-December 31, 2004, No. 76, pp. 15-23 (2005), available at http://www.law.onu.edu/faculty/streib/documents/Juv_DeathDec2004.pdf (last updated Jan. 31, 2005) (as visited Feb. 25, 2005, and available in Clerk of Court's case file) (hereinafter Streib). In these respects, the objective evidence in this case is, indeed, "similar, and in some respects parallel to," the evidence upon which we relied in *Atkins*. *Ante*, at 1192.

While the similarities between the two cases are undeniable, the objective evidence of national consensus is marginally weaker here. Most importantly, in *Atkins* there was significant evidence of *opposition* to the execution of the mentally retarded, but there was virtually no countervailing evidence of affirmative legislative *support* for this practice. Cf. *Thompson*, 487 U.S., at 849, 108 S.Ct. 2687 (O'CONNOR, J., concurring in judgment) (attributing significance to the fact that "no legislature in this country has affirmatively and unequivocally endorsed" capital punishment of 15-year-old offenders). The States that permitted such executions did so only because they had not enacted any prohibitory legislation. Here, by contrast, at least seven States have current statutes that specifically set 16 or 17 as the minimum age at which *596 commission of a capital crime can expose the offender to the death penalty. See *ante*, at 1200-1201 (Appendix A).^{FN2} Five of these seven States presently have one or more juvenile offenders**1211 on death row (six if respondent is included in the count), see Streib 24-31, and four of

them have executed at least one under-18 offender in the past 15 years, see *id.*, at 15-23. In all, there are currently over 70 juvenile offenders on death row in 12 different States (13 including respondent). See *id.*, at 11, 24-31. This evidence suggests some measure of continuing public support for the availability of the death penalty for 17-year-old capital murderers.

FN* In 12 other States that have capital punishment, under-18 offenders can be subject to the death penalty as a result of transfer statutes that permit such offenders to be tried as adults for certain serious crimes. See *ante*, at 1200-1201 (Appendix A). As I observed in *Thompson v. Oklahoma*, 487 U.S. 815, 850-852, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988) (opinion concurring in judgment): "There are many reasons, having nothing whatsoever to do with capital punishment, that might motivate a legislature to provide as a general matter for some [minors] to be channeled into the adult criminal justice process." Accordingly, while these 12 States clearly cannot be counted as *opposing* capital punishment of under-18 offenders, the fact that they permit such punishment through this indirect mechanism does not necessarily show affirmative and unequivocal legislative support for the practice. See *ibid.*

Moreover, the Court in *Atkins* made clear that it was "not so much the number of [States forbidding execution of the mentally retarded] that [was] significant, but the consistency of the direction of change." 536 U.S., at 315, 122 S.Ct. 2242. In contrast to the trend in *Atkins*, the States have not moved uniformly toward abolishing the juvenile death penalty. Instead, since our decision in *Stanford*, two States have expressly reaffirmed their support for this practice by enacting statutes setting 16 as the minimum age for capital punishment. See Mo.Rev.Stat. § 565.020.2 (2000); Va.Code Ann. § 18.2-10(a) (Lexis 2004). Furthermore, as the Court emphasized in *Atkins* itself, 536 U.S., at 315, n. 18, 122 S.Ct. 2242, the pace of legislative action in this context has been considerably slower than it was with regard to capital punishment of the mentally retarded.*597 In the 13 years between our decisions in *Penry* and *Atkins*, no fewer than 16 States banned the execution of mentally retarded offenders. See *Atkins, supra*, at 314-315, 122 S.Ct. 2242. By comparison, since our decision 16 years ago in *Stanford*, only four States that previously permitted the execution of under-18 offenders, plus the Federal Government, have legislatively

reversed course, and one additional State's high court has construed the State's death penalty statute not to apply to under-18 offenders, see *State v. Furman*, 122 Wash.2d 440, 458, 858 P.2d 1092, 1103 (1993) (en banc). The slower pace of change is no doubt partially attributable, as the Court says, to the fact that 12 States had already imposed a minimum age of 18 when *Stanford* was decided. See *ante*, at 1193-1194. Nevertheless, the extraordinary wave of legislative action leading up to our decision in *Atkins* provided strong evidence that the country truly had set itself against capital punishment of the mentally retarded. Here, by contrast, the halting pace of change gives reason for pause.

To the extent that the objective evidence supporting today's decision is similar to that in *Atkins*, this merely highlights the fact that such evidence is not dispositive in either of the two cases. After all, as the Court today confirms, *ante*, at 1191, 1197-1198, the Constitution requires that "in the end our own judgment ... be brought to bear" in deciding whether the Eighth Amendment forbids a particular punishment, *Atkins, supra*, at 312, 122 S.Ct. 2242 (quoting *Coker*, 433 U.S., at 597, 97 S.Ct. 2861 (plurality opinion)). This judgment is not merely a rubber stamp on the tally of legislative and jury actions. Rather, it is an integral part of the Eighth Amendment inquiry and one that is entitled to independent weight in reaching our ultimate decision.

Here, as in *Atkins*, the objective evidence of a national consensus is weaker than in most prior cases in which the Court has struck down a particular punishment under the Eighth Amendment. See *Coker, supra*, at 595-596, 97 S.Ct. 2861 (plurality opinion) (striking down death penalty for rape of an adult *598 woman, where only one jurisdiction authorized such punishment); *Enmund*, 458 U.S., at 792, 102 S.Ct. 3368 (striking down death penalty for certain crimes of aiding and abetting felony-murder, where only eight jurisdictions authorized such punishment); **1212 *Ford v. Wainwright*, 477 U.S., at 408, 106 S.Ct. 2595 (striking down capital punishment of the insane, where no jurisdiction permitted this practice). In my view, the objective evidence of national consensus, standing alone, was insufficient to dictate the Court's holding in *Atkins*. Rather, the compelling moral proportionality argument against capital punishment of mentally retarded offenders played a *decisive* role in persuading the Court that the practice was inconsistent with the Eighth Amendment. Indeed, the force of the proportionality argument in *Atkins* significantly bolstered the Court's confidence that the objective evidence in that case did, in fact,

herald the emergence of a genuine national consensus. Here, by contrast, the proportionality argument against the juvenile death penalty is so flawed that it can be given little, if any, analytical weight—it proves too weak to resolve the lingering ambiguities in the objective evidence of legislative consensus or to justify the Court's categorical rule.

C

Seventeen-year-old murderers must be categorically exempted from capital punishment, the Court says, because they “cannot with reliability be classified among the worst offenders.” *Ante*, at 1195. That conclusion is premised on three perceived differences between “adults,” who have already reached their 18th birthdays, and “juveniles,” who have not. See *ante*, at 1195-1196. First, juveniles lack maturity and responsibility and are more reckless than adults. Second, juveniles are more vulnerable to outside influences because they have less control over their surroundings. And third, a juvenile's character is not as fully formed as that of an adult. Based on these characteristics, the Court determines that 17-year-old capital murderers are not as *599 blameworthy as adults guilty of similar crimes; that 17-year-olds are less likely than adults to be deterred by the prospect of a death sentence; and that it is difficult to conclude that a 17-year-old who commits even the most heinous of crimes is “irretrievably depraved.” *Ante*, at 1195-1197. The Court suggests that “a rare case might arise in which a juvenile offender has sufficient psychological maturity, and at the same time demonstrates sufficient depravity, to merit a sentence of death.” *Ante*, at 1197. However, the Court argues that a categorical age-based prohibition is justified as a prophylactic rule because “[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability.” *Ante*, at 1197.

It is beyond cavil that juveniles as a class are generally less mature, less responsible, and less fully formed than adults, and that these differences bear on juveniles' comparative moral culpability. See, e.g., *Johnson v. Texas*, 509 U.S. 350, 367, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993) (“There is no dispute that a defendant's youth is a relevant mitigating circumstance”); *id.*, at 376, 113 S.Ct. 2658 (O'CONNOR, J., dissenting) (“[T]he vicissitudes of youth bear directly on the young offender's culpability and responsibility for the crime”); *Eddings*, 455 U.S., at 115-116, 102 S.Ct. 869 (“Our history is replete with laws and judicial recognition that minors, especially in their

earlier years, generally are less mature and responsible than adults”). But even accepting this premise, the Court's proportionality argument fails to support its categorical rule.

First, the Court adduces no evidence whatsoever in support of its sweeping conclusion, see *ante*, at 1196-1197, that it is only in “rare” cases, if ever, that 17-year-old murderers are sufficiently mature and act with sufficient depravity to warrant the death penalty. The fact that juveniles are **1213 generally less culpable for their misconduct than adults does not necessarily mean that a 17-year-old murderer cannot be sufficiently culpable to merit the death penalty. At most, the *600 Court's argument suggests that the average 17-year-old murderer is not as culpable as the average adult murderer. But an especially depraved juvenile offender may nevertheless be just as culpable as many adult offenders considered bad enough to deserve the death penalty. Similarly, the fact that the availability of the death penalty may be less likely to deter a juvenile from committing a capital crime does not imply that this threat cannot effectively deter some 17-year-olds from such an act. Surely there is an age below which no offender, no matter what his crime, can be deemed to have the cognitive or emotional maturity necessary to warrant the death penalty. But at least at the margins between adolescence and adulthood—and especially for 17-year-olds such as respondent—the relevant differences between “adults” and “juveniles” appear to be a matter of degree, rather than of kind. It follows that a legislature may reasonably conclude that at least some 17-year-olds can act with sufficient moral culpability, and can be sufficiently deterred by the threat of execution, that capital punishment may be warranted in an appropriate case.

Indeed, this appears to be just such a case. Christopher Simmons' murder of Shirley Crook was premeditated, wanton, and cruel in the extreme. Well before he committed this crime, Simmons declared that he wanted to kill someone. On several occasions, he discussed with two friends (ages 15 and 16) his plan to burglarize a house and to murder the victim by tying the victim up and pushing him from a bridge. Simmons said they could “get away with it” because they were minors. Brief for Petitioner 3. In accord with this plan, Simmons and his 15-year-old accomplice broke into Mrs. Crook's home in the middle of the night, forced her from her bed, bound her, and drove her to a state park. There, they walked her to a railroad trestle spanning a river, “hog-tied” her with electrical cable, bound her face completely with duct tape, and pushed her, still alive, from the trestle. She drowned in the water

below. *Id.*, at 4. One can *601 scarcely imagine the terror that this woman must have suffered throughout the ordeal leading to her death. Whatever can be said about the comparative moral culpability of 17-year-olds as a general matter, Simmons' actions unquestionably reflect "a consciousness materially more 'depraved' than that of... the average murderer." *Atkins*, 536 U.S., at 319, 122 S.Ct. 2242 (quoting *Godfrey v. Georgia*, 446 U.S. 420, 433, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980)). And Simmons' prediction that he could murder with impunity because he had not yet turned 18—though inaccurate—suggests that he *did* take into account the perceived risk of punishment in deciding whether to commit the crime. Based on this evidence, the sentencing jury certainly had reasonable grounds for concluding that, despite Simmons' youth, he "ha[d] sufficient psychological maturity" when he committed this horrific murder, and "at the same time demonstrate[d] sufficient depravity, to merit a sentence of death." *Ante*, at 1197.

The Court's proportionality argument suffers from a second and closely related defect: It fails to establish that the differences in maturity between 17-year-olds and young "adults" are both universal enough and significant enough to justify a bright-line prophylactic rule against capital punishment of the former. The Court's analysis is premised on differences in the aggregate between juveniles and adults, which frequently do not hold true when comparing individuals. Although it may **1214 be that many 17-year-old murderers lack sufficient maturity to deserve the death penalty, some juvenile murderers may be quite mature. Chronological age is not an unfailing measure of psychological development, and common experience suggests that many 17-year-olds are more mature than the average young "adult." In short, the class of offenders exempted from capital punishment by today's decision is too broad and too diverse to warrant a categorical prohibition. Indeed, the age-based line drawn by the Court is indefensibly arbitrary—it quite likely will protect a number of offenders who are mature enough to *602 deserve the death penalty and may well leave vulnerable many who are not.

For purposes of proportionality analysis, 17-year-olds as a class are qualitatively and materially different from the mentally retarded. "Mentally retarded" offenders, as we understood that category in *Atkins*, are defined by precisely the characteristics which render death an excessive punishment. A mentally retarded person is, "by definition," one whose cognitive and behavioral capacities have been proved to fall below a certain minimum. See *Atkins*,

536 U.S., at 318, 122 S.Ct. 2242; see also *id.*, at 308, n. 3, 122 S.Ct. 2242 (discussing characteristics of mental retardation); *id.*, at 317, and n. 22, 122 S.Ct. 2242 (leaving to the States the development of mechanisms to determine which offenders fall within the class exempt from capital punishment). Accordingly, for purposes of our decision in *Atkins*, the mentally retarded are not merely *less* blameworthy for their misconduct or *less* likely to be deterred by the death penalty than others. Rather, a mentally retarded offender is one whose demonstrated impairments make it so highly unlikely that he is culpable enough to deserve the death penalty or that he could have been deterred by the threat of death, that execution is not a defensible punishment. There is no such inherent or accurate fit between an offender's chronological age and the personal limitations which the Court believes make capital punishment excessive for 17-year-old murderers. Moreover, it defies common sense to suggest that 17-year-olds as a class are somehow equivalent to mentally retarded persons with regard to culpability or susceptibility to deterrence. Seventeen-year-olds may, on average, be less mature than adults, but that lesser maturity simply cannot be equated with the major, lifelong impairments suffered by the mentally retarded.

The proportionality issues raised by the Court clearly implicate Eighth Amendment concerns. But these concerns may properly be addressed not by means of an arbitrary, categorical age-based rule, but rather through individualized *603 sentencing in which juries are required to give appropriate mitigating weight to the defendant's immaturity, his susceptibility to outside pressures, his cognizance of the consequences of his actions, and so forth. In that way the constitutional response can be tailored to the specific problem it is meant to remedy. The Eighth Amendment guards against the execution of those who are "insufficient[ly] culpab[le]," see *ante*, at 1197, in significant part, by requiring sentencing that "reflect[s] a reasoned moral response to the defendant's background, character, and crime." *California v. Brown*, 479 U.S. 538, 545, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987) (O'CONNOR, J., concurring). Accordingly, the sentencer in a capital case must be permitted to give full effect to all constitutionally relevant mitigating evidence. See *Tennard v. Dretke*, 542 U.S. 274, 283-285, 124 S.Ct. 2562, 2569-2570, 159 L.Ed.2d 384 (2004); *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (plurality opinion). A **1215 defendant's youth or immaturity is, of course, a paradigmatic example of such evidence. See *Eddings*, 455 U.S., at 115-116, 102 S.Ct. 869.

Although the prosecutor's apparent attempt to use respondent's youth as an aggravating circumstance in this case is troubling, that conduct was never challenged with specificity in the lower courts and is not directly at issue here. As the Court itself suggests, such "overreaching" would best be addressed, if at all, through a more narrowly tailored remedy. See *ante*, at 1197. The Court argues that sentencing juries cannot accurately evaluate a youthful offender's maturity or give appropriate weight to the mitigating characteristics related to youth. But, again, the Court presents no real evidence and the record appears to contain none supporting this claim. Perhaps more importantly, the Court fails to explain why this duty should be so different from, or so much more difficult than, that of assessing and giving proper effect to any other qualitative capital sentencing factor. I would not be so quick to conclude that the constitutional safeguards, the sentencing juries, and the trial judges upon *604 which we place so much reliance in all capital cases are inadequate in this narrow context.

D

I turn, finally, to the Court's discussion of foreign and international law. Without question, there has been a global trend in recent years toward abolishing capital punishment for under-18 offenders. Very few, if any, countries other than the United States now permit this practice in law or in fact. See *ante*, at 1199. While acknowledging that the actions and views of other countries do not dictate the outcome of our Eighth Amendment inquiry, the Court asserts that "the overwhelming weight of international opinion against the juvenile death penalty ... does provide respected and significant confirmation for [its] own conclusions." *Ante*, at 1200. Because I do not believe that a genuine *national* consensus against the juvenile death penalty has yet developed, and because I do not believe the Court's moral proportionality argument justifies a categorical, age-based constitutional rule, I can assign no such *confirmatory* role to the international consensus described by the Court. In short, the evidence of an international consensus does not alter my determination that the Eighth Amendment does not, at this time, forbid capital punishment of 17-year-old murderers in all cases.

Nevertheless, I disagree with Justice SCALIA's contention, *post*, at 1225-1229 (dissenting opinion), that foreign and international law have no place in our Eighth Amendment jurisprudence. Over the course of nearly half a century, the Court has consistently referred to foreign and international law as relevant to its assessment of

evolving standards of decency. See *Atkins, supra*, at 317, n. 21, 122 S.Ct. 2242; *Thompson*, 487 U.S., at 830-831, and n. 31, 108 S.Ct. 2687 (plurality opinion); *Enmund*, 458 U.S., at 796-797, n. 22, 102 S.Ct. 3368; *Coker*, 433 U.S., at 596, n. 10, 97 S.Ct. 2861 (plurality opinion); *Trop*, 356 U.S., at 102-103, 78 S.Ct. 590 (plurality opinion). This inquiry reflects the special character of the Eighth *605 Amendment, which, as the Court has long held, draws its meaning directly from the maturing values of civilized society. Obviously, American law is distinctive in many respects, not least where the specific provisions of our Constitution and the history of its exposition so dictate. Cf. *post*, at 1226-1227 (SCALIA, J., dissenting) (discussing distinctively American rules of law related to the Fourth Amendment and the Establishment Clause). But this Nation's evolving understanding of human dignity certainly**1216 is neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries. On the contrary, we should not be surprised to find congruence between domestic and international values, especially where the international community has reached clear agreement-expressed in international law or in the domestic laws of individual countries-that a particular form of punishment is inconsistent with fundamental human rights. At least, the existence of an international consensus of this nature can serve to confirm the reasonableness of a consonant and genuine American consensus. The instant case presents no such domestic consensus, however, and the recent emergence of an otherwise global consensus does not alter that basic fact.

In determining whether the Eighth Amendment permits capital punishment of a particular offense or class of offenders, we must look to whether such punishment is consistent with contemporary standards of decency. We are obligated to weigh both the objective evidence of societal values and our own judgment as to whether death is an excessive sanction in the context at hand. In the instant case, the objective evidence is inconclusive; standing alone, it does not demonstrate that our society has repudiated capital punishment of 17-year-old offenders in all cases. Rather, the actions of the Nation's legislatures suggest that, although a clear and durable national consensus against this practice may in time *606 emerge, that day has yet to arrive. By acting so soon after our decision in *Stanford*, the Court both pre-empts the democratic debate through which genuine consensus might develop and simultaneously runs a considerable risk of inviting lower court reassessments of our Eighth Amendment prece-

dents.

To be sure, the objective evidence supporting today's decision is similar to (though marginally weaker than) the evidence before the Court in *Atkins*. But *Atkins* could not have been decided as it was based solely on such evidence. Rather, the compelling proportionality argument against capital punishment of the mentally retarded played a decisive role in the Court's Eighth Amendment ruling. Moreover, the constitutional rule adopted in *Atkins* was tailored to this proportionality argument: It exempted from capital punishment a defined group of offenders whose proven impairments rendered it highly unlikely, and perhaps impossible, that they could act with the degree of culpability necessary to deserve death. And *Atkins* left to the States the development of mechanisms to determine which individual offenders fell within this class.

In the instant case, by contrast, the moral proportionality arguments against the juvenile death penalty fail to support the rule the Court adopts today. There is no question that "the chronological age of a minor is itself a relevant mitigating factor of great weight," *Eddings*, 455 U.S., at 116, 102 S.Ct. 869, and that sentencing juries must be given an opportunity carefully to consider a defendant's age and maturity in deciding whether to assess the death penalty. But the mitigating characteristics associated with youth do not justify an absolute age limit. A legislature can reasonably conclude, as many have, that some 17-year-old murderers are mature enough to deserve the death penalty in an appropriate case. And nothing in the record before us suggests that sentencing juries are so unable accurately to assess a 17-year-old defendant's⁶⁰⁷ maturity, or so incapable of giving proper weight to youth as a mitigating factor, that the Eighth Amendment requires the bright-line rule imposed today. In the end, the Court's flawed proportionality argument simply ⁶⁰⁸cannot bear the weight the Court would place upon it.

Reasonable minds can differ as to the minimum age at which commission of a serious crime should expose the defendant to the death penalty, if at all. Many jurisdictions have abolished capital punishment altogether, while many others have determined that even the most heinous crime, if committed before the age of 18, should not be punishable by death. Indeed, were my office that of a legislator, rather than a judge, then I, too, would be inclined to support legislation setting a minimum age of 18 in this context. But a significant number of States, includ-

ing Missouri, have decided to make the death penalty potentially available for 17-year-old capital murderers such as respondent. Without a clearer showing that a genuine national consensus forbids the execution of such offenders, this Court should not substitute its own "inevitably subjective judgment" on how best to resolve this difficult moral question for the judgments of the Nation's democratically elected legislatures. See *Thompson*, 487 U.S., at 854, 108 S.Ct. 2687 (O'CONNOR, J., concurring in judgment). I respectfully dissent.

Justice SCALIA, with whom THE CHIEF JUSTICE and Justice THOMAS join, dissenting.

In urging approval of a constitution that gave life-tenured judges the power to nullify laws enacted by the people's representatives, Alexander Hamilton assured the citizens of New York that there was little risk in this, since "[t]he judiciary ... ha[s] neither FORCE nor WILL but merely judgment." The Federalist No. 78, p. 465 (C. Rossiter ed. 1961). But Hamilton had in mind a traditional judiciary, "bound down by strict rules and precedents which serve to define ⁶⁰⁸and point out their duty in every particular case that comes before them." *Id.*, at 471. Bound down, indeed. What a mockery today's opinion makes of Hamilton's expectation, announcing the Court's conclusion that the meaning of our Constitution has changed over the past 15 years—not, mind you, that this Court's decision 15 years ago was *wrong*, but that the Constitution *has changed*. The Court reaches this implausible result by purporting to advert, not to the original meaning of the Eighth Amendment, but to "the evolving standards of decency," *ante*, at 1190 (internal quotation marks omitted), of our national society. It then finds, on the flimsiest of grounds, that a national consensus which could not be perceived in our people's laws barely 15 years ago now solidly exists. Worse still, the Court says in so many words that what our people's laws say about the issue does not, in the last analysis, matter: "[I]n the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." *Ante*, at 1191-1192 (internal quotation marks omitted). The Court thus proclaims itself sole arbiter of our Nation's moral standards—and in the course of discharging that awesome responsibility purports to take guidance from the views of foreign courts and legislatures. Because I do not believe that the meaning of our Eighth Amendment, any more than the meaning of other provisions of our Constitution, should be determined by the subjective views of five Members of this Court and like-minded foreigners, I dissent.

I

In determining that capital punishment of offenders who committed murder before age 18 is "cruel and unusual" under the Eighth Amendment, the Court first considers, in accordance with our modern (though in my view mistaken) jurisprudence, whether there is a "national consensus," *ibid.* (internal quotation marks omitted), **1218 that laws allowing such *609 executions contravene our modern "standards of decency," ^{FN1} *Trop v. Dulles*, 356 U.S. 86, 101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958). We have held that this determination should be based on "objective indicia that reflect the public attitude toward a given sanction"—namely, "statutes passed by society's elected representatives." *Stanford v. Kentucky*, 492 U.S. 361, 370, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989) (internal quotation marks omitted). As in *Atkins v. Virginia*, 536 U.S. 304, 312, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), the Court dutifully recites this test and claims halfheartedly that a national consensus has emerged since our decision in *Stanford*, because 18 States—or 47% of States that permit capital punishment—now have legislation prohibiting the execution of offenders under 18, and because all of 4 States have adopted such legislation since *Stanford*. See *ante*, at 1192-1193.

^{FN1}. The Court ignores entirely the threshold inquiry in determining whether a particular punishment complies with the Eighth Amendment: whether it is one of the "modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted." *Ford v. Wainwright*, 477 U.S. 399, 405, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986). As we have noted in prior cases, the evidence is unusually clear that the Eighth Amendment was not originally understood to prohibit capital punishment for 16- and 17-year-old offenders. See *Stanford v. Kentucky*, 492 U.S. 361, 368, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989). At the time the Eighth Amendment was adopted, the death penalty could theoretically be imposed for the crime of a 7-year-old, though there was a rebuttable presumption of incapacity to commit a capital (or other) felony until the age of 14. See *ibid.* (citing 4 W. Blackstone, Commentaries *23-*24; 1 M. Hale, Pleas of the Crown 24-29 (1800)).

Words have no meaning if the views of less than 50% of death penalty States can constitute a national consensus.

See *Atkins*, *supra*, at 342-345, 122 S.Ct. 2242 (SCALIA, J., dissenting). Our previous cases have required overwhelming opposition to a challenged practice, generally over a long period of time. In *Coker v. Georgia*, 433 U.S. 584, 595-596, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977), a plurality concluded the Eighth Amendment prohibited capital punishment for rape of an adult woman where only one jurisdiction authorized such punishment. The plurality also observed that "[a]t no time in the last 50 years ha[d] a majority of *610 States authorized death as a punishment for rape." *Id.*, at 593, 97 S.Ct. 2861. In *Ford v. Wainwright*, 477 U.S. 399, 408, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986), we held execution of the insane unconstitutional, tracing the roots of this prohibition to the common law and noting that "no State in the union permits the execution of the insane." In *Enmund v. Florida*, 458 U.S. 782, 792, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), we invalidated capital punishment imposed for participation in a robbery in which an accomplice committed murder, because 78% of all death penalty States prohibited this punishment. Even there we expressed some hesitation, because the legislative judgment was "neither 'wholly unanimous among state legislatures,' ... nor as compelling as the legislative judgments considered in *Coker*." *Id.*, at 793, 102 S.Ct. 3368. By contrast, agreement among 42% of death penalty States in *Stanford*, which the Court appears to believe was correctly decided at the time, *ante*, at 1197-1198, was insufficient to show a national consensus. See *Stanford*, *supra*, at 372, 109 S.Ct. 2969.

In an attempt to keep afloat its implausible assertion of national consensus, the Court throws overboard a proposition well established in our Eighth Amendment jurisprudence. "It should be observed," the Court says, "that the *Stanford* Court **1219 should have considered those States that had abandoned the death penalty altogether as part of the consensus against the juvenile death penalty ... ; a State's decision to bar the death penalty altogether of necessity demonstrates a judgment that the death penalty is inappropriate for all offenders, including juveniles." *Ante*, at 1198. The insinuation that the Court's new method of counting contradicts only "the *Stanford* Court" is misleading. None of our cases dealing with an alleged constitutional limitation upon the death penalty has counted, as States supporting a consensus in favor of that limitation, States that have eliminated the death penalty entirely. See *Ford*, *supra*, at 408, n. 2, 106 S.Ct. 2595; *Enmund*, *supra*, at 789, 102 S.Ct. 3368; *Coker*, *supra*, at 594, 97 S.Ct. 2861. And with good reason. Consulting States that bar the death penalty concerning the necessity of making an exception to the penalty*611 for offenders

under 18 is rather like including old-order Amishmen in a consumer-preference poll on the electric car. Of course they don't like it, but that sheds no light whatever on the point at issue. That 12 States favor no executions says something about consensus against the death penalty, but nothing-absolutely nothing-about consensus that offenders under 18 deserve special immunity from such a penalty. In repealing the death penalty, those 12 States considered none of the factors that the Court puts forth as determinative of the issue before us today-lower culpability of the young, inherent recklessness, lack of capacity for considered judgment, etc. What might be relevant, perhaps, is how many of those States permit 16- and 17-year-old offenders to be treated as adults with respect to noncapital offenses. (They all do; ^{FN2} indeed, some even require that juveniles as young as 14 be tried as adults if they are charged with murder.^{FN3}) The attempt by the Court to turn its remarkable minority consensus into a faux majority by counting Amishmen is an act of nomological desperation.

FN2. See Alaska Stat. § 47.12.030 (Lexis 2002); Haw.Rev.Stat. § 571-22 (1999); Iowa Code § 232.45 (2003); Me.Rev.Stat. Ann., Tit. 15, § 3101(4) (West 2003); Mass. Gen. Laws Ann., ch. 119, § 74 (West 2003); Mich. Comp. Laws Ann. § 764.27 (West 2000); Minn.Stat. § 260B.125 (2004); N.D. Cent.Code § 27-20-34 (Lexis Supp.2003); R.I. Gen. Laws § 14-1-7 (Lexis 2002); Vt. Stat. Ann., Tit. 33, § 5516 (Lexis 2001); W. Va.Code § 49-5-10 (Lexis 2004); Wis. Stat. § 938.18 (2003-2004); see also National Center for Juvenile Justice, Trying and Sentencing Juveniles as Adults: An Analysis of State Transfer and Blended Sentencing Laws 1 (Oct.2003). The District of Columbia is the only jurisdiction without a death penalty that specifically exempts under-18 offenders from its harshest sanction-life imprisonment without parole. See D.C.Code § 22-2104 (West 2001).

FN3. See Mass. Gen. Laws Ann., ch. 119, § 74 (West 2003); N.D. Cent.Code § 27-20-34 (Lexis Supp.2003); W. Va.Code § 49-5-10 (Lexis 2004).

Recognizing that its national-consensus argument was weak compared with our earlier cases, the *Atkins* Court found additional support in the fact that 16 States had prohibited execution of mentally retarded individuals since *612 *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct.

2934, 106 L.Ed.2d 256 (1989). *Atkins*, 536 U.S., at 314-316, 122 S.Ct. 2242. Indeed, the *Atkins* Court distinguished *Stanford* on that very ground, explaining that "[a]lthough we decided *Stanford* on the same day as *Penry*, apparently only two state legislatures have raised the threshold age for imposition of the death penalty." 536 U.S., at 315, n. 18, 122 S.Ct. 2242 (emphasis added). Now, the Court says a legislative change in four States is "significant" enough to trigger a constitutional prohibition.^{FN4} *Ante*, at 1193. It is amazing to **1220 think that this subtle shift in numbers can take the issue entirely off the table for legislative debate.

FN4. As the Court notes, Washington State's decision to prohibit executions of offenders under 18 was made by a judicial, not legislative, decision. *State v. Furman*, 122 Wash.2d 440, 459, 858 P.2d 1092, 1103 (1993), construed the State's death penalty statute-which did not set any age limit-to apply only to persons over 18. The opinion found that construction necessary to avoid what it considered constitutional difficulties, and did not purport to reflect popular sentiment. It is irrelevant to the question of changed national consensus.

I also doubt whether many of the legislators who voted to change the laws in those four States would have done so if they had known their decision would (by the pronouncement of this Court) be rendered irreversible. After all, legislative support for capital punishment, in any form, has surged and ebbed throughout our Nation's history. As Justice O'CONNOR has explained:

"The history of the death penalty instructs that there is danger in inferring a settled societal consensus from statistics like those relied on in this case. In 1846, Michigan became the first State to abolish the death penalty In succeeding decades, other American States continued the trend towards abolition Later, and particularly after World War II, there ensued a steady and dramatic decline in executions In the 1950's and 1960's, more States abolished or radically restricted capital punishment, and executions ceased completely for several years beginning in 1968....

*613 "In 1972, when this Court heard arguments on the constitutionality of the death penalty, such statistics might have suggested that the practice had become a relic, implicitly rejected by a new societal consensus.... We now know that any inference of a societal consen-

(Cite as: 543 U.S. 551, 125 S.Ct. 1183)

sus rejecting the death penalty would have been mistaken. But had this Court then declared the existence of such a consensus, and outlawed capital punishment, legislatures would very likely not have been able to revive it. The mistaken premise of the decision would have been frozen into constitutional law, making it difficult to refute and even more difficult to reject.” Thompson v. Oklahoma, 487 U.S. 815, 854-855, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988) (opinion concurring in judgment).

Relying on such narrow margins is especially inappropriate in light of the fact that a number of legislatures and voters have expressly affirmed their support for capital punishment of 16- and 17-year-old offenders since Stanford. Though the Court is correct that no State has lowered its death penalty age, both the Missouri and Virginia Legislatures—which, at the time of Stanford, had no minimum age requirement—expressly established 16 as the minimum. Mo.Rev.Stat. § 565.020.2 (2000); Va.Code Ann. § 18.2-10(a) (Lexis 2004). The people of Arizona^{FN5} and Florida^{FN6} have *614 done the same by ballot initiative. **1221 Thus, even States that have not executed an under-18 offender in recent years unquestionably favor the possibility of capital punishment in some circumstances.

FN5. In 1996, Arizona's Ballot Proposition 102 exposed under-18 murderers to the death penalty by automatically transferring them out of juvenile courts. The statute implementing the proposition required the county attorney to “bring a criminal prosecution against a juvenile in the same manner as an adult if the juvenile is fifteen, sixteen or seventeen years of age and is accused of ... first degree murder.” Ariz.Rev.Stat. Ann. § 13-501 (West 2001). The Arizona Supreme Court has added to this scheme a constitutional requirement that there be an individualized assessment of the juvenile's maturity at the time of the offense. See State v. Davolt, 207 Ariz. 191, 214-216, 84 P.3d 456, 479-481 (2004).

FN6. Florida voters approved an amendment to the State Constitution, which changed the wording from “cruel or unusual” to “cruel and unusual,” Fla. Const., Art. I, § 17 (2003). See Commentary to 1998 Amendment, 25B Fla. Stat. Ann., p. 180 (West 2004). This was a response to a Florida Supreme Court ruling that “cruel or unusual” excluded the death penalty for a defen-

dant who committed murder when he was younger than 17. See Brennan v. State, 754 So.2d 1, 5 (1999). By adopting the federal constitutional language, Florida voters effectively adopted our decision in Stanford v. Kentucky, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989). See Weaver, Word May Allow Execution of 16-Year-Olds, Miami Herald, Nov. 7, 2002, p. 7B.

The Court's reliance on the infrequency of executions for under-18 murderers, *ante*, at 1192-1193, 1194, credits an argument that this Court considered and explicitly rejected in Stanford. That infrequency is explained, we accurately said, both by “the undisputed fact that a far smaller percentage of capital crimes are committed by persons under 18 than over 18,” 492 U.S., at 374, 109 S.Ct. 2969, and by the fact that juries are required at sentencing to consider the offender's youth as a mitigating factor, see Eddings v. Oklahoma, 455 U.S. 104, 115-116, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). Thus, “it is not only possible, but overwhelmingly probable, that the very considerations which induce [respondent] and [his] supporters to believe that death should *never* be imposed on offenders under 18 cause prosecutors and juries to believe that it should *rarely* be imposed.” Stanford, supra, at 374, 109 S.Ct. 2969.

It is, furthermore, unclear that executions of the relevant age group have decreased since we decided Stanford. Between 1990 and 2003, 123 of 3,599 death sentences, or 3.4%, were given to individuals who committed crimes before reaching age 18. V. Streib, *The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes*, January 1, 1973-September 30, 2004, No. 75, p. 9 (Table 3) (last updated Oct. 5, 2004), <http://www.law.onu.edu/faculty/streib/documents/JuvDeathSept302004.pdf> (all Internet materials as visited Jan. 12, 2005, and available in Clerk of Court's case file) (hereinafter *Juvenile Death Penalty Today*). *615 By contrast, only 2.1% of those sentenced to death between 1982 and 1988 committed the crimes when they were under 18. See Stanford, supra, at 373, 109 S.Ct. 2969 (citing V. Streib, *Imposition of Death Sentences for Juvenile Offenses*, January 1, 1982, Through April 1, 1989, p. 2 (paper for Cleveland-Marshall College of Law, April 5, 1989)). As for actual executions of under-18 offenders, they constituted 2.4% of the total executions since 1973. *Juvenile Death Penalty Today* 4. In Stanford, we noted that only 2% of the executions between 1642 and 1986 were of under-18 offenders and found that that lower number did

not demonstrate a national consensus against the penalty. 492 U.S., at 373-374, 109 S.Ct. 2969 (citing V. Streib, *Death Penalty for Juveniles* 55, 57 (1987)). Thus, the numbers of under-18 offenders subjected to the death penalty, though low compared with adults, have either held steady or slightly increased since *Stanford*. These statistics in no way support the action the Court takes today.

II

Of course, the real force driving today's decision is not the actions of four state legislatures, but the Court's "own judgment" that murderers younger than 18 can never be as morally culpable as older counterparts. *Ante*, at 1191-1192 (quoting *Atkins*, 536 U.S., at 312, 122 S.Ct. 2242 (in turn quoting *Coker*, 433 U.S., at 597, 97 S.Ct. 2861 (plurality opinion))). The Court claims that this usurpation of the role of moral arbiter is simply a "return" to the rule established in decisions predating *Stanford*, *ante*, at 1191. That supposed **1222 rule—which is reflected solely in dicta and never once in a *holding* that purports to supplant the consensus of the American people with the Justices' views^{FN7}—was repudiated in *Stanford* for the very good reason*616 that it has no foundation in law or logic. If the Eighth Amendment set forth an ordinary rule of law, it would indeed be the role of this Court to say what the law is. But the Court having pronounced that the Eighth Amendment is an ever-changing reflection of "the evolving standards of decency" of our society, it makes no sense for the Justices then to *prescribe* those standards rather than discern them from the practices of our people. On the evolving-standards hypothesis, the only legitimate function of this Court is to identify a moral consensus of the American people. By what conceivable warrant can nine lawyers presume to be the authoritative conscience of the Nation?^{FN8}

FN7. See, e.g., *Enmund v. Florida*, 458 U.S. 782, 801, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) ("[W]e have no reason to disagree with th[e] judgment [of the state legislatures] for purposes of construing and applying the Eighth Amendment"); *Coker v. Georgia*, 433 U.S. 584, 597, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977) (plurality opinion) ("[T]he legislative rejection of capital punishment for rape strongly confirms our own judgment").

FN8. Justice O'CONNOR agrees with our analy-

sis that no national consensus exists here, *ante*, at 1210-1212 (dissenting opinion). She is nonetheless prepared (like the majority) to override the judgment of America's legislatures if it contradicts her own assessment of "moral proportionality," *ante*, at 1212. She dissents here only because it does not. The votes in today's case demonstrate that the offending of selected lawyers' moral sentiments is not a predictable basis for law—much less a democratic one.

The reason for insistence on legislative primacy is obvious and fundamental: "[I]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people." *Gregg v. Georgia*, 428 U.S. 153, 175-176, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.) (quoting *Furman v. Georgia*, 408 U.S. 238, 383, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (Burger, C. J., dissenting)). For a similar reason we have, in our determination of society's moral standards, consulted the practices of sentencing juries: Juries "maintain a link between contemporary community values and the penal system" that this Court cannot claim for itself. *Gregg, supra*, at 181, 96 S.Ct. 2909 (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 519, n. 15, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968)).

Today's opinion provides a perfect example of why judges are ill equipped to make the type of legislative judgments the Court insists on making here. To support its opinion that States should be prohibited from imposing the death *617 penalty on anyone who committed murder before age 18, the Court looks to scientific and sociological studies, picking and choosing those that support its position. It never explains why those particular studies are methodologically sound; none was ever entered into evidence or tested in an adversarial proceeding. As THE CHIEF JUSTICE has explained:

"[M]ethodological and other errors can affect the reliability and validity of estimates about the opinions and attitudes of a population derived from various sampling techniques. Everything from variations in the survey methodology, such as the choice of the target population, the sampling design used, the questions asked, and the statistical analyses used to interpret the data can skew the results." *Atkins, supra*, at 326-327, 122 S.Ct. 2242 (dissenting opinion) (citing R. Groves, *Survey Errors and Survey **1223 Costs* (1989); I. C. Turner & E. Martin, *Surveying Subjective Phenomena* (1984)).

In other words, all the Court has done today, to borrow from another context, is to look over the heads of the crowd and pick out its friends. Cf. Conroy v. Aniskoff, 507 U.S. 511, 519, 113 S.Ct. 1562, 123 L.Ed.2d 229 (1993) (SCALIA, J., concurring in judgment).

We need not look far to find studies contradicting the Court's conclusions. As petitioner points out, the American Psychological Association (APA), which claims in this case that scientific evidence shows persons under 18 lack the ability to take moral responsibility for their decisions, has previously taken precisely the opposite position before this very Court. In its brief in Hodgson v. Minnesota, 497 U.S. 417, 110 S.Ct. 2926, 111 L.Ed.2d 344 (1990), the APA found a "rich body of research" showing that juveniles are mature enough to decide whether to obtain an abortion without parental involvement. Brief for APA as *Amicus Curiae*, O.T.1989, No. 88-805 etc., p. 18. The APA brief, citing psychology treatises and studies too numerous to list here, asserted: "[B]y middle adolescence (age 14-15) young people develop abilities similar to adults in reasoning *618 about moral dilemmas, understanding social rules and laws, [and] reasoning about interpersonal relationships and interpersonal problems." *Id.*, at 19-20 (citations omitted). Given the nuances of scientific methodology and conflicting views, courts—which can only consider the limited evidence on the record before them—are ill equipped to determine which view of science is the right one. Legislatures "are better qualified to weigh and 'evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.'" McCleskey v. Kemp, 481 U.S. 279, 319, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987) (quoting Gregg, supra, at 186, 96 S.Ct. 2909).

Even putting aside questions of methodology, the studies cited by the Court offer scant support for a categorical prohibition of the death penalty for murderers under 18. At most, these studies conclude that, *on average*, or *in most cases*, persons under 18 are unable to take moral responsibility for their actions. Not one of the cited studies opines that all individuals under 18 are unable to appreciate the nature of their crimes.

Moreover, the cited studies describe only adolescents who engage in risky or antisocial behavior, as many young people do. Murder, however, is more than just risky or antisocial behavior. It is entirely consistent to believe that young people often act impetuously and lack judgment, but, at the same time, to believe that those who commit

premeditated murder are—at least sometimes—just as culpable as adults. Christopher Simmons, who was only seven months shy of his 18th birthday when he murdered Shirley Crook, described to his friends *beforehand*—"[i]n chilling, callous terms," as the Court puts it, *ante*, at 1187—the murder he planned to commit. He then broke into the home of an innocent woman, bound her with duct tape and electrical wire, and threw her off a bridge alive and conscious. *Ante*, at 1188. In their *amici* brief, the States of Alabama, Delaware, Oklahoma, Texas, Utah, and Virginia offer additional examples*619 of murders committed by individuals under 18 that involve truly monstrous acts. In Alabama, two 17-year-olds, one 16-year-old, and one 19-year-old picked up a female hitchhiker, threw bottles at her, and kicked and stomped her for approximately 30 minutes until she died. They then sexually assaulted her lifeless body and, when they were finished, **1224 threw her body off a cliff. They later returned to the crime scene to mutilate her corpse. See Brief for Alabama et al. as *Amici Curiae* 9-10; see also Loggins v. State, 771 So.2d 1070, 1074-1075 (Ala.Crim.App.1999); Duncan v. State, 827 So.2d 838, 840-841 (Ala.Crim.App.1999). Other examples in the brief are equally shocking. Though these cases are assuredly the exception rather than the rule, the studies the Court cites in no way justify a constitutional imperative that prevents legislatures and juries from treating exceptional cases in an exceptional way by determining that some murders are not just the acts of happy-go-lucky teenagers, but heinous crimes deserving of death.

That "almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent," *ante*, at 1195, is patently irrelevant and is yet another resurrection of an argument that this Court gave a decent burial in Stanford. (What kind of Equal Justice under Law is it that—without so much as a "Sorry about that"—gives as the basis for sparing one person from execution arguments *explicitly rejected* in refusing to spare another?) As we explained in Stanford, 492 U.S., at 374, 109 S.Ct. 2969, it is "absurd to think that one must be mature enough to drive carefully, to drink responsibly, or to vote intelligently, in order to be mature enough to understand that murdering another human being is profoundly wrong, and to conform one's conduct to that most minimal of all civilized standards." Serving on a jury or entering into marriage also involve decisions far more sophisticated than the simple decision not to take another's life.

*620 Moreover, the age statutes the Court lists "set the

appropriate ages for the operation of a system that makes its determinations in gross, and that does not conduct individualized maturity tests." *Ibid.* The criminal justice system, by contrast, provides for individualized consideration of each defendant. In capital cases, this Court requires the sentencer to make an individualized determination, which includes weighing aggravating factors and mitigating factors, such as youth. See *Eddings*, 455 U.S., at 115-117, 102 S.Ct. 869. In other contexts where individualized consideration is provided, we have recognized that at least some minors will be mature enough to make difficult decisions that involve moral considerations. For instance, we have struck down abortion statutes that do not allow minors deemed mature by courts to bypass parental notification provisions. See, e.g., *Bellotti v. Baird*, 443 U.S. 622, 643-644, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979) (opinion of Powell, J.); *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 74-75, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976). It is hard to see why this context should be any different. Whether to obtain an abortion is surely a much more complex decision for a young person than whether to kill an innocent person in cold blood.

The Court concludes, however, *ante*, at 1196-1197, that juries cannot be trusted with the delicate task of weighing a defendant's youth along with the other mitigating and aggravating factors of his crime. This startling conclusion undermines the very foundations of our capital sentencing system, which entrusts juries with "mak[ing] the difficult and uniquely human judgments that defy codification and that 'buil[d] discretion, equity, and flexibility into a legal system.'" *McCleskey*, *supra*, at 311, 107 S.Ct. 1756 (quoting H. Kalven & H. Zeisel, *The American Jury* 498 (1966)). The Court says, *ante*, at 1197, that juries will be unable to appreciate the significance of a defendant's youth when faced with details of a brutal crime. This assertion is based on no evidence; to the contrary, the Court itself acknowledges **1225 that the execution of under-18 offenders is "infrequent" even in the States "without*621 a formal prohibition on executing juveniles," *ante*, at 1192, suggesting that juries take seriously their responsibility to weigh youth as a mitigating factor.

Nor does the Court suggest a stopping point for its reasoning. If juries cannot make appropriate determinations in cases involving murderers under 18, in what other kinds of cases will the Court find jurors deficient? We have already held that no jury may consider whether a mentally deficient defendant can receive the death penalty, irrespective of his crime. See *Atkins*, 536 U.S., at 321, 122

S.Ct. 2242. Why not take other mitigating factors, such as considerations of childhood abuse or poverty, away from juries as well? Surely jurors "overpower[ed]" by "the brutality or cold-blooded nature" of a crime, *ante*, at 1197, could not adequately weigh these mitigating factors either.

The Court's contention that the goals of retribution and deterrence are not served by executing murderers under 18 is also transparently false. The argument that "[r]etribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished," *ante*, at 1196, is simply an extension of the earlier, false generalization that youth *always* defeats culpability. The Court claims that "juveniles will be less susceptible to deterrence," *ibid.*, because "[t]he likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent," *ibid.* (quoting *Thompson*, 487 U.S., at 837, 108 S.Ct. 2687). The Court unsurprisingly finds no support for this astounding proposition, save its own case law. The facts of this very case show the proposition to be false. Before committing the crime, Simmons encouraged his friends to join him by assuring them that they could "get away with it" because they were minors. *State ex rel. Simmons v. Roper*, 112 S.W.3d 397, 419 (Mo.2003) (Price, J., dissenting). This fact may have influenced the jury's decision to impose capital punishment despite Simmons' age. *622 Because the Court refuses to entertain the possibility that its own unsubstantiated generalization about juveniles could be wrong, it ignores this evidence entirely.

III

Though the views of our own citizens are essentially irrelevant to the Court's decision today, the views of other countries and the so-called international community take center stage.

The Court begins by noting that "Article 37 of the United Nations Convention on the Rights of the Child, [1577 U.N.T.S. 3, 28 I.L.M. 1448, 1468-1470, entered into force Sept. 2, 1990,] which every country in the world has ratified *save for the United States and Somalia*, contains an express prohibition on capital punishment for crimes committed by juveniles under 18." *Ante*, at 1199 (emphasis added). The Court also discusses the International Covenant on Civil and Political Rights (ICCPR), December 19, 1966, 999 U.N.T.S. 175, *ante*, at 1194, 1199,

which the Senate ratified only subject to a reservation that reads:

"The United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age." Senate Committee on Foreign Relations, International **1226-Covenant-on-Civil-and-Political Rights, S. Exec. Rep. No. 102-23, p. 11 (1992).

Unless the Court has added to its arsenal the power to join and ratify treaties on behalf of the United States, I cannot see how this evidence favors, rather than refutes, its position. That the Senate and the President—those actors our Constitution empowers to enter into treaties, see Art. II, § 2—have declined to join and ratify treaties prohibiting *623 execution of under-18 offenders can only suggest that *our country* has either not reached a national consensus on the question, or has reached a consensus contrary to what the Court announces. That the reservation to the ICCPR was made in 1992 does not suggest otherwise, since the reservation still remains in place today. It is also worth noting that, in addition to barring the execution of under-18 offenders, the United Nations Convention on the Rights of the Child prohibits punishing them with life in prison without the possibility of release. If we are truly going to get in line with the international community, then the Court's reassurance that the death penalty is really not needed, since "the punishment of life imprisonment without the possibility of parole is itself a severe sanction," *ante*, at 1196, gives little comfort.

It is interesting that whereas the Court is not content to accept what the States of our Federal Union *say*, but insists on inquiring into what they *do* (specifically, whether they in fact *apply* the juvenile death penalty that their laws allow), the Court is quite willing to believe that every foreign nation—of whatever tyrannical political makeup and with however subservient or incompetent a court system—in fact *adheres* to a rule of no death penalty for offenders under 18. Nor does the Court inquire into how many of the countries that have the death penalty, but have forsworn (on paper at least) imposing that penalty on offenders under 18, have what no State of this country can constitutionally have: a *mandatory* death penalty for certain crimes, with no possibility of mitigation by the sentencing authority, for youth or any other reason. I suspect it is most of them. See, e.g., R. Simon &

D. Blaskovich, *A Comparative Analysis of Capital Punishment: Statutes, Policies, Frequencies, and Public Attitudes the World Over* 25, 26, 29 (2002). To forbid the death penalty for juveniles under such a system may be a good idea, but it says nothing about our system, in which the sentencing authority, typically a jury, always can, and almost *624 always does, withhold the death penalty from an under-18 offender except, after considering all the circumstances, in the rare cases where it is warranted. The foreign authorities, in other words, do not even speak to the issue before us here.

More fundamentally, however, the basic premise of the Court's argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand. In fact the Court itself does not believe it. In many significant respects the laws of most other countries differ from our law—including not only such explicit provisions of our Constitution as the right to jury trial and grand jury indictment, but even many interpretations of the Constitution prescribed by this Court itself. The Court-pronounced exclusionary rule, for example, is distinctively American. When we adopted that rule in *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), it was "unique to American jurisprudence." *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 415, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) (Burger, C. J., dissenting). Since then a categorical exclusionary rule has been "universally rejected" by other countries, including those with rules prohibiting illegal searches and police misconduct, **1227 despite the fact that none of these countries "appears to have any alternative form of discipline for police that is effective in preventing search violations." *Bradley, Mapp Goes Abroad*, 52 Case W. Res. L.Rev. 375, 399-400 (2001). England, for example, rarely excludes evidence found during an illegal search or seizure and has only recently begun excluding evidence from illegally obtained confessions. See C. Slobogin, *Criminal Procedure: Regulation of Police Investigation* 550 (3d ed. 2002). Canada rarely excludes evidence and will only do so if admission will "bring the administration of justice into disrepute." *Id.*, at 550-551 (internal quotation marks omitted). The European Court of Human Rights has held that introduction of illegally seized evidence does not violate the "fair trial" requirement in Article 6, § 1, of the European Convention on *625 Human Rights. See Slobogin, *supra*, at 551; Bradley, *supra*, at 377-378.

The Court has been oblivious to the views of other countries when deciding how to interpret our Constitution's

requirement that "Congress shall make no law respecting an establishment of religion...." Amdt. 1. Most other countries-including those committed to religious neutrality-do not insist on the degree of separation between church and state that this Court requires. For example, whereas "we have recognized special Establishment Clause dangers where the government makes direct money payments to sectarian institutions," *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 842, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995) (citing cases), countries such as the Netherlands, Germany, and Australia allow direct government funding of religious schools on the ground that "the state can only be truly neutral between secular and religious perspectives if it does not dominate the provision of so key a service as education, and makes it possible for people to exercise their right of religious expression within the context of public funding." S. Monsma & J. Soper, *The Challenge of Pluralism: Church and State in Five Democracies* 207 (1997); see also *id.*, at 67, 103, 176. England permits the teaching of religion in state schools. *Id.*, at 142. Even in France, which is considered "America's only rival in strictness of church-state separation," "[t]he practice of contracting for educational services provided by Catholic schools is very widespread." C. Glenn, *The Ambiguous Embrace: Government and Faith-Based Schools and Social Agencies* 110 (2000).

And let us not forget the Court's abortion jurisprudence, which makes us one of only six countries that allow abortion on demand until the point of viability. See Larsen, *Importing Constitutional Norms from a "Wider Civilization": Lawrence and the Rehnquist Court's Use of Foreign and International Law in Domestic Constitutional Interpretation*, 65 Ohio St. L.J. 1283, 1320 (2004); Center for Reproductive Rights, *The World's Abortion Laws* (June 2004), http://www.reproductive rights.org/pub_fac_abortion_laws.html. Though the Government and amici in cases following *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), urged the Court to follow the international community's lead, these arguments fell on deaf ears. See McCrudden, *A Part of the Main? The Physician-Assisted Suicide Cases and Comparative Law Methodology in the United States Supreme Court*, in *Law at the End of Life: The Supreme Court and Assisted Suicide* 125, 129-130 (C. Schneider ed.2000).

The Court's special reliance on the laws of the United Kingdom is perhaps the most indefensible part of its opinion. It is of course true that we share a common history with the United Kingdom, and that we often consult Eng-

lish sources when **1228 asked to discern the meaning of a constitutional text written against the backdrop of 18th-century English law and legal thought. If we applied that approach today, our task would be an easy one. As we explained in *Harmelin v. Michigan*, 501 U.S. 957, 973-974, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991), the "Cruell and Unusuall Punishments" provision of the English Declaration of Rights was originally meant to describe those punishments " 'out of [the Judges'] Power' "-that is, those punishments that were not authorized by common law or statute, but that were nonetheless administered by the Crown or the Crown's judges. Under that reasoning, the death penalty for under-18 offenders would easily survive this challenge. The Court has, however-I think wrongly-long rejected a purely originalist approach to our Eighth Amendment, and that is certainly not the approach the Court takes today. Instead, the Court undertakes the majestic task of determining (and thereby prescribing) our Nation's current standards of decency. It is beyond comprehension why we should look, for that purpose, to a country that has developed, in the centuries since the Revolutionary War-and with increasing speed since the United Kingdom's recent submission to the jurisprudence of European courts dominated by continental *627 jurists-a legal, political, and social culture quite different from our own. If we took the Court's directive seriously, we would also consider relaxing our double jeopardy prohibition, since the British Law Commission recently published a report that would significantly extend the rights of the prosecution to appeal cases where an acquittal was the result of a judge's ruling that was legally incorrect. See Law Commission, *Double Jeopardy and Prosecution Appeals*, LAW COM No. 267, Cm 5048, p. 6, ¶ 1.19 (Mar.2001); J. Spencer, *The English System in European Criminal Procedures* 142, 204, and n. 239 (M. Delmas-Marty & J. Spencer eds.2002). We would also curtail our right to jury trial in criminal cases since, despite the jury system's deep roots in our shared common law, England now permits all but the most serious offenders to be tried by magistrates without a jury. See D. Feldman, *England and Wales, in Criminal Procedure: A Worldwide Study* 91, 114-115 (C. Bradley ed.1999).

The Court should either profess its willingness to reconsider all these matters in light of the views of foreigners, or else it should cease putting forth foreigners' views as part of the *reasoned basis* of its decisions. To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry.^{FN2}

FN9. Justice O'CONNOR asserts that the Eighth Amendment has a "special character," in that it "draws its meaning directly from the maturing values of civilized society." *Ante*, at 1215. Nothing in the text reflects such a distinctive character and we have certainly applied the "maturing values" rationale to give brave new meaning to other provisions of the Constitution, such as the Due Process Clause and the Equal Protection Clause. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 571-573, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003); *United States v. Virginia*, 518 U.S. 515, 532-534, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 847-850, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). Justice O'CONNOR asserts that an international consensus can at least "serve to confirm the reasonableness of a consonant and genuine American consensus." *Ante*, at 1216. Surely not unless it can also demonstrate the unreasonableness of such a consensus. Either America's principles are its own, or they follow the world; one cannot have it both ways. Finally, Justice O'CONNOR finds it unnecessary to consult foreign law in the present case because there is "no ... domestic consensus" to be confirmed. *Ibid*. But since she believes that the Justices can announce their own requirements of "moral proportionality" despite the absence of consensus, why would foreign law not be relevant to that judgment? If foreign law is powerful enough to supplant the judgment of the American people, surely it is powerful enough to change a personal assessment of moral proportionality.

****1229 *628** The Court responds that "[i]t does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom." *Ante*, at 1200. To begin with, I do not believe that approval by "other nations and peoples" should buttress our commitment to American principles any more than (what should logically follow) disapproval by "other nations and peoples" should weaken that commitment. More importantly, however, the Court's statement flatly misdescribes what is going on here. Foreign sources are cited today, *not* to underscore our "fidelity" to the Constitution, our "pride in its origins," and "our own [American] heritage." To the contrary, they are cited to *set aside* the centuries-old American practice—a practice still engaged in by a large majority of the relevant

States—of letting a jury of 12 citizens decide whether, in the particular case, youth should be the basis for withholding the death penalty. What these foreign sources "affirm," rather than repudiate, is the Justices' own notion of how the world ought to be, and their dictat that it shall be so henceforth in America. The Court's parting attempt to downplay the significance of its extensive discussion of foreign law is unconvincing. "Acknowledgment" of foreign approval has no place in the legal opinion of this Court *unless it is part of the basis for the Court's judgment*—which is surely what it parades as today.

IV

To add insult to injury, the Court affirms the Missouri Supreme Court without even admonishing that court for its ***629** flagrant disregard of our precedent in *Stanford*. Until today, we have always held that "it is this Court's prerogative alone to overrule one of its precedents." *State Oil Co. v. Khan*, 522 U.S. 3, 20, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997). That has been true even where "changes in judicial doctrine" ha[ve] significantly undermined" our prior holding, *United States v. Hatter*, 532 U.S. 557, 567, 121 S.Ct. 1782, 149 L.Ed.2d 820 (2001) (quoting *Hatter v. United States*, 64 F.3d 647, 650 (C.A.Fed.1995)), and even where our prior holding "appears to rest on reasons rejected in some other line of decisions," *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989). Today, however, the Court silently approves a state-court decision that blatantly rejected controlling precedent.

One must admit that the Missouri Supreme Court's action, and this Court's indulgent reaction, are, in a way, understandable. In a system based upon constitutional and statutory text democratically adopted, the concept of "law" ordinarily signifies that particular words have a fixed meaning. Such law does not change, and this Court's pronouncement of it therefore remains authoritative until (confessing our prior error) we overrule. The Court has purported to make of the Eighth Amendment, however, a mirror of the passing and changing sentiment of American society regarding penology. The lower courts can look into that mirror as well as we can; and what we saw 15 years ago bears no necessary relationship to what they see today. Since they are not looking at the same text, but at a different ****1230** scene, why should our earlier decision control their judgment?

However sound philosophically, this is no way to run a

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legal system. We must disregard the new reality that, to the extent our Eighth Amendment decisions constitute something more than a show of hands on the current Justices' current personal views about penology, they purport to be nothing more than a snapshot of American public opinion at a particular point in time (with the timeframes now shortened to a mere 15 years). We must treat these decisions*630 just as though they represented *real* law, *real* prescriptions democratically adopted by the American people, as conclusively (rather than sequentially) construed by this Court. Allowing lower courts to reinterpret the Eighth Amendment whenever they decide enough time has passed for a new snapshot leaves this Court's decisions without any force-especially since the "evolution" of our Eighth Amendment is no longer determined by objective criteria. To allow lower courts to behave as we do, "updating" the Eighth Amendment as needed, destroys stability and makes our case law an unreliable basis for the designing of laws by citizens and their representatives, and for action by public officials. The result will be to crown arbitrariness with chaos.

U.S.Mo.,2005.

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Supreme Court of the United States
 Patrick KENNEDY, Petitioner,
 v.
 LOUISIANA.
 No. 07-343.

Argued April 16, 2008.

Decided June 25, 2008.

As Modified Oct. 1, 2008.

Background: Defendant was convicted of aggravated rape of his eight-year-old stepdaughter, and was sentenced to death. On his appeal, the Supreme Court of Louisiana, 957 So.2d 757, affirmed. Defendant petitioned for certiorari which was granted.

Holding: The Supreme Court, Kennedy, J., held that the Eighth Amendment prohibits the death penalty for the rape of a child where the crime did not result, and was not intended to result, in death of the victim.

Reversed and remanded.

Justice Alito filed dissenting opinion in which Chief Justice Roberts and Justices Scalia and Thomas joined.

West Headnotes

[1] Sentencing and Punishment 350H ⚡1667

350H Sentencing and Punishment

350HVIII The Death Penalty

350HVIII(D) Factors Related to Offense

350Hk1666 Nature or Degree of Offense

350Hk1667 k. In General: Most Cited

Cases

The Eighth Amendment prohibits the death penalty for the rape of a child where the crime did not result, and was not intended to result, in death of the victim. U.S.C.A. Const.Amend. 8.

[2] Sentencing and Punishment 350H ⚡1624

350H Sentencing and Punishment

350HVIII The Death Penalty

350HVIII(A) In General

350Hk1622 Validity of Statute or Regulatory Provision

350Hk1624 k. Provision Authorizing

Death Penalty. Most Cited Cases

Louisiana statute authorizing death penalty for rape of child under 12 years of age violated Eighth Amendment proscription against cruel and unusual punishment when applied to defendant convicted of aggravated rape of his then-eight-year-old stepdaughter, where crime did not result, and was not intended to result, in death of victim, considering national consensus against capital punishment for crime of child rape and evolving standards of decency. U.S.C.A. Const.Amend. 8; LSA. R.S. 14:42.

[3] Sentencing and Punishment 350H ⚡1482

350H Sentencing and Punishment

350HVII Cruel and Unusual Punishment in General

350HVII(E) Excessiveness and Proportionality of Sentence

350Hk1482 k. Proportionality. Most Cited

Cases

The Eighth Amendment's protection against excessive or cruel and unusual punishments flows from the basic precept of justice that punishment for a crime should be graduated and proportioned to the offense; whether that requirement has been fulfilled is determined not by the standards that prevailed when the Eighth Amendment was adopted in 1791 but by the norms that currently prevail. U.S.C.A. Const.Amend. 8.

[4] Sentencing and Punishment 350H ⚡41

350H Sentencing and Punishment

350HI Punishment in General

350HI(C) Factors or Purposes in General

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350Hk41 k. Deterrence. Most Cited Cases

Sentencing and Punishment 350H 44

350H Sentencing and Punishment

350HI Punishment in General

350HI(C) Factors or Purposes in General

350Hk44 k. Retribution. Most Cited Cases

Sentencing and Punishment 350H 45

350H Sentencing and Punishment

350HI Punishment in General

350HI(C) Factors or Purposes in General

350Hk45 k. Rehabilitation and Reform.

Most Cited Cases.

Punishment is justified under one or more of three principal rationales: rehabilitation, deterrence, and retribution.

West Codenotes

Held Unconstitutional LSA-R.S. 14:42

Validity Called into Doubt West's Ga.Code Ann. § 16-6-1; MCA 45-5-503; 10 Okl.St. Ann. § 7115(K); S.C.Code 1976, § 16-3-655(C)(1); V.T.C.A., Penal Code § 12.42(c)(3).

2641 Syllabus ^{FN}

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Louisiana charged petitioner with the aggravated rape of his then-8-year-old stepdaughter. He was convicted and sentenced to death under a state statute authorizing capital punishment for the rape of a child under 12. The State Supreme Court affirmed, rejecting petitioner's reliance on *Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982, which barred the use of the death penalty as punishment for the rape of an adult woman but left *2642 open the question which, if any, other non-homicide crimes can be punished by death consist-

ent with the Eighth Amendment. Reasoning that children are a class in need of special protection, the state court held child rape to be unique in terms of the harm it inflicts upon the victim and society and concluded that, short of first-degree murder, there is no crime more deserving of death. The court acknowledged that petitioner would be the first person executed since the state law was amended to authorize the death penalty for child rape in 1995, and that Louisiana is in the minority of jurisdictions authorizing death for that crime. However, emphasizing that four more States had capitalized child rape since 1995 and at least eight others had authorized death for other nonhomicide crimes, as well as that, under *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1, and *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335, it is the direction of change rather than the numerical count that is significant, the court held petitioner's death sentence to be constitutional.

Held: The Eighth Amendment bars Louisiana from imposing the death penalty for the rape of a child where the crime did not result, and was not intended to result, in the victim's death. Pp. 2649 - 2665.

1. The Amendment's Cruel and Unusual Punishment Clause "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101, 78 S.Ct. 590, 2 L.Ed.2d 630. The standard for extreme cruelty "itself remains the same, but its applicability must change as the basic mores of society change." *Furman v. Georgia*, 408 U.S. 238, 382, 92 S.Ct. 2726, 33 L.Ed.2d 346. Under the precept of justice that punishment is to be graduated and proportioned to the crime, informed by evolving standards, capital punishment must "be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" *Roper, supra*, at 568, 125 S.Ct. 1183. Applying this principle, the Court held in *Roper* and *Atkins* that the execution of juveniles

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and mentally retarded persons violates the Eighth Amendment because the offender has a diminished personal responsibility for the crime. The Court also has found the **death penalty** disproportionate to the crime itself where the crime did not result, or was not intended to result, in the victim's death. See, e.g., *Coker, supra*; *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140. In making its determination, the Court is guided by "objective indicia of society's standards, as expressed in legislative enactments and state practice with respect to executions." *Roper, supra*, at 563, 125 S.Ct. 1183. Consensus is not dispositive, however. Whether the **death penalty** is disproportionate to the crime also depends on the standards elaborated by controlling precedents and on the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose. Pp. 2649 - 2651.

2. A review of the authorities informed by contemporary norms, including the history of the **death penalty** for this and other nonhomicide crimes, current state statutes and new enactments, and the number of executions since 1964, demonstrates a national consensus against capital punishment for the crime of **child rape**. Pp. 2651 - 2658.

(a) The Court follows the approach of cases in which objective indicia of consensus demonstrated an opinion against the **death penalty** for juveniles, see *Roper, supra*, mentally retarded offenders, see *Atkins, supra*, and vicarious felony murderers, see *Enmund, supra*. Thirty-seven *2643 jurisdictions—36 States plus the Federal Government—currently impose capital punishment, but only six States authorize it for **child rape**. In 45 jurisdictions, by contrast, petitioner could not be executed for **child rape** of any kind. That number surpasses the 30 States in *Atkins* and *Roper* and the 42 in *Enmund* that prohibited the **death penalty** under the circumstances those cases considered. Pp. 2651 - 2653.

(b) Respondent's argument that *Coker's* general discussion contrasting murder and rape, 433 U.S., at 598, 97 S.Ct. 2861, has been interpreted too ex-

pansively, leading some States to conclude that *Coker* applies to **child rape** when in fact it does not, is unsound. *Coker's* holding was narrower than some of its language read in isolation indicates. The *Coker* plurality framed the question as whether, "with respect to rape of an adult woman," the **death penalty** is disproportionate punishment, *id.*, at 592, 97 S.Ct. 2861, and it repeated the phrase "adult woman" or "adult female" eight times in discussing the crime or the victim. The distinction between adult and **child rape** was not merely rhetorical; it was central to *Coker's* reasoning, including its analysis of legislative consensus. See, e.g., *id.*, at 595-596, 97 S.Ct. 2861. There is little evidence to support respondent's contention that state legislatures have understood *Coker* to state a broad rule that covers minor victims, and state courts have uniformly concluded that *Coker* did not address that crime. Accordingly, the small number of States that have enacted the **death penalty** for **child rape** is relevant to determining whether there is a consensus against capital punishment for the **rape** of a **child**. Pp. 2653-2656.

(c) A consistent direction of change in support of the **death penalty** for **child rape** might counterbalance an otherwise weak demonstration of consensus, see, e.g., *Atkins*, 536 U.S., at 315, 122 S.Ct. 2242, but no showing of consistent change has been made here. That five States may have had pending legislation authorizing death for **child rape** is not dispositive because it is not this Court's practice, nor is it sound, to find contemporary norms based on legislation proposed but not yet enacted. Indeed, since the parties submitted their briefs, the legislation in at least two of the five States has failed. Further, evidence that, in the last 13 years, six new **death penalty** statutes have been enacted, three in the last two years, is not as significant as the data in *Atkins*, where 18 States between 1986 and 2001 had enacted legislation prohibiting the execution of mentally retarded persons. See *id.*, at 314-315, 122 S.Ct. 2242. Respondent argues that this case is like *Roper* because, there, only five States had shifted their positions between 1989 and 2005, one less

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State than here. See 543 U.S., at 565, 125 S.Ct. 1183. But the *Roper* Court emphasized that the slow pace of abolition was counterbalanced by the total number of States that had recognized the impropriety of executing juvenile offenders. See *id.*, at 566-567, 125 S.Ct. 1183. Here, the fact that only six States have made child rape a capital offense is not an indication of a trend or change in direction comparable to the one in *Roper*. The evidence bears a closer resemblance to that in *Enmund*, where the Court found a national consensus against death for vicarious felony murder despite eight jurisdictions having authorized it. See 458 U.S., at 789, 792, 102 S.Ct. 3368. Pp. 2656 - 2657.

(d) Execution statistics also confirm that there is a social consensus against the death penalty for child rape. Nine States have permitted capital punishment for adult or child rape for some length of time between the Court's 1972 *Furman* decision and today; yet no individual has been executed for the rape of an adult or child since 1964, and no execution for any other non-homicide offense has been conducted since 1963. Louisiana is the only State since 1964 that has sentenced an individual to death for child rape, and petitioner and another man so sentenced are the only individuals now on death row in the United States for nonhomicide offenses. Pp. 2657 - 2658.

3. Informed by its own precedents and its understanding of the Constitution and the rights it secures, the Court concludes, in its independent judgment, that the death penalty is not a proportional punishment for the crime of child rape. Pp. 2658 - 2664.

(a) The Court's own judgment should be brought to bear on the death penalty's acceptability under the Eighth Amendment. See, e.g., *Coker*, *supra*, at 597, 97 S.Ct. 2861. Rape's permanent and devastating impact on a child suggests moral grounds for questioning a rule barring capital punishment simply because the crime did not result in the victim's death, but it does not follow that death is a proportionate penalty for child rape. The constitutional prohibi-

tion against excessive or cruel and unusual punishments mandates that punishment "be exercised within the limits of civilized standards." *Trop*, 356 U.S., at 99-100, 78 S.Ct. 590. Evolving standards of decency counsel the Court to be most hesitant before allowing extension of the death penalty, especially where no life was taken in the commission of the crime. See, e.g., *Coker*, 433 U.S., at 597-598, 97 S.Ct. 2861; *Enmund*, 458 U.S., at 797, 102 S.Ct. 3368. Consistent with those evolving standards and the teachings of its precedents, the Court concludes that there is a distinction between intentional first-degree murder on the one hand and nonhomicide crimes against individuals, even including child rape, on the other. The latter crimes may be devastating in their harm, as here, but "in terms of moral depravity and of the injury to the person and to the public," they cannot compare to murder in their "severity and irrevocability," *id.*, at 598, 97 S.Ct. 2861. The Court finds significant the substantial number of executions that would be allowed for child rape under respondent's approach. Although narrowing aggravators might be used to ensure the death penalty's restrained application in this context, as they are in the context of capital murder, all such standards have the potential to result in some inconsistency of application. The Court, for example, has acknowledged that the requirement of general rules to ensure consistency of treatment, see, e.g., *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398, and the insistence that capital sentencing be individualized, see, e.g., *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944, have resulted in tension and imprecision. This approach might be sound with respect to capital murder but it should not be introduced into the justice system where death has not occurred. The Court has spent more than 32 years developing a foundational jurisprudence for capital murder to guide the States and juries in imposing the death penalty. Beginning the same process for crimes for which no one has been executed in more than 40 years would require experimentation in an area where a failed experiment would result in the execution of individuals undeserving of death. Pp.

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(b) The Court's decision is consistent with the justifications offered for the **death penalty**, retribution and deterrence, see, e.g., *Gregg v. Georgia*, 428 U.S. 153, 183, 96 S.Ct. 2909, 49 L.Ed.2d 859. Among the factors for determining whether retribution is served, the Court must look to whether the **death penalty** balances the wrong to the victim in nonhomicide cases. *2645 Cf. *Roper, supra*, at 571, 125 S.Ct. 1183. It is not at all evident that the **child rape** victim's hurt is lessened when the law permits the perpetrator's death, given that capital cases require a long-term commitment by those testifying for the prosecution. Society's desire to inflict death for **child rape** by enlisting the child victim to assist it over the course of years in asking for capital punishment forces a moral choice on the child, who is not of mature age to make that choice. There are also relevant systemic concerns in prosecuting **child rape**, including the documented problem of unreliable, induced, and even imagined child testimony, which creates a "special risk of wrongful execution" in some cases. Cf. *Atkins, supra*, at 321, 122 S.Ct. 2242. As to deterrence, the evidence suggests that the **death penalty** may not result in more effective enforcement, but may add to the risk of nonreporting of **child rape** out of fear of negative consequences for the perpetrator, especially if he is a family member. And, by in effect making the punishment for **child rape** and murder equivalent, a State may remove a strong incentive for the rapist not to kill his victim. Pp. 2661 - 2664.

4. The concern that the Court's holding will effectively block further development of a consensus favoring the **death penalty** for **child rape** overlooks the principle that the Eighth Amendment is defined by "the evolving standards of decency that mark the progress of a maturing society," *Trop*, 356 U.S., at 101, 78 S.Ct. 590. Confirmed by the Court's repeated, consistent rulings, this principle requires that resort to capital punishment be restrained, limited in its instances of application, and reserved for the worst of crimes, those that, in the case of crimes

against individuals, take the victim's life. Pp. 2664 - 2665.

957 So.2d 757, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined. ALITO, J., filed a dissenting opinion, in which ROBERTS, C.J., and SCALIA and THOMAS, JJ., joined.

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Juliet L. Clark, for respondent.

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For U.S. Supreme Court briefs, see: 2008 WL 466093 (Pet.Brief) 2008 WL 727814 (Resp.Brief) 2008 WL 954280 (Reply.Brief)

Justice KENNEDY delivered the opinion of the Court.

[1][2] The National Government and, beyond it, the separate States are bound by the proscriptive mandates of the Eighth Amendment to the Constitution of the United States, and all persons within those respective jurisdictions may invoke its protection. See Amdts. 8 and 14, § 1; *Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962). Patrick Kennedy, the petitioner here, seeks to set aside his death sentence under the Eighth Amendment. He was charged by the respondent, *2646 the

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State of Louisiana, with the aggravated rape of his then-8-year-old stepdaughter. After a jury trial petitioner was convicted and sentenced to death under a state statute authorizing capital punishment for the rape of a child under 12 years of age. See La. Stat. Ann. § 14:42 (West 1997 and Supp.1998). This case presents the question whether the Constitution bars respondent from imposing the death penalty for the rape of a child where the crime did not result, and was not intended to result, in death of the victim. We hold the Eighth Amendment prohibits the death penalty for this offense. The Louisiana statute is unconstitutional.

I

Petitioner's crime was one that cannot be recounted in these pages in a way sufficient to capture in full the hurt and horror inflicted on his victim or to convey the revulsion society, and the jury that represents it, sought to express by sentencing petitioner to death. At 9:18 a.m. on March 2, 1998, petitioner called 911 to report that his stepdaughter, referred to here as L. H., had been raped. He told the 911 operator that L.H. had been in the garage while he readied his son for school. Upon hearing loud screaming, petitioner said, he ran outside and found L.H. in the side yard. Two neighborhood boys, petitioner told the operator, had dragged L.H. from the garage to the yard, pushed her down, and raped her. Petitioner claimed he saw one of the boys riding away on a blue 10-speed bicycle.

When police arrived at petitioner's home between 9:20 and 9:30 a.m., they found L.H. on her bed, wearing a T-shirt and wrapped in a bloody blanket. She was bleeding profusely from the vaginal area. Petitioner told police he had carried her from the yard to the bathtub and then to the bed. Consistent with this explanation, police found a thin line of blood drops in the garage on the way to the house and then up the stairs. Once in the bedroom, petitioner had used a basin of water and a cloth to wipe blood from the victim. This later prevented medical personnel from collecting a reliable DNA sample.

L.H. was transported to the Children's Hospital. An expert in pediatric forensic medicine testified that L. H.'s injuries were the most severe he had seen from a sexual assault in his four years of practice. A laceration to the left wall of the vagina had separated her cervix from the back of her vagina, causing her rectum to protrude into the vaginal structure. Her entire perineum was torn from the posterior fourchette to the anus. The injuries required emergency surgery.

At the scene of the crime, at the hospital, and in the first weeks that followed, both L.H. and petitioner maintained in their accounts to investigators that L.H. had been raped by two neighborhood boys. One of L. H.'s doctors testified at trial that L.H. told all hospital personnel the same version of the rape, although she reportedly told one family member that petitioner raped her. L.H. was interviewed several days after the rape by a psychologist. The interview was videotaped, lasted three hours over two days, and was introduced into evidence at trial. On the tape one can see that L.H. had difficulty discussing the subject of the rape. She spoke haltingly and with long pauses and frequent movement. Early in the interview, L.H. expressed reservations about the questions being asked:

"I'm going to tell the same story. They just want me to change it They want me to say my Dad did it I don't want to say it I tell them the same, same story." Def. Exh. D-7, 01:29:07-:36.

*2647 She told the psychologist that she had been playing in the garage when a boy came over and asked her about Girl Scout cookies she was selling; and that the boy "pulled [her by the legs to] the backyard," *id.*, at 01:47:41-:52, where he placed his hand over her mouth, "pulled down [her] shorts," Def. Exh. D-8, 00:03:11-:12, and raped her, *id.*, at 00:14:39-:40.

Eight days after the crime, and despite L. H.'s insistence that petitioner was not the offender, petitioner was arrested for the rape. The State's investigation had drawn the accuracy of petitioner and L.

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H.'s story into question. Though the defense at trial proffered alternative explanations, the case for the prosecution, credited by the jury, was based upon the following evidence: An inspection of the side yard immediately after the assault was inconsistent with a rape having occurred there, the grass having been found mostly undisturbed but for a small patch of coagulated blood. Petitioner said that one of the perpetrators fled the crime scene on a blue 10-speed bicycle but gave inconsistent descriptions of the bicycle's features, such as its handlebars. Investigators found a bicycle matching petitioner and L. H.'s description in tall grass behind a nearby apartment, and petitioner identified it as the bicycle one of the perpetrators was riding. Yet its tires were flat, it did not have gears, and it was covered in spider webs. In addition police found blood on the underside of L. H.'s mattress. This convinced them the rape took place in her bedroom, not outside the house.

Police also found that petitioner made two telephone calls on the morning of the rape. Sometime before 6:15 a.m., petitioner called his employer and left a message that he was unavailable to work that day. Petitioner called back between 6:30 and 7:30 a.m. to ask a colleague how to get blood out of a white carpet because his daughter had "just become a young lady." Brief for Respondent 12. At 7:37 a.m., petitioner called B & B Carpet Cleaning and requested urgent assistance in removing bloodstains from a carpet. Petitioner did not call 911 until about an hour and a half later.

About a month after petitioner's arrest L.H. was removed from the custody of her mother, who had maintained until that point that petitioner was not involved in the rape. On June 22, 1998, L.H. was returned home and told her mother for the first time that petitioner had raped her. And on December 16, 1999, about 21 months after the rape, L.H. recorded her accusation in a videotaped interview with the Child Advocacy Center.

The State charged petitioner with aggravated rape of a child under La. Stat. Ann. § 14:42 (West 1997

and Supp.1998) and sought the death penalty. At all times relevant to petitioner's case, the statute provided:

"A. Aggravated rape is a rape committed ... where the anal or vaginal sexual intercourse is deemed to be without lawful consent of the victim because it is committed under any one or more of the following circumstances:

"(4) When the victim is under the age of twelve years. Lack of knowledge of the victim's age shall not be a defense.

"D. Whoever commits the crime of aggravated rape shall be punished by life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence.

"(1) However, if the victim was under the age of twelve years, as provided by Paragraph A(4) of this Section:

"(a) And if the district attorney seeks a capital verdict, the offender shall be *2648 punished by death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence, in accordance with the determination of the jury."

(Since petitioner was convicted and sentenced, the statute has been amended to include oral intercourse within the definition of aggravated rape and to increase the age of the victim from 12 to 13. See La. Stat. Ann. § 14:42 (West Supp.2007).)

Aggravating circumstances are set forth in La.Code Crim. Proc. Ann., Art. 905.4 (West 1997 Supp.). In pertinent part and at all times relevant to petitioner's case, the provision stated:

"A. The following shall be considered aggravating circumstances:

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"(1) The offender was engaged in the perpetration or attempted perpetration of aggravated rape, forcible rape, aggravated kidnapping, second degree kidnapping, aggravated burglary, aggravated arson, aggravated escape, assault by drive-by shooting, armed robbery, first degree robbery, or simple robbery.

"(10) The victim was under the age of twelve years or sixty-five years of age or older."

The trial began in August 2003. L.H. was then 13 years old. She testified that she " 'woke up one morning and Patrick was on top of [her]. ' " She remembered petitioner bringing her "[a] cup of orange juice and pills chopped up in it" after the rape and overhearing him on the telephone saying she had become a "young lady." 2005-1981, pp. 12, 15, 16 (La.5/22/07), 957 So.2d 757, 767, 769, 770. L.H. acknowledged that she had accused two neighborhood boys but testified petitioner told her to say this and that it was untrue. *Id.*, at 769.

The jury having found petitioner guilty of aggravated rape, the penalty phase ensued. The State presented the testimony of S.L., who is the cousin and goddaughter of petitioner's ex-wife. S.L. testified that petitioner sexually abused her three times when she was eight years old and that the last time involved sexual intercourse. *Id.*, at 772. She did not tell anyone until two years later and did not pursue legal action.

The jury unanimously determined that petitioner should be sentenced to death. The Supreme Court of Louisiana affirmed. See *id.*, at 779-789, 793; see also *State v. Wilson*, 96-1392, 96-2076 (La.12/13/96), 685 So.2d 1063 (upholding the constitutionality of the death penalty for child rape). The court rejected petitioner's reliance on *Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977), noting that, while *Coker* bars the use of the death penalty as punishment for the rape of an adult woman, it left open the question which, if

any, other nonhomicide crimes can be punished by death consistent with the Eighth Amendment. Because " 'children are a class that need special protection,' " the state court reasoned, the rape of a child is unique in terms of the harm it inflicts upon the victim and our society. 957 So.2d, at 781.

The court acknowledged that petitioner would be the first person executed for committing child rape since La. Stat. Ann. § 14:42 was amended in 1995 and that Louisiana is in the minority of jurisdictions that authorize the death penalty for the crime of child rape. But following the approach of *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), and *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), it found significant not the "numerical counting of which [S]tates ... stand for or against a particular capital prosecution," but "the direction of change." *2649957 So.2d, at 783 (emphasis deleted). Since 1993, the court explained, four more States—Oklahoma, South Carolina, Montana, and Georgia—had capitalized the crime of child rape and at least eight States had authorized capital punishment for other nonhomicide crimes. By its count, 14 of the then-38 States permitting capital punishment, plus the Federal Government, allowed the death penalty for nonhomicide crimes and 5 allowed the death penalty for the crime of child rape. See *id.*, at 785-786.

The state court next asked whether "child rapists rank among the worst offenders." *Id.*, at 788. It noted the severity of the crime; that the execution of child rapists would serve the goals of deterrence and retribution; and that, unlike in *Atkins* and *Roper*, there were no characteristics of petitioner that tended to mitigate his moral culpability. *Id.*, at 788-789. It concluded: "[S]hort of first-degree murder, we can think of no other non-homicide crime more deserving [of capital punishment]." *Id.*, at 789.

On this reasoning the Supreme Court of Louisiana rejected petitioner's argument that the death penalty for the rape of a child under 12 years is dis-

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proportionate and upheld the constitutionality of the statute. Chief Justice Calogero dissented. *Coker, supra*, and *Eberheart v. Georgia*, 433 U.S. 917, 97 S.Ct. 2994, 53 L.Ed.2d 1104 (1977), in his view, "set out a bright-line and easily administered rule" that the Eighth Amendment precludes capital punishment for any offense that does not involve the death of the victim. 957 So.2d, at 794.

We granted certiorari. See 552 U.S. ----, 128 S.Ct. 829, 169 L.Ed.2d 625 (2008).

II

[3] The Eighth Amendment, applicable to the States through the Fourteenth Amendment, provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Amendment proscribes "all excessive punishments, as well as cruel and unusual punishments that may or may not be excessive." *Atkins*, 536 U.S., at 311, n. 7, 122 S.Ct. 2242. The Court explained in *Atkins, id.*, at 311, 122 S.Ct. 2242, and *Roper, supra*, at 560, 125 S.Ct. 1183, that the Eighth Amendment's protection against excessive or cruel and unusual punishments flows from the basic "precept of justice that punishment for [a] crime should be graduated and proportioned to [the] offense." *Weems v. United States*, 217 U.S. 349, 367, 30 S.Ct. 544, 54 L.Ed. 793 (1910). Whether this requirement has been fulfilled is determined not by the standards that prevailed when the Eighth Amendment was adopted in 1791 but by the norms that "currently prevail." *Atkins, supra*, at 311, 122 S.Ct. 2242. The Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (plurality opinion). This is because "[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change." *Furman v. Georgia*, 408 U.S. 238, 382, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (Burger,

C. J., dissenting).

[4] Evolving standards of decency must embrace and express respect for the dignity of the person, and the punishment of criminals must conform to that rule. See *Trop, supra*, at 100, 78 S.Ct. 590 (plurality opinion). As we shall discuss, punishment is justified under one or more of three principal rationales: rehabilitation, deterrence, and retribution. See *2650 *Harmelin v. Michigan*, 501 U.S. 957, 999, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (KENNEDY, J., concurring in part and concurring in judgment); see also Part IV-B, *infra*. It is the last of these, retribution, that most often can contradict the law's own ends. This is of particular concern when the Court interprets the meaning of the Eighth Amendment in capital cases. When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint.

For these reasons we have explained that capital punishment must "be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" *Roper, supra*, at 568, 125 S.Ct. 1183 (quoting *Atkins, supra*, at 319, 122 S.Ct. 2242). Though the death penalty is not invariably unconstitutional, see *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), the Court insists upon confining the instances in which the punishment can be imposed.

Applying this principle, we held in *Roper* and *Atkins* that the execution of juveniles and mentally retarded persons are punishments violative of the Eighth Amendment because the offender had a diminished personal responsibility for the crime. See *Roper, supra*, at 571-573, 125 S.Ct. 1183; *Atkins, supra*, at 318, 320, 122 S.Ct. 2242. The Court further has held that the death penalty can be disproportionate to the crime itself where the crime did not result, or was not intended to result, in death of the victim. In *Coker*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982, for instance, the Court held it would be unconstitutional to execute an offender

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who had raped an adult woman. See also *Eberheart, supra* (holding unconstitutional in light of *Coker* a sentence of death for the kidnaping and rape of an adult woman). And in *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), the Court overturned the capital sentence of a defendant who aided and abetted a robbery during which a murder was committed but did not himself kill, attempt to kill, or intend that a killing would take place. On the other hand, in *Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987), the Court allowed the defendants' death sentences to stand where they did not themselves kill the victims but their involvement in the events leading up to the murders was active, recklessly indifferent, and substantial.

In these cases the Court has been guided by "objective indicia of society's standards, as expressed in legislative enactments and state practice with respect to executions." *Roper*, 543 U.S., at 563, 125 S.Ct. 1183; see also *Coker, supra*, at 593-597, 97 S.Ct. 2861 (plurality opinion) (finding that both legislatures and juries had firmly rejected the penalty of death for the rape of an adult woman); *Enmund, supra*, at 788, 102 S.Ct. 3368 (looking to "historical development of the punishment at issue, legislative judgments, international opinion, and the sentencing decisions juries have made"). The inquiry does not end there; however. Consensus is not dispositive. Whether the death penalty is disproportionate to the crime committed depends as well upon the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose. See *id.*, at 797-801, 102 S.Ct. 3368; *Gregg, supra*, at 182-183, 96 S.Ct. 2909 (joint opinion of Stewart, Powell, and STEVENS, JJ.); *Coker, supra*, at 597-600, 97 S.Ct. 2861 (plurality opinion).

Based both on consensus and our own independent judgment, our holding is that a death sentence for one who raped but *2651 did not kill a child, and who did not intend to assist another in killing the

child, is unconstitutional under the Eighth and Fourteenth Amendments.

III

A

--- The existence of objective indicia of consensus against making a crime punishable by death was a relevant concern in *Roper*, *Atkins*, *Coker*, and *Enmund*, and we follow the approach of those cases here. The history of the death penalty for the crime of rape is an instructive beginning point.

In 1925, 18 States, the District of Columbia, and the Federal Government had statutes that authorized the death penalty for the rape of a child or an adult. See *Coker, supra*, at 593, 97 S.Ct. 2861 (plurality opinion). Between 1930 and 1964, 455 people were executed for those crimes. See 5 Historical Statistics of the United States: Earliest Times to the Present, pp. 5-262 to 5-263 (S. Carter et al. eds. 2006) (Table Ec343-357). To our knowledge the last individual executed for the rape of a child was Ronald Wolfe in 1964. See H. Frazier, *Death Sentences in Missouri, 1803-2005: A History and Comprehensive Registry of Legal Executions, Pardons, and Commutations* 143 (2006).

In 1972, *Furman* invalidated most of the state statutes authorizing the death penalty for the crime of rape; and in *Furman's* aftermath only six States reenacted their capital rape provisions. Three States-Georgia, North Carolina, and Louisiana-did so with respect to all rape offenses. Three States-Florida, Mississippi, and Tennessee-did so with respect only to child rape. See *Coker, supra*, at 594-595, 97 S.Ct. 2861 (plurality opinion). All six statutes were later invalidated under state or federal law. See *Coker, supra* (striking down Georgia's capital rape statute); *Woodson v. North Carolina*, 428 U.S. 280, 287, n. 6, 301-305, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) (plurality opinion) (striking down North Carolina's mandatory death penalty

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statute); *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976) (striking down Louisiana's mandatory death penalty statute); *Collins v. State*, 550 S.W.2d 643, 646 (Tenn.1977) (striking down Tennessee's mandatory death penalty statute); *Buford v. State*, 403 So.2d 943, 951 (Fla.1981) (holding unconstitutional the imposition of death for child rape); *Leatherwood v. State*, 548 So.2d 389, 402-403 (Miss.1989) (striking down the death penalty for child rape on state-law grounds).

Louisiana reintroduced the death penalty for rape of a child in 1995. See La. Stat. Ann. § 14:42 (West Supp.1996). Under the current statute, any anal, vaginal, or oral intercourse with a child under the age of 13 constitutes aggravated rape and is punishable by death. See La. Stat. Ann. § 14:42 (West Supp.2007). Mistake of age is not a defense, so the statute imposes strict liability in this regard. Five States have since followed Louisiana's lead: Georgia, see Ga.Code Ann. § 16-6-1 (2007) (enacted 1999); Montana, see Mont.Code Ann. § 45-5-503 (2007) (enacted 1997); Oklahoma, see Okla. Stat., Tit. 10, § 7115(K) (West 2007 Supp.) (enacted 2006); South Carolina, see S.C.Code Ann. § 16-3-655(C)(1) (Supp.2007) (enacted 2006); and Texas, see Tex. Penal Code Ann. § 12.42(c)(3) (West Supp.2007) (enacted 2007); see also Tex. Penal Code Ann. § 22.021(a) (West Supp.2007). Four of these States' statutes are more narrow than Louisiana's in that only offenders with a previous rape conviction are death eligible. See Mont.Code Ann. § 45-5-503(3)(c); Okla. Stat., Tit. 10, § 7115(K); S.C.Code Ann. § 16-3-655(C)(1); Tex. Penal Code Ann. § 12.42(c)(3). Georgia's statute makes child rape a capital offense *2652 only when aggravating circumstances are present, including but not limited to a prior conviction. See Ga.Code Ann. § 17-10-30 (Supp.2007).

By contrast, 44 States have not made child rape a capital offense. As for federal law, Congress in the Federal Death Penalty Act of 1994 expanded the number of federal crimes for which the death pen-

alty is a permissible sentence, including certain nonhomicide offenses; but it did not do the same for child rape or abuse. See 108 Stat.1972 (codified as amended in scattered sections of 18 U.S.C.). Under 18 U.S.C. § 2245, an offender is death eligible only when the sexual abuse or exploitation results in the victim's death.

Petitioner claims the death penalty for child rape is not authorized in Georgia, pointing to a 1979 decision in which the Supreme Court of Georgia stated that "[s]tatutory rape is not a capital crime in Georgia." *Presnell v. State*, 243 Ga. 131, 132-133, 252 S.E.2d 625, 626 (1979). But it appears *Presnell* was referring to the separate crime of statutory rape, which is not a capital offense in Georgia, see Ga.Code Ann. § 26-2018 (1969); cf. Ga.Code Ann. § 16-6-3 (2007). The State's current capital rape statute, by contrast, is explicit that the rape of "[a] female who is less than ten years of age" is punishable "by death." Ga.Code Ann. §§ 16-6-1(a)(2), (b) (2007). Based on a recent statement by the Supreme Court of Georgia it must be assumed that this law is still in force: "Neither the United States Supreme Court, nor this Court, has yet addressed whether the death penalty is unconstitutionally disproportionate for the crime of raping a child." *State v. Velazquez*, 283 Ga. 206, 208, 657 S.E.2d 838, 840 (2008).

Respondent would include Florida among those States that permit the death penalty for child rape. The state statute does authorize, by its terms, the death penalty for "sexual battery upon ... a person less than 12 years of age." Fla. Stat. § 794.011(2) (2007); see also § 921.141(5) (2007). In 1981, however, the Supreme Court of Florida held the death penalty for child sexual assault to be unconstitutional. See *Buford*, *supra*. It acknowledged that *Coker* addressed only the constitutionality of the death penalty for rape of an adult woman, 403 So.2d, at 950, but held that "[t]he reasoning of the justices in *Coker*... compels [the conclusion] that a sentence of death is grossly disproportionate and excessive punishment for the crime of sexual as-

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sault and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment," *id.*, at 951. Respondent points out that the state statute has not since been amended. Pursuant to Fla. Stat. § 775.082(2) (2007), however, Florida state courts have understood *Buford* to bind their sentencing discretion in **child rape** cases. See, e.g., *Gibson v. State*, 721 So.2d 363, 367, and n. 2 (Fla.App.1998) (deeming it irrelevant that "the Florida Legislature never changed the wording of the sexual battery statute"); *Cooper v. State*, 453 So.2d 67 (Fla.App.1984) ("After *Buford*, death was no longer a possible penalty in Florida for sexual battery"); see also Fla. Stat. § 775.082(2) ("In the event the **death penalty** in a capital felony is held to be unconstitutional by the Florida Supreme Court ... the court having jurisdiction over a person previously sentenced to death for a capital felony ... shall sentence such person to life imprisonment").

Definitive resolution of state-law issues is for the States' own courts, and there may be disagreement over the statistics. It is further true that some States, including States that have addressed the issue in just the last few years, have made **child rape** a capital offense. The summary recited here, however, does allow us to make *2653 certain comparisons with the data cited in the *Atkins*, *Roper*, and *Enmund* cases.

When *Atkins* was decided in 2002, 30 States, including 12 noncapital jurisdictions, prohibited the **death penalty** for mentally retarded offenders; 20 permitted it. See 536 U.S., at 313-315, 122 S.Ct. 2242. When *Roper* was decided in 2005, the numbers disclosed a similar division among the States: 30 States prohibited the **death penalty** for juveniles, 18 of which permitted the **death penalty** for other offenders; and 20 States authorized it. See 543 U.S., at 564, 125 S.Ct. 1183. Both in *Atkins* and in *Roper*, we noted that the practice of executing mentally retarded and juvenile offenders was infrequent. Only five States had executed an offender known to have an IQ below 70 between 1989 and 2002, see *Atkins*, *supra*, at 316, 122 S.Ct.

2242; and only three States had executed a juvenile offender between 1995 and 2005, see *Roper*, *supra*, at 564-565, 125 S.Ct. 1183.

The statistics in *Enmund* bear an even greater similarity to the instant case. There eight jurisdictions had authorized imposition of the **death penalty** solely for participation in a robbery during which an accomplice committed murder, see 458 U.S., at 789, 102 S.Ct. 3368, and six defendants between 1954 and 1982 had been sentenced to death for felony murder where the defendant did not personally commit the homicidal assault, *id.*, at 794, 102 S.Ct. 3368. These facts, the Court concluded, "weigh[ed] on the side of rejecting capital punishment for the crime." *Id.*, at 793, 102 S.Ct. 3368.

The evidence of a national consensus with respect to the **death penalty** for child rapists, as with respect to juveniles, mentally retarded offenders, and vicarious felony murderers, shows divided opinion but, on balance, an opinion against it. Thirty-seven jurisdictions—36 States plus the Federal Government—have the **death penalty**. As mentioned above, only six of those jurisdictions authorize the **death penalty** for **rape of a child**. Though our review of national consensus is not confined to tallying the number of States with applicable **death penalty** legislation, it is of significance that, in 45 jurisdictions, petitioner could not be executed for **child rape** of any kind. That number surpasses the 30 States in *Atkins* and *Roper* and the 42 States in *Enmund* that prohibited the **death penalty** under the circumstances those cases considered.^{FN*}

FN* When issued and announced on June 25, 2008, the Court's decision neither noted nor discussed the military penalty for rape under the Uniform Code of Military Justice. See 10 U.S.C. §§ 856, 920; Manual for Courts-Martial, United States, Part IV, ¶ 45.f(1) (2008). In a petition for rehearing respondent argues that the military penalty bears on our consideration of the question in this case. For the reasons set forth in the statement respecting the

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denial of rehearing, *post* p. ---, we find that the military penalty does not affect our reasoning or conclusion.

B

At least one difference between this case and our Eighth Amendment proportionality precedents must be addressed. Respondent and its *amici* suggest that some States have an "erroneous understanding of this Court's Eighth Amendment jurisprudence." Brief for Missouri Governor Matt Blunt et al. as *Amici Curiae* 10. They submit that the general propositions set out in *Coker*, contrasting murder and rape, have been interpreted in too expansive a way, leading some state legislatures to conclude that *Coker* applies to child rape when in fact its reasoning does not, or ought not, apply to that specific crime.

This argument seems logical at first, but in the end it is unsound. In *Coker*, a four-Member plurality of the Court, plus Justice Brennan and Justice Marshall in concurrence, held that a sentence of death for the rape of a 16-year-old woman, who was a minor under Georgia law, see Ga.Code Ann. § 74-104 (1973), yet was characterized by the Court as an adult, was disproportionate and excessive under the Eighth Amendment. See 433 U.S., at 593-600, 97 S.Ct. 2861; see also *id.*, at 600, 97 S.Ct. 2861 (Brennan, J., concurring in judgment); *ibid.* (Marshall, J., concurring in judgment). (The Court did not explain *2654 why the 16-year-old victim qualified as an adult, but it may be of some significance that she was married, had a home of her own, and had given birth to a son three weeks prior to the rape. See Brief for Petitioner in *Coker v. Georgia*, O.T.1976, No. 75-5444, pp. 14-15.)

The plurality noted that only one State had a valid statute authorizing the death penalty for adult rape and that "in the vast majority of cases, at least 9 out of 10, juries ha[d] not imposed the death sentence." *Coker*, 433 U.S., at 597, 97 S.Ct. 2861; see also *id.*, at 594, 97 S.Ct. 2861 ("Of the 16 States in which

rape had been a capital offense, only three provided the death penalty for rape of an adult woman in their revised statutes—Georgia, North Carolina, and Louisiana. In the latter two States, the death penalty was mandatory for those found guilty, and those laws were invalidated by *Woodson* and *Roberts* "). This "history and ... objective evidence of the country's present judgment concerning the acceptability of death as a penalty for rape of an adult woman," *id.*, at 593, 97 S.Ct. 2861, confirmed the Court's independent judgment that punishing adult rape by death was not proportional:

"Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life. Although it may be accompanied by another crime, rape by definition does not include the death of ... another person. The murderer kills; the rapist, if no more than that, does not We have the abiding conviction that the death penalty, which 'is unique in its severity and irrevocability,' *Gregg v. Georgia*, 428 U.S., at 187, 96 S.Ct. 2909, is an excessive penalty for the rapist who, as such, does not take human life." *Id.*, at 598, 97 S.Ct. 2861 (footnote omitted).

Confined to this passage, *Coker's* analysis of the Eighth Amendment is susceptible of a reading that would prohibit making child rape a capital offense. In context, however, *Coker's* holding was narrower than some of its language read in isolation. The *Coker* plurality framed the question as whether, "with respect to rape of an adult woman," the death penalty is disproportionate punishment. *Id.*, at 592, 97 S.Ct. 2861. And it repeated the phrase "an adult woman" or "an adult female" in discussing the act of rape or the victim of rape eight times in its opinion. See *Coker, supra*. The distinction between adult and child rape was not merely rhetorical; it was central to the Court's reasoning. The opinion does not speak to the constitutionality of the death penalty for child rape, an issue not then before the

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Court. In discussing the legislative background, for example, the Court noted:

"Florida, Mississippi, and Tennessee also authorized the **death penalty** in some rape cases, but only where the victim was a child and the rapist an adult. The Tennessee statute has since been invalidated because the death sentence was mandatory. The upshot is that Georgia is the sole jurisdiction in the United States at the present time that authorizes a sentence of death when the rape victim is an adult woman, and only two other jurisdictions provide capital punishment when the victim is a child [This] obviously weighs very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman." *Id.*, at 595-596, 97 S.Ct. 2861 (citation and footnote omitted).

Still, respondent contends, it is possible that state legislatures have understood *Coker* to state a broad rule that covers the *2655 situation of the minor victim as well. We see little evidence of this. Respondent cites no reliable data to indicate that state legislatures have read *Coker* to bar capital punishment for child rape and, for this reason, have been deterred from passing applicable **death penalty** legislation. In the absence of evidence from those States where legislation has been proposed but not enacted we refuse to speculate about the motivations and concerns of particular state legislators.

The position of the state courts, furthermore, to which state legislators look for guidance on these matters, indicates that *Coker* has not blocked the emergence of legislative consensus. The state courts that have confronted the precise question before us have been uniform in concluding that *Coker* did not address the constitutionality of the **death penalty** for the crime of child rape. See, e.g., *Wilson*, 685 So.2d, at 1066 (upholding the constitutionality of the **death penalty** for rape of a child and noting that "[t]he plurality [in *Coker*] took great pains in referring only to the rape of adult women throughout their opinion" (emphasis deleted)); *Upshaw v. State*, 350 So.2d 1358, 1360 (Miss.1977)

("In *Coker* the Court took great pains to limit its decision to the applicability of the **death penalty** for the rape of an adult woman As we view *Coker* the Court carefully refrained from deciding whether the **death penalty** for the rape of a female child under the age of twelve years is grossly disproportionate to the crime"). See also *Simpson v. Owens*, 207 Ariz. 261, 268, n. 8, 85 P.3d 478, 485, n. 8 (App.2004) (addressing the denial of bail for sexual offenses against children and noting that "[a]lthough the **death penalty** was declared in a plurality opinion of the United States Supreme Court to be a disproportionate punishment for the rape of an adult woman ... the rape of a child remains a capital offense in some states"); *People v. Hernandez*, 30 Cal.4th 835, 869, 134 Cal.Rptr.2d 602, 69 P.3d 446, 466 (2003) (addressing the **death penalty** for conspiracy to commit murder and noting that "the constitutionality of laws imposing the **death penalty** for crimes not necessarily resulting in death is unresolved").

There is, to be sure, some contrary authority contained in various state-court opinions. But it is either dicta, see *State v. Barnum*, 921 So.2d 513, 526 (Fla.2005) (addressing the retroactivity of *Thompson v. State*, 695 So.2d 691 (Fla.1997)); *State v. Coleman*, 185 Mont. 299, 327, 605 P.2d 1000, 1017 (1979) (upholding the defendant's death sentence for aggravated kidnapping); *State v. Gardner*, 947 P.2d 630, 653 (Utah 1997) (addressing the constitutionality of the **death penalty** for prison assaults); equivocal in its conclusion, see *People v. Huddleston*, 212 Ill.2d 107, 141, 287 Ill.Dec. 560, 816 N.E.2d 322, 341-342 (2004) (citing law review articles for the proposition that the constitutionality of the **death penalty** for nonhomicide crimes "is the subject of debate"); or from a decision of a state intermediate court that has been superseded by a more specific statement of the law by the State's supreme court, compare, e.g., *Parker v. State*, 216 Ga.App. 649, 650, n. 1, 455 S.E.2d 360, 361, n. 1 (1995) (characterizing *Coker* as holding that the **death penalty** "is no longer permitted for rape where the victim is not killed"), with *Velazquez*,

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283 Ga., at 208, 657 S.E.2d, at 840 (“[T]he United States Supreme Court ... has yet [to] address[s] whether the death penalty is unconstitutionally disproportionate for the crime of raping a child”).

The Supreme Court of Florida's opinion in *Buford* could be read to support respondent's argument. But even there the state court recognized that “[t]he [Supreme] Court has yet to decide whether [Coker's rationale] holds true for the rape of a *2656 child” and made explicit that it was extending the reasoning but not the holding of *Coker* in striking down the death penalty for child rape. 403 So.2d, at 950, 951. The same is true of the Supreme Court of California's opinion in *Hernandez*, *supra*, at 867, 134 Cal.Rptr.2d 602, 69 P.3d, at 464.

We conclude on the basis of this review that there is no clear indication that state legislatures have misinterpreted *Coker* to hold that the death penalty for child rape is unconstitutional. The small number of States that have enacted this penalty, then, is relevant to determining whether there is a consensus against capital punishment for this crime.

C

Respondent insists that the six States where child rape is a capital offense, along with the States that have proposed but not yet enacted applicable death penalty legislation, reflect a consistent direction of change in support of the death penalty for child rape. Consistent change might counterbalance an otherwise weak demonstration of consensus. See *Atkins*, 536 U.S., at 315, 122 S.Ct. 2242 (“It is not so much the number of these States that is significant, but the consistency of the direction of change”); *Roper*, 543 U.S., at 565, 125 S.Ct. 1183 (“Impressive in *Atkins* was the rate of abolition of the death penalty for the mentally retarded”). But whatever the significance of consistent change where it is cited to show emerging support for expanding the scope of the death penalty, no showing of consistent change has been made in this case.

Respondent and its *amici* identify five States where, in their view, legislation authorizing capital punishment for child rape is pending. See Brief for Missouri Governor Matt Blunt et al. as *Amici Curiae* 2, 14. It is not our practice, nor is it sound, to find contemporary norms based upon state legislation that has been proposed but not yet enacted. There are compelling reasons not to do so here. Since the briefs were submitted by the parties, legislation in two of the five States has failed. See, e.g., S. 195, 66th Gen. Assembly, 2d Reg. Sess. (Colo.2008) (rejected by Senate Appropriations Committee on Apr. 11, 2008); S. 2596, 2008 Leg., Reg. Sess. (Miss.2008) (rejected by House Committee on Mar. 18, 2008). In Tennessee, the house bills were rejected almost a year ago, and the senate bills appear to have died in committee. See H.R. 601, 105th Gen. Assembly, 1st Reg. Sess. (2007) (taken off Subcommittee Calendar on Apr. 4, 2007); H.R. 662, *ibid.* (failed for lack of second on Mar. 21, 2007); H.R. 1099, *ibid.* (taken off notice for Judiciary Committee calendar on May 16, 2007); S. 22, *ibid.* (referred to General Subcommittee of Senate Finance, Ways, and Means Committee on June 11, 2007); S. 157, *ibid.* (referred to Senate Judiciary Committee on Feb. 7, 2007; action deferred until Jan. 2008); S. 841, *ibid.* (referred to General Subcommittee of Senate Judiciary Committee on Mar. 27, 2007). In Alabama, the recent legislation is similar to a bill that failed in 2007. Compare H.R. 456, 2008 Leg., Reg. Sess. (2008), with H.R. 335, 2007 Leg., Reg. Sess. (2007). And in Missouri, the 2008 legislative session has ended, tabling the pending legislation. See Mo. Const., Art. III, § 20(a).

Aside from pending legislation, it is true that in the last 13 years there has been change towards making child rape a capital offense. This is evidenced by six new death penalty statutes, three enacted in the last two years. But this showing is not as significant as the data in *Atkins*, where 18 States between 1986 and 2001 had enacted legislation prohibiting the execution of mentally retarded persons. See *2657 *Atkins*, *supra*, at 313-315, 122 S.Ct. 2242. Respondent argues the instant case is like *Roper* be-

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cause, there, only five States had shifted their positions between 1989 and 2005, one less State than here. See *Roper, supra*, at 565, 125 S.Ct. 1183. But in *Roper*, we emphasized that, though the pace of abolition was not as great as in *Atkins*, it was counterbalanced by the total number of States that had recognized the impropriety of executing juvenile offenders. See 543 U.S., at 566-567, 125 S.Ct. 1183. When we decided *Stanford v. Kentucky*, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989), 12 death penalty States already prohibited the execution of any juvenile under 18, and 15 prohibited the execution of any juvenile under 17. See *Roper, supra*, at 566-567, 125 S.Ct. 1183 ("If anything, this shows that the impropriety of executing juveniles between 16 and 18 years of age gained wide recognition earlier"). Here, the total number of States to have made child rape a capital offense after *Furman* is six. This is not an indication of a trend or change in direction comparable to the one supported by data in *Roper*. The evidence here bears a closer resemblance to the evidence of state activity in *Enmund*, where we found a national consensus against the death penalty for vicarious felony murder despite eight jurisdictions having authorized the practice. See 458 U.S., at 789, 792, 102 S.Ct. 3368.

D

There are measures of consensus other than legislation. Statistics about the number of executions may inform the consideration whether capital punishment for the crime of child rape is regarded as unacceptable in our society. See, e.g., *id.*, at 794-795, 102 S.Ct. 3368; *Roper, supra*, at 564-565, 125 S.Ct. 1183; *Atkins, supra*, at 316, 122 S.Ct. 2242; Cf. *Coker*, 433 U.S., at 596-597, 97 S.Ct. 2861 (plurality opinion). These statistics confirm our determination from our review of state statutes that there is a social consensus against the death penalty for the crime of child rape.

Nine States—Florida, Georgia, Louisiana, Mississippi, Montana, Oklahoma, South Carolina, Ten-

nessee, and Texas—have permitted capital punishment for adult or child rape for some length of time between the Court's 1972 decision in *Furman* and today. See *supra*, at 2651; *Coker, supra*, at 595, 97 S.Ct. 2861 (plurality opinion). Yet no individual has been executed for the rape of an adult or child since 1964, and no execution for any other non-homicide offense has been conducted since 1963. See Historical Statistics of the United States, at 5-262 to 5-263 (Table Ec343-357). Cf. *Thompson v. Oklahoma*, 487 U.S. 815, 852-853, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988) (O'Connor, J., concurring in judgment) (that "four decades have gone by since the last execution of a defendant who was younger than 16 at the time of the offense ... support[s] the inference of a national consensus opposing the death penalty for 15-year-olds").

Louisiana is the only State since 1964 that has sentenced an individual to death for the crime of child rape; and petitioner and Richard Davis, who was convicted and sentenced to death for the aggravated rape of a 5-year-old child by a Louisiana jury in December 2007, see *State v. Davis*, Case No. 262,971 (1st Jud. Dist., Caddo Parish, La.) (cited in Brief for Respondent 42, and n. 38), are the only two individuals now on death row in the United States for a nonhomicide offense.

After reviewing the authorities informed by contemporary norms, including the history of the death penalty for this and other nonhomicide crimes, current state statutes and new enactments, and the number of executions since 1964, we conclude there is *2658 a national consensus against capital punishment for the crime of child rape.

IV

A

As we have said in other Eighth Amendment cases, objective evidence of contemporary values as it relates to punishment for child rape is entitled to

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great weight, but it does not end our inquiry. "[T]he Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." *Coker, supra*, at 597, 97 S.Ct. 2861 (plurality opinion); see also *Roper, supra*, at 563, 125 S.Ct. 1183; *Enmund, supra*, at 797, 102 S.Ct. 3368 ("[I]t is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty"). We turn, then, to the resolution of the question before us, which is informed by our precedents and our own understanding of the Constitution and the rights it secures.

It must be acknowledged that there are moral grounds to question a rule barring capital punishment for a crime against an individual that did not result in death. These facts illustrate the point. Here the victim's fright, the sense of betrayal, and the nature of her injuries caused more prolonged physical and mental suffering than, say, a sudden killing by an unseen assassin. The attack was not just on her but on her childhood. For this reason, we should be most reluctant to rely upon the language of the plurality in *Coker*, which posited that, for the victim of rape, "life may not be nearly so happy as it was" but it is not beyond repair. 433 U.S., at 598, 97 S.Ct. 2861. Rape has a permanent psychological, emotional, and sometimes physical impact on the child. See C. Bagley & K. King, *Child Sexual Abuse: The Search for Healing* 2-24, 111-112 (1990); Finkelhor & Browne, *Assessing the Long-Term Impact of Child Sexual Abuse: A Review and Conceptualization in Handbook on Sexual Abuse of Children* 55-60 (L. Walker ed.1988). We cannot dismiss the years of long anguish that must be endured by the victim of child rape.

It does not follow, though, that capital punishment is a proportionate penalty for the crime. The constitutional prohibition against excessive or cruel and unusual punishments mandates that the State's power to punish "be exercised within the limits of civilized standards." *Trop*, 356 U.S., at 99, 100, 78 S.Ct. 590 (plurality opinion). Evolving standards of

decency that mark the progress of a maturing society counsel us to be most hesitant before interpreting the Eighth Amendment to allow the extension of the death penalty, a hesitation that has special force where no life was taken in the commission of the crime. It is an established principle that decency, in its essence, presumes respect for the individual and thus moderation or restraint in the application of capital punishment. See *id.*, at 100, 78 S.Ct. 590.

To date the Court has sought to define and implement this principle, for the most part, in cases involving capital murder. One approach has been to insist upon general rules that ensure consistency in determining who receives a death sentence. See *California v. Brown*, 479 U.S. 538, 541, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987) ("[D]eath penalty statutes [must] be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion" (citing *Gregg*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859; *Furman*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346)); *Godfrey v. Georgia*, 446 U.S. 420, 428, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) (plurality opinion) (requiring a State to give narrow and precise definition to the aggravating factors that warrant its *2659 imposition). At the same time the Court has insisted, to ensure restraint and moderation in use of capital punishment, on judging 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." *Woodson*, 428 U.S., at 304, 96 S.Ct. 2978 (plurality opinion); *Lockett v. Ohio*, 438 U.S. 586, 604-605, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (plurality opinion).

The tension between general rules and case-specific circumstances has produced results not all together satisfactory. See *Tuilaepa v. California*, 512 U.S. 967, 973, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994) ("The objectives of these two inquiries can be in some tension, at least when the inquiries occur at the same time"); *Walton v. Arizona*, 497 U.S. 639,

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664-665, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990) (SCALIA, J., concurring in part and concurring in judgment) ("The latter requirement quite obviously destroys whatever rationality and predictability the former requirement was designed to achieve"). This has led some Members of the Court to say we should cease efforts to resolve the tension and simply allow legislatures, prosecutors, courts, and juries greater latitude. See *id.*, at 667-673, 110 S.Ct. 3047 (advocating that the Court adhere to the *Furman* line of cases and abandon the *Woodson-Lockett* line of cases). For others the failure to limit these same imprecisions by stricter enforcement of narrowing rules has raised doubts concerning the constitutionality of capital punishment itself. See *Baze v. Rees*, 553 U.S. ---, ---, 128 S.Ct. 1520, 1532-1534, 170 L.Ed.2d 420 (2008) (STEVENS, J., concurring in judgment); *Furman*, *supra*, at 310-314, 92 S.Ct. 2726 (White, J., concurring); *Callins v. Collins*, 510 U.S. 1141, 1144-1145, 114 S.Ct. 1127, 127 L.Ed.2d 435 (1994) (Blackmun, J., dissenting from denial of certiorari).

Our response to this case law, which is still in search of a unifying principle, has been to insist upon confining the instances in which capital punishment may be imposed. See *Gregg*, *supra*, at 187, 184, 96 S.Ct. 2909 (joint opinion of Stewart, Powell, and STEVENS, JJ.) (because "death as a punishment is unique in its severity and irrevocability," capital punishment must be reserved for those crimes that are "so grievous an affront to humanity that the only adequate response may be the penalty of death" (citing in part *Furman*, 408 U.S., at 286-291, 92 S.Ct. 2726 (Brennan, J., concurring); *id.*, at 306, 92 S.Ct. 2726 (Stewart, J., concurring))); see also *Roper*, 543 U.S., at 569, 125 S.Ct. 1183 (the Eighth Amendment requires that "the death penalty is reserved for a narrow category of crimes and offenders").

Our concern here is limited to crimes against individual persons. We do not address, for example, crimes defining and punishing treason, espionage, terrorism, and drug kingpin activity, which are of-

fenses against the State. As it relates to crimes against individuals, though, the death penalty should not be expanded to instances where the victim's life was not taken. We said in *Coker* of adult rape:

"We do not discount the seriousness of rape as a crime. It is highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim Short of homicide, it is the 'ultimate violation of self.' ... [But] [t]he murderer kills; the rapist, if no more than that, does not.... We have the abiding conviction that the death penalty, which 'is unique in its severity and irrevocability,' is an excessive penalty for the rapist who, as such, does not take human life." *2660433 U.S., at 597-598, 97 S.Ct. 2861 (plurality opinion) (citation omitted).

The same distinction between homicide and other serious violent offenses against the individual informed the Court's analysis in *Enmund*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140, where the Court held that the death penalty for the crime of vicarious felony murder is disproportionate to the offense. The Court repeated there the fundamental, moral distinction between a "murderer" and a "robber," noting that while "robbery is a serious crime deserving serious punishment," it is not like death in its "severity and irrevocability." *Id.*, at 797, 102 S.Ct. 3368 (internal quotation marks omitted).

Consistent with evolving standards of decency and the teachings of our precedents we conclude that, in determining whether the death penalty is excessive, there is a distinction between intentional first-degree murder on the one hand and nonhomicide crimes against individual persons, even including child rape, on the other. The latter crimes may be devastating in their harm, as here, but "in terms of moral depravity and of the injury to the person and to the public," *Coker*, 433 U.S., at 598, 97 S.Ct. 2861 (plurality opinion), they cannot be compared to murder in their "severity and irrevocability."

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Ibid.

In reaching our conclusion we find significant the number of executions that would be allowed under respondent's approach. The crime of **child rape**, considering its reported incidents, occurs more often than first-degree murder. Approximately 5,702 incidents of vaginal, anal, or oral rape of a child under the age of 12 were reported nationwide in 2005; this is almost twice the total incidents of intentional murder for victims of all ages (3,405) reported during the same period. See Inter-University Consortium for Political and Social Research, National Incident-Based Reporting System, 2005, Study No. 4720, <http://www.icpsr.umich.edu> (as visited June 12, 2008, and available in Clerk of Court's case file). Although we have no reliable statistics on convictions for **child rape**, we can surmise that, each year, there are hundreds, or more, of these convictions just in jurisdictions that permit capital punishment. Cf. Brief for Louisiana Association of Criminal Defense Lawyers et al. as *Amici Curiae* 1-2, and n. 2 (noting that there are now at least 70 capital rape indictments pending in Louisiana and estimating the actual number to be over 100). As a result of existing rules, see generally *Godfrey*, 446 U.S., at 428-433, 100 S.Ct. 1759 (plurality opinion), only 2.2% of convicted first-degree murderers are sentenced to death, see Blume, Eisenberg, & Wells, Explaining Death Row's Population and Racial Composition, 1 J. of Empirical Legal Studies 165, 171 (2004). But under respondent's approach, the 36 States that permit the **death penalty** could sentence to death all persons convicted of raping a child less than 12 years of age. This could not be reconciled with our evolving standards of decency and the necessity to constrain the use of the **death penalty**.

It might be said that narrowing aggravators could be used in this context, as with murder offenses, to ensure the **death penalty's** restrained application. We find it difficult to identify standards that would guide the decisionmaker so the penalty is reserved for the most severe cases of **child rape** and yet not

imposed in an arbitrary way. Even were we to forbid, say, the execution of first-time child rapists, see *supra* at 2651, or require as an aggravating factor a finding that the perpetrator's instant rape offense involved multiple victims, the jury still must balance, in its discretion, those aggravating factors against mitigating circumstances. In this *2661 context, which involves a crime that in many cases will overwhelm a decent person's judgment, we have no confidence that the imposition of the **death penalty** would not be so arbitrary as to be "freakis[h]," *Furman*, 408 U.S., at 310, 92 S.Ct. 2726 (Stewart, J., concurring). We cannot sanction this result when the harm to the victim, though grave, cannot be quantified in the same way as death of the victim.

It is not a solution simply to apply to this context the aggravating factors developed for capital murder. The Court has said that a State may carry out its obligation to ensure individualized sentencing in capital murder cases by adopting sentencing processes that rely upon the jury to exercise wide discretion so long as there are narrowing factors that have some " 'common-sense core of meaning ... that criminal juries should be capable of understanding.' " *Tuilaepa*, 512 U.S., at 975, 114 S.Ct. 2630 (quoting *Jurek v. Texas*, 428 U.S. 262, 279, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976) (White, J., concurring in judgment)). The Court, accordingly, has upheld the constitutionality of aggravating factors ranging from whether the defendant was a " 'cold-blooded, pitiless slayer,' " *Arave v. Creech*, 507 U.S. 463, 471-474, 113 S.Ct. 1534, 123 L.Ed.2d 188 (1993), to whether the "perpetrator inflict[ed] mental anguish or physical abuse before the victim's death," *Walton*, 497 U.S., at 654, 110 S.Ct. 3047, to whether the defendant " 'would commit criminal acts of violence that would constitute a continuing threat to society,' " *Jurek*, *supra*, at 269-270, 274-276, 96 S.Ct. 2950 (joint opinion of Stewart, Powell, and STEVENS, JJ.). All of these standards have the potential to result in some inconsistency of application.

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As noted above, the resulting imprecision and the tension between evaluating the individual circumstances and consistency of treatment have been tolerated where the victim dies. It should not be introduced into our justice system, though, where death has not occurred.

Our concerns are all the more pronounced where, as here, the **death penalty** for this crime has been most infrequent. See Part III-D, *supra*. We have developed a foundational jurisprudence in the case of capital murder to guide the States and juries in imposing the **death penalty**. Starting with *Gregg*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859, we have spent more than 32 years articulating limiting factors that channel the jury's discretion to avoid the **death penalty's** arbitrary imposition in the case of capital murder. Though that practice remains sound, beginning the same process for crimes for which no one has been executed in more than 40 years would require experimentation in an area where a failed experiment would result in the execution of individuals undeserving of the **death penalty**. Evolving standards of decency are difficult to reconcile with a regime that seeks to expand the **death penalty** to an area where standards to confine its use are indefinite and obscure.

B

Our decision is consistent with the justifications offered for the **death penalty**. *Gregg* instructs that capital punishment is excessive when it is grossly out of proportion to the crime or it does not fulfill the two distinct social purposes served by the **death penalty**: retribution and deterrence of capital crimes. See *id.*, at 173, 183, 187, 96 S.Ct. 2909 (joint opinion of Stewart, Powell, and STEVENS, JJ.); see also *Coker*, 433 U.S., at 592, 97 S.Ct. 2861 (plurality opinion) ("A punishment might fail the test on either ground").

As in *Coker*, here it cannot be said with any certainty that the **death penalty** for **child rape** serves no deterrent or retributive function. See *2662*id.*, at

593, n. 4, 97 S.Ct. 2861 (concluding that the **death penalty** for rape might serve "legitimate ends of punishment" but nevertheless is disproportionate to the crime). Cf. *Gregg*, *supra*, at 185-186, 96 S.Ct. 2909 (joint opinion of Stewart, Powell, and STEVENS, JJ.) ("[T]here is no convincing empirical evidence either supporting or refuting th[e] view [that the **death penalty** serves as a significantly greater deterrent than lesser penalties]. We may nevertheless assume safely that there are murderers ... for whom ... the **death penalty** undoubtedly is a significant deterrent"); *id.*, at 186, 96 S.Ct. 2909 (the value of capital punishment, and its contribution to acceptable penological goals, typically is a "complex factual issue the resolution of which properly rests with the legislatures"). This argument does not overcome other objections, however. The incongruity between the crime of **child rape** and the harshness of the **death penalty** poses risks of overpunishment and counsels against a constitutional ruling that the **death penalty** can be expanded to include this offense.

The goal of retribution, which reflects society's and the victim's interests in seeing that the offender is repaid for the hurt he caused, see *Atkins*, 536 U.S., at 319, 122 S.Ct. 2242; *Furman*, *supra*, at 308, 92 S.Ct. 2726 (Stewart, J., concurring), does not justify the harshness of the **death penalty** here. In measuring retribution, as well as other objectives of criminal law, it is appropriate to distinguish between a particularly depraved murder that merits death as a form of retribution and the crime of **child rape**. See Part IV-A, *supra*; *Coker*, *supra*, at 597-598, 97 S.Ct. 2861 (plurality opinion).

There is an additional reason for our conclusion that imposing the **death penalty** for **child rape** would not further retributive purposes. In considering whether retribution is served, among other factors we have looked to whether capital punishment "has the potential ... to allow the community as a whole, including the surviving family and friends of the victim, to affirm its own judgment that the culpability of the prisoner is so serious that

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the ultimate penalty must be sought and imposed.” *Panetti v. Quarterman*, 551 U.S. ----, ----, 127 S.Ct. 2842, 2847, 168 L.Ed.2d 662 (2007). In considering the death penalty for nonhomicide offenses this inquiry necessarily also must include the question whether the death penalty balances the wrong to the victim. Cf. *Roper*, 543 U.S., at 571, 125 S.Ct. 1183.

It is not at all evident that the child rape victim's hurt is lessened when the law permits the death of the perpetrator. Capital cases require a long-term commitment by those who testify for the prosecution, especially when guilt and sentencing determinations are in multiple proceedings. In cases like this the key testimony is not just from the family but from the victim herself. During formative years of her adolescence, made all the more daunting for having to come to terms with the brutality of her experience, L.H. was required to discuss the case at length with law enforcement personnel. In a public trial she was required to recount once more all the details of the crime to a jury as the State pursued the death of her stepfather. Cf. G. Goodman et al., *Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims* 50, 62, 72 (1992); Brief for National Association of Social Workers et al. as *Amici Curiae* 17-21. And in the end the State made L.H. a central figure in its decision to seek the death penalty, telling the jury in closing statements: “[L. H.] is asking you, asking you to set up a time and place when he dies.” Tr. 121 (Aug. 26, 2003).

Society's desire to inflict the death penalty for child rape by enlisting the child *2663 victim to assist it over the course of years in asking for capital punishment forces a moral choice on the child, who is not of mature age to make that choice. The way the death penalty here involves the child victim in its enforcement can compromise a decent legal system; and this is but a subset of fundamental difficulties capital punishment can cause in the administration and enforcement of laws proscribing child rape.

There are, moreover, serious systemic concerns in prosecuting the crime of child rape that are relevant to the constitutionality of making it a capital offense. The problem of unreliable, induced, and even imagined child testimony means there is a “special risk of wrongful execution” in some child rape cases. *Atkins*, *supra*, at 321, 122 S.Ct. 2242. See also Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 5-17. This undermines, at least to some degree, the meaningful contribution of the death penalty to legitimate goals of punishment. Studies conclude that children are highly susceptible to suggestive questioning techniques like repetition, guided imagery, and selective reinforcement. See Ceci & Friedman, *The Suggestibility of Children: Scientific Research and Legal Implications*, 86 Cornell L.Rev. 33, 47 (2000) (there is “strong evidence that children, especially young children, are suggestible to a significant degree—even on abuse-related questions”); Gross, Jacoby, Matheson, Montgomery, & Patil, *Exonerations in the United States 1989 Through 2003*, 95 J.Crim. L. & C. 523, 539 (2005) (discussing allegations of abuse at the Little Rascals Day Care Center); see also Quas, Davis, Goodman, & Myers, *Repeated Questions, Deception, and Children's True and False Reports of Body Touch*, 12 Child Maltreatment 60, 61-66 (2007) (finding that 4- to 7-year-olds “were able to maintain [a] lie about body touch fairly effectively when asked repeated, direct questions during a mock forensic interview”).

Similar criticisms pertain to other cases involving child witnesses; but child rape cases present heightened concerns because the central narrative and account of the crime often comes from the child herself. She and the accused are, in most instances, the only ones present when the crime was committed. See *Pennsylvania v. Ritchie*, 480 U.S. 39, 60, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987). Cf. Goodman, *Testifying in Criminal Court*, at 118. And the question in a capital case is not just the fact of the crime, including, say, proof of rape as distinct from abuse short of rape, but details bearing

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upon brutality in its commission. These matters are subject to fabrication or exaggeration, or both. See Ceci and Friedman, *supra*; Quas, *supra*. Although capital punishment does bring retribution, and the legislature here has chosen to use it for this end, its judgment must be weighed, in deciding the constitutional question, against the special risks of unreliable testimony with respect to this crime.

With respect to deterrence, if the death penalty adds to the risk of non-reporting, that, too, diminishes the penalty's objectives. Underreporting is a common problem with respect to child sexual abuse. See Hanson, Resnick, Saunders, Kilpatrick, & Best, Factors Related to the Reporting of Childhood Rape, 23 Child Abuse & Neglect 559, 564 (1999) (finding that about 88% of female rape victims under the age of 18 did not disclose their abuse to authorities); Smith et al., Delay in Disclosure of Childhood Rape: Results From A National Survey, 24 Child Abuse & Neglect 273, 278-279 (2000) (finding that 72% of women raped as children disclosed their abuse to someone, but that only 12% of the victims reported the rape to authorities). Although we know little about what differentiates*2664 those who report from those who do not report, see Hanson, *supra*, at 561, one of the most commonly cited reasons for nondisclosure is fear of negative consequences for the perpetrator, a concern that has special force where the abuser is a family member, see Goodman-Brown, Edelstein, Goodman, Jones, & Gordon, Why Children Tell: A Model of Children's Disclosure of Sexual Abuse, 27 Child Abuse & Neglect 525, 527-528 (2003); Smith, *supra*, at 283-284 (finding that, where there was a relationship between perpetrator and victim, the victim was likely to keep the abuse a secret for a longer period of time, perhaps because of a "greater sense of loyalty or emotional bond"); Hanson, *supra*, at 565-566, and Table 3 (finding that a "significantly greater proportion of reported than nonreported cases involved a stranger"); see also Ritchie, *supra*, at 60. The experience of the amici who work with child victims indicates that, when the punishment is death, both

the victim and the victim's family members may be more likely to shield the perpetrator from discovery, thus increasing underreporting. See Brief for National Association of Social Workers et al. as Amici Curiae 11-13. As a result, punishment by death may not result in more deterrence or more effective enforcement.

In addition, by in effect making the punishment for child rape and murder equivalent, a State that punishes child rape by death may remove a strong incentive for the rapist not to kill the victim. Assuming the offender behaves in a rational way, as one must to justify the penalty on grounds of deterrence, the penalty in some respects gives less protection, not more, to the victim, who is often the sole witness to the crime. See Rayburn, Better Dead Than Raped?: The Patriarchal Rhetoric Driving Capital Rape Statutes, 78 St. John's L.Rev. 1119, 1159-1160 (2004). It might be argued that, even if the death penalty results in a marginal increase in the incentive to kill, this is counterbalanced by a marginally increased deterrent to commit the crime at all. Whatever balance the legislature strikes, however, uncertainty on the point makes the argument for the penalty less compelling than for homicide crimes.

Each of these propositions, standing alone, might not establish the unconstitutionality of the death penalty for the crime of child rape. Taken in sum, however, they demonstrate the serious negative consequences of making child rape a capital offense. These considerations lead us to conclude, in our independent judgment, that the death penalty is not a proportional punishment for the rape of a child.

V

Our determination that there is a consensus against the death penalty for child rape raises the question whether the Court's own institutional position and its holding will have the effect of blocking further or later consensus in favor of the penalty from

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developing. The Court, it will be argued, by the act of addressing the constitutionality of the **death penalty**, intrudes upon the consensus-making process. By imposing a negative restraint, the argument runs, the Court makes it more difficult for consensus to change or emerge. The Court, according to the criticism, itself becomes enmeshed in the process, part judge and part the maker of that which it judges.

These concerns overlook the meaning and full substance of the established proposition that the Eighth Amendment is defined by "the evolving standards of decency that mark the progress of a maturing society." *Trop*, 356 U.S., at 101, 78 S.Ct. 590 (plurality opinion). Confirmed by repeated,*2665 consistent rulings of this Court, this principle requires that use of the **death penalty** be restrained. The rule of evolving standards of decency with specific marks on the way to full progress and mature judgment means that resort to the penalty must be reserved for the worst of crimes and limited in its instances of application. In most cases justice is not better served by terminating the life of the perpetrator rather than confining him and preserving the possibility that he and the system will find ways to allow him to understand the enormity of his offense. Difficulties in administering the penalty to ensure against its arbitrary and capricious application require adherence to a rule reserving its use, at this stage of evolving standards and in cases of crimes against individuals, for crimes that take the life of the victim.

The judgment of the Supreme Court of Louisiana upholding the capital sentence is reversed. This case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice ALITO, with whom THE CHIEF JUSTICE, Justice SCALIA, and Justice THOMAS join, dissenting.

The Court today holds that the Eighth Amendment categorically prohibits the imposition of the **death**

penalty for the crime of raping a child. This is so, according to the Court, no matter how young the child, no matter how many times the child is raped, no matter how many **children** the perpetrator **rapes**, no matter how sadistic the crime, no matter how much physical or psychological trauma is inflicted, and no matter how heinous the perpetrator's prior criminal record may be. The Court provides two reasons for this sweeping conclusion: First, the Court claims to have identified "a national consensus" that the **death penalty** is never acceptable for the **rape** of a child; second, the Court concludes, based on its "independent judgment," that imposing the **death penalty** for **child rape** is inconsistent with " 'the evolving standards of decency that mark the progress of a maturing society.' " *Ante*, at 2649, 2653, 2654 (citation omitted). Because neither of these justifications is sound, I respectfully dissent.

I

A.

I turn first to the Court's claim that there is "a national consensus" that it is never acceptable to impose the **death penalty** for the **rape** of a child. The Eighth Amendment's requirements, the Court writes, are "determined not by the standards that prevailed" when the Amendment was adopted but "by the norms that 'currently prevail.' " *Ante*, at 2649 (quoting *Atkins v. Virginia*, 536 U.S. 304, 311, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002)). In assessing current norms, the Court relies primarily on the fact that only 6 of the 50 States now have statutes that permit the **death penalty** for this offense. But this statistic is a highly unreliable indicator of the views of state lawmakers and their constituents. As I will explain, dicta in this Court's decision in *Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977), has stunted legislative consideration of the question whether the **death penalty** for the targeted offense of raping a young

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child is consistent with prevailing standards of decency. The *Coker* dicta gave state legislators and others good reason to fear that any law permitting the imposition of the **death penalty** for this crime would meet precisely the fate that has now befallen the Louisiana statute that is currently before us, and this threat strongly discouraged state legislators-regardless of their own values and those of *2666 their constituents-from supporting the enactment of such legislation.

As the Court correctly concludes, the *holding* in *Coker* was that the Eighth Amendment prohibits the **death penalty** for the rape of an "adult woman," and thus *Coker* does not control our decision here. See *ante*, at 2654. But the reasoning of the Justices in the majority had broader implications.

Two Members of the *Coker* majority, Justices Brennan and Marshall, took the position that the **death penalty** is always unconstitutional. 433 U.S., at 600, 97 S.Ct. 2861 (Brennan, J., concurring in judgment) and (Marshall, J., concurring in judgment). Four other Justices, who joined the controlling plurality opinion, suggested that the Georgia capital rape statute was unconstitutional for the simple reason that the impact of a rape, no matter how heinous, is not grievous enough to justify capital punishment. In the words of the plurality: "Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair." *Id.*, at 598, 97 S.Ct. 2861. The plurality summarized its position as follows: "We have the abiding conviction that the **death penalty**... is an excessive penalty for the rapist who, as such, does not take human life." *Ibid.*

The implications of the *Coker* plurality opinion were plain. Justice Powell, who concurred in the judgment overturning the death sentence in the case at hand, did not join the plurality opinion because he understood it to draw "a bright line between murder and all rapes-regardless of the degree of brutality of the rape or the effect upon the victim." *Id.*, at 603, 97 S.Ct. 2861. If Justice Powell read

Coker that way, it was reasonable for state legislatures to do the same.

Understandably, state courts have frequently read *Coker* in precisely this way. The Court is correct that state courts have generally understood the limited scope of the *holding* in *Coker, ante*, at 2654 - 2655, but lower courts and legislators also take into account-and I presume that this Court wishes them to continue to take into account-the Court's dicta. And that is just what happened in the wake of *Coker*. Four years after *Coker*, when Florida's capital child rape statute was challenged, the Florida Supreme Court, while correctly noting that this Court had not *held* that the Eighth Amendment bars the **death penalty** for child rape, concluded that "[t]he reasoning of the justices in *Coker v. Georgia* compels us to hold that a sentence of death is grossly disproportionate and excessive punishment for the crime of sexual assault and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment." *Buford v. State*, 403 So.2d 943, 951 (1981).

Numerous other state courts have interpreted the *Coker* dicta similarly. See *State v. Barnum*, 921 So.2d 513, 526 (Fla.2005) (citing *Coker* as holding that "a sentence of death is grossly disproportionate and excessive punishment for the crime of rape," not merely the rape of an adult woman); *People v. Huddleston*, 212 Ill.2d 107, 141, 287 Ill.Dec. 560, 816 N.E.2d 322, 341 (2004) (recognizing that "the constitutionality of state statutes that impose the **death penalty** for nonhomicide crimes is the subject of debate" after *Coker*); *People v. Hernandez*, 30 Cal.4th 835, 867, 134 Cal.Rptr.2d 602, 69 P.3d 446, 464-467 (2003) (*Coker* "rais[ed] serious doubts that the federal Constitution permitted the **death penalty** for any offense not requiring the actual taking of human life" because "[a]lthough the high court did not expressly hold [in *Coker*] that the Eighth Amendment prohibits capital punishment for *all* crimes not resulting in death, the plurality *2667 stressed that the crucial difference between rape and murder is that a

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rapist 'does not take human life' "); *State v. Gardner*, 947 P.2d 630, 653 (Utah 1997) ("The *Coker* holding leaves no room for the conclusion that any rape, even an 'inhuman' one involving torture and aggravated battery but not resulting in death, would constitutionally sustain imposition of the death penalty"); *Parker v. State*, 216 Ga.App. 649, n. 1, 455 S.E.2d 360, 361, n. 1 (1995) (citing *Coker* for the proposition that the death penalty "is no longer permitted for rape where the victim is not killed"); *Leatherwood v. State*, 548 So.2d 389, 406 (Miss.1989) (Robertson, J., concurring) ("There is as much chance of the Supreme Court sanctioning death as a penalty for any non-fatal rape as the proverbial snowball enjoys in the nether regions"); *State v. Coleman*, 185 Mont. 299, 327-328, 605 P.2d 1000, 1017 (1979) (stating that "[t]he decision of the Court in *Coker v. Georgia* is relevant only to crimes for which the penalty has been imposed which did not result in the loss of a life" (citations omitted)); *Boyer v. State*, 240 Ga. 170, 240 S.E.2d 68 (1977)(*per curiam*) (stating that "[s]ince death to the victim did not result ... the death penalty for rape must be set aside"); see also 2005-1981 (La.Sup.Ct.5/22/07), 957 So.2d 757, 794 (case below) (Calogero, C.J., dissenting) (citing the comments of the *Coker* plurality and concluding that the Louisiana child rape law cannot pass constitutional muster).^{FN1}

FN1. Commentators have expressed similar views. See Fleming, Louisiana's Newest Capital Crime: The Death Penalty for Child Rape, 89 J.Crim. L. & C. 717, 727 (1999) (the *Coker* Court drew a line between "crimes which result in loss of life, and crimes which do not"); Baily, Death is Different, Even on the Bayou: The Disproportionality of Crime, 55 Wash. & Lee L.Rev. 1335, 1357 (1998) (noting that "[m]any post-*Coker* cases interpreting the breadth of *Coker*'s holding suggest that the Mississippi Supreme Court's narrow reading of *Coker* in *Upshaw* is a minority position"); Matura, When Will It Stop?

The Use of the Death Penalty for Non-homicide Crimes, 24 J. Legis. 249, 255 (1998) (stating that the *Coker* Court did not "draw a distinction between the rape of an adult woman and the rape of a minor"); Garvey, "As the Gentle Rain from Heaven": Mercy in Capital Sentencing, 81 Cornell L.Rev. 989, 1009, n. 74 (1996) (stating that courts generally understand *Coker* to prohibit death sentences for crimes other than murder); Nanda, Recent Developments in the United States and Internationally Regarding Capital Punishment-An Appraisal, 67 St. John's L.Rev. 523, 532 (1993) (finding that *Coker* stands for the proposition that a death sentence is excessive when the victim is not killed); Ellis, Guilty but Mentally Ill and the Death Penalty: Punishment Full of Sound and Fury, Signifying Nothing, 43 Duke L.J. 87, 94 (1994) (referencing *Coker* to require capital offenses to be defined by unjustified human death); Dingerson, Reclaiming the Gavel: Making Sense out of the Death Penalty Debate in State Legislatures, 18 N.Y.U. Rev. L. & Soc. Change 873, 878 (1991) (stating that *Coker* "ruled that the imposition of the death penalty for crimes from which no death results violates the cruel and unusual punishment provision of the eighth amendment" and that "[n]o subsequent Supreme Court decision has challenged this precedent").

For the past three decades, these interpretations have posed a very high hurdle for state legislatures considering the passage of new laws permitting the death penalty for the rape of a child. The enactment and implementation of any new state death penalty statute-and particularly a new type of statute such as one that specifically targets the rape of young children-imposes many costs. There is the burden of drafting an innovative law that must take into account this Court's exceedingly complex Eighth Amendment jurisprudence. Securing pas-

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sage of controversial legislation may interfere in a variety of ways with the enactment of other bills on the legislative agenda. *2668 Once the statute is enacted, there is the burden of training and coordinating the efforts of those who must implement the new law. Capital prosecutions are qualitatively more difficult than noncapital prosecutions and impose special emotional burdens on all involved. When a capital sentence is imposed under the new law, there is the burden of keeping the prisoner on death row and the lengthy and costly project of defending the constitutionality of the statute on appeal and in collateral proceedings. And if the law is eventually overturned, there is the burden of new proceedings on remand. Moreover, conscientious state lawmakers, whatever their personal views about the morality of imposing the **death penalty** for **child rape**, may defer to this Court's dicta, either because they respect our authority and expertise in interpreting the Constitution or merely because they do not relish the prospect of being held to have violated the Constitution and contravened prevailing "standards of decency." Accordingly, the *Coker* dicta gave state legislators a strong incentive not to push for the enactment of new capital **child-rape** laws even though these legislators and their constituents may have believed that the laws would be appropriate and desirable.

B

The Court expresses doubt that the *Coker* dicta had this effect, but the skepticism is unwarranted. It would be quite remarkable if state legislators were not influenced by the considerations noted above. And although state legislatures typically do not create legislative materials like those produced by Congress, there is evidence that proposals to permit the imposition of the **death penalty** for **child rape** were opposed on the ground that enactment would be futile and costly.

In Oklahoma, the opposition to the State's capital **child-rape** statute argued that *Coker* had already ruled the **death penalty** unconstitutional as applied

to cases of rape. See Oklahoma Senate News Release, Senator Nichols Targets Child Predators with **Death Penalty**, Child Abuse Response Team, May 26, 2006, on line at http://www.oksenate.gov/news/press_releases/press_releases_2006/pr20060526d.htm (all Internet materials as visited June 23, 2008, and available in Clerk of Court's case file). Likewise, opponents of South Carolina's capital **child-rape** law contended that the statute would waste state resources because it would undoubtedly be held unconstitutional. See The State, **Death Penalty** Plan in Spotlight: Attorney General to Advise Senate Panel on Proposal for Repeat Child Rapists, Mar. 28, 2006 (quoting Laura Hudson, spokeswoman for the S. C. Victim Assistance Network, as stating that "[w]e don't need to be wasting state money to have an appeal to the [United States] Supreme Court, knowing we are going to lose it"). Representative Fletcher Smith of the South Carolina House of Representatives forecast that the bill would not meet constitutional standards because "death isn't involved." See Davenport, **Emotion Drives Child Rape Death Penalty Debate in South Carolina**, Associated Press, Apr. 4, 2006.

In Texas, opponents of that State's capital **child-rape** law argued that *Coker's* reasoning doomed the proposal. House Research Organization Bill Analysis, Mar. 5, 2007 (stating that "the law would impose an excessive punishment and fail to pass the proportionality test established by the U.S. Supreme Court" and arguing that "Texas should not enact a law of questionable constitutionality simply because it is politically popular, especially given clues by the U.S. Supreme Court that **death penalty** laws that would be rarely imposed *2669 or that are not supported by a broad national consensus would be ruled unconstitutional").

C

Because of the effect of the *Coker* dicta, the Court is plainly wrong in comparing the situation here to that in *Atkins* or *Roper v. Simmons*, 543 U.S. 551,

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125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). See *ante*, at 2652 - 2653. *Atkins* concerned the constitutionality of imposing the **death penalty** on a mentally retarded defendant. Thirteen years earlier, in *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), the Court had held that this was permitted by the Eighth Amendment, and therefore, during the time between *Penry* and *Atkins*, state legislators had reason to believe that this Court would follow its prior precedent and uphold statutes allowing such punishment.

The situation in *Roper* was similar. *Roper* concerned a challenge to the constitutionality of imposing the **death penalty** on a defendant who had not reached the age of 18 at the time of the crime. Sixteen years earlier in *Stanford v. Kentucky*, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989), the Court had rejected a similar challenge, and therefore state lawmakers had cause to believe that laws allowing such punishment would be sustained.

When state lawmakers believe that their decision will prevail on the question whether to permit the **death penalty** for a particular crime or class of offender, the legislators' resolution of the issue can be interpreted as an expression of their own judgment, informed by whatever weight they attach to the values of their constituents. But when state legislators think that the enactment of a new **death penalty** law is likely to be futile, inaction cannot reasonably be interpreted as an expression of their understanding of prevailing societal values. In that atmosphere, legislative inaction is more likely to evidence acquiescence.

D

If anything can be inferred from state legislative developments, the message is very different from the one that the Court perceives. In just the past few years, despite the shadow cast by the *Coker* dicta, five States have enacted targeted capital **child-rape** laws. See Ga.Code Ann. § 16-6-1 (1999); Mont.Code Ann. § 45-5-503 (1997); Okla. Stat.,

Tit. 10, § 7115(K) (West Supp.2008); S.C.Code Ann. § 16-3-655(C)(1) (Supp.2007); Tex. Penal Code Ann. §§ 22.021(a), 12.42(c)(3) (West Supp.2007). If, as the Court seems to think, our society is "[e]volving" toward ever higher "standards of decency," *ante*, at 2664 - 2665, these enactments might represent the beginning of a new evolutionary line.

Such a development would not be out of step with changes in our society's thinking since *Coker* was decided. During that time, reported instances of child abuse have increased dramatically;^{FN2} and there *2670 are many indications of growing alarm about the sexual abuse of children. In 1994, Congress enacted the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program, 42 U.S.C. § 14071 (2000 ed. and Supp. V), which requires States receiving certain federal funds to establish registration systems for convicted sex offenders and to notify the public about persons convicted of the sexual abuse of minors. All 50 States have now enacted such statutes.^{FN3} In addition, at least 21 States and the District of Columbia now have statutes permitting the involuntary commitment of sexual predators,^{FN4} and at least 12 States *2671 have enacted residency restrictions for sex offenders.^{FN5}

FN2. From 1976 to 1986, the number of reported cases of child sexual abuse grew from 6,000 to 132,000, an increase of 2,100%. A. Lurigio, M. Jones, & B. Smith, *Child Sexual Abuse: Its Causes, Consequences, and Implications for Probation Practice*, 59 Sep Fed. Probation 69 (1995). By 1991, the number of cases totaled 432,000, an increase of another 227%. *Ibid.* In 1995, local child protection services agencies identified 126,000 children who were victims of either substantiated or indicated sexual abuse. Nearly 30% of those child victims were between the age of four and seven. Rape, Abuse & Incest National Network Statistics, online at ht-

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tp:// www. rainn. org/ get- information/ statistics/sexual-assault-victims. There were an estimated 90,000 substantiated cases of child sexual abuse in 2003. Crimes Against Children Research Center, Reports from the States to the National Child Abuse and Neglect Data System, available at www. unh. edu/ ccrc/ sexual-abuse/ChildSexualAbuse.pdf.

FN3: Ala.Code §§ 13A-11-200 to 13A-11-203, 1181 (1994); Alaska Stat §§ 1.56.840, 12.63.010-100, 18.65.087, 28.05.048, 33.30.035 (1994, 1995, and 1995 Cum.Supp.); Ariz.Rev.Stat. Ann. §§ 13-3821 to -3825 (1989 and Supp.1995); Ark.Code Ann. §§ 12-12-901 to -909 (1995); Cal.Penal Code Ann. §§ 290 to 290.4 (West Supp.1996); Colo.Rev.Stat. Ann. § 18-3-412.5 (Supp.1996); Conn. Gen.Stat. Ann. §§ 54-102a to 54-102r (Supp.1995); Del.Code Ann. Tit. 11, § 4120 (1995); Fla. Stat. Ann. §§ 775.13, 775.22 (1992 and Supp.1994); Ga.Code Ann. § 42-9-44.1 (1994); 1995 Haw. Sess. Laws No. 160 (enacted June 14, 1995); Idaho Code §§ 9-340(1)(f), 18-8301 to 18-8311 (Supp.1995); Ill. Comp. Stat. Ann., ch. 730, §§ 150/1 to 150/10 (2002); Ind.Code §§ 5-2-12-1 to 5-2-12-13 (West Supp.1995); 1995 Iowa Legis. Serv. 146 (enacted May 3, 1995); Kan. Stat. Ann. §§ 22-4901 to 22-4910 (1995); Ky.Rev.Stat. Ann. §§ 17.500 to 17.540 (West Supp.1994); La. Stat. Ann. §§ 15:540 to 15:549 (West Supp.1995); Me.Rev.Stat. Ann., Tit. 34-A, §§ 11001 to 11004 (West Supp.1995); 1995 Md. Laws p. 142 (enacted May 9, 1995); Mass. Gen. Laws Ann., ch. 6, § 178D; 1994 Mich. Pub. Acts p. 295 (enacted July 13, 1994); Minn.Stat. § 243.166 (1992 and Supp.1995); Miss.Code Ann. §§ 45-33-1 to 45-33-19 (Supp.1995); Mo.Rev.Stat. §§ 566.600 to 566.625 (Supp.1996); Mont.Code Ann. §§

46-23-501 to 46-23-507 (1994); Neb.Rev.Stat. §§ 4001 to 4014; Nev.Rev.Stat. §§ 207.080, 207.151 to 207.157 (1992 and Supp.1995); N.H.Rev.Stat. Ann. §§ 632-A:11 to 632-A:19 (Supp.1995); N.J. Stat. Ann. §§ 2c:7-1 to 2c:7-11 (1995); N.M. Stat. Ann. §§ 29-11A-1 to 29-11A-8 (Supp.1995); N.Y. Correct. Law Ann. §§ 168 to 168-V (West Supp.1996); N.C. Gen.Stat. Ann. §§ 14-208.5-10 (Lexis Supp.1995); N.D. Cent.Code § 12.1-32-15 (Lexis Supp.1995); Ohio Rev.Code Ann. § 2950.01-.08 (Baldwin 1997); Okla. Stat., Tit. 57, §§ 582-584 (2003 Supp.); Ore.Rev.Stat. §§ 181.507 to 181.519 (1993); 1995 Pa. Laws p. 24 (enacted Oct. 24, 1995); R.I. Gen. Laws § 11-37-16 (1994); S.C.Code Ann. § 23-3-430; S.D. Codified Laws §§ 22-22-30 to 22-22-41 (Supp.1995); Tenn.Code Ann. §§ 40-39-101 to 40-39-108 (2003); Tex.Rev.Civ. Stat. Ann., Art. 6252-13c.1 (Vernon Supp.1996); Utah Code Ann. §§ 53-5-212.5, 77-27-21.5 (Lexis Supp.1995); Vt. Stat. Ann., Tit. 13, § 5402; Va.Code Ann. §§ 19.2-298.1 to 19.2-390.1 (Lexis 1995); Wash. Rev.Code §§ 4.24.550, 9A.44.130, 9A.44.140, 10.01.200, 70.48.470, 72.09.330 (1992 and Supp.1996); W. Va.Code §§ 61-8F-1 to 61-8F-8 (Lexis Supp.1995); Wis. Stat. § 175.45 (Supp.1995); Wyo. Stat. Ann. §§ 7-19-301 to 7-19-306 (1995).

FN4. Those States are Arizona, California, Connecticut, the District of Columbia, Florida, Illinois, Iowa, Kansas, Kentucky, Massachusetts, Minnesota, Missouri, Nebraska, New Jersey, North Dakota, Oregon, Pennsylvania, South Carolina, Texas, Virginia, Washington, and Wisconsin. See Ariz.Rev.Stat. §§ 36-3701 to 36-3713 (West 2003 and Supp.2007); Cal. Welf. & Inst.Code Ann. §§ 6600 to 6609.3 (West

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1998 and Supp.2008); Conn. Gen.Stat. § 17a-566 (1998); D.C.Code §§ 22-3803 to 22-3811 (2001); Fla. Stat. §§ 394.910 to 394.931 (West 2002 and Supp.2005); Ill. Comp. Stat., ch. 725, §§ 207/1 to 207/99 (2002); Iowa Code §§ 229A.1-.16 (Supp.2005); Kan. Stat. Ann. § 59-29a02 (2004 and Supp.2005); Ky.Rev.Stat. Ann. § 202A.051 (West ___); Mass. Gen. Laws, ch. 123A (1989); Minn.Stat. § 253B.02 (1992); Mo. Ann. Stat. §§ 632.480 to 632.513 (West 2000 and Supp.2006); Neb.Rev.Stat. §§ 83-174 to 83-174.05 (2007); N.J. Stat. Ann. §§ 30:4-27.24 to 30:4-27.38 (West Supp.2004); N.D. Cent.Code Ann. § 25-03.3 (Lexis 2002); Ore.Rev.Stat. § 426.005 (1998); Pa. Stat. Ann., Tit. 42, §§ 9791 to 9799.9 (2007); S.C.Code Ann. §§ 44-48-10 to 44-48-170 (2002 and Supp.2007); Tex. Health & Safety Code Ann. §§ 841.001 to 841.147 (West 2003); Va.Code Ann. §§ 37.2-900 to 37.2-920 (2006 and Supp.2007); Wash. Rev.Code § 71.09.010 (West 1992 and Supp.2002); Wis. Stat. § 980.01-13 (2005).

FN5. See Ala.Code § 15-20-26 (Supp.2000) (restricts sex offenders from residing or accepting employment within 2,000 feet of school or child-care facility); Ark.Code Ann. § 5-14-128 (Supp.2007) (unlawful for level three or four sex offenders to reside within 2,000 feet of school or daycare center); Cal.Penal Code Ann. § 3003 (West Supp.2008) (parolees may not live within 35 miles of victim or witnesses, and certain sex offenders on parole may not live within a quarter mile from a primary school); Fla. Stat. § 947.1405(7)(a)(2) (2001) (released sex offender with victim under 18 prohibited from living within 1,000 feet of a school, daycare center, park, playground, or other place where children regularly congregate); Ga.Code Ann. § 42-1-13 (Supp.2007)

(sex offenders required to register shall not reside within 1,000 feet of any childcare facility, school, or area where minors congregate); Ill. Comp. Stat., ch. 720, § 5/11-9.3(b-5) (Supp.2008) (child sex offenders prohibited from knowingly residing within 500 feet of schools); Ky.Rev.Stat. Ann. § 17.495 (West 2000) (registered sex offenders on supervised release shall not reside within 1,000 feet of school or childcare facility); La.Rev.Stat. Ann. § 14:91.1 (West Supp.2004) (sexually violent predators shall not reside within 1,000 feet of schools unless permission is given by school superintendent); Ohio Rev.Code Ann. § 2950.031 (Lexis 2003) (sex offenders prohibited from residing within 1,000 feet of school); Okla. Stat., Tit. 57, § 590 (West 2003) (prohibits sex offenders from residing within 2,000 feet of schools or educational institutions); Ore.Rev.Stat. §§ 144.642, 144.643 (1999) (incorporates general prohibition on supervised sex offenders living near places where children reside); Tenn.Code Ann. § 40-39-111 (2006) (repealed by Acts 2004, ch. 921, § 4, effective Aug. 1, 2004) (sex offenders prohibited from establishing residence within 1,000 feet of school, childcare facility, or victim).

Seeking to counter the significance of the new capital child-rape laws enacted during the past two years, the Court points out that in recent months efforts to enact similar laws in five other States have stalled. *Ante*, at 2656. These developments, however, all took place after our decision to grant certiorari in this case, see 552 U.S. ___, 128 S.Ct. 829, 169 L.Ed.2d 625 (2008), which gave state legislators reason to delay the enactment of new legislation until the constitutionality of such laws was clarified. And there is no evidence of which I am aware that these legislative initiatives failed because the proposed laws were viewed as inconsistent with our society's standards of decency.

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On the contrary, the available evidence suggests otherwise. For example, in Colorado, the Senate Appropriations Committee in April voted 6 to 4 against Senate Bill 195, reportedly because it "would have cost about \$616,000 next year for trials, appeals, public defenders, and prison costs." Associated Press, *Lawmakers Reject Death Penalty for Child Sex Abusers*, Denver Post, Apr. 11, 2008. Likewise, in Tennessee, the capital child-rape bill was withdrawn in committee "because of the high associated costs." The bill's sponsor stated that "[b]ecause of the state's budget situation, we thought to withdraw that bill.... We'll revisit it next year to see if we can reduce the cost of the fiscal note." Green, *Small Victory in Big Fight for Tougher Sex Abuse Laws*, The Leaf-Chronicle, May 8, 2008, p. 1A. Thus, the failure to enact capital child-rape laws cannot be viewed as evidence of a moral consensus against such punishment.

E

Aside from its misleading tally of current state laws, the Court points to two additional "objective indicia" of a "national *2672 consensus," *ante*, at 2651, but these arguments are patent makeweights. The Court notes that Congress has not enacted a law permitting a federal district court to impose the death penalty for the rape of a child, *ante*, at 2651 - 2652, but due to the territorial limits of the relevant federal statutes, very few rape cases, not to mention child-rape cases, are prosecuted in federal court. See 18 U.S.C. §§ 2241, 2242 (2000 ed. and Supp. V); United States Sentencing Commission, Report to Congress: Analysis of Penalties for Federal Rape Cases, p. 10, Table 1. Congress' failure to enact a death penalty statute for this tiny set of cases is hardly evidence of Congress' assessment of our society's values.^{FN6}

FN6. Moreover, as noted in the petition for rehearing, the Uniform Code of Military Justice permits such a sentence. See 10 U.S.C. § 856; Manual for Courts-Martial,

United States, Part II, Ch. X, Rule 1004(c)(9) (2008); *id.*, Part IV, ¶ 45.f(1).

Finally, the Court argues that statistics about the number of executions in rape cases support its perception of a "national consensus," but here too the statistics do not support the Court's position. The Court notes that the last execution for the rape of a child occurred in 1964, *ante*, at 2657, but the Court fails to mention that litigation regarding the constitutionality of the death penalty brought executions to a halt across the board in the late 1960's. In 1965 and 1966, there were a total of eight executions for all offenses, and from 1968 until 1977, the year when *Coker* was decided, there were no executions for any crimes.^{FN7} The Court also fails to mention that in Louisiana, since the state law was amended in 1995 to make child rape a capital offense, prosecutors have asked juries to return death verdicts in four cases. See *State v. Dickerson*, 01-1287 (La.App.6/26/02), 822 So.2d 849 (2002); *State v. Leblanc*, 01-1322 (La.App.5/31/01), 788 So.2d 1255; 2005-1981 (La.Sup.Ct.5/22/07), 957 So.2d 757; *State v. Davis*, Case No. 262,971 (1st Jud. Dist., Caddo Parish, La.) (cited in Brief for Respondent 42, and n. 38). In two of those cases, Louisiana juries imposed the death penalty. See 2005-1981 (La.Sup.Ct.5/22/07), 957 So.2d 757; *Davis*, *supra*. This 50% record is hardly evidence that juries share the Court's view that the death penalty for the rape of a young child is unacceptable under even the most aggravated circumstances.^{FN8}

FN7. Department of Justice, Bureau of Justice Statistics, online at <http://www.ojp.usdoj.gov/bjs/glance/tables/exetab.htm>; see also Death Penalty Information Center, Executions in the U.S. 1608-2002: The ESPY File Executions by Date (2007), online at <http://www.deathpenalty-info.org/ESPYyear.pdf>.

FN8. Of course, the other five capital child rape statutes are too recent for any indi-

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vidual to have been sentenced to death under them.

F

In light of the points discussed above, I believe that the "objective indicia" of our society's "evolving standards of decency" can be fairly summarized as follows. Neither Congress nor juries have done anything that can plausibly be interpreted as evidencing the "national consensus" that the Court perceives. State legislatures, for more than 30 years, have operated under the ominous shadow of the *Coker* dicta and thus have not been free to express their own understanding of our society's standards of decency. And in the months following our grant of certiorari in this case, state legislatures have had an additional reason to pause. Yet despite the inhibiting legal atmosphere that has prevailed since 1977, six States have recently enacted new, targeted child-rape laws.

I do not suggest that six new state laws necessarily establish a "national consensus" or even that they are sure evidence of an ineluctable trend. In terms of the Court's metaphor of moral evolution, these *2673 enactments might have turned out to be an evolutionary dead end. But they might also have been the beginning of a strong new evolutionary line. We will never know, because the Court today snuffs out the line in its incipient stage.

II

A

The Court is willing to block the potential emergence of a national consensus in favor of permitting the death penalty for child rape because, in the end, what matters is the Court's "own judgment" regarding "the acceptability of the death penalty." *Ante*, at 2658. Although the Court has much to say on this issue, most of the Court's discussion is not

pertinent to the Eighth Amendment question at hand. And once all of the Court's irrelevant arguments are put aside, it is apparent that the Court has provided no coherent explanation for today's decision.

In the next section of this opinion, I will attempt to weed out the arguments that are not germane to the Eighth Amendment inquiry, and in the final section, I will address what remains.

B

A major theme of the Court's opinion is that permitting the death penalty in child-rape cases is not in the best interests of the victims of these crimes and society at large. In this vein, the Court suggests that it is more painful for child-rape victims to testify when the prosecution is seeking the death penalty. *Ante*, at 2662. The Court also argues that "a State that punishes child rape by death may remove a strong incentive for the rapist not to kill the victim," *ante*, at 2664, and may discourage the reporting of child rape, *ante*, at 2663 - 2664.

These policy arguments, whatever their merits, are simply not pertinent to the question whether the death penalty is "cruel and unusual" punishment. The Eighth Amendment protects the right of an accused. It does not authorize this Court to strike down federal or state criminal laws on the ground that they are not in the best interests of crime victims or the broader society. The Court's policy arguments concern matters that legislators should and presumably do take into account in deciding whether to enact a capital child-rape statute, but these arguments are irrelevant to the question that is before us in this case. Our cases have cautioned against using "the aegis of the Cruel and Unusual Punishment Clause" to cut off the normal democratic processes," *Atkins v. Virginia*, 536 U.S. 304, 323, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) (Rehnquist, C. J., dissenting), in turn quoting *Gregg v. Georgia*, 428 U.S. 153, 176, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), (joint opinion of Stewart, Powell, and

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STEVENS, JJ.), but the Court forgets that warning here.

The Court also contends that laws permitting the death penalty for the rape of a child create serious procedural problems. Specifically, the Court maintains that it is not feasible to channel the exercise of sentencing discretion in child-rape cases, *ante*, at 2660 - 2661, and that the unreliability of the testimony of child victims creates a danger that innocent defendants will be convicted and executed, *ante*, at 2663 - 2664. Neither of these contentions provides a basis for striking down all capital child-rape laws no matter how carefully and narrowly they are crafted.

The Court's argument regarding the structuring of sentencing discretion is hard to comprehend. The Court finds it "difficult to identify standards that would guide the decisionmaker so the penalty is reserved*2674 for the most severe cases of child rape and yet not imposed in an arbitrary way." *Ante*, at 2660 - 2661. Even assuming that the age of a child is not alone a sufficient factor for limiting sentencing discretion, the Court need only examine the child-rape laws recently enacted in Texas, Oklahoma, Montana, and South Carolina, all of which use a concrete factor to limit quite drastically the number of cases in which the death penalty may be imposed. In those States, a defendant convicted of the rape of a child may be sentenced to death only if the defendant has a prior conviction for a specified felony sex offense. See Mont.Code Ann. § 45-5-503(3)(c) (2007) ("If the offender was previously convicted of [a felony sexual offense] ... the offender shall be ... punished by death ..."); Okla. Stat., Tit. 10, § 7115(K) (West Supp.2008) ("Notwithstanding any other provision of law, any parent or other person convicted of forcible anal or oral sodomy, rape, rape by instrumentation, or lewd molestation of a child under fourteen (14) years of age subsequent to a previous conviction for any offense of forcible anal or oral sodomy, rape, rape by instrumentation, or lewd molestation of a child under fourteen (14) years of age shall be punished by

death"); S.C.Code Ann. § 16-3-655(C)(1) (Supp.2007) ("If the [defendant] has previously been convicted of, pled guilty or nolo contendere to, or adjudicated delinquent for first degree criminal sexual conduct with a minor who is less than eleven years of age ... he must be punished by death or by imprisonment for life"); Tex. Penal Code Ann. § 12.42(c)(3) (2007 Supp.); ("[A] defendant shall be punished for a capital felony if it is shown on the trial of an offense under Section 22.021... that the defendant has previously been finally convicted of [a felony sexual offense against a victim younger than fourteen years of age]").

Moreover, it takes little imagination to envision other limiting factors that a State could use to structure sentencing discretion in child rape cases. Some of these might be: whether the victim was kidnapped, whether the defendant inflicted severe physical injury on the victim, whether the victim was raped multiple times, whether the rapes occurred over a specified extended period, and whether there were multiple victims.

The Court refers to limiting standards that are "indefinite and obscure," *ante*, at 2661, but there is nothing indefinite or obscure about any of the above-listed aggravating factors. Indeed, they are far more definite and clear-cut than aggravating factors that we have found to be adequate in murder cases. See, e.g., *Arave v. Creech*, 507 U.S. 463, 471, 113 S.Ct. 1534, 123 L.Ed.2d 188 (1993) (whether the defendant was a " 'cold-blooded, pitiless slayer' "); *Walton v. Arizona*, 497 U.S. 639, 646, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990) (whether the " 'perpetrator inflict[ed] mental anguish or physical abuse before the victim's death' "); *Jurek v. Texas*, 428 U.S. 262, 269, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.) (whether the defendant " 'would commit criminal acts of violence that would constitute a continuing threat to society' "). For these reasons, concerns about limiting sentencing discretion provide no support for the Court's blanket condemnation of all capital

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rape statutes.

ally unacceptable? I see two.

That sweeping holding is also not justified by the Court's concerns about the reliability of the testimony of child victims. First, the Eighth Amendment provides a poor vehicle for addressing problems regarding the admissibility or reliability of evidence, and problems presented by the testimony of child victims are not unique to capital cases. Second, concerns about *2675 the reliability of the testimony of child witnesses are not present in every child-rape case. In the case before us, for example, there was undisputed medical evidence that the victim was brutally raped, as well as strong independent evidence that petitioner was the perpetrator. Third, if the Court's evidentiary concerns have Eighth Amendment relevance, they could be addressed by allowing the death penalty in only those child-rape cases in which the independent evidence is sufficient to prove all the elements needed for conviction and imposition of a death sentence. There is precedent for requiring special corroboration in certain criminal cases. For example, some jurisdictions do not allow a conviction based on the uncorroborated testimony of an accomplice. See, e.g., Ala.Code 12-21-222 (1986); Alaska Stat. § 12.45.020 (1984); Ark.Code Ann. § 16-89-111(e)(1) (1977); Cal.Penal Code Ann. § 1111 (West 1985); Ga.Code Ann. § 24-4-8 (1995); Idaho Code § 19-2117 (Lexis 1979); Minn.Stat. § 634.04 (1983); Mont.Code Ann. § 46-16-213 (1985); Nev.Rev.Stat. § 175.291 (1985); N.D. Cent.Code Ann. § 29-21-14 (1974); Okla. St., Tit. 22, § 742 (West 1969); Ore.Rev.Stat. § 136.440 (1984); S.D. Codified Laws § 23A-22-8 (1979). A State wishing to permit the death penalty in child-rape cases could impose an analogous corroboration requirement.

C

After all the arguments noted above are put aside, what is left? What remaining grounds does the Court provide to justify its independent judgment that the death penalty for child rape is categoric-

1

The first is the proposition that we should be "most hesitant before interpreting the Eighth Amendment to allow the *extension* of the death penalty." *Ante*, at 2658 (emphasis added); see also *ante*, at 2659 - 2660, 2661 (referring to expansion of the death penalty). But holding that the Eighth Amendment does not categorically prohibit the death penalty for the rape of a young child would not "extend" or "expand" the death penalty. Laws enacted by the state legislatures are presumptively constitutional, *Gregg*, 428 U.S., at 175, 96 S.Ct. 2909 (joint opinion of Stewart, Powell, and STEVENS, JJ.) ("[I]n assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity"), and until today, this Court has not held that capital child rape laws are unconstitutional, see *ante*, at 2654 (*Coker* "does not speak to the constitutionality of the death penalty for child rape, an issue not then before the Court"). Consequently, upholding the constitutionality of such a law would not "extend" or "expand" the death penalty; rather, it would confirm the status of presumptive constitutionality that such laws have enjoyed up to this point. And in any event, this Court has previously made it clear that "[t]he Eighth Amendment is not a ratchet, whereby a temporary consensus on leniency for a particular crime fixes a permanent constitutional maximum, disabling States from giving effect to altered beliefs and responding to changed social conditions." *Harmelin v. Michigan*, 501 U.S. 957, 990, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (principal opinion); see also *Gregg*, *supra*, at 176, 96 S.Ct. 2909 (joint opinion of Stewart, Powell, and STEVENS, JJ.).

2

The Court's final-and, it appears, principal-justification for its holding is that murder, the only crime for which defendants have been executed

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since this *2676 Court's 1976 death penalty decisions,^{FN9} is unique in its moral depravity and in the severity of the injury that it inflicts on the victim and the public. See *ante*, at 2659 - 2660. But the Court makes little attempt to defend these conclusions.

FN9. *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976).

With respect to the question of moral depravity, is it really true that every person who is convicted of capital murder and sentenced to death is more morally depraved than every child rapist? Consider the following two cases. In the first, a defendant robs a convenience store and watches as his accomplice shoots the store owner. The defendant acts recklessly, but was not the triggerman and did not intend the killing. See, e.g., *Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987). In the second case, a previously convicted child rapist kidnaps, repeatedly rapes, and tortures multiple child victims. Is it clear that the first defendant is more morally depraved than the second?

The Court's decision here stands in stark contrast to *Atkins* and *Roper*, in which the Court concluded that characteristics of the affected defendants—mental retardation in *Atkins* and youth in *Roper*—diminished their culpability. See *Atkins*, 536 U.S., at 305, 122 S.Ct. 2242; *Roper*, 543 U.S., at 571, 125 S.Ct. 1183. Nor is this case comparable to *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), in which the Court held that the Eighth Amendment prohibits the death penalty where the defendant participated in a robbery during which a murder was committed but did not personally intend for lethal force to be used. I have no doubt that, under the prevailing standards of our so-

ciety, robbery, the crime that the petitioner in *Enmund* intended to commit, does not evidence the same degree of moral depravity as the brutal rape of a young child. Indeed, I have little doubt that, in the eyes of ordinary Americans, the very worst child rapists—predators who seek out and inflict serious physical and emotional injury on defenseless young children—are the epitome of moral depravity.

With respect to the question of the harm caused by the rape of child in relation to the harm caused by murder, it is certainly true that the loss of human life represents a unique harm, but that does not explain why other grievous harms are insufficient to permit a death sentence. And the Court does not take the position that no harm other than the loss of life is sufficient. The Court takes pains to limit its holding to “crimes against individual persons” and to exclude “offenses against the State,” a category that the Court stretches—without explanation—to include “drug kingpin activity.” *Ante*, at 2659. But the Court makes no effort to explain why the harm caused by such crimes is necessarily greater than the harm caused by the rape of young children. This is puzzling in light of the Court's acknowledgment that “[r]ape has a permanent psychological, emotional, and sometimes physical impact on the child.” *Ante*, at 2658. As the Court aptly recognizes, “[w]e cannot dismiss the years of long anguish that must be endured by the victim of child rape.” *Ibid*.

The rape of any victim inflicts great injury, and “[s]ome victims are so grievously injured physically or psychologically that life is beyond repair.” *2677 *Coker*, 433 U.S., at 603, 97 S.Ct. 2861 (opinion of Powell, J.). “The immaturity and vulnerability of a child, both physically and psychologically, adds a devastating dimension to rape that is not present when an adult is raped.” Meister, *Murdering Innocence: The Constitutionality of Capital Child Rape Statutes*, 45 *Ariz. L.Rev.* 197, 208-209 (2003). See also *State v. Wilson*, 96-1392, p. 6 (La.Sup.Ct.12/13/96), 685 So.2d 1063, 1067; Broughton, “On Horror's Head Horrors Accumu-

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late": A Reflective Comment on Capital Child Rape Legislation, 39 Duquesne L.Rev. 1, 38 (2000). Long-term studies show that sexual abuse is "grossly intrusive in the lives of children and is harmful to their normal psychological, emotional and sexual development in ways which no just or humane society can tolerate." C. Bagley & K. King, Child Sexual Abuse: The Search for Healing 2 (1990).

It has been estimated that as many as 40% of 7- to 13-year-old sexual assault victims are considered "seriously disturbed." A. Lurigio, M. Jones, & B. Smith, Child Sexual Abuse: Its Causes, Consequences, and Implications for Probation Practice, 59 Sep Fed. Probation 69, 70 (1995). Psychological problems include sudden school failure, unprovoked crying, dissociation, depression, insomnia, sleep disturbances, nightmares, feelings of guilt and inferiority, and self-destructive behavior, including an increased incidence of suicide. Meister, *supra*, at 209; Broughton, *supra*, at 38; Glazer, Child Rapists Beware! The Death Penalty and Louisiana's Amended Aggravated Rape Statute, 25 Am. J.Crim. L. 79, 88 (1997).

The deep problems that afflict child-rape victims often become society's problems as well. Commentators have noted correlations between childhood sexual abuse and later problems such as substance abuse, dangerous sexual behaviors or dysfunction, inability to relate to others on an interpersonal level, and psychiatric illness. Broughton, *supra*, at 38; Glazer, *supra*, at 89; Handbook on Sexual Abuse of Children 7 (L. Walker ed.1988). Victims of child rape are nearly 5 times more likely than non-victims to be arrested for sex crimes and nearly 30 times more likely to be arrested for prostitution. *Ibid*.

The harm that is caused to the victims and to society at large by the worst child rapists is grave. It is the judgment of the Louisiana lawmakers and those in an increasing number of other States that these harms justify the death penalty. The Court provides no cogent explanation why this legislative

judgment should be overridden. Conclusory references to "decency," "moderation," "restraint," "full progress," and "moral judgment" are not enough.

III

In summary, the Court holds that the Eighth Amendment categorically rules out the death penalty in even the most extreme cases of child rape even though: (1) This holding is not supported by the original meaning of the Eighth Amendment; (2) neither *Coker* nor any other prior precedent commands this result; (3) there are no reliable "objective indicia" of a "national consensus" in support of the Court's position; (4) sustaining the constitutionality of the state law before us would not "extend" or "expand" the death penalty; (5) this Court has previously rejected the proposition that the Eighth Amendment is a one-way ratchet that prohibits legislatures from adopting new capital punishment statutes to meet new problems; (6) the worst child rapists exhibit the epitome of moral depravity; and (7) child rape inflicts grievous injury on victims and on society in general.

*2678 The party attacking the constitutionality of a state statute bears the "heavy burden" of establishing that the law is unconstitutional. *Gregg*, 428 U.S., at 175, 96 S.Ct. 2909 (joint opinion of Stewart, Powell, and STEVENS, JJ.). That burden has not been discharged here, and I would therefore affirm the decision of the Louisiana Supreme Court.

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H

Supreme Court of the United States

Patrick KENNEDY, Petitioner,

v.

LOUISIANA

No. 07-343.

Oct. 1, 2008..

Statement of Justice KENNEDY, with whom Justice STEVENS, Justice SOUTER, Justice GINSBURG, and Justice BREYER join, respecting the denial of rehearing.

The opinion of the Court is modified by the addition of a footnote at page 15, after the word "considered" in the last paragraph of Part II-A. The footnote is as follows:

* When issued and announced on June 25, 2008, the Court's decision neither noted nor discussed the military penalty for rape under the Uniform Code of Military Justice. See 10 U.S.C. §§ 856, 920; Manual for Courts-Martial, United States, Part IV, ¶ 45.f(1) (2008). In a petition for rehearing respondent argues that the military penalty bears on our consideration of the question in this case. For the reasons set forth in the statement respecting the denial of rehearing, *post*, p. 1, we find that the military penalty does not affect our reasoning or conclusions.

The dissenting opinion is modified as follows:

(1) By the addition of the words "a federal district court to impose" at page 13 between the words "a law permitting" and the words "the death penalty" in the first paragraph of Part I-E;

(2) By the addition of footnote 6 after the word "values" in said paragraph. The footnote is as follows:

⁶ Moreover, as noted in the petition for rehear-

ing, the Uniform Code of Military Justice permits such a sentence. See 10 U.S.C. § 856; Manual for Courts-Martial, United States, Part II, Ch. X, Rule 1004(c)(9) (2008); *id.*, Part IV, ¶ 45.f(1).

The petition for rehearing is denied.

Justice THOMAS and Justice ALITO would grant the petition for rehearing. Statement of Justice KENNEDY, with whom Justice STEVENS, Justice SOUTER, Justice GINSBURG, and Justice BREYER join, respecting the denial of rehearing.

In its petition for rehearing respondent argues that the military penalty for rape, a congressional amendment of the Uniform Code of Military Justice (UCMJ) in 2006, and a related executive order in 2007 should alter the Court's analysis of the Eighth Amendment question in this case. After considering the petition as well as supplemental briefs from the parties and the United States, the Court has determined that rehearing is not warranted.

The military death penalty for rape has been the rule for more than a century. As respondent acknowledges in its petition for rehearing, military law has included the death penalty for rape of a child or adult victim since at least 1863. See § 30, 12 Stat. 736. Since 1950, that punishment has applied to peacetime offenses by members of the military. See Art. 120, 64 Stat. 140. The death penalty, however, has not been carried out against a military offender for almost 50 years. The last instance of military capital punishment, in 1961, was for the crimes of rape and attempted murder. See R. Paternoster, R. Brame, & S. Bacon, *The Death Penalty: America's Experience with Capital Punishment* 69 (2008). There are six individuals now subject to a final sentence of death under the *2 UCMJ, see NAACP Legal Defense and Educational Fund, Inc., *Death Row U.S.A.* 66 (Winter 2008), all of whom committed offenses that involved the death of a victim.

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In 2006, Congress passed the National Defense Authorization Act, which authorized that year's appropriations for military and national-security activities. Pub L. 109-163. Also in that bill, Congress revised the military's sexual-assault statutes, in part by reclassifying the UCMJ's offense of rape as two separate crimes: adult rape and child rape. § 552(a)(1), 119 Stat. 3257. It is unclear what effect, if any, that reclassification worked on the availability of the military death penalty. Pending the President's setting the maximum penalty for adult rape and child rape, Congress included a temporary provision applying the existing maximum punishment of death for rape as the "interim maximum punishment" for those crimes. *Id.*, § 552(b)(1), at 3263; see also 10 U.S.C. § 856. But Congress also removed from the text of the statute itself, § 920, the specific authorization of "death" as a punishment; the new statute provides only that adult rape and child rape shall be punished "as a court-martial may direct." For his part, the President later left in place, in the Manual for Courts-Martial, the availability of the death penalty for rape of an adult or child victim. Exec. Order No. 13447, 72 Fed.Reg. 56214 (2007); Manual for Courts-Martial, United States, Part IV, ¶ 45.f(1) (2008). The parties disagree on the effect of Congress' and the President's actions in light of 10 U.S.C. § 818, which allows imposition of the death penalty only "when specifically authorized by this chapter."

In any event, authorization of the death penalty in the military sphere does not indicate that the penalty is constitutional in the civilian context. The military death penalty for rape was in effect before the decisions in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (*per curiam*), and *Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977); and when the Court surveyed state and federal law in *Coker*, it made no mention of the military penalty. See *id.*, at 595-596, 593, and n. 6, 97 S.Ct. 2861 (plurality opinion) (not including the military as a "jurisdiction in the United States" that authorized the death penalty for rape, and naming the Federal Government

among jurisdictions that recognized the death penalty for rape prior to *Furman* but citing only the nonmilitary provision). The same is true of more recent Eighth Amendment cases in the civilian context. See *Enmund v. Florida*, 458 U.S. 782, 789-793, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982); *Tison v. Arizona*, 481 U.S. 137, 152-154, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987). This case, too, involves the application of the Eighth Amendment to civilian law; and so we need not decide whether certain considerations might justify differences in the application of the Cruel and Unusual Punishments Clause to military cases (a matter not presented here for our decision). Cf. *Loving v. United States*, 517 U.S. 748, 755, 116 S.Ct. 1737, 135 L.Ed.2d 36 (1996).

That the Manual for Courts-Martial retains the death penalty for rape of a child or an adult when committed by a member of the military does not draw into question our conclusions that there is a consensus against the death penalty for the crime in the civilian context and that the penalty here is unconstitutional. The laws of the separate States, which have responsibility for the administration of the criminal law for their civilian populations, are entitled to considerable weight over and above the punishments Congress and the President consider appropriate in the military context. The more relevant federal benchmark³ is federal criminal law that applies to civilians, and that law does not permit the death penalty for child rape. Until the petition for rehearing, none of the briefs or submissions filed by the parties or the *amici* in this case cited or discussed the UCMJ provisions. Statement of Justice SCALIA, with whom THE CHIEF JUSTICE joins, respecting the denial of rehearing.

Respondent has moved for rehearing of this case because there has come to light a federal statute enacted in 2006 permitting the death sentence under the Uniform Code of Military Justice for rape of a minor. See Pub L. 109-163, § 552(b)(1), 119 Stat. 3263. This provision was not cited by either party,

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nor by any of the numerous *amici* in the case; it was first brought to the Court's attention after the opinion had issued, in a letter signed by 85 Members of Congress. Respondent asserts that rehearing is justified because this statute calls into question the majority opinion's conclusion that there is a national consensus against capital punishment for rape of a child.

I am voting against the petition for rehearing because the views of the American people on the death penalty for child rape were, to tell the truth, irrelevant to the majority's decision in this case. The majority opinion, after an unpersuasive attempt to show that a consensus against the penalty existed, in the end came down to this: "[T]he Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." --- U.S. ---, 128 S.Ct. 2641, 2658, 171 L.Ed.2d 525. Of course the Constitution contemplates no such thing; the proposed Eighth Amendment would have been laughed to scorn if it had read "no criminal penalty shall be imposed which the Supreme Court deems unacceptable." But that is what the majority opinion said, and there is no reason to believe that absence of a national consensus would provoke second thoughts.

While the new evidence of American opinion is ultimately irrelevant to the majority's decision, let there be no doubt that it utterly destroys the majority's claim to be discerning a national consensus and not just giving effect to the majority's own preference. As noted in the letter from Members of Congress, the bill providing the death penalty for child rape passed the Senate 95-0; it passed the House 374-41, with the votes of a majority of each State's delegation; and was signed by the President. Justice KENNEDY's statement posits two reasons why this act by Congress proves nothing about the national consensus regarding permissible penalties for child rape. First, it claims the statute merely "reclassif[ied]" the offense of child rape. *Ante*, at 2. But the law did more than that; it specifically es-

tablished (as it would have to do) the penalty for the new offense of child rape-and that penalty was death: "For an offense under subsection (a) (rape) or subsection (b) (rape of a child), death or such other punishment as a court-martial may direct." § 552(b)(1), 119 Stat. 3263 (emphasis added). By separate executive order, the President later expressly reauthorized the death penalty as a punishment for child rape. Exec. Order No. 13447, 72 Fed.Reg. 56214 (2007). Based on these acts, there is infinitely more reason to think that Congress and the President made a judgment regarding the appropriateness of the death penalty for child rape than there is to think that the many non-enacting state legislatures upon which the majority relies did so-especially since it was widely believed that *Coker* took the capital-punishment option off the table. See *4*Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977).

Second, Justice KENNEDY speculates that the Eighth Amendment may permit subjecting a member of the military to a means of punishment that would be cruel and unusual if inflicted upon a civilian for the same crime. That is perhaps so where the fact of the malefactor's membership in the Armed Forces makes the offense more grievous. One can imagine, for example, a social judgment that treason by a military officer who has sworn to defend his country deserves the death penalty even though treason by a civilian does not. (That is not the social judgment our society has made, see 18 U.S.C. § 2381, but one can imagine it.) It is difficult to imagine, however, how rape of a child could sometimes be deserving of death for a soldier but never for a civilian.

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A

Supreme Court of the United States
Ehrlich Anthony COKER, Petitioner,

v.

State of GEORGIA.

No. 75-5444.

Argued March 28, 1977.

Decided June 29, 1977.

By a judgment of the Superior Court, Ware County, Georgia, the defendant was convicted of the crimes of motor vehicle theft, armed robbery, rape, kidnapping, and escape. A sentence of death was imposed for the offense of rape and he appealed. The Supreme Court of Georgia, 234 Ga. 555, 216 S.E.2d 782, affirmed and certiorari was granted. Mr. Justice White announced as the judgment of the Supreme Court that a sentence of death for the crime of rape of adult woman was grossly disproportionate and excessive punishment forbidden by Eighth Amendment.

Reversed and remanded.

Mr. Justice Brennan and Mr. Justice Marshall each filed opinions concurring in the judgment in the judgment.

Mr. Justice Powell filed an opinion concurring in the judgment in part and dissenting

Mr. Chief Justice Burger, with whom Mr. Justice Rehnquist joined, filed a dissenting opinion.

West Headnotes

Sentencing and Punishment 350H 1667

350H Sentencing and Punishment

350HVIII The Death Penalty

350HVIII(D) Factors Related to Offense

350Hk1666 Nature or Degree of Offense

350Hk1667 k. In General. Most Cited

Cases

(Formerly 110k1213.8(8), 110k1213)

Sentence of death for crime of rape of adult woman was grossly disproportionate and excessive punishment forbidden by the Eighth Amendment as cruel and unusual punishment. Code Ga. § 26-2001; U.S.C.A.Const. Amend. 8.

**2862 Syllabus^{FN*}

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

*584 While serving various sentences for murder, rape, kidnapping, and aggravated assault, petitioner escaped from a Georgia prison and, in the course of committing an armed robbery and other offenses, raped an adult woman. He was convicted of rape, armed robbery, and the other offenses and sentenced to death on the rape charge, when the jury found two of the aggravating circumstances present for imposing such a sentence, viz., that the rape was committed (1) by a person with prior capital-felony convictions and (2) in the course of committing another capital felony, armed robbery. The Georgia Supreme Court affirmed both the conviction and sentence. Held: The judgment upholding the death sentence is reversed and the case is remanded. Pp. 2865-2870.

234 Ga. 555, 216 S.E.2d 782, reversed and remanded.

Mr. Justice WHITE, joined by Mr. Justice STEWART, Mr. Justice BLACKMUN, and Mr. Justice STEVENS, concluded that the sentence of death for the crime of rape is grossly disproportionate and excessive punishment and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment. Pp. 2865-2870.

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(a) The Eighth Amendment bars not only those punishments that are 'barbaric' but also those that are 'excessive' in relation to the crime committed, and a punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. Pp. 2865-2866.

(b) That death is a disproportionate penalty for rape is strongly indicated by the objective evidence of present public judgment, as represented by the attitude of state legislatures and sentencing juries, concerning the acceptability of such a penalty, it appearing that Georgia is currently the only State authorizing the death sentence for rape of an adult woman, that it is authorized for rape in only two other States but only when the victim is a child, and that in the vast majority (9 out of 10) of rape convictions in Georgia since 1973, juries have not imposed the death sentence. Pp. 2866-2868.

(c) *585 Although rape deserves serious punishment, the death penalty, which is unique in its severity and irrevocability, is an excessive penalty for the rapist who, as such and as opposed to the murderer, does not unjustifiably take human life. Pp. 2868-2869.

(d) The conclusion that the death sentence imposed on petitioner is disproportionate punishment for rape is not affected by the fact that the jury found the aggravating circumstances of prior capital-felony convictions and occurrence of the rape while committing armed robbery, a felony for which the death sentence is also authorized, since the prior convictions do not change the fact that the rape did not involve the taking of life, and since the jury did not deem the robbery itself deserving of **2863 the death penalty, even though accompanied by the aggravating circumstances of prior capital-felony convictions. P. 2869.

(e) That under Georgia law a deliberate killer cannot be sentenced to death, absent aggravating cir-

cumstances, argues strongly against the notion that, with or without such circumstances, a rapist who does not take the life of his victim should be punished more severely than the deliberate killer. Pp. 2869-2870.

Mr. Justice BRENNAN concluded that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. P. 2870.

Mr. Justice MARSHALL concluded that the death penalty is a cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. P. 2870.

Mr. Justice POWELL concluded that death is disproportionate punishment for the crime of raping an adult woman where, as here, the crime was not committed with excessive brutality and the victim did not sustain serious or lasting injury. P. 2870.
 David E. Kendall, New York City, for petitioner.

*586 B. Dean Grindle, Jr., Atlanta, Ga., for respondent.

Mr. Justice WHITE announced the judgment of the Court and filed an opinion in which Mr. Justice STEWART, Mr. Justice BLACKMUN, and Mr. Justice STEVENS, joined.

Georgia Code Ann. s 26-2001 (1972) provides that '(a) person convicted of rape shall be punished by death or by imprisonment for life, or by imprisonment for not less than one nor more than 20 years.'^{FN1} Punishment is determined by a jury in a separate sentencing proceeding in which at least one of the statutory aggravating circumstances must be found before the death penalty may be imposed.^{FN2} Petitioner Coker was convicted of rape and sentenced to death. Both the conviction and the sentence were affirmed by the Georgia Supreme Court. Coker was granted a writ of certiorari, 429 U.S. 815, 97 S.Ct. 56, 50 L.Ed.2d 75, limited to the single claim, rejected by the Georgia court, that the punishment of death for rape violates the Eighth

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Amendment, which proscribes 'cruel and unusual punishments' and which must be observed by the States as well as the Federal Government. *Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962).

FN1. The section defines rape as having 'carnal knowledge of a female, forcibly and against her will. Carnal knowledge in rape occurs when there is any penetration of the female sex organ by the male sex organ.'

FN2. See n. 3, *infra*.

*587 I

While serving various sentences for murder, rape, kidnaping, and aggravated assault, petitioner escaped from the Ware Correctional Institution near Waycross, Ga., on September 2, 1974. At approximately 11 o'clock that night, petitioner entered the house of Allen and Elnita Carver through an unlocked kitchen door. Threatening the couple with a 'board,' he tied up Mr. Carver in the bathroom, obtained a knife from the kitchen, and took Mr. Carver's money and the keys to the family car. Brandishing the knife and saying 'you know what's going to happen to you if you try anything, don't you,' Coker then raped Mrs. Carver. Soon thereafter, petitioner drove away in the Carver car, taking Mrs. Carver with him. Mr. Carver, freeing himself, notified the police; and not long thereafter petitioner was apprehended. Mrs. Carver was unharmed.

Petitioner was charged with escape, armed robbery, motor vehicle theft, kidnaping, and rape. Counsel was appointed to represent him. Having been found competent to stand trial, he was tried. The jury returned a verdict of guilty, rejecting his **2864 general plea of insanity. A sentencing hearing was then conducted in accordance with the procedures dealt with at length in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), where this Court sustained the death penalty for murder when

imposed pursuant to the statutory procedures.^{FN3} The jury was *588 instructed that **2865 it could consider as aggravating circumstances whether the rape *589 had been committed by a person with a prior record of conviction for a capital felony and whether the rape had been committed in the course of committing another capital felony, namely, the armed robbery of Allen Carver. The court also instructed, pursuant to statute, that even if *590 aggravating circumstances were present, the death penalty need not be imposed if the jury found they were out-weighed by mitigating circumstances, that is, circumstances not constituting justification or excuse for the offense in question, *591 'but which, in fairness and mercy, may be considered as extenuating or reducing the degree' of moral culpability or punishment. App. 300. The jury's verdict on the rape count was death by electrocution. Both aggravating circumstances on which the court instructed were found to be present by the jury.

FN3.Ga.Code s 26-3102 (Supp. 1976):

'Capital offenses; jury verdict and sentence.

'Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment as provided by law. Unless the jury trying the case makes a finding of at least one statutory aggravating circumstance and recommends the death sentence in its verdict, the court shall not sentence the defendant to death, provided that no such finding of statutory aggravating cir-

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cumstance shall be necessary in offenses of treason or aircraft hijacking. The provisions of this section shall not affect a sentence when the case is tried without a jury or when the judge accepts a plea of guilty.'

Ga.Code s 27-2302 (Supp.1976):

Recommendation to mercy.

'In all capital cases, other than those of homicide, when the verdict is guilty, with a recommendation to mercy, it shall be legal and shall be a recommendation to the judge of imprisonment for life. Such recommendation shall be binding upon the judge.'

Ga.Code s 27-2534.1 (Supp.1976):

'Mitigating and aggravating circumstances; death penalty.

'(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.

'(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

'(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

'(2) The offense of murder, rape, armed robbery, or kidnapping was committed

while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

'(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

'(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

'(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

'(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

'(7) The offense of murder, rape, armed robbery or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

'(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

'(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

'(10) The murder was committed for the

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purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

'(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in section 27-2534.1(b) is so found, the death penalty shall not be imposed.'

Ga.Code s 27-2537 (Supp.1976):

'Review of death sentences.

'(a) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Georgia. The clerk of the trial court, within ten days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of Georgia together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court of Georgia.

'(b) The Supreme Court of Georgia shall

consider the punishment as well as any errors enumerated by way of appeal.

'(c) With regard to the sentence, the court shall determine:

'(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

'(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 27-2534.1(b), and

'(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

'(d) Both the defendant and the State shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

'(e) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

'(1) Affirm the sentence of death; or

'(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court of Georgia in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration.

'(f) There shall be an Assistant to the Supreme Court, who shall be an attorney ap-

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pointed by the Chief Justice of Georgia and who shall serve at the pleasure of the court. The court shall accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate. The Assistant shall provide the court with whatever extracted information it desires with respect thereto, including but not limited to a synopsis or brief of the facts in the record concerning the crime and the defendant.

'(g) The court shall be authorized to employ an appropriate staff and such methods to compile such data as are deemed by the Chief Justice to be appropriate and relevant to the statutory questions concerning the validity of the sentence.

'(h) The office of the Assistant shall be attached to the office of the Clerk of the Supreme Court of Georgia for administrative purposes.

'(ni) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.'

II

Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), and the Court's decisions last Term in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); and *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976), make unnecessary the re-canvassing of certain critical as-

pects of the controversy about the constitutionality of capital punishment. It is now settled that the death penalty is not invariably cruel and unusual **2866 punishment within the meaning of the Eighth Amendment; it is not inherently barbaric or an unacceptable mode of punishment for crime; neither is it always disproportionate to the crime for which it is imposed. It is also established that imposing capital punishment, at least for murder, in accordance with the procedures provided under the Georgia statutes saves the sentence from the infirmities which led the Court to invalidate the prior Georgia capital punishment statute in *Furman v. Georgia*, *supra*.

In sustaining the imposition of the death penalty in *Gregg*, *592 however, the Court firmly embraced the holdings and dicta from prior cases, *Furman v. Georgia*, *supra*; *Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962); *Trop v. Dulles*, 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958); and *Weems v. United States*, 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793 (1910), to the effect that the Eighth Amendment bars not only those punishments that are 'barbaric' but also those that are 'excessive' in relation to the crime committed. Under *Gregg*, a punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. A punishment might fail the test on either ground. Furthermore, these Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent. To this end, attention must be given to the public attitudes concerning a particular sentence history and precedent, legislative attitudes, and the response of juries reflected in their sentencing decisions are to be consulted. In *Gregg*, after giving due regard to such sources, the Court's judgment was that the death penalty for deliberate murder was neither the purposeless imposition of severe

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punishment nor a punishment grossly disproportionate to the crime. But the Court reserved the question of the constitutionality of the death penalty when imposed for other crimes. 428 U.S., at 187 n. 35, 96 S.Ct., at 2932.

III

That question, with respect to rape of an adult woman, is now before us. We have concluded that a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment.^{FN4}

FN4. Because the death sentence is a disproportionate punishment for rape, it is cruel and unusual punishment within the meaning of the Eighth Amendment even though it may measurably serve the legitimate ends of punishment and therefore is not invalid for its failure to do so. We observe that in the light of the legislative decisions in almost all of the States and in most of the countries around the world, it would be difficult to support a claim that the death penalty for rape is an indispensable part of the States' criminal justice system.

*593 A

As advised by recent cases, we seek guidance in history and from the objective evidence of the country's present judgment concerning the acceptability of death as a penalty for rape of an adult woman. At no time in the last 50 years have a majority of the States authorized death as a punishment for rape. In 1925, 18 States, the District of Columbia, and the Federal Government authorized capital punishment for the rape of an adult female.^{FN5} By 1971 just prior to the decision in *Furman v. Georgia*, that number had declined, but not substantially, to 16 States plus the Federal Government.^{FN6} *Furman* then invalidated **2867 most of the capital

punishment statutes in this country, including the rape statutes, because, among other reasons, of the manner in which the death penalty was imposed and utilized under those laws.

FN5. See *Bye*, Recent History and Present Status of Capital Punishment in the United States, 17 J.Crim.L. & C., 234, 241-242 (1926).

FN6. Ala.Code, Tit. 14, s 395 (1958); Ark.Stat.Ann. s 41-3403 (1964); Fla.Stat.Ann. s 794.01 (1965); Ga.Code s 26-2001 (1970); Ky.Rev.Stat.Ann. ss 435.080-435.090 (1962); La.Rev.Stat.Ann. s 14:42 (1950); Md.Ann.Code, Art. 27, s 461 (1957); Miss.Code Ann. s 2358 (1957); Mo. Rev.Stat. s 559260 (1969); Nev.Rev.Stat. s 200.360 (1963) (rape with substantial bodily harm); N.C.Gen.Stat. s 14-21 (1969); Okl.Stat.Ann., Tit. 21, s 1115 (1958); S.C.Code Ann. ss 16-72, 16-80 (1962); Tenn. Code Ann. s 39-3702 (1955); Tex.Penal Code s 1189 (1961); Va.Code Ann. s 18.1-44 (1960); 18 U.S.C. s 2031.

With their death penalty statutes for the most part invalidated, the States were faced with the choice of enacting modified capital punishment laws in an attempt to satisfy the requirements of *Furman* or of being satisfied with life imprisonment as the ultimate punishment for any offense. Thirty-five States *594 immediately reinstituted the death penalty for at least limited kinds of crime. *Gregg v. Georgia*, 428 U.S., at 179 n. 23, 96 S.Ct., at 2928. This public judgment as to the acceptability of capital punishment, evidenced by the immediate, post-*Furman* legislative reaction in a large majority of the States, heavily influenced the Court to sustain the death penalty for murder in *Gregg v. Georgia*, *supra*, at 179-182, 96 S.Ct., at 2928-2929.

But if the 'most marked indication of society's endorsement of the death penalty for murder is the legislative response to *Furman*,' *Gregg v. Georgia*,

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supra, at 179-180, 96 S.Ct., at 2928, it should also be a telling datum that the public judgment with respect to rape, as reflected in the statutes providing the punishment for that crime, has been dramatically different. In reviving death penalty laws to satisfy Furman's mandate, none of the States that had not previously authorized death for rape chose to include rape among capital felonies. Of the 16 States in which rape had been a capital offense, only three provided the death penalty for rape of an adult woman in their revised statutes: Georgia, North Carolina, and Louisiana. In the latter two States, the death penalty was mandatory for those found guilty, and those laws were invalidated by *Woodson* and *Roberts*. When Louisiana and North Carolina, responding to those decisions, again revised their capital punishment laws, they reenacted the death penalty for murder but not for rape; none of the seven other legislatures that to our knowledge have amended or replaced their death penalty statutes since July 2, 1976, including four States (in addition to Louisiana and North Carolina) that had authorized the death sentence for rape prior to 1972 and had reacted to *Furman* with mandatory statutes, included rape among the crimes for which death was an authorized punishment.^{FN7}

FN7. 1976 Okla.Sess.Laws, c. 1, p. 627; 1976 La. Acts, Nos. 657, 694; 1976 Ky.Acts. c. 15 (Ex. Sess.); 1977 Wyo.Sess.Laws, c. 122. Recent legislative action has taken place in North Carolina, Virginia, Maryland, California, and New Jersey. The legislation has been signed into law in North Carolina and Virginia, N.C.Sess. Laws (May 19, 1977); 1977 Va.Acts, c. 492 (Mar. 29, 1977), and has been vetoed in Maryland and California, *Washington Post*, May 27, 1977, p. A1, col. 1; *N.Y. Times*, May 28, 1977, p. 8, col. 6. The Governor of New Jersey apparently has not yet acted on the legislation in that State.

*595 Georgia argues that 11 of the 16 States that

authorized death for rape in 1972 attempted to comply with *Furman* by enacting arguably mandatory death penalty legislation and that it is very likely that, aside from Louisiana and North Carolina, these States simply chose to eliminate rape as a capital offense rather than to require death for each and every instance of rape.^{FN8} The argument is not without force; but 4 of the 16 States did not take the mandatory course and also did not continue rape of an adult **2868 woman as a capital offense. Further, as we have indicated, the legislatures of 6 of the 11 arguably mandatory States have revised their death penalty laws since *Woodson* and *Roberts* without enacting a new death penalty for rape. And this is to say nothing of 19 other States that enacted nonmandatory, post-*Furman* statutes and chose not to sentence rapists to death.

FN8. The legislation that respondent places in this category is as follows:

Ky.Rev.Stat. s 507.020 (1975);
 La.Rev.Stat. Ann. s 14:30 (1974); Md.Code Ann., Art. 27, s 413(b) (Supp. 1976);
 Miss.Code Ann. ss 97-3-19, 97-3-21, 97-25-55, 99-17-20 (Supp. 1975);
 Mo.Rev.Stat. ss 559.005, 559.009 (Supp. 1975); Nev.Rev.Stat. s 200.030 (1975);
 N.C.Gen.Stat. ss 14-17, 14-21 (Supp. 1975); Okl.Stat. Ann., Tit. 21, ss 701.1-701.3 (Supp. 1975); S.C.Code Ann. s 16-52 (Supp. 1975); Tenn.Code Ann. ss 39-2402, 39-2406, 39-3702 (1975);
 Va.Code Ann. ss 18.2-10, 18.2-31 (1975).
 Brief for Respondent 19 n. 38.

It should be noted that Florida, Mississippi, and Tennessee also authorized the death penalty in some rape cases, but only where the victim was a child and the rapist an adult.^{FN9} The Tennessee statute has since been invalidated because the death sentence was mandatory. *Collins v. State*, 550 S.W.2d 643 (Tenn.1977). The upshot is that Georgia is the sole jurisdiction*596 in the United States at the present time that authorizes a sentence of death when the rape victim is an adult woman, and

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only two other jurisdictions provide capital punishment when the victim is a child.

FN9.Fla.Stat.Ann. s 794.011(2) (1976);
 Miss.Code Ann. s 97-3-65 (Supp.1976);
 Tenn.Code Ann. s 39-3702 (1974).

The current judgment with respect to the death penalty for rape is not wholly unanimous among state legislatures, but it obviously weighs very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman.^{FN10}

FN10. In *Trop v. Dulles*, 356 U.S. 86, 102, 78 S.Ct. 590, 598, 2 L.Ed.2d 630 (1958), the plurality took pains to note the climate of international opinion concerning the acceptability of a particular punishment. It is thus not irrelevant here that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue. United Nations, Department of Economic and Social Affairs, Capital Punishment 40, 86 (1968).

B

It was also observed in *Gregg* that '(t)he jury . . . is a significant and reliable objective index of contemporary values because it is so directly involved.' 428 U.S., at 181, 96 S.Ct., at 2929, and that it is thus important to look to the sentencing decisions that juries have made in the course of assessing whether capital punishment is an appropriate penalty for the crime being tried. Of course, the jury's judgment is meaningful only where the jury has an appropriate measure of choice as to whether the death penalty is to be imposed. As far as execution for rape is concerned, this is now true only in Georgia and in Florida; and in the latter State, capital punishment is authorized only for the rape of children.

According to the factual submissions in this Court, out of all rape convictions in Georgia since 1973 and that total number has not been tendered

63 cases had been reviewed by the Georgia Supreme Court as of the time of oral argument; and of these, 6 involved a death sentence, 1 of which was set aside, leaving 5 convicted rapists now under sentence *597 of death in the State of Georgia. Georgia juries have thus sentenced rapists to death six times since 1973. This obviously is not a negligible number; and the State argues that as a practical matter juries simply reserve the extreme sanction for extreme cases of rape and that recent experience surely does not prove that jurors consider the death penalty to be a disproportionate punishment for every conceivable instance of rape, no matter how aggravated. Nevertheless, it is true that in the vast majority of cases, at least 9 out of 10, juries have not imposed the death sentence.

IV

These recent events evidencing the attitude of state legislatures and sentencing juries do not wholly determine this controversy, for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment. Nevertheless, the legislative rejection of capital punishment for rape strongly confirms our own judgment, **2869 which is that death is indeed a disproportionate penalty for the crime of raping an adult woman.

We do not discount the seriousness of rape as a crime. It is highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim and for the latter's privilege of choosing those with whom intimate relationships are to be established. Short of homicide, it is the 'ultimate violation of self.' ^{FN11} It is also a violent crime because it normally involves force, or the threat of force or intimidation, to overcome the will and the capacity of the victim to resist. Rape is very often accompanied*598 by physical injury to the female and can also inflict mental and psychological damage.^{FN12} Because it undermines the community's

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sense of security, there is public injury as well.

FN11. U.S.Dept. of Justice Law Enforcement Assistance Administration Report, Rape and Its Victims: A Report for Citizens, Health Facilities, and Criminal Justice Agencies 1 (1975), quoting Bard & Ellison, Crisis Intervention and Investigation of Forcible Rape, The Police Chief (May 1974), reproduced as Appendix I B to the Report.

FN12. See Note, The Victim In a Forcible Rape Case: A Feminist View, 11 Am.Crim.L.Rev. 335, 338 (1973); Comment, Rape and Rape Laws: Sexism in Society and Law, 61 Calif.L.Rev. 919, 922-923 (1973).

Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life. Although it may be accompanied by another crime, rape by definition does not include the death of or even the serious injury to another person.^{FN13} The murderer kills; the rapist, if no more than that, does not. Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair. We have the abiding conviction that the death penalty, which 'is unique in its severity and irrevocability,' Gregg v. Georgia, 428 U.S., at 187, 96 S.Ct., at 2931, is an excessive penalty for the rapist who, as such, does not take human life.

FN13. See n. 1, supra, for the Georgia definition of rape.

This does not end the matter; for under Georgia law, death may not be imposed for any capital offense, including rape, unless the jury or judge finds one of the statutory aggravating circumstances and then elects to impose that sentence. Ga.Code s 26-3102 (1976 Supp); Gregg v. Georgia, supra, 428

U.S., at 165-166, 96 S.Ct., at 2921-2922. For the rapist to be executed in Georgia, it must therefore be found not only that he committed rape but also that one or more of the following aggravating circumstances were present: (1) that the rape was committed by a person with a prior record of conviction for a capital felony; (2) that the rape was committed while the offender was engaged in the commission of another capital felony, or aggravated battery; or (3) the rape 'was outrageously or wantonly vile, horrible or *599 inhuman in that it involved torture, depravity of mind, or aggravated battery to the victim.'^{FN14} Here, the first two of these aggravating circumstances were alleged and found by the jury.

FN14. There are other aggravating circumstances provided in the statute, see n. 3, supra, but they are not applicable to rape.

Neither of these circumstances, nor both of them together, change our conclusion that the death sentence imposed on Coker is a disproportionate punishment for rape. Coker had prior convictions for capital felonies rape, murder, and kidnaping but these prior convictions do not change the fact that the instant crime being punished is a rape not involving the taking of life.

It is also true that the present rape occurred while Coker was committing armed robbery, a felony for which the Georgia statutes authorize the death penalty.^{FN15} But **2870 Coker was tried for the robbery offense as well as for rape and received a separate life sentence for this crime; the jury did not deem the robbery itself deserving of the death penalty, even though accompanied by the aggravating circumstance, which was stipulated, that Coker had been convicted of a prior capital crime.^{FN16}

FN15. In Gregg v. Georgia, the Georgia Supreme Court refused to sustain a death sentence for armed robbery because, for one reason, death had been so seldom imposed for this crime in other cases that such a sentence was excessive and could

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not be sustained under the statute. As it did in this case, however, the Georgia Supreme Court apparently continues to recognize armed robbery as a capital offense for the purpose of applying the aggravating-circumstances provisions of the Georgia Code.

FN16. Where the accompanying capital crime is murder, it is most likely that the defendant would be tried for murder, rather than rape; and it is perhaps academic to deal with the death sentence for rape in such a circumstance. It is likewise unnecessary to consider the rape-felony murder a rape accompanied by the death of the victim which was unlawfully but nonmaliciously caused by the defendant.

Where the third aggravating circumstance mentioned in the text is present that the rape is particularly vile or involves torture or aggravated battery it would seem that the defendant could very likely be convicted, tried, and appropriately punished for this additional conduct.

*600 We note finally that in Georgia a person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. He also commits that crime when in the commission of a felony he causes the death of another human being, irrespective of malice. But even where the killing is deliberate, it is not punishable by death absent proof of aggravating circumstances. It is difficult to accept the notion, and we do not, that the rapist, with or without aggravating circumstances, should be punished more heavily than the deliberate killer as long as the rapist does not himself take the life of his victim. The judgment of the Georgia Supreme Court upholding the death sentence is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

So ordered.

Mr. Justice BRENNAN, concurring in the judgment.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg v. Georgia*, 428 U.S. 153, 227, 96 S.Ct. 2909, 2971, 49 L.Ed.2d 859 (1976) (dissenting opinion), I concur in the judgment of the Court setting aside the death sentence imposed under the Georgia rape statute.

Mr. Justice MARSHALL, concurring in the judgment.

In *Gregg v. Georgia*, 428 U.S. 153, 231, 96 S.Ct. 2909, 2973, 49 L.Ed.2d 859 (1976) (dissenting opinion), I stated: 'In *Furman v. Georgia*, 408 U.S. 238, 314, 92 S.Ct. 2726, 2764, 33 L.Ed.2d 346 (1972) (concurring opinion), I set forth at some length my views on the basic issue presented to the Court in these cases. The death penalty, I concluded, is a cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. That continues to be my view.'

*601 I then explained in some detail my reasons for reaffirming my position. I continue to adhere to those views in concurring in the judgment of the Court in this case.

Mr. Justice POWELL, concurring in the judgment in part and dissenting in part.

I concur in the judgment of the Court on the facts of this case, and also in the plurality's reasoning supporting the view that ordinarily death is disproportionate punishment for the crime of raping an adult woman. Although rape invariably is a reprehensible crime, there is no indication that petitioner's offense was committed with excessive brutality or that the victim sustained serious or lasting injury. The plurality, however, does not limit its holding to the case before us or to similar cases. Rather, in an opinion that ranges well beyond what is necessary, it holds that capital punishment always regardless of the circumstances is a disproportionate penalty for the crime of rape.

The Georgia statute, sustained in *Gregg v. Georgia*,

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428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), specifies aggravating ****2871** circumstances that may be considered by the jury when appropriate. With respect to the crime of rape, only three such circumstances are specified: (i) the offense was committed by a person with a prior record of conviction for a capital felony; (ii) the offense was committed while the offender was engaged in another capital felony or in aggravated battery; and (iii) the offense was 'outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.' Ante, at 2864, n. 3. Only the third circumstance describes in general the offense of aggravated rape, often identified as a separate and more heinous offense than rape. See, e. g., ALI, Model Penal Code s 207.4, Comment, p. 246 (Tent.Draft No. 4, 1955); ALI, Model Penal Code s 213.1 (Prop. Off. Draft, 1962); Nev.Rev.Stat. s 200.363 (1975). That third circumstance was not submitted*602 to the jury in this case, as the evidence would not have supported such a finding. It is therefore quite unnecessary for the plurality to write in terms so sweeping as to foreclose each of the 50 state legislatures from creating a narrowly defined substantive crime of aggravated rape punishable by death.^{FN1}

FN1. It is not this Court's function to formulate the relevant criteria that might distinguish aggravated rape from the more usual case, but perhaps a workable test would embrace the factors identified by Georgia: the cruelty or viciousness of the offender, the circumstances and manner in which the offense was committed, and the consequences suffered by the victim. See also *Ralph v. Warden*, 438 F.2d 786 (CA4 1970), cert. denied, 408 U.S. 942, 92 S.Ct. 2846, 33 L.Ed.2d 766 (1972); 438 F.2d, at 794 (opinion of Haynsworth, C. J.). The legislative task of defining, with appropriate specificity, the elements of the offense of aggravated rape would not be easy, see *Furman v. Georgia*, 408 U.S. 238, 460, 92

S.Ct. 2726, 2839, 33 L.Ed.2d 346 (1972) (Powell, J., dissenting), but certainly this Court should not assume that the task is impossible.

The dissent of THE CHIEF JUSTICE, relying on selected excerpts from my opinion in *Furman*, seeks to buttress the view that for sentencing purposes meaningful distinctions cannot be drawn between rapes regardless of the circumstances and effect upon the victim. Post, at 2873, n. 2. The dissent emphasizes the difficulties of proof. But the jury system is designed and operates successfully to resolve precisely this type of factual issue. The law of negligence, for example, is replete with issues requiring the jury to determine degrees of culpability and the extent or permanency of physical and psychological injury.

I am complimented by the frequency with which THE CHIEF JUSTICE, in his dissent, cites and quotes from my opinion in *Furman*. That opinion, however, did not prevail, and as with most of the writing in *Furman* it now must be read in light of *Gregg and Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976), which have established the controlling general principles. But contrary to implications in THE CHIEF JUSTICE's dissent, my opinion in *Furman* did emphasize that the proportionality test as to rape should be applied on a case-by-case basis, noting that in some cases the death sentence would be 'grossly excessive.' 408 U.S., at 461, 92 S.Ct., at 2839. I remain in disagreement with the simplistic all-or-nothing views of the plurality opinion and the dissenting opinion of THE CHIEF JUSTICE.

In accord with our decisions last Term, the plurality opinion states:

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'(T)he death penalty is not invariably cruel and unusual punishment within the meaning of the Eighth Amendments *603 it is not inherently barbaric or an unacceptable mode of punishment for crime; neither is it always disproportionate to the crime for which it is imposed.' Ante, at 2865.

Thus capital punishment may be imposed on those sentenced in accordance with the procedures identified in *Gregg and Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976), at least when the offender is convicted of murder, the crime involved in all five of last Term's capital cases.

Today, in a case that does not require such an expansive pronouncement, the plurality draws a bright line between murder and all rapes regardless of the degree of brutality of the rape or the effect upon the victim. I dissent because I am not persuaded that such a bright line is appropriate. As noted in *Snider v. Peyton*, 356 F.2d 626, 627 (CA4 1966), '(t)here is extreme variation in the degree of culpability of **2872 rapists.' The deliberate viciousness of the rapist may be greater than that of the murderer. Rape is never an act committed accidentally. Rarely can it be said to be unpremeditated. There also is wide variation in the effect on the victim. The plurality opinion says that '(l)ife is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair.' Ante, at 2869. But there is indeed 'extreme variation' in the crime of rape. Some victims are so grievously injured physically or psychologically that life is beyond repair.

Thus, it may be that the death penalty is not disproportionate punishment for the crime of aggravated rape. Final resolution of the question must await careful inquiry into objective indicators of society's 'evolving standards of decency,' particularly legislative enactments and the responses of juries in capital cases.^{FN2} See *Gregg v. Georgia*, supra, 428 U.S., at 173-182, 96 S.Ct., at 2925-2929 *604 joint opinion of Stewart, Powell, and Stevens, JJ.); *Woodson v. North Carolina*, supra, 428 U.S., at

294-295, 96 S.Ct., at 2987 (plurality opinion); *Furman v. Georgia*, 408 U.S. 238, 436-443, 92 S.Ct. 2726, 2827-2830, 33 L.Ed.2d 346 (1972) (Powell, J., dissenting). The plurality properly examines these indicia, which do support the conclusion that society finds the death penalty unacceptable for the crime of rape in the absence of excessive brutality or severe injury. But it has not been shown that society finds the penalty disproportionate for all rapes. In a proper case a more discriminating inquiry than the plurality undertakes well might discover that both juries and legislatures have reserved the ultimate penalty for the case of an outrageous rape resulting in serious, lasting harm to the victim. I would not prejudge the issue. To this extent, I respectfully dissent.

FN2. These objective indicators are highly relevant, but the ultimate decision as to the appropriateness of the death penalty under the Eighth Amendment as the plurality notes, ante, at 2868 must be decided on the basis of our own judgment in light of the precedents of this Court.

Mr. Chief Justice BURGER, with whom Mr. Justice REHNQUIST joins, dissenting.

In a case such as this, confusion often arises as to the Court's proper role in reaching a decision. Our task is not to give effect to our individual views on capital punishment; rather, we must determine what the Constitution permits a State to do under its reserved powers. In striking down the death penalty imposed upon the petitioner in this case, the Court has overstepped the bounds of proper constitutional adjudication by substituting its policy judgment for that of the state legislature. I accept that the Eighth Amendment's concept of disproportionality bars the death penalty for minor crimes. But rape is not a minor crime; hence the Cruel and Unusual Punishments Clause does not give the Members of this Court license to engraft their conceptions of proper public policy onto the considered legislative judgments of the States. Since I cannot agree that Georgia lacked the constitutional*605 power to impose

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the penalty of death for rape, I dissent from the Court's judgment.

(1)

On December 5, 1971, the petitioner, Ehrlich Anthony Coker, raped and then stabbed to death a young woman. Less than eight months later Coker kidnaped and raped a second young woman. After twice raping this 16-year-old victim, he stripped her, severely beat her with a club, and dragged her into a wooded area where he left her for dead. He was apprehended and pleaded guilty to offenses stemming from these incidents. He was sentenced by three separate courts to three life terms, two 20-year terms, and one 8-year term of imprisonment.^{FN1} Each judgment specified that the **2873 sentences it imposed were to run consecutively rather than concurrently. Approximately 1 1/2 years later, on September 2, 1974, petitioner escaped from the state prison where he was serving these sentences. He promptly raped another 16-year-old woman in the presence of her husband, abducted her from her home, and threatened her with death and serious bodily harm. It is this crime for which the sentence now under review was imposed.

FN1. On March 12, 1973, the Superior Court of Richmond County, Ga., sentenced Coker to 20 years' imprisonment for the kidnaping of petitioner's second victim, and to life imprisonment for one act of rape upon her. On May 28, 1973, the Superior Court of Taliaferro County, Ga., sentenced Coker to eight years' imprisonment for aggravated assault upon the same victim, and to life imprisonment for the second rape upon her. On April 6, 1973, the Superior Court of Clayton County, Ga., sentenced Coker to 20 years' imprisonment for the rape of petitioner's first victim, and to life imprisonment for her murder. App. 307-312.

The Court today holds that the State of Georgia

may not impose the death penalty on Coker. In so doing, it prevents the State from imposing any effective punishment upon Coker for his latest rape. The Court's holding, moreover, bars Georgia from guaranteeing its citizens that they *606 will suffer no further attacks by this habitual rapist. In fact, given the lengthy sentences Coker must serve for the crimes he has already committed, the Court's holding assures that petitioner as well as others in his position will henceforth feel no compunction whatsoever about committing further rapes as frequently as he may be able to escape from confinement and indeed even within the walls of the prison itself. To what extent we have left States 'elbowroom' to protect innocent persons from depraved human beings like Coker remains in doubt.

(2)

My first disagreement with the Court's holding is its unnecessary breadth. The narrow issue here presented is whether the State of Georgia may constitutionally execute this petitioner for the particular rape which he has committed, in light of all the facts and circumstances shown by this record. The plurality opinion goes to great lengths to consider societal mores and attitudes toward the generic crime of rape and the punishment for it; however, the opinion gives little attention to the special circumstances which bear directly on whether imposition of the death penalty is an appropriate societal response to Coker's criminal acts: (a) On account of his prior offenses, Coker is already serving such lengthy prison sentences that imposition of additional periods of imprisonment would have no incremental punitive effect; (b) by his life pattern Coker has shown that he presents a particular danger to the safety, welfare, and chastity of women, and on his record the likelihood is therefore great that he will repeat his crime at the first opportunity; (c) petitioner escaped from prison, only a year and a half after he commenced serving his latest sentences; he has nothing to lose by further escape attempts; and (d) should he again succeed in escaping from prison, it is reasonably predictable

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that he will repeat his pattern of attacks on *607 women and with impunity since the threat of added prison sentences will be no deterrent.

Unlike the plurality, I would narrow the inquiry in this case to the question actually presented: Does the Eighth Amendment's ban against cruel and unusual punishment prohibit the State of Georgia from executing a person who has, within the space of three years, raped three separate women, killing one and attempting to kill another, who is serving prison terms exceeding his probable lifetime and who has not hesitated to escape confinement at the first available opportunity? Whatever one's view may be as to the State's constitutional power to impose the death penalty upon a rapist who stands before a court convicted for the first time, this case reveals a chronic rapist whose continuing danger to the community is abundantly clear.

Mr. Justice POWELL would hold the death sentence inappropriate in this case because 'there is no indication that petitioner's offense was committed with excessive brutality or that the victim sustained **2874 serious or lasting injury.' Ante, at 2870.^{FN2} Apart from the reality that rape is inherently one *608 of the most egregiously brutal acts one human being can inflict upon another, there is nothing in the Eighth Amendment that so narrowly limits the factors which may be considered by a state legislature in determining whether a particular punishment is grossly excessive. Surely recidivism, especially the repeated commission of heinous crimes, is a factor which may properly be weighed as an aggravating circumstance, permitting the imposition of a punishment more severe than for one isolated offense. For example, as a matter of national policy, Congress has expressed its will that a person who has committed two felonies will suffer enhanced punishment for a third one, 18 U.S.C. s 3575(e)(1); Congress has also declared that a second conviction for assault on a mail carrier may be punished more seriously than a first such conviction, 18 U.S.C. s 2114. Many States *609 provide an increased penalty for habitual criminality. See, e.

g., Wis.Stat.Ann. s 939.62 (1958); see also Annot., 58 A.L.R. 20 (1929); 82 A.L.R. 345 (1933); 79 A.L.R.2d 826 (1961).^{FN3} As a factual matter, the **2875 plurality opinion is correct in stating that Coker's 'prior convictions do not change the fact that the instant crime being punished is a rape not involving the taking of life,' ante, at 2869; however, it cannot be disputed that the existence of these prior convictions makes Coker a substantially more serious menace to society than a first-time offender:

^{FN4}

FN2. The position today adopted by Mr. Justice POWELL constitutes a disquieting shift from the view he embraced several Terms ago in *Furman v. Georgia*, 408 U.S. 238, 460-461, 92 S.Ct. 2726, 2839, 33 L.Ed.2d 346 (1972) (dissenting opinion), where he stated:

'While I reject each of (petitioners') attempts to establish specific categories of cases in which the death penalty may be deemed excessive, I view them as groping toward what is for me the appropriate application of the Eighth Amendment. While in my view the disproportionality test may not be used either to strike down the death penalty for rape altogether or to install the Court as a tribunal for sentencing review, that test may find its application in the peculiar circumstances of specific cases. Its utilization should be limited to the rare case in which the death penalty is rendered for a crime technically falling within the legislatively defined class but factually falling outside the likely legislative intent in creating the category.' (Emphasis added.)

While Mr. Justice POWELL purports to dissent from the broadest sweep of the Court's holding, I cannot see that his view differs materially from that of the plurality. He suggests two situations where it might be proper to execute rapists: (1) where the

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'offense (is) committed with excessive brutality'; and (2) where 'the victim sustained serious or lasting injury.' The second part of this test was rejected by Mr. Justice POWELL himself in *Furman*, and with good reason: '(T)he emotional impact (upon the rape victim) may be impossible to gauge at any particular point in time. The extent and duration of psychological trauma may not be known or ascertainable prior to the date of trial.' *Id.*, at 460, 92 S.Ct., at 2839. Can any Member of the Court state with confidence that a 16-year-old woman who is raped in the presence of her husband three weeks after giving birth to a baby 'sustained (no) serious or lasting injury'? This bifurcation of rape into categories of harmful and non-harmful eludes my comprehension.

The difficulty with the first part of Mr. Justice POWELL's test is that rape is inherently an aggravated offense; in Mr. Justice POWELL's own words, 'the threat of both (physical and psychological) injury is always present.' *Id.*, at 459, 92 S.Ct., at 2838. Therefore the 'excessive brutality' requirement must refer to something more, I assume, than the force normally associated with physically coercing or overpowering the will of another. Rather, what must be meant is that the rapist has engaged, in torture or has committed an aggravated battery upon the victim. See, ante, at 2870-2871, and n. 1. However, torture and aggravated battery are offenses separate from rape, and ordinarily are punished separately. The clear negative inference of Mr. Justice POWELL's analysis therefore appears to be that where rape alone is committed, i. e., rape unaccompanied by any other criminal conduct, the death penalty may never be imposed.

FN3. This Court has consistently upheld

the constitutional validity of such punishment-enhancing statutes. See, e. g., *Spencer v. Texas*, 385 U.S. 554, 559-560, 87 S.Ct. 648, 651, 17 L.Ed.2d 606 (1967):

'No claim is made here that recidivist statutes are . . . unconstitutional, nor could there be under our cases. Such statutes and other enhanced-sentence laws, and procedures designed to implement their underlying policies, have been enacted in all the States, and by the Federal Government as well. . . . Such statutes . . . have been sustained in this Court on several occasions against contentions that they violate constitutional strictures dealing with double jeopardy, ex post facto laws, cruel and unusual punishment, due process, equal protection, and privileges and immunities.' (Footnote and citations omitted; emphasis added.)

Accord, *Oyler v. Boles*, 368 U.S. 448, 451, 82 S.Ct. 501, 503, 7 L.Ed.2d 446 (1962).

FN4. This special danger is demonstrated by the very record in this case. After tying and gagging the victim's husband, and raping the victim, petitioner sought to make his getaway in their automobile. Leaving the victim's husband tied and gagged in his bathroom, Coker took the victim with him. As he started to leave, he brandished the kitchen knife he was carrying and warned the husband that 'if he would get pulled over or the police was following him in any way that he would kill he would kill my wife. He said he didn't have nothing to lose that he was in prison for the rest of his life, anyway' Testimony of the victim's husband, App. 121 (emphasis added).

'There is a widely held view that those who present the strongest case for severe measures of incapacitation are not murderers as a group (their offenses often are situational) but rather those who have re-

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peatedly engaged in violent, combative behavior. A well-demonstrated *610 propensity for life-endangering behavior is thought to provide a more solid basis for infliction of the most severe measures of incapacitation than does the fortuity of a single homicidal incident.'Packer, *Making the Punishment Fit the Crime*, 77 Harv.L.Rev. 1071, 1080 (1964). (Emphasis added.)

In my view, the Eighth Amendment does not prevent the State from taking an individual's 'well-demonstrated propensity for life-endangering behavior' into account in devising punitive measures which will prevent inflicting further harm upon innocent victims. See *Gregg v. Georgia*, 428 U.S. 153, 183 n. 28, 96 S.Ct. 2909, 2930, 49 L.Ed.2d 859 (1976). Only one year ago Mr. Justice White succinctly noted: '(D)eath finally forecloses the possibility that a prisoner will commit further crimes, whereas life imprisonment does not.' *Roberts v. Louisiana*, 428 U.S. 325, 354, 96 S.Ct. 3001, 3016, 49 L.Ed.2d 974 (1976) (dissenting opinion); see also *Furman v. Georgia*, 408 U.S., at 311, 92 S.Ct., at 2763 (White, J., concurring).

In sum, once the Court has held that 'the punishment of death does not invariably violate the Constitution,' *Gregg v. Georgia*, supra, 428 U.S., at 169, 96 S.Ct., at 2923, it seriously impinges upon the State's legislative judgment to hold that it may not impose such sentence upon an individual who has shown total and repeated disregard for the welfare, safety, personal integrity, and human worth of others, and who seemingly cannot be deterred from continuing such conduct.^{FN5} I therefore would *611 hold that the death sentence here imposed is within the power reserved to the State and leave for another day the question of whether such sanction would be proper under other circumstances. The dangers which inhere whenever the Court casts its constitutional decisions in terms sweeping beyond the facts of the case presented, are magnified in the context of the Eighth Amendment. In *Furman v. Georgia*, supra, at 431, 92 S.Ct., at 2824, Mr. Justice POWELL, in dissent stated:

FN5. Professor Packer addressed this:

'What are we to do with those whom we cannot reform, and, in particular, those who by our failure are thought to remain menaces to life? Current penal theories admit, indeed insist upon, the need for permanent incapacitation in such cases. Once this need is recognized, the death penalty as a means of incapacitation for the violent psychopath can hardly be objected to on grounds that will survive rational scrutiny, if the use of the death penalty in any situation is to be permitted. And its use in rape cases as a class, while inept, is no more so than its use for any other specific offense involving danger to life and limb.'*Making the Punishment Fit the Crime*, 77 Harv.L.Rev. 1071, 1081 (1964). (Emphasis added.)

'(W)here, as here, the language of the applicable (constitutional) provision provides**2876 great leeway and where the underlying social policies are felt to be of vital importance, the temptation to read personal preference into the Constitution is understandably great. It is too easy to propound our subjective standards of wise policy under the rubric of more or less universally held standards of decency.'(Emphasis added.)

Since the Court now invalidates the death penalty as a sanction for all rapes of adults at all times under all circumstances,^{FN6} I reluctantly turn to what I see as the broader issues raised by this holding.

FN6. I find a disturbing confusion as to this issue in the plurality opinion. The issue is whether Georgia can, under any circumstances and for any kind of rape 'mild' or 'gross' impose the death penalty. Yet the plurality opinion opens its discussion, apparently directed at demonstrating that this was not an 'aggravated' rape, saying that following the rape and kidnapping, 'Mrs. Carver was unharmed.' Ante, at 2863. If the Court is holding that no rape can ever

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be punished by death, why is it relevant whether Mrs. Carver was 'unharmd'?

(3)

The plurality, ante, at 2868-2869, acknowledges the gross nature of the crime of rape. A rapist not only violates a victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. The longrange effect upon the victim's life and health is likely *612 to be irreparable; it is impossible to measure the harm which results. Volumes have been written by victims, physicians, and psychiatric specialists on the lasting injury suffered by rape victims. Rape is not a mere physical attack it is destructive of the human personality. The remainder of the victim's life may be gravely affected, and this in turn may have a serious detrimental effect upon her husband and any children she may have. I therefore wholly agree with Mr. Justice WHITE's conclusion as far as it goes that '(s)hort of homicide, (rape) is the 'ultimate violation of self.' Ante, at 2868. Victims may recover from the physical damage of knife or bullet wounds, or a beating with fists or a club, but recovery from such a gross assault on the human personality is not healed by medicine or surgery. To speak blandly, as the plurality does, of rape victims who are 'unharmd,' or to classify the human outrage of rape, as does Mr. Justice POWELL, in terms of 'excessively brutal,' ante, at 2870, versus 'moderately brutal,' takes too little account of the profound suffering the crime imposes upon the victims and their loved ones.

Despite its strong condemnation of rape, the Court reaches the inexplicable conclusion that 'the death penalty . . . is an excessive penalty' for the perpetrator of this heinous offense.^{FN7} This, the Court holds, is true even though in Georgia the death penalty may be imposed only where the rape is coupled with one or more aggravating circumstances. The process by which this conclusion is reached is startling as it is disquieting. It represents a clear departure from precedent by making this Court 'under

the aegis of the Cruel and Unusual Punishments Clause, the ultimate arbiter of the standards of criminal responsibility in diverse areas of the *613 criminal law, throughout the country.' *Powell v. Texas*, 392 U.S. 514, 533, 88 S.Ct. 2145, 2154, 20 L.Ed.2d 1254 (1968) (opinion of Marshall, J.).^{FN8} This seriously strains and distorts our **2877 federal system, removing much of the flexibility from which it has drawn strength for two centuries.

FN7. While only three Justices have joined Mr. Justice WHITE in this portion of his opinion, see separate opinion of Mr. Justice POWELL, ante, p. 2870, I take this to be the view of the Court in light of Mr. Justice BRENNAN's and Mr. Justice MARSHALL's statements joining the judgment.

FN8. Only last Term in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), Mr. Justice Stewart, Mr. Justice Powell, and Mr. Justice Stevens warned that 'the requirements of the Eighth Amendment must be applied with an awareness of the limited role to be played by the courts,' and noted that 'we may not act as judges as we might as legislators,' *Id.*, at 174-175, 96 S.Ct., at 295. Accord, *Roberts v. Louisiana*, 428 U.S. 325, 355-356, 96 S.Ct. 3001, 3017, 49 L.Ed.2d 974 (1976). (White, J., dissenting). Mr. Justice STEWART, Mr. Justice POWELL, and Mr. Justice STEVENS further noted that '(t)he deference we owe to decisions of the state legislatures under our federal system, (*Furman v. Georgia*, 408 U.S.), at 465-470, 92 S.Ct., at 2842-2844 (Rehnquist, J., dissenting), is enhanced where the specification of punishments is concerned, for 'these are peculiarly questions of legislative policy.' *Gore v. United States*, 357 U.S. 386, 393, 78 S.Ct. 1280, 1285, 2 L.Ed.2d 1405 (1958).' 428 U.S., at 176, 96 S.Ct., at 2926 (Emphasis added.)

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The analysis of the plurality opinion is divided into two parts: (a) an 'objective' determination that most American jurisdictions do not presently make rape a capital offense, and (b) a subjective judgment that death is an excessive punishment for rape because the crime does not, in and of itself, cause the death of the victim. I take issue with each of these points.

(a)

The plurality opinion bases its analysis, in part, on the fact that 'Georgia is the sole jurisdiction in the United States at the present time that authorizes a sentence of death when the rape victim is an adult woman.' Ante, at 2867. Surely, however, this statistic cannot be deemed determinative, or even particularly relevant. As the opinion concedes, ante, at 2867, two other States Louisiana and North Carolina have enacted death penalty statutes for adult rape since this Court's 1972 decision in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346. If the Court is to rely on some 'public opinion' process, does this not suggest the beginning of a 'trend'?

*614 More to the point, however, it is myopic to base sweeping constitutional principles upon the narrow experience of the past five years. Considerable uncertainty was introduced into this area of the law by this Court's *Furman* decision. A large number of States found their death penalty statutes invalidated; legislatures were left in serious doubt by the expressions vacillating between discretionary and mandatory death penalties, as to whether this Court would sustain any statute imposing death as a criminal sanction.^{FN9} Failure of more States to enact statutes imposing death for rape of an adult woman may thus reflect hasty legislative compromise occasioned by time pressures following *Furman*, a desire to wait on the experience of those States which did enact such statutes, or simply an accurate forecast of today's holding.

FN9. I take no satisfaction in my predict-

ive caveat in *Furman*:

'Since there is no majority of the Court on the ultimate issue presented in these cases, the future of capital punishment in this country has been left in an uncertain limbo. Rather than providing a final and unambiguous answer on the basic constitutional question, the collective impact of the majority's ruling is to demand an undetermined measure of change from the various state legislatures and the Congress.' 408 U.S., at 403, 92 S.Ct., at 2811 (dissenting opinion).

In any case, when considered in light of the experience since the turn of this century, where more than one-third of American jurisdictions have consistently provided the death penalty for rape, the plurality's focus on the experience of the immediate past must be viewed as truly disingenuous. Having in mind the swift changes in positions of some Members of this Court in the short span of five years, can it rationally be considered a relevant indicator of what our society deems 'cruel and unusual' to look solely to what legislatures have refrained from doing under conditions of great uncertainty arising from our less than lucid holdings on the Eighth Amendment? Far more representative of societal mores of the 20th century is the accepted *615 practice in a substantial number of jurisdictions preceding the *Furman* decision. '(The) problem . . . is the suddenness of the Court's perception of progress in the human attitude since **2878 decisions of only a short while ago.' *Furman v. Georgia*, supra, at 410, 92 S.Ct., at 2814 (Blackmun, J., dissenting). Cf. *Rudolph v. Alabama*, 375 U.S. 889, 84 S.Ct. 155, 11 L.Ed.2d 119 (1963).

However, even were one to give the most charitable acceptance to the plurality's statistical analysis, it still does not, to my mind, support its conclusion. The most that can be claimed is that for the past year Georgia has been the only State whose adult rape death penalty statute has not otherwise been invalidated; two other state legislatures had enacted

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rape death penalty statutes in the last five years, but these were invalidated for reasons unrelated to rape under the Court's decisions last Term. *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976). Even if these figures could be read as indicating that no other States view the death penalty as an appropriate punishment for the rape of an adult woman, it would not necessarily follow that Georgia's imposition of such sanction violates the Eighth Amendment.

The Court has repeatedly pointed to the reserve strength of our federal system which allows state legislatures, within broad limits, to experiment with laws, both criminal and civil, in the effort to achieve socially desirable results. See, e. g., *Whalen v. Roe*, 429 U.S. 589, 597-598, and n. 22, 97 S.Ct. 869, 875-876, 51 L.Ed.2d 64 (1977); *Johnson v. Louisiana*, 406 U.S. 356, 376, 92 S.Ct. 1620, 1641, 32 L.Ed.2d 152 (1972) (opinion of Powell, J.); *California v. Green*, 399 U.S. 149, 184-185, 90 S.Ct. 1930, 1948-1949, 26 L.Ed.2d 489 (1970) (Harlan, J., concurring); *Fay v. New York*, 332 U.S. 261, 296, 67 S.Ct. 1613, 1631, 91 L.Ed. 2043 (1947). Various provisions of the Constitution, including the Eighth Amendment and the Due Process Clause, of course place substantive limitations on the type of experimentation a State may undertake. However, as the plurality admits, the crime of rape is second perhaps only to murder in its gravity. It follows then that Georgia did not approach *616 such substantive constraints by enacting the statute here in question. See also *infra* at 2879-2881.

Statutory provisions in criminal justice applied in one part of the country can be carefully watched by other state legislatures, so that the experience of one State becomes available to all. Although human lives are in the balance, it must be remembered that failure to allow flexibility may also jeopardize human lives those of the victims of undeterred criminal conduct. See, *infra*, at 2880. Our concern for the accused ought not foreclose legislative judgments

showing a modicum of consideration for the potential victims.

Three state legislatures have, in the past five years, determined that the taking of human life and the devastating consequences of rape will be minimized if rapists may, in a limited class of cases, be executed for their offenses.^{FN10} That these States are presently a minority does not, in my view, make their judgment less worthy of deference. Our concern for human life must not be confined to the guilty; a state legislature is not to be thought insensitive to human values because it acts firmly to protect the lives and related values of the innocent. In this area the choices for legislatures are at best painful and difficult and deserve a high degree of deference. Only last Term Mr. Justice White observed:

FN10. The statute here in question does not provide the death penalty for any and all rapes. Rather, the jury must find that at least one statutorily defined aggravated circumstance is present. Ga.Code ss 26-3102, 27-2534.1(b)(1), (2), and (7) (Supp.1976).

'It will not do to denigrate these legislative judgments as some form of vestigial savagery or as purely retributive in motivation; for they are solemn judgments, reasonably based, that imposition of the death penalty will save the lives of innocent persons. This concern for life and human values and the sincere efforts of the States to pursue them are matters of the greatest moment with which the judiciary should be most reluctant*617 to interfere.'***2879 *Roberts v. Louisiana*, *supra*, 428 U.S., at 355, 96 S.Ct., at 3017 (dissenting opinion). (Emphasis added.)

The question of whether the death penalty is an appropriate punishment for rape is surely an open one. It is arguable that many prospective rapists would be deterred by the possibility that they could suffer death for their offense; it is also arguable that the death penalty would have only minimal deterrent effect.^{FN11} It may well be that rape victims would

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become more willing to report the crime and aid in the apprehension of the criminals if they knew that community disapproval of rapists was sufficiently strong to inflict the extreme penalty; or perhaps they would be reluctant to cooperate in the prosecution of rapists if they knew that a conviction might result in the imposition of the death penalty. Quite possibly, the occasional, well-publicized execution of egregious rapists may cause citizens to feel greater security in their daily lives;^{FN12} or, on the contrary, it may be that members of a civilized community will suffer the pangs of a heavy conscience because such punishment will be perceived as excessive.^{FN13} We cannot know which among *618 this range of possibilities is correct, but today's holding forecloses the very exploration we have said federalism was intended to foster. It is difficult to believe that Georgia would long remain alone in punishing rape by death if the next decade demonstrated a drastic reduction in its incidence of rape, an increased cooperation by rape victims in the apprehension and prosecution of rapists, and a greater confidence in the rule of law on the part of the populace.

FN11. 'The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts. *Furman v. Georgia*, (408 U.S.,) at 403-405, 92 S.Ct., at 2810-2812 (Burger, C. J., dissenting).' *Gregg v. Georgia*, 428 U.S., at 186, 96 S.Ct., at 2931 (joint opinion of Stewart, Powell, and Stevens, JJ.).

FN12. 'There are many cases in which the sordid, heinous nature of a particular (rape), demeaning, humiliating, and often physically or psychologically traumatic, will call for public condemnation.' *Furman v. Georgia*, 408 U.S., at 459, 92 S.Ct., at

2839 (Powell, J., dissenting).

FN13. Obviously I have no special competence to make these judgments, but by the same token no other Member of the Court is competent to make a contrary judgment. This is why our system has, until now, left these difficult policy choices to the state legislatures, which may be no wiser, but surely are more attuned to the mores of their communities, than are we.

In order for Georgia's legislative program to develop it must be given time to take effect so that data may be evaluated for comparison with the experience of States which have not enacted death penalty statutes. Today, the Court repudiates the State's solemn judgment on how best to deal with the crime of rape before anyone can know whether the death penalty is an effective deterrent for one of the most horrible of all crimes. And this is done a few short years after Mr. Justice Powell's excellent statement:

'In a period in our country's history when the frequency of (rape) is increasing alarmingly, it is indeed a grave event for the Court to take from the States whatever deterrent and retributive weight the death penalty retains.' *Furman v. Georgia*, 408 U.S., at 459, 92 S.Ct., at 2839 (dissenting opinion) (footnote omitted).

To deprive States of this authority as the Court does, on the basis that '(t)he current judgment with respect to the death penalty for rape . . . weighs very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman,' ante, at 2867, is impermissibly rash. The current judgment of some Members of this Court has undergone significant change in the short time since *Furman*.^{FN14} Social **2880 change on great issues generally reveals itself in small increments, and the 'current judgment' of many States could *619 well be altered on the basis of Georgia's experience, were we to allow its statute to stand.^{FN15}

FN14. Indeed as recently as 1971 a year

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before Furman a majority of this Court appeared to have no doubt about the constitutionality of the death penalty. See *McGautha v. California*, 402 U.S. 183, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1971).

FN15. To paraphrase Mr. Justice Powell, '(w)hat (the Court is) saying, in effect, is that the evolutionary process has come suddenly to an end; that the ultimate wisdom as to the appropriateness of capital punishment (for adult rape) under all circumstances, and for all future generations, has somehow been revealed.' *Furman v. Georgia*, supra, at 430-431, 92 S.Ct., at 2824 (dissenting opinion).

(b)

The subjective judgment that the death penalty is simply disproportionate to the crime of rape is even more disturbing than the 'objective' analysis discussed supra. The plurality's conclusion on this point is based upon the bare fact that murder necessarily results in the physical death of the victim, while rape does not. Ante, at 2869, 2870. However, no Member of the Court explains why this distinction has relevance, much less constitutional significance. It is, after all, not irrational nor constitutionally impermissible for a legislature to make the penalty more severe than the criminal act it punishes^{FN16} in the hope it would deter wrongdoing:

FN16. For example, hardly any thief would be deterred from stealing if the only punishment upon being caught were return of the money stolen.

'We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved.' *Gregg v. Georgia*, 428 U.S., at 175, 96 S.Ct., at 2926.

Accord, *Furman v. Georgia*, supra, 408 U.S., at 451, 92 S.Ct., at 2834 (Powell, J., dissenting).

It begs the question to state, as does the plurality opinion:

'Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair.' Ante, at 2869.

*620 Until now, the issue under the Eighth Amendment has not been the state of any particular victim after the crime, but rather whether the punishment imposed is grossly disproportionate to the evil committed by the perpetrator. See *Gregg v. Georgia*, supra, at 173, 96 S.Ct., at 2925; *Furman v. Georgia*, supra, at 458, 92 S.Ct., at 2838 (Powell, J., dissenting). As a matter of constitutional principle, that test cannot have the primitive simplicity of 'life for life, eye for eye, tooth for tooth.' Rather States must be permitted to engage in a more sophisticated weighing of values in dealing with criminal activity which consistently poses serious danger of death or grave bodily harm. If innocent life and limb are to be preserved I see no constitutional barrier in punishing by death all who engage in such activity, regardless of whether the risk comes to fruition in any particular instance. See Packer, 77 *Harv.L.Rev.*, at 1077-1079.

Only one year ago the Court held it constitutionally permissible to impose the death penalty for the crime of murder, provided that certain procedural safeguards are followed. Compare *Gregg v. Georgia*, supra; *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), and *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976), with *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976), and *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). Today, the plurality readily admits that '(s)hort of homicide, (rape) is the 'ultimate violation of self.' Ante, at 2868. Moreover, as stated by Mr. Justice Powell:

'The threat of serious injury is implicit in the definition of rape; the victim is either forced into submission by physical violence or by the threat of viol-

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ence.' *Furman v. Georgia*, supra, 408 U.S., at 460, 92 S.Ct., at 2839 (dissenting opinion).

****2881** Rape thus is not a crime 'light years' removed from murder in the degree of its heinousness; it certainly poses a serious potential danger to the life and safety of innocent victims apart from the devastating psychic consequences. It would ***621** seem to follow therefore that, affording the States proper leeway under the broad standard of the Eighth Amendment, ^{FN17} murder is properly punishable by death, rape should be also, if that is the considered judgment of the legislators.

FN17. Mr. Justice Stewart, Mr. Justice Powell, and Mr. Justice Stevens in *Gregg v. Georgia* noted: '(I)n assessing a punishment selected by a democratically elected legislature against the constitutional measure (of the Eighth Amendment), we presume its validity. . . . (A) heavy burden rests on those who would attack the judgment of the representatives of the people.' 428 U.S., at 175, 96 S.Ct., at 2926 (emphasis added). Accord, *Furman v. Georgia*, supra, 408 U.S., at 451, 92 S.Ct., at 2834 (Powell, J., dissenting).

The reason for this special deference to state legislative enactments was described:

'This is true in part because the constitutional test is intertwined with an assessment of contemporary standards and the legislative judgment weighs heavily in ascertaining such standards. '(I)n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.' *Furman v. Georgia*, (408 U.S.,) at 383, 92 S.Ct., at 2800 (Burger, C. J., dissenting).' 428 U.S., at 175-176, 96 S.Ct., at 2926.

The Court's conclusion to the contrary is very disturbing indeed. The clear implication of today's holding appears to be that the death penalty may be

properly imposed only as to crimes resulting in death of the victim. This casts serious doubt upon the constitutional validity of statutes imposing the death penalty for a variety of conduct which, though dangerous, may not necessarily result in any immediate death, e. g., treason, airplane hijacking, and kidnaping. In that respect, today's holding does even more harm than is initially apparent. We cannot avoid taking judicial notice that crimes such as airplane hijacking, kidnaping, and mass terrorist activity constitute a serious and increasing danger to the safety of the public. It would be unfortunate indeed if the effect of today's holding were to inhibit States and the Federal Government from experimenting with various remedies including possibly imposition of the penalty of death to prevent and deter such crimes.

***622** Some sound observations, made only a few years ago, deserve repetition:

'Our task here, as must so frequently be emphasized and re-emphasized, is to pass upon the constitutionality of legislation that has been enacted and that is challenged. This is the sole task for judges. We should not allow our personal preferences as to the wisdom of legislative and congressional action, or our distaste for such action, to guide our judicial decision in cases such as these. The temptations to cross that policy line are very great. In fact, as today's decision reveals, they are almost irresistible.' *Furman v. Georgia*, 408 U.S., at 411, 92 S.Ct., at 2815 (Blackmun, J., dissenting).

Whatever our individual views as to the wisdom of capital punishment, I cannot agree that it is constitutionally impermissible for a state legislature to make the 'solemn judgment' to impose such penalty for the crime of rape. Accordingly, I would leave to the States the task of legislating in this area of the law.

U.S.Ga., 1977.
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Supreme Court of the United States
Daryl Renard ATKINS, Petitioner,
v.
VIRGINIA.
No. 00-8452.

Argued Feb. 20, 2002.
Decided June 20, 2002.

Defendant was convicted, in the Circuit Court, York County, N. Prentis Smiley, Jr., J., of capital murder and was sentenced to death. The Virginia Supreme Court affirmed the conviction, 257 Va. 160, 510 S.E.2d 445, and sentence, 260 Va. 375, 534 S.E.2d 312. Certiorari was granted. The Supreme Court, Justice Stevens, held that executions of mentally retarded criminals were "cruel and unusual punishments" prohibited by Eighth Amendment, abrogating Penry v. Lynaugh, 109 S.Ct. 2934.

Reversed and remanded.

Chief Justice Rehnquist dissented and filed opinion in which Justices Scalia and Thomas joined.

Justice Scalia dissented and filed opinion in which Chief Justice Rehnquist and Justice Thomas joined.

West Headnotes

[1] Sentencing and Punishment 350H ⚡1482

350H Sentencing and Punishment

350HVII Cruel and Unusual Punishment in General

350HVII(E) Excessiveness and Proportionality of Sentence

350Hk1482 k. Proportionality. Most Cited Cases

Punishment is "excessive," and therefore prohibited by Eighth Amendment, if it is not graduated and proportioned to offense. U.S.C.A. Const.Amend. 8.

[2] Sentencing and Punishment 350H ⚡1435

350H Sentencing and Punishment

350HVII Cruel and Unusual Punishment in General

350HVII(A) In General

350Hk1434 Scope of Prohibition

350Hk1435 k. In General. Most Cited Cases

Claim that punishment is unconstitutionally excessive is judged by currently prevailing standards of decency. U.S.C.A. Const.Amend. 8.

[3] Sentencing and Punishment 350H ⚡1480

350H Sentencing and Punishment

350HVII Cruel and Unusual Punishment in General

350HVII(E) Excessiveness and Proportionality of Sentence

350Hk1480 k. In General. Most Cited Cases
(Formerly 110k1480)

Sentencing and Punishment 350H ⚡1483

350H Sentencing and Punishment

350HVII Cruel and Unusual Punishment in General

350HVII(E) Excessiveness and Proportionality of Sentence

350Hk1483 k. Punishment Authorized by Statute. Most Cited Cases
(Formerly 110k1483)

Determination of whether punishment in particular case is unconstitutionally excessive in light of evolving community standards should be informed by objective factors to maximum possible extent, with clearest and most reliable one being legislation enacted by country's legislatures. U.S.C.A. Const.Amend. 8.

[4] Criminal Law 110 ⚡1134.75

110 Criminal Law

110XXIV Review

110XXIV(L) Scope of Review in General

110XXIV(L)8 Sentencing

110k1134.75 k. In General. Most Cited Cases
(Formerly 110k1134(3))

Sentencing and Punishment 350H ⚡1480

350H Sentencing and Punishment

350HVII Cruel and Unusual Punishment in General

350HVII(E) Excessiveness and Proportionality of

Sentence

350Hk1480 k. In General. Most Cited Cases

In deciding whether punishment in particular case is unconstitutionally excessive, Supreme Court may bring its own judgment to bear by asking whether there is reason to agree or disagree with judgment reached by citizenry and its legislators. U.S.C.A. Const.Amend. 8.

[5] Sentencing and Punishment 350H 1642

350H Sentencing and Punishment

350HVIII The Death Penalty

350HVIII(B) Persons Eligible

350Hk1642 k. Mentally Retarded Persons. Most Cited Cases

Execution of mentally retarded criminal is unconstitutionally "cruel and unusual punishment," abrogating Penry v. Lynaugh, 109 S.Ct. 2934.

**2242 *304 Syllabus ^{FN*}

^{FN*} The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Petitioner Atkins was convicted of capital murder and related crimes by a Virginia jury and sentenced to death. Affirming, the Virginia Supreme Court relied on Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256, in rejecting Atkins' contention that he could not be sentenced to death because he is mentally retarded.

****2243 Held:** Executions of mentally retarded criminals are "cruel and unusual punishments" prohibited by the Eighth Amendment. Pp. 2246-2252.

(a) A punishment is "excessive," and therefore prohibited by the Amendment, if it is not graduated and proportioned to the offense. *E.g.*, Weems v. United States, 217 U.S. 349, 367, 30 S.Ct. 544, 54 L.Ed. 793. An excessiveness claim is judged by currently prevailing standards of decency. Trop v. Dulles, 356 U.S. 86, 100-101, 78 S.Ct. 590, 2 L.Ed.2d 630. Proportionality review under such evolving standards should be informed by objective factors to the maximum possible extent, see, *e.g.*, Harmelin v. Michigan, 501 U.S. 957, 1000, 111 S.Ct. 2680, 115 L.Ed.2d 836, the clearest and most reliable of which is the

legislation enacted by the country's legislatures, Penry, 492 U.S., at 331, 109 S.Ct. 2934. In addition to objective evidence, the Constitution contemplates that this Court will bring its own judgment to bear by asking whether there is reason to agree or disagree with the judgment reached by the citizenry and its legislators, *e.g.*, Coker v. Georgia, 433 U.S. 584, 597, 97 S.Ct. 2861, 53 L.Ed.2d 982. Pp. 2246-2248.

(b) Much has changed since Penry's conclusion that the two state statutes then existing that prohibited such executions, even when added to the 14 States that had rejected capital punishment completely, did not provide sufficient evidence of a consensus. 492 U.S., at 334, 109 S.Ct. 2934. Subsequently, a significant number of States have concluded that death is not a suitable punishment for a mentally retarded criminal, and similar bills have passed at least one house in other States. It is not so much the number of these States that is significant, but the consistency of the direction of change. Given that anticrime legislation is far more popular than legislation protecting violent criminals, the large number of States prohibiting the execution of mentally retarded persons (and the complete absence of legislation reinstating such executions) provides powerful evidence that today society views mentally retarded offenders as categorically less culpable than the average criminal. The evidence carries even greater force when it is noted that the legislatures addressing the issue have voted overwhelmingly in favor of the prohibition. *305 Moreover, even in States allowing the execution of mentally retarded offenders, the practice is uncommon. Pp. 2248-2250.

(c) An independent evaluation of the issue reveals no reason for the Court to disagree with the legislative consensus. Clinical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills. Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial, but, by definition, they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand others' reactions. Their deficiencies do not warrant an exemption from criminal sanctions, but diminish their personal culpability. In light of these deficiencies, the Court's death penalty jurisprudence provides two reasons to agree with the legislative consensus. First, there is a serious question whether either justification underpinning the death penalty—retribution and deterrence of capital crimes—applies to

536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335, 70 USLW 4585, 02 Cal. Daily Op. Serv. 5439, 2002 Daily Journal D.A.R. 6937, 15 Fla. L. Weekly Fed. S 397
(Cite as: 536 U.S. 304, 122 S.Ct. 2242)

mentally retarded offenders. As to retribution, the severity of the appropriate punishment necessarily depends on the offender's culpability. If the culpability of the average murderer is insufficient to justify imposition of death, see *Godfrey v. Georgia*, 446 U.S. 420, 433, 100 S.Ct. 1759, 64 L.Ed.2d 398, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution. As to deterrence, the same cognitive and behavioral impairments that make mentally retarded defendants less morally culpable **2244 also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information. Nor will exempting the mentally retarded from execution lessen the death penalty's deterrent effect with respect to offenders who are not mentally retarded. Second, mentally retarded defendants in the aggregate face a special risk of wrongful execution because of the possibility that they will unwittingly confess to crimes they did not commit, their lesser ability to give their counsel meaningful assistance, and the facts that they are typically poor witnesses and that their demeanor may create an unwarranted impression of lack of remorse for their crimes. Pp. 2250-2252.

260 Va. 375, 534 S.E.2d 312, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which O'CONNOR, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. REHNQUIST, C.J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined, *post*, p. 2252. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C.J., and THOMAS, J., joined, *post*, p. 2259.

*306 James W. Ellis, for the petitioner.

Pamela A. Rumpz, for the respondent.

For U.S. Supreme Court briefs, see: 2001 WL 1663817 (Pet.Brief) 2002 WL 63726 (Resp.Brief) 2002 WL 225883 (Reply.Brief)

Justice STEVENS delivered the opinion of the Court.

Those mentally retarded persons who meet the law's requirements for criminal responsibility should be tried and punished when they commit crimes. Because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct. Moreover, their impairments can jeopardize the *307 reliability and fairness of capital proceed-

ings against mentally retarded defendants. Presumably for these reasons, in the 13 years since we decided *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), the American public, legislators, scholars, and judges have deliberated over the question whether the death penalty should ever be imposed on a mentally retarded criminal. The consensus reflected in those deliberations informs our answer to the question presented by this case: whether such executions are "cruel and unusual punishments" prohibited by the Eighth Amendment to the Federal Constitution.

I

Petitioner, Daryl Renard Atkins, was convicted of abduction, armed robbery, and capital murder, and sentenced to death. At approximately midnight on August 16, 1996, Atkins and William Jones, armed with a semiautomatic handgun, abducted Eric Nesbitt, robbed him of the money on his person, drove him to an automated teller machine in his pickup truck where cameras recorded their withdrawal of additional cash, then took him to an isolated location where he was shot eight times and killed.

Jones and Atkins both testified in the guilt phase of Atkins' trial.^{FN1} Each confirmed most of the details in the other's account of the incident, with the important exception that each stated that the other had actually shot and killed Nesbitt. Jones' testimony, which was both more coherent and credible than Atkins', was obviously credited by the jury and was **2245 sufficient to establish Atkins' guilt.^{FN2} At the penalty *308 phase of the trial, the State introduced victim impact evidence and proved two aggravating circumstances: future dangerousness and "vileness of the offense." To prove future dangerousness, the State relied on Atkins' prior felony convictions as well as the testimony of four victims of earlier robberies and assaults. To prove the second aggravator, the prosecution relied upon the trial record, including pictures of the deceased's body and the autopsy report.

^{FN1}. Initially, both Jones and Atkins were indicted for capital murder. The prosecution ultimately permitted Jones to plead guilty to first-degree murder in exchange for his testimony against Atkins. As a result of the plea, Jones became ineligible to receive the death penalty.

^{FN2}. Highly damaging to the credibility of Atkins' testimony was its substantial inconsistency with the statement he gave to the police upon his

arrest. Jones, in contrast, had declined to make an initial statement to the authorities.

In the penalty phase, the defense relied on one witness, Dr. Evan Nelson, a forensic psychologist who had evaluated Atkins before trial and concluded that he was "mildly mentally retarded." ^{FN3} His conclusion was based on interviews with people who knew Atkins, ^{FN4} a review of school and court *309 records, and the administration of a standard intelligence test which indicated that Atkins had a full scale IQ of 59. ^{FN5}

^{FN3} The American Association on Mental Retardation (AAMR) defines mental retardation as follows: "Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18." Mental Retardation: Definition, Classification, and Systems of Supports 5 (9th ed.1992).

The American Psychiatric Association's definition is similar: "The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system." Diagnostic and Statistical Manual of Mental Disorders 41 (4th ed.2000). "Mild" mental retardation is typically used to describe people with an IQ level of 50-55 to approximately 70. *Id.*, at 42-43.

^{FN4} The doctor interviewed Atkins, members of his family, and deputies at the jail where he had

been incarcerated for the preceding 18 months. Dr. Nelson also reviewed the statements that Atkins had given to the police and the investigative reports concerning this case.

^{FN5} Dr. Nelson administered the Wechsler Adult Intelligence Scales test (WAIS-III), the standard instrument in the United States for assessing intellectual functioning. AAMR, Mental Retardation, *supra*. The WAIS-III is scored by adding together the number of points earned on different subtests, and using a mathematical formula to convert this raw score into a scaled score. The test measures an intelligence range from 45 to 155. The mean score of the test is 100, which means that a person receiving a score of 100 is considered to have an average level of cognitive functioning. A. Kaufman & E. Lichtenberger, *Essentials of WAISIII Assessment* 60 (1999). It is estimated that between 1 and 3 percent of the population has an IQ between 70 and 75 or lower, which is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition. 2 Kaplan & Sadock's *Comprehensive Textbook of Psychiatry* 2952 (B. Sadock & V. Sadock eds. 7th ed.2000).

At the sentencing phase, Dr. Nelson testified: "[Atkins] full scale IQ is 59. Compared to the population at large, that means less than one percentile Mental retardation is a relatively rare thing. It's about one percent of the population." App. 274. According to Dr. Nelson, Atkins' IQ score "would automatically qualify for Social Security disability income." *Id.*, at 280. Dr. Nelson also indicated that of the over 40 capital defendants that he had evaluated, Atkins was only the second individual who met the criteria for mental retardation. *Id.*, at 310. He testified that, in his opinion, Atkins' limited intellect had been a consistent feature throughout his life, and that his IQ score of 59 is not an "aberration, malingered result, or invalid test score." *Id.*, at 308.

The jury sentenced Atkins to death, but the Virginia Supreme Court ordered a second**2246 sentencing hearing because the trial court had used a misleading verdict form. 257 Va. 160, 510 S.E.2d 445 (1999). At the resentencing, Dr. Nelson again testified. The State presented an expert

536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335, 70 USLW 4585, 02 Cal. Daily Op. Serv. 5439, 2002 Daily Journal D.A.R. 6937, 15 Fla. L. Weekly Fed. S 397
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rebuttal witness, Dr. Stanton Samenow, who expressed the opinion that Atkins was not mentally retarded, but rather was of "average intelligence, at least," and diagnosable as having antisocial personality disorder.^{FN6} App. 476. The jury again sentenced Atkins to death.

^{FN6} Dr. Samenow's testimony was based upon two interviews with Atkins, a review of his school records, and interviews with correctional staff. He did not administer an intelligence test, but did ask Atkins questions taken from the 1972 version of the Wechsler Memory Scale. *Id.*, at 524-525, 529. Dr. Samenow attributed Atkins' "academic performance [that was] by and large terrible" to the fact that he "is a person who chose to pay attention sometimes, not to pay attention others, and did poorly because he did not want to do what he was required to do." *Id.*, at 480-481.

*310 The Supreme Court of Virginia affirmed the imposition of the death penalty. 260 Va. 375, 385, 534 S.E.2d 312, 318 (2000). Atkins did not argue before the Virginia Supreme Court that his sentence was disproportionate to penalties imposed for similar crimes in Virginia, but he did contend "that he is mentally retarded and thus cannot be sentenced to death." *Id.*, at 386, 534 S.E.2d, at 318. The majority of the state court rejected this contention, relying on our holding in *Penry*. 260 Va., at 387, 534 S.E.2d, at 319. The court was "not willing to commute Atkins' sentence of death to life imprisonment merely because of his IQ score." *Id.*, at 390, 534 S.E.2d, at 321.

Justice Hassell and Justice Koontz dissented. They rejected Dr. Samenow's opinion that Atkins possesses average intelligence as "incredulous as a matter of law," and concluded that "the imposition of the sentence of death upon a criminal defendant who has the mental age of a child between the ages of 9 and 12 is excessive." *Id.*, at 394, 395-396, 534 S.E.2d, at 323-324. In their opinion, "it is indefensible to conclude that individuals who are mentally retarded are not to some degree less culpable for their criminal acts. By definition, such individuals have substantial limitations not shared by the general population. A moral and civilized society diminishes itself if its system of justice does not afford recognition and consideration of those limitations in a meaningful way." *Id.*, at 397, 534 S.E.2d, at 325.

Because of the gravity of the concerns expressed by the dissenters, and in light of the dramatic shift in the state

legislative landscape that has occurred in the past 13 years, we granted certiorari to revisit the issue that we first addressed in the *Penry* case. 533 U.S. 976, 122 S.Ct. 24, 150 L.Ed.2d 805 (2001).

*311 II

[1] The Eighth Amendment succinctly prohibits "[e]xcessive" sanctions. It provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." In *Weems v. United States*, 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793 (1910), we held that a punishment of 12 years jailed in irons at hard and painful labor for the crime of falsifying records was excessive. We explained "that it is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense." *Id.*, at 367, 30 S.Ct. 544. We have repeatedly applied this proportionality precept in later cases interpreting the Eighth Amendment. See *Harmelin v. Michigan*, 501 U.S. 957, 997-998, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (KENNEDY, J., concurring in part and concurring in judgment); see also *id.*, at 1009-1011, 111 S.Ct. 2680 (White, J., dissenting).^{FN7} Thus, even **2247 though "imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual," it may not be imposed as a penalty for "the 'status' of narcotic addiction," *Robinson v. California*, 370 U.S. 660, 666-667, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962), because such a sanction would be excessive. As Justice Stewart explained in *Robinson*: "Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." *Id.*, at 667, 82 S.Ct. 1417.

^{FN7} Thus, we have read the text of the Amendment to prohibit all excessive punishments, as well as cruel and unusual punishments that may or may not be excessive.

[2] A claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the "Bloody Assizes" or when the Bill of Rights was adopted, but rather by those that currently prevail. As Chief Justice Warren explained in his opinion in *Trop v. Dulles*, 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958): "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.... The Amendment must draw its meaning from the *312 evolving standards of decency that mark the progress of a maturing society." *Id.*, at 100-101, 78 S.Ct. 590.

[3] Proportionality review under those evolving standards

should be informed by " 'objective factors to the maximum possible extent,' " see *Harmelin*, 501 U.S., at 1000, 111 S.Ct. 2680 (quoting *Rummel v. Estelle*, 445 U.S. 263, 274-275, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980)). We have pinpointed that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Penry*, 492 U.S., at 331, 109 S.Ct. 2934. Relying in part on such legislative evidence, we have held that death is an impermissibly excessive punishment for the rape of an adult woman, *Coker v. Georgia*, 433 U.S. 584, 593-596, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977), or for a defendant who neither took life, attempted to take life, nor intended to take life, *Enmund v. Florida*, 458 U.S. 782, 789-793, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). In *Coker*, we focused primarily on the then-recent legislation that had been enacted in response to our decision 10 years earlier in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (*per curiam*), to support the conclusion that the "current judgment," though "not wholly unanimous," weighed very heavily on the side of rejecting capital punishment as a "suitable penalty for raping an adult woman." *Coker*, 433 U.S., at 596, 97 S.Ct. 2861. The "current legislative judgment" relevant to our decision in *Enmund* was less clear than in *Coker* but "nevertheless weigh[ed] on the side of rejecting capital punishment for the crime at issue." *Enmund*, 458 U.S., at 793, 102 S.Ct. 3368.

[4] We also acknowledged in *Coker* that the objective evidence, though of great importance, did not "wholly determine" the controversy, "for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." 433 U.S., at 597, 97 S.Ct. 2861. For example, in *Enmund*, we concluded by expressing our own judgment about the issue:

"For purposes of imposing the death penalty, Enmund's criminal culpability must be limited to his participation *313 in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt. Putting Enmund to death to avenge two killings that he did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts. This is the judgment of most of the legislatures that have recently addressed the matter, and we have no reason to disagree with that judgment for purposes of construing and applying the Eighth Amendment." 458 U.S., at 801, 102 S.Ct. 3368 (emphasis added).

Thus, in cases involving a consensus, our own judgment is "brought to bear," *Coker*, 433 U.S., at 597, 97 S.Ct. 2861, by asking whether there is reason to disagree with **2248 the judgment reached by the citizenry and its legislators.

Guided by our approach in these cases, we shall first review the judgment of legislatures that have addressed the suitability of imposing the death penalty on the mentally retarded and then consider reasons for agreeing or disagreeing with their judgment.

III

The parties have not called our attention to any state legislative consideration of the suitability of imposing the death penalty on mentally retarded offenders prior to 1986. In that year, the public reaction to the execution of a mentally retarded murderer in Georgia ^{FN8} apparently led to the enactment*314 of the first state statute prohibiting such executions. ^{FN9} In 1988, when Congress enacted legislation reinstating the federal death penalty, it expressly provided that a "sentence of death shall not be carried out upon a person who is mentally retarded." ^{FN10} In 1989, Maryland enacted a similar prohibition. ^{FN11} It was in that year that we decided *Penry*, and concluded that those two state enactments, "even when added to the 14 States that have rejected capital punishment completely, do not provide sufficient evidence at present of a national consensus." 492 U.S., at 334, 109 S.Ct. 2934.

^{FN8}. Jerome Bowden, who was identified as having mental retardation when he was 14 years old, was scheduled for imminent execution in Georgia in June 1986. The Georgia Board of Pardons and Paroles granted a stay following public protests over his execution. A psychologist selected by the State evaluated Bowden and determined that he had an IQ of 65, which is consistent with mental retardation. Nevertheless, the board lifted the stay and Bowden was executed the following day. The board concluded that Bowden understood the nature of his crime and his punishment and therefore that execution, despite his mental deficiencies, was permissible. See Montgomery, Bowden's Execution Stirs Protest, Atlanta Journal, Oct. 13, 1986, p. A1.

^{FN9}. Ga.Code Ann. § 17-7-131(j) (Supp.1988).

FN10. The Anti-Drug Abuse Act of 1988, Pub.L. 100-690, § 7001(l), 102 Stat. 4390, 21 U.S.C. § 848(l). Congress expanded the federal death penalty law in 1994. It again included a provision that prohibited any individual with mental retardation from being sentenced to death or executed. Federal Death Penalty Act of 1994, 18 U.S.C. § 3596(c).

FN11. Md. Ann.Code, Art. 27, § 412(f)(1) (1989).

Much has changed since then. Responding to the national attention received by the Bowden execution and our decision in *Penry*, state legislatures across the country began to address the issue. In 1990, Kentucky and Tennessee enacted statutes similar to those in Georgia and Maryland, as did New Mexico in 1991, and Arkansas, Colorado, Washington, Indiana, and Kansas in 1993 and 1994.^{FN12} In 1995, when New York reinstated its death penalty, it emulated the Federal Government by expressly exempting the mentally retarded.^{FN13} Nebraska followed suit in 1998.^{FN14} There appear *315 to have been no similar enactments during the next two years, but in 2000 and 2001 six more States—South Dakota, Arizona, Connecticut, Florida, Missouri, and North Carolina—joined the procession.^{FN15} The Texas Legislature unanimously**2249 adopted a similar bill,^{FN16} and bills have passed at least one house in other States, including Virginia and Nevada.^{FN17}

FN12. Ky.Rev.Stat. Ann. §§ 532.130, 532.135, 532.140; Tenn.Code Ann. § 39-13-203; N.M. Stat. Ann. § 31-20A-2.1; Ark.Code Ann. § 5-4-618; Colo.Rev.Stat. § 16-9-401; Wash. Rev.Code § 10.95.030; Ind.Code §§ 35-36-9-2 through 35-36-9-6; Kan. Stat. Ann. § 21-4623.

FN13. N.Y.Crim. Proc. Law § 400.27. However, New York law provides that a sentence of death “may not be set aside ... upon the ground that the defendant is mentally retarded” if “the killing occurred while the defendant was confined or under custody in a state correctional facility or local correctional institution.” N.Y.Crim. Proc. Law § 400.27.12(d) (McKinney 2001-2002 Interim Pocket Part).

FN14. Neb.Rev.Stat. § 28-105.01.

FN15. S.D. Codified Laws § 23A-27A-26.1; Ariz.Rev.Stat. Ann. § 13-703.02; Conn. Gen.Stat. § 53a-46a; Fla. Stat. § 921.137; Mo.Rev.Stat. § 565.030; 2001-346 N.C. Sess. Laws p. 45.

FN16. House Bill No. 236 passed the Texas House on April 24, 2001, and the Senate version, S. 686, passed the Texas Senate on May 16, 2001. Governor Perry vetoed the legislation on June 17, 2001. In his veto statement, the Texas Governor did not express dissatisfaction with the principle of categorically excluding the mentally retarded from the death penalty. In fact, he stated: “We do not execute mentally retarded murderers today.” See Veto Proclamation for H.B. No. 236. Instead, his motivation to veto the bill was based upon what he perceived as a procedural flaw: “My opposition to this legislation focuses on a serious legal flaw in the bill. House Bill No. 236 would create a system whereby the jury and judge are asked to make the same determination based on two different sets of facts Also of grave concern is the fact that the provision that sets up this legally flawed process never received a public hearing during the legislative process.” *Ibid*.

FN17. Virginia Senate Bill No. 497 (2002); House Bill No. 957 (2002); see also Nevada Assembly Bill 353 (2001). Furthermore, a commission on capital punishment in Illinois has recently recommended that Illinois adopt a statute prohibiting the execution of mentally retarded offenders. Report of the Governor's Commission on Capital Punishment 156 (Apr. 2002).

It is not so much the number of these States that is significant, but the consistency of the direction of change.^{FN18} Given the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime, the large number of States prohibiting the execution of mentally retarded persons (and the *316 complete absence of States passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal. The evidence carries even greater force when it is noted that the legislatures that have addressed the issue have voted overwhelmingly in

favor of the prohibition.^{FN19} Moreover, even in those States that allow the execution of mentally retarded offenders, the practice is uncommon. Some States, for example New Hampshire and New Jersey, continue to authorize executions, but none have been carried out in decades. Thus there is little need to pursue legislation barring the execution of the mentally retarded in those States. And it appears that even among those States that regularly execute offenders and that have no prohibition with regard to the mentally retarded, only five have executed offenders possessing a known IQ less than 70 since we decided *Penry*.^{FN20} The practice, therefore, has become truly unusual, and it is fair to say that a national consensus has developed against it.^{FN21}

FN18. A comparison to *Stanford v. Kentucky*, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989), in which we held that there was no national consensus prohibiting the execution of juvenile offenders over age 15, is telling. Although we decided *Stanford* on the same day as *Penry*, apparently only two state legislatures have raised the threshold age for imposition of the death penalty. Mont.Code Ann. § 45-5-102 (1999); Ind.Code § 35-50-2-3 (1998).

FN19. App. D to Brief for AAMR et al. as *Amici Curiae*.

FN20. Those States are Alabama, Texas, Louisiana, South Carolina, and Virginia. D. Keyes, W. Edwards, & R. Perske, *People with Mental Retardation are Dying Legally*, 35 *Mental Retardation* (Feb.1997) (updated by Death Penalty Information Center, available at <http://www.advocacyone.org/deathpenalty.html> (as visited June 18, 2002)).

FN21. Additional evidence makes it clear that this legislative judgment reflects a much broader social and professional consensus. For example, several organizations with germane expertise have adopted official positions opposing the imposition of the death penalty upon a mentally retarded offender. See Brief for American Psychological Association et al. as *Amici Curiae*; Brief for AAMR et al. as *Amici Curiae*. In addition, representatives of widely diverse religious communities in the United States, reflecting Christian, Jewish, Muslim, and Buddhist traditions, have filed an *amicus curiae* brief explaining that

even though their views about the death penalty differ, they all "share a conviction that the execution of persons with mental retardation cannot be morally justified." Brief for United States Catholic Conference et al. as *Amici Curiae* 2. Moreover, within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved. Brief for European Union as *Amicus Curiae* 4. Finally, polling data shows a widespread consensus among Americans, even those who support the death penalty, that executing the mentally retarded is wrong. Bonner & Rimer, *Executing the Mentally Retarded Even as Laws Begin to Shift*, N.Y. Times, Aug. 7, 2000, p. A1; App. B to Brief for AAMR, et al. as *Amici Curiae* (appending approximately 20 state and national polls on the issue). Although these factors are by no means dispositive, their consistency with the legislative evidence lends further support to our conclusion that there is a consensus among those who have addressed the issue. See *Thompson v. Oklahoma*, 487 U.S. 815, 830, 831, n. 31, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988) (considering the views of "respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community").

****2250 *317** To the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded. In this case, for instance, the Commonwealth of Virginia disputes that Atkins suffers from mental retardation. Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus. As was our approach in *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986), with regard to insanity, "we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Id.*, at 405, 416-417, 106 S.Ct. 2595.^{FN22}

FN22. The statutory definitions of mental retardation are not identical, but generally conform to the clinical definitions set forth in n. 3, *supra*.

IV

This consensus unquestionably reflects widespread judgment about the relative culpability of mentally retarded offenders, and the relationship between mental retardation and the penological purposes served by the death penalty. Additionally, it suggests that some characteristics of mental retardation undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards.

*318 As discussed above, clinical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18. Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.^{FN23} There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders.^{FN24} Their deficiencies**2251 do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.

FN23. J. McGee & F. Menolascino, *The Evaluation of Defendants with Mental Retardation in the Criminal Justice System*, in *The Criminal Justice System and Mental Retardation* 55, 58-60 (R. Conley, R. Luckasson, & G. Bouthilet eds.1992); Appelbaum & Appelbaum, *Criminal-Justice Related Competencies in Defendants with Mental Retardation*, 14 *J. of Psychiatry & L.* 483, 487-489 (Winter 1994).

FN24. See, e.g., Ellis & Luckasson, *Mentally Retarded Criminal Defendants*, 53 *Geo. Wash. L.Rev.* 414, 429 (1985); Levy-Shiff, Kedem, & Sevilla, *Ego Identity in Mentally Retarded Adolescents*, 94 *Am. J. Mental Retardation* 541, 547 (1990); Whitman, *Self Regulation and Mental Retardation*, 94 *Am. J. Mental Retardation* 347, 360 (1990); Everington & Fulero, *Competence to Confess: Measuring Understanding and Suggestibility of Defendants with Mental Retardation*, 37 *Mental Retardation* 212, 212-213, 535 (1999) (hereinafter Everington & Fulero).

In light of these deficiencies, our death penalty jurisprudence provides two reasons consistent with the legislative consensus that the mentally retarded should be categorically excluded from execution. First, there is a serious question as to whether either justification that we have recognized as *319 a basis for the death penalty applies to mentally retarded offenders. *Gregg v. Georgia*, 428 U.S. 153, 183, 96 S.Ct. 2909, 49 L.Ed.2d 859, (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.), identified "retribution and deterrence of capital-crimes by prospective offenders" as the social purposes served by the death penalty. Unless the imposition of the death penalty on a mentally retarded person "measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." *Enmund*, 458 U.S., at 798, 102 S.Ct. 3368.

With respect to retribution-the interest in seeing that the offender gets his "just deserts"-the severity of the appropriate punishment necessarily depends on the culpability of the offender. Since *Gregg*, our jurisprudence has consistently confined the imposition of the death penalty to a narrow category of the most serious crimes. For example, in *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), we set aside a death sentence because the petitioner's crimes did not reflect "a consciousness materially more 'depraved' than that of any person guilty of murder." *Id.*, at 433, 100 S.Ct. 1759. If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution. Thus, pursuant to our narrowing jurisprudence, which seeks to ensure that only the most deserving of execution are put to death, an exclusion for the mentally retarded is appropriate.

With respect to deterrence-the interest in preventing capital crimes by prospective offenders-"it seems likely that 'capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation,' " *Enmund*, 458 U.S., at 799, 102 S.Ct. 3368. Exempting the mentally retarded from that punishment will not affect the "cold calculus that precedes the decision" of other potential murderers. *Gregg*, 428 U.S., at 186, 96 S.Ct. 2909. Indeed, that sort of calculus is at the opposite end of the spectrum from behavior of mentally retarded *320 offenders. The theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying

out murderous conduct. Yet it is the same cognitive and behavioral impairments that make these defendants less morally culpable—for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses—that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information. Nor will exempting the mentally retarded from execution lessen the deterrent effect of the death penalty with respect to offenders who are not mentally retarded. Such individuals are unprotected by the exemption and will continue to face the threat of execution. Thus, executing the mentally retarded will not measurably further the goal of deterrence.

The reduced capacity of mentally retarded offenders provides a second justification for a categorical rule making such offenders ineligible for the death penalty. The risk “that the death penalty will be imposed in spite of factors which may call for a less severe penalty,” *Lockett v. Ohio*, 438 U.S. 586, 605, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), is enhanced, not only by the **2252 possibility of false confessions,^{FN25} but also by the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors. Mentally retarded defendants may be less able to give meaningful assistance to their counsel and *321 are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes. As *Penry* demonstrated, moreover, reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury. 492 U.S., at 323-325, 109 S.Ct. 2934. Mentally retarded defendants in the aggregate face a special risk of wrongful execution.

^{FN25} See Everington & Fulero 212-213. Despite the heavy burden that the prosecution must shoulder in capital cases, we cannot ignore the fact that in recent years a disturbing number of inmates on death row have been exonerated. These exonerations have included at least one mentally retarded person who unwittingly confessed to a crime that he did not commit. See Baker, Death-Row Inmate Gets Clemency; Agreement Ends Days of Suspense, Washington Post, Jan. 15, 1994, p. A1.

[5] Our independent evaluation of the issue reveals no

reason to disagree with the judgment of “the legislatures that have recently addressed the matter” and concluded that death is not a suitable punishment for a mentally retarded criminal. We are not persuaded that the execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty. Construing and applying the Eighth Amendment in the light of our “evolving standards of decency,” we therefore conclude that such punishment is excessive and that the Constitution “places a substantive restriction on the State’s power to take the life” of a mentally retarded offender. *Ford*, 477 U.S., at 405, 106 S.Ct. 2595.

The judgment of the Virginia Supreme Court is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Chief Justice REHNQUIST, with whom Justice SCALIA and Justice THOMAS join, dissenting.

The question presented by this case is whether a national consensus deprives Virginia of the constitutional power to impose the death penalty on capital murder defendants like petitioner, i.e., those defendants who indisputably are competent to stand trial, aware of the punishment they are about to suffer and why, and whose mental retardation has been found an insufficiently compelling reason to lessen their individual responsibility for the crime. The Court pronounces *322 the punishment cruel and unusual primarily because 18 States recently have passed laws limiting the death eligibility of certain defendants based on mental retardation alone, despite the fact that the laws of 19 other States besides Virginia continue to leave the question of proper punishment to the individuated consideration of sentencing judges or juries familiar with the particular offender and his or her crime. See *ante*, at 2248.

I agree with Justice SCALIA, *post*, at 2259 (dissenting opinion), that the Court’s assessment of the current legislative judgment regarding the execution of defendants like petitioner more resembles a *post hoc* rationalization for the majority’s subjectively preferred result rather than any objective effort to ascertain the content of an evolving standard of decency. I write separately, however, to call attention to the defects in the Court’s decision to place weight on foreign laws, the views of professional and religious organizations, and **2253 opinion polls in reaching its conclusion. See *ante*, at 2249-2250, n. 21. The Court’s suggestion that these sources are relevant to the constitutional question finds little support in our

536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335, 70 USLW 4585, 02 Cal. Daily Op. Serv. 5439, 2002 Daily Journal D.A.R. 6937, 15 Fla. L. Weekly Fed. S 397
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precedents and, in my view, is antithetical to considerations of federalism, which instruct that any "permanent prohibition upon all units of democratic government must [be apparent] in the operative acts (laws and the application of laws) that the people have approved." Stanford v. Kentucky, 492 U.S. 361, 377, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989) (plurality opinion). The Court's uncritical acceptance of the opinion poll data brought to our attention, moreover, warrants additional comment, because we lack sufficient information to conclude that the surveys were conducted in accordance with generally accepted scientific principles or are capable of supporting valid empirical inferences about the issue before us.

"In making determinations about whether a punishment is 'cruel and unusual' under the evolving standards of decency embraced by the Eighth Amendment, we have emphasized that legislation is the 'clearest and most reliable objective *323 evidence of contemporary values.'" Penry v. Lynaugh, 492 U.S. 302, 331, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). See also McCleskey v. Kemp, 481 U.S. 279, 300, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987). The reason we ascribe primacy to legislative enactments follows from the constitutional role legislatures play in expressing policy of a State. "[I]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people." Gregg v. Georgia, 428 U.S. 153, 175-176, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.) (quoting Furman v. Georgia, 408 U.S. 238, 383, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (Burger, C. J., dissenting)). And because the specifications of punishments are "peculiarly questions of legislative policy," Gore v. United States, 357 U.S. 386, 393, 78 S.Ct. 1280, 2 L.Ed.2d 1405 (1958), our cases have cautioned against using "the aegis of the Cruel and Unusual Punishment Clause" "to cut off the normal democratic processes, Gregg, supra, at 176, 96 S.Ct. 2909 (quoting Powell v. Texas, 392 U.S. 514, 533, 88 S.Ct. 2145, 20 L.Ed.2d 1254 (1968) (plurality opinion)).

Our opinions have also recognized that data concerning the actions of sentencing juries, though entitled to less weight than legislative judgments, "is a significant and reliable objective index of contemporary values," Coker v. Georgia, 433 U.S. 584, 596, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977) (plurality opinion) (quoting Gregg, supra, at 181, 96 S.Ct. 2909), because of the jury's intimate involvement in the case and its function of "maintain[ing] a link between contemporary community values and the penal system," Gregg, supra, at 181, 96 S.Ct. 2909

(quoting Witherspoon v. Illinois, 391 U.S. 510, 519, n. 15, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968)). In Coker, supra, at 596-597, 97 S.Ct. 2861, for example, we credited data showing that "at least 9 out of 10" juries in Georgia did not impose the death sentence for rape convictions. And in Enmund v. Florida, 458 U.S. 782, 793-794, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), where evidence of the current legislative judgment was not as "compelling" as that in Coker (but more so than that here), we were persuaded by "overwhelming [evidence] that American juries ... repudiated imposition of the death penalty" for a defendant who neither took life nor attempted or intended to take life.

*324 In my view, these two sources—the work product of legislatures and sentencing jury determinations—ought to be the sole indicators by which courts ascertain the contemporary American conceptions of decency for purposes of the Eighth Amendment. They are the only objective indicia of contemporary values firmly supported by our precedents. More importantly, however, they can be reconciled with the undeniable precepts that the democratic branches of government and individual sentencing juries are, by design, **2254 better suited than courts to evaluating and giving effect to the complex societal and moral considerations that inform the selection of publicly acceptable criminal punishments.

In reaching its conclusion today, the Court does not take notice of the fact that neither petitioner nor his amici have adduced any comprehensive statistics that would conclusively prove (or disprove) whether juries routinely consider death a disproportionate punishment for mentally retarded offenders like petitioner.^{FN*} Instead, it adverts to the fact that other countries have disapproved imposition of the death penalty for crimes committed by mentally retarded offenders, see *ante*, at 2249-2250, n. 21 (citing the Brief for European Union as *Amicus Curiae* 2). I fail to see, however, *325 how the views of other countries regarding the punishment of their citizens provide any support for the Court's ultimate determination. While it is true that some of our prior opinions have looked to "the climate of international opinion," Coker, supra, at 596, n. 10, 97 S.Ct. 2861, to reinforce a conclusion regarding evolving standards of decency, see Thompson v. Oklahoma, 487 U.S. 815, 830, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988) (plurality opinion); Enmund, supra, at 796-797, n. 22, 102 S.Ct. 3368; Trop v. Dulles, 356 U.S. 86, 102-103, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (plurality opinion); we have since explicitly rejected the idea that the sentencing practices of other countries could "serve to

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establish the first Eighth Amendment prerequisite, that [a] practice is accepted among our people." *Stanford*, 492 U.S., at 369, n. 1, 109 S.Ct. 2969 (emphasizing that "American conceptions of decency ... are dispositive" (emphasis in original)).

FN* Apparently no such statistics exist. See Brief for American Association on Mental Retardation et al. as *Amici Curiae* 19, n. 29 (noting that "actions by individual prosecutors and by juries are difficult to quantify with precision"). Petitioner's inability to muster studies in his favor ought to cut against him, for it is his "heavy burden," *Stanford v. Kentucky*, 492 U.S. 361, 373, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989) (internal quotation marks omitted), to establish a national consensus against a punishment deemed acceptable by the Virginia Legislature and jury who sentenced him. Furthermore, it is worth noting that experts have estimated that as many as 10 percent of death row inmates are mentally retarded, see R. Bonner & S. Rimer, Executing the Mentally Retarded Even as Laws Begin to Shift, N.Y. Times, Aug. 7, 2000, p. A1, a number which suggests that sentencing juries are not as reluctant to impose the death penalty on defendants like petitioner as was the case in *Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977), and *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982).

Stanford's reasoning makes perfectly good sense, and the Court offers no basis to question it. For if it is evidence of a national consensus for which we are looking, then the viewpoints of other countries simply are not relevant. And nothing in *Thompson*, *Enmund*, *Coker*, or *Trop* suggests otherwise. *Thompson*, *Enmund*, and *Coker* rely only on the bare citation of international laws by the *Trop* plurality as authority to deem other countries' sentencing choices germane. But the *Trop* plurality representing the view of only a minority of the Court offered no explanation for its own citation, and there is no reason to resurrect this view given our sound rejection of the argument in *Stanford*.

To further buttress its appraisal of contemporary societal values, the Court marshals public opinion poll results and evidence that several professional organizations and religious groups have adopted official positions opposing the imposition of the death penalty upon mentally retarded

offenders. See *ante*, at 2249-2250, n. 21 (citing Brief for American Psychological Association et al. as *Amici Curiae*; Brief for American Association on Mental Retardation et al. as *Amici Curiae*; noting that "representatives of widely diverse religious*326 communities **2255 ... reflecting Christian, Jewish, Muslim, and Buddhist traditions ... 'share a conviction that the execution of persons with mental retardation cannot be morally justified' "; and stating that "polling data shows a widespread consensus among Americans ... that executing the mentally retarded is wrong"). In my view, none should be accorded any weight on the Eighth Amendment scale when the elected representatives of a State's populace have not deemed them persuasive enough to prompt legislative action. In *Penry*, 492 U.S., at 334-335, 109 S.Ct. 2934, we were cited similar data and declined to take them into consideration where the "public sentiment expressed in [them]" had yet to find expression in state law. See also *Stanford*, 492 U.S., at 377, 109 S.Ct. 2969 (plurality opinion) (refusing "the invitation to rest constitutional law upon such uncertain foundations" as "public opinion polls, the views of interest groups, and the positions adopted by various professional associations"). For the Court to rely on such data today serves only to illustrate its willingness to proscribe by judicial fiat at the behest of private organizations speaking only for themselves—a punishment about which no across-the-board consensus has developed through the workings of normal democratic processes in the laboratories of the States.

Even if I were to accept the legitimacy of the Court's decision to reach beyond the product of legislatures and practices of sentencing juries to discern a national standard of decency, I would take issue with the blind-faith credence it accords the opinion polls brought to our attention. An extensive body of social science literature describes how methodological and other errors can affect the reliability and validity of estimates about the opinions and attitudes of a population derived from various sampling techniques. Everything from variations in the survey methodology, such as the choice of the target population, the sampling design used, the questions asked, and the statistical analyses used to interpret the data can skew the results. See, e.g., R. Groves, Survey *327 Errors and Survey Costs (1989); I. C. Turner & E. Martin, Surveying Subjective Phenomena (1984).

The Federal Judicial Center's Reference Manual on Scientific Evidence 221-271 (1994) and its *Manual for Complex Litigation* § 21.493, pp. 101-103 (3d ed.1995), offer helpful suggestions to judges called upon to assess the

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weight and admissibility of survey evidence on a factual issue before a court. Looking at the polling data (reproduced in the Appendix to this opinion) in light of these factors, one cannot help but observe how unlikely it is that the data could support a valid inference about the question presented by this case. For example, the questions reported to have been asked in the various polls do not appear designed to gauge whether the respondents might find the death penalty an acceptable punishment for mentally retarded offenders in rare cases. Most are categorical (e.g., "Do you think that persons convicted of murder who are mentally retarded should or should not receive the death penalty?"), and, as such, would not elicit whether the respondent might agree or disagree that all mentally retarded people by definition can never act with the level of culpability associated with the death penalty, regardless of the severity of their impairment or the individual circumstances of their crime. Second, none of the 27 polls cited disclose the targeted survey population or the sampling techniques used by those who conducted the research. Thus, even if one accepts that the survey instruments were adequately designed to address a relevant question, it is impossible to know whether the sample was representative enough or the methodology sufficiently sound to tell us anything about the opinions of the citizens of a particular State or the American public at large. Finally, the information provided to us does not indicate

why a particular survey was conducted or, in a few cases, by whom, factors which also can bear on the ****2256** objectivity of the results. In order to be credited here, such surveys should be offered as ***328** evidence at trial, where their sponsors can be examined and cross-examined about these matters.

There are strong reasons for limiting our inquiry into what constitutes an evolving standard of decency under the Eighth Amendment to the laws passed by legislatures and the practices of sentencing juries in America. Here, the Court goes beyond these well-established objective indicators of contemporary values. It finds "further support to [its] conclusion" that a national consensus has developed against imposing the death penalty on all mentally retarded defendants in international opinion, the views of professional and religious organizations, and opinion polls not demonstrated to be reliable. *Ante*, at 2249-2250, n. 21. Believing this view to be seriously mistaken, I dissent.

APPENDIX TO OPINION OF REHNQUIST, C. J.

16 Polls and survey results reported in Brief for American Association on Mental Retardation et al. as *Amici Curiae*, Brief, and cited by the Court *ante*, at 2249-2250, n. 21.

ST	POLL	DATE	RESPONSE	QUESTION
AR	Arkansans' Opinion on the Death Penalty, Opinion Research Associates, Inc., Q. 13 (July 1992) John DiPippa, <i>Will Fairchild's Death Violate the Constitution, or Simply Our Morality?</i> , Arkansas Forum, Sept. 1993	1992	61% never appropriate 17% is appropriate 5% opposed to all executions 17% undecided	"Some people say that there is nothing wrong with executing a person who is mentally retarded. Others say that the death penalty should never be imposed on a person who is mentally retarded. Which of these positions comes closest to your own?"
AZ	Behavior Research Center Survey, 2000 (July 2000) (Q. 3) (July 2000)	2000	71% oppose 12% favor 11% depends 6% refuse to answer	"For persons convicted of murder, do you favor or oppose use of the death penalty when the defendant is mentally retarded?"
CA	Field Research Corp., California Death Penalty Survey, Q. 22 (Dec. 1989) Frank Hill, <i>Death Penalty For The Retarded</i> , San Diego Union-	1989	64.8% not all right 25.7% is all right 9.5% no opinion	"Some people feel there is nothing wrong with imposing the death penalty on persons who are mentally retarded depending on the circumstances. Others feel the death penalty

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Tribune, Mar. 28, 1993, at G3

should never be imposed on persons who are mentally retarded under any circumstance. The death penalty on a mentally retarded person is ... ?"

CA	Field Research Corp., California	1997	74% disagree	Mentally retarded defendants
	Death Penalty Survey, Q. 62(b)		16% agree	should be given the death penalty
	(Dec. 1997)		9% no opinion	when they commit capital crimes
	Paul Van Slambrouck, <i>Execu-</i>			
	<i>tion and a Connecticut Mental</i>			
	<i>State</i> , The Christian Science			
	Monitor, Apr. 27, 1993, at 1			
CT	Quinnipiac University Polling	2001	77% no	"Do you think that persons convicted
	Institute, Death Penalty Survey		12% yes	of murder who are mentally retarded
	Info., Q. 35 (April 23, 2001)		11% don't know	should or should not receive the
				death penalty?"
FL	Amnesty International	1986	71% opposed	[not provided]
	Martin Dyckman, <i>Death Pen-</i>			
	<i>alty's High Price</i> , St. Petersburg			
	Times, Apr. 19, 1992, at 31D4			
GA	Georgia State University	1987	66% opposed	[not provided]
	Tracy Thompson, <i>Executions of</i>		17% favor	
	<i>Retarded Opposed</i> , Atlanta		16% depends	
	Journal, Jan. 6, 1987, at 1B			
LA	Marking Research Inst.	1993	74% no	"Would you vote for the death pen-
	Love and Death Penalty Survey		19% yes	alty for a convicted person, men-
	Q. 7 (Feb. 1993)		13% uncertain	ally retarded?"
LA	Louisiana Poll, Poll 104, Q. 9	2001	68% no	"Do you believe mentally retarded
	(Apr. 2001)		19% yes	people, who are convicted of capital
			11% no opinion	murder, should be executed?"
			2% won't say	
MD	Survey Research Center, Univ.	1988	82% opposed	"Would you favor or oppose the
	University of Maryland (Nov. 1988)		8% favor	death penalty for a person convicted
			10% other	of murder, if he or she is mentally
				retarded?"
M	Missouri Mental Retardation and	1993	61.3% not all right	"Some people feel there is nothing
O	Death Penalty Survey, Q. 5		23.7% is all right	wrong with imposing the death pen-
	(Oct. 1993)		15% don't know	alty on persons who are mentally
				retarded depending on the circum-
				stances. Others feel that the death
				penalty should never be imposed on
				persons who are mentally retarded
				under any circumstances. Do you
				think it IS or IS NOT all right to
				impose the death penalty on a men-
				mentally retarded person?"
NC	Charlotte Observer-WMTN	2000	64% yes	"Should the Carolinas ban the execu-
SC	NYC Poll (Sept. 2000)		42% no	tion of people with mental retarda-
	Diane Sotterika, <i>Carolinas Join</i>		14% not sure	tion?"
	<i>Emotional Debate Over Execu-</i>			

<i>The Mentally Retarded</i> , Charlotte Observer, Sept. 11, 2000				
N	Research & Polling Inc., Use of	1990	57.1% oppose	62% support the death penalty.
M	the Death Penalty Public Opin-		10.5% support	Asked of those that support it, "for
	ion Poll, Q. 2 (Dec.1990)		26.2% depends	which of the following do you sup-
			6.1% don't know	port use of the death penalty ... when
				the convicted person is mentally
				retarded?"
NY Patrick Caddell Enterprises, 1989 NY Public Opinion Poll: The Death Penalty: An Executive Summary © 2/99 May 1989 Ronald Tabak & J. Mark Lane <i>The Execution of Injustice: A Cost and Lack of Benefit Analy-</i> <i>sis of the Death Penalty</i> 23 Rev. L.A. L. Rev. 139, 93 (1989)			82% oppose 10% favor 9% don't know	"I'd like you to imagine you are a member of a jury. The jury has found the defendant guilty of murder beyond a reasonable doubt and now needs to decide about sentencing. You are the last juror to decide and your decision will determine whether or not the offender will receive the death penalty. Would you favor or oppose sentencing the offender to the death penalty if the convicted per- son were mentally retarded?"
OK	Survey of Oklahoma Attitudes Regarding Capital Punishment: Survey Conducted for Oklahoma Indigent Defense System, Q. C (July 1999)	1999	83.5% should not be executed 10.8% should be executed 5.7% depends	"Some people think that persons convicted of murder who are men- tally retarded (or have a mental age of between 5 and 10 years) should not be executed. Other people think that 'retarded' persons should be subject to the death penalty like any- one else. Which is closer to the way you feel, that 'retarded' persons should not be executed, or that 're- tarder' persons should be subject to the death penalty like everyone else?"
TX Austin American Statesman Nov. 15, 1988, at B3			1988 73% opposed 27% supported	not provided
TX	Sam Houston State University, College of Criminal Justice, Texas Crime Poll On-line (1995) Domingo Ramirez, Jr., <i>Murder Trial May Hinge on Defendant's IQ</i> , The Fort Worth Star- Telegram, Oct. 6, 1997, at 1	1995	61% more likely to oppose	"For each of the following items that have been found to affect people's attitude about the death penalty, please state if you would be more likely to favor or more likely to op- pose the death penalty, or wouldn't it matter ... if the murderer is severely mentally retarded?"
TX Scripps Howard Texas Poll Death Penalty (Mar. 2001) Dan Parker, <i>More than 60% Oppose Death Penalty</i> , Corpus Christi Caller Times, Mar. 12, 2001, at A1			2001 66% no 17% yes 17% don't know/no answer	"Should the state use the death pen- alty when the inmate is considered mentally retarded?"
TX	Houston Chronicle (Feb.2001)	2001	59.9% no support	"Would you support the death pen-

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Stephen Brewer & Mike Tolson,
*A Deadly Distinction: Part III,
Debate Fervent in Mental Cases,
Johnny Paul Penry Illustrates a
Lingering Capital Conundrum*,
The Houston Chronicle, Feb. 6,
2001, at A6

19.3% support
20.7% not sure/no
answer

ality if you were convinced the de-
fendant were guilty, but the defen-
dant is mentally impaired?"

US. Harris Poll, Unfinished Agenda 1988 on Race Q. 32 (Sept. 1988) Saundra Torrey, <i>High Court to Hear Case on Retarded Slayer</i> , The Washington Post, Jan. 11, 1989, at A6	71% should not be executed 21% should be executed 4% depends 2% not sure/refused	"Some people think that persons convicted of murder who have a mental age of less than 18 (or the retarded) should not be executed. Other people think that retarded persons should be subject to the death penalty like anyone else. Which is closer to the way you feel that retarded persons should not be executed, or that retarded persons should be subject to the death pen- alty like anyone else?"

US Yankelovich Clancy Shulman, 1989
Time/CNN Poll, Q. 14 (July 7,
1989)
61% oppose
27% favor
12% not sure

Samuel R. Gross, *Second
Thoughts: Americans' Views on
the Death Penalty at the Turn of
the Century*, Capital Punishment
and the American Future
(Feb. 2001)

"Do you favor or oppose the death
penalty for mentally retarded indi-
viduals convicted of serious crimes,
such as murder?"

US. The Fairness Group, Death Pen- alty Poll Q. 9 (Mar. 1993) Samuel R. Gross, <i>Update: American Public Opinion on the Death Penalty: It's Getting Per- sonal</i> , 83 Cornell L. Rev. 1448, 1467 (1998)	56% not all right 32% is all right 11% unsure	"Some people feel that there is noth- ing wrong with imposing the death penalty on persons who are mentally retarded depending on the circum- stances. Others feel that the death- penalty should never be imposed on persons who are mentally retarded under any circumstances. Which of these views comes closest to your own?"

US Public Policy Research, Crime
in America, Q. 72 (July 1995)
1995
67% likely to oppose
7% likely to favor
26% wouldn't matter

"For each item please tell me if you
would be more likely to favor the
death penalty, more likely to oppose
the death penalty or it wouldn't mat-
ter ... if it is true that the murderer is
severely mentally retarded?"

US. Princeton Research, Newsweek Poll Q. 16 (Nov. 1995) Samuel R. Gross, <i>Update: American Public Opinion on the Death Penalty: It's Getting Per- sonal</i> , 83 Cornell L. Rev. 1448	83% oppose 9% favor 8% don't know/refused	"If the convicted person was men- tally retarded, would you favor or oppose the death penalty?"

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1468 (1998)		
US Peter Hart Research Associates, 1999 Inc., Innocence Survey, Q. 12 (Dec.1999)	58% strongly/somewhat favor 26% strongly/somewhat oppose 12% mixed/neutral 4% not sure	"... [F]or each proposal I read, please tell me whether you strongly favor, somewhat favor, have mixed or neutral feelings, somewhat oppose, or strongly oppose that proposal [P]rohibit the death penalty for defendants who are mentally retarded."
US Peter Hart Research Associates, 1999 Inc., Innocence Survey, Q. 12 (Dec.1999)	52% much/somewhat less likely 19% no difference 19% not sure 7% much less likely 2% somewhat less likely	Suppose you were on a jury and a defendant was convicted of murder. Now it is time to determine the sentence. If you knew that the defendant was mentally retarded or otherwise mentally impaired in a serious way, would you be much less likely to support the use of the death penalty in this specific case, somewhat less likely, or would it make no difference to you?

US Houston Chronicle (Feb.2001) 2001 Stephen Brewer & Mike Tolson, <i>A Deadly Distinction: Part III, Debate Fervent in Mental Cases, Johnny Paul Penry Illustrates a Lingering Capital Conundrum</i> , The Houston Chronicle, Feb. 6, 2001, at A6	63.8% no support 16.4% support 19.8% not sure/no answer	"Would you support the death penalty if you were convinced the defendant were guilty, but the defendant is mentally impaired?"

*337 Justice SCALIA, with whom THE CHIEF JUSTICE and Justice THOMAS join, dissenting.
Today's decision is the pinnacle of our Eighth Amendment death-is-different jurisprudence. Not only does it, like all of that jurisprudence, find no support in the text or history of the Eighth Amendment; it does not even have support in current social attitudes regarding the conditions that render *338 an otherwise just death penalty inappropriate. Seldom has an opinion of this Court rested so obviously upon nothing but the personal views of its Members.

I

I begin with a brief restatement of facts that are abridged by the Court but important to understanding this case. After spending the day drinking alcohol and smoking marijuana, petitioner Daryl Renard Atkins and a partner in crime drove to a convenience store, intending to rob a customer. Their victim was Eric Nesbitt, an airman from Langley Air Force Base, whom they abducted, drove to a nearby automated teller machine, and forced to withdraw

\$200. They then drove him to a deserted area, ignoring his pleas to leave him unharmed. According to the co-conspirator, whose testimony the jury evidently credited, Atkins ordered Nesbitt out of the vehicle and, after he had taken only a few steps, shot him one, two, three, four, five, six, seven, eight times in the thorax, chest, abdomen, arms, and legs.

The jury convicted Atkins of capital murder. At resentencing (the Virginia Supreme Court affirmed his conviction but remanded for resentencing because the trial court had used an improper verdict form, 257 Va. 160, 179, 510 S.E.2d 445, 457 (1999)), the jury heard extensive evidence of petitioner's alleged mental retardation. A psychologist testified that petitioner was mildly mentally retarded with an IQ of 59, that he was a "slow learner," App. 444, who showed a "lack of success in pretty much every domain of his life," *id.*, at 442, and that he had an "impaired" capacity to **2260 appreciate the criminality of his conduct and to conform his conduct to the law, *id.*, at 453. Petitioner's family members offered additional evidence in support of his mental retardation claim (e.g., that petitioner is a "follower," *id.*, at 421). The Commonwealth contested the evidence of retardation and pre-

sented testimony of a psychologist who found "absolutely no evidence other than the IQ score ... indicating that [petitioner]*339 was in the least bit mentally retarded" and concluded that petitioner was "of average intelligence, at least." *Id.*, at 476.

The jury also heard testimony about petitioner's 16 prior felony convictions for robbery, attempted robbery, abduction, use of a firearm, and maiming. *Id.*, at 491-522. The victims of these offenses provided graphic depictions of petitioner's violent tendencies: He hit one over the head with a beer bottle, *id.*, at 406; he slapped a gun across another victim's face, clubbed her in the head with it, knocked her to the ground, and then helped her up, only to shoot her in the stomach, *id.*, at 411-413. The jury sentenced petitioner to death. The Supreme Court of Virginia affirmed petitioner's sentence. 260 Va. 375, 534 S.E.2d 312 (2000).

II

As the foregoing history demonstrates, petitioner's mental retardation was a *central issue* at sentencing. The jury concluded, however, that his alleged retardation was not a compelling reason to exempt him from the death penalty in light of the brutality of his crime and his long demonstrated propensity for violence. "In upsetting this particularized judgment on the basis of a constitutional absolute," the Court concludes that no one who is even slightly mentally retarded can have sufficient "moral responsibility to be subjected to capital punishment for any crime. As a sociological and moral conclusion that is implausible; and it is doubly implausible as an interpretation of the United States Constitution." *Thompson v. Oklahoma*, 487 U.S. 815, 863-864, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988) (SCALIA, J., dissenting).

Under our Eighth Amendment jurisprudence, a punishment is "cruel and unusual" if it falls within one of two categories: "those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted," *Ford v. Wainwright*, 477 U.S. 399, 405, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986), and modes of punishment that are inconsistent with *340 modern "standards of decency," as evinced by objective indicia, the most important of which is "legislation enacted by the country's legislatures," *Penry v. Lynaugh*, 492 U.S. 302, 330-331, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

The Court makes no pretense that execution of the mildly

mentally retarded would have been considered "cruel and unusual" in 1791. Only the *severely* or *profoundly* mentally retarded, commonly known as "idiots," enjoyed any special status under the law at that time. They, like lunatics, suffered a "deficiency in will" rendering them unable to tell right from wrong. 4 W. Blackstone, Commentaries on the Laws of England 24 (1769) (hereinafter Blackstone); see also *Penry*, 492 U.S., at 331-332, 109 S.Ct. 2934 ("[T]he term 'idiot' was generally used to describe persons who had a total lack of reason or understanding, or an inability to distinguish between good and evil"); *id.*, at 333, 109 S.Ct. 2934 (citing sources indicating that idiots generally had an IQ of 25 or below, which would place them within the "profound" or "severe" range of mental retardation under modern standards); 2 A. Fitz-Herbert, *Natura Brevium* 233B (9th ed. 1794) (originally published 1534) (An idiot is "such a person who cannot account or number twenty pence, nor can tell who was his father or mother, nor how old he is, etc., so as it may appear that he hath no understanding of reason what shall be for his profit, or what for his loss"). Due to their incompetence, idiots were "excuse[d] **2261 from the guilt, and of course from the punishment, of any criminal action committed under such deprivation of the senses." 4 Blackstone 25; see also *Penry*, *supra*, at 331, 109 S.Ct. 2934. Instead, they were often committed to civil confinement or made wards of the State, thereby preventing them from "go[ing] loose, to the terror of the king's subjects." 4 Blackstone 25; see also S. Brakel, J. Parry, & B. Weiner, *The Mentally Disabled and the Law* 12-14 (3d ed. 1985); 1 Blackstone 292-296; 1 M. Hale, *Pleas of the Crown* 33 (1st Am. ed. 1847). Mentally retarded offenders with less severe impairments—those who were not "idiots"—suffered criminal prosecution *341 and punishment, including capital punishment. See, e.g., I. Ray, *Medical Jurisprudence of Insanity* 65, 87-92 (W. Overholser ed. 1962) (recounting the 1834 trial and execution in Concord, New Hampshire, of an apparent "imbecile"—imbecility being a less severe form of retardation which "differs from idiocy in the circumstance that while in [the idiot] there is an utter destitution of every thing like reason, [imbeciles] possess some intellectual capacity, though infinitely less than is possessed by the great mass of mankind"); A. Highmore, *Law of Idiocy and Lunacy* 200 (1807) ("The great difficulty in all these cases, is to determine where a person shall be said to be so far deprived of his sense and memory as not to have any of his actions imputed to him: or where notwithstanding some defects of this kind he still appears to have so much reason and understanding as will make him accountable for his actions ...").

The Court is left to argue, therefore, that execution of the mildly retarded is inconsistent with the "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (plurality opinion) (Warren, C. J.). Before today, our opinions consistently emphasized that Eighth Amendment judgments regarding the existence of social "standards" "should be informed by objective factors to the maximum possible extent" and "should not be, or appear to be, merely the subjective views of individual Justices." *Coker v. Georgia*, 433 U.S. 584, 592, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977) (plurality opinion); see also *Stanford v. Kentucky*, 492 U.S. 361, 369, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989); *McCleskey v. Kemp*, 481 U.S. 279, 300, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987); *Enmund v. Florida*, 458 U.S. 782, 788, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). "First" among these objective factors are the "statutes passed by society's elected representatives," *Stanford v. Kentucky*, *supra*, at 370, 109 S.Ct. 2969; because it "will rarely if ever be the case that the Members of this Court will have a better sense of the evolution in views of the American people than do their elected representatives," *Thompson*, *supra*, at 865, 108 S.Ct. 2687 (SCALIA, J., dissenting).

*342 The Court pays lipservice to these precedents as it miraculously extracts a "national consensus" forbidding execution of the mentally retarded, *ante*, at 2250, from the fact that 18 States—less than half (47%) of the 38 States that permit capital punishment (for whom the issue exists)—have very recently enacted legislation barring execution of the mentally retarded. Even that 47% figure is a distorted one. If one is to say, as the Court does today, that *all* executions of the mentally retarded are so morally repugnant as to violate our national "standards of decency," surely the "consensus" it points to must be one that has set its righteous face against *all* such executions. Not 18 States, but only 7-18% of death penalty jurisdictions—have legislation of that scope. Eleven of those that the Court counts enacted statutes prohibiting execution of mentally retarded defendants *convicted after, or convicted of crimes committed after, the effective date* of the legislation; ^{FN1} those already on death row, ****2262** or consigned there before the statute's effective date, or even (in those States using the date of the crime as the criterion of retroactivity) tried in the future for murders committed many years ago, could be put to death. That is not a statement of absolute moral repugnance, but one of current preference between two tolerable approaches. Two of these States permit execution of the mentally retarded in other situations as well: Kansas apparently permits execution of all *343 except the *severely* mentally retarded; ^{FN2} New York

permits execution of the mentally retarded who commit murder in a correctional facility. N.Y.Crim. Proc. Law § 400.27.12(d) (McKinney 2001); N.Y. Penal Law § 125.27 (McKinney 2002).

FN1. See *Ariz.Rev.Stat. Ann. § 13-703.02(I)* (Supp.2001); *Ark.Code Ann. § 5-4-618(d)(1)* (1997); *Reams v. State*, 322 Ark. 336, 340, 909 S.W.2d 324, 326-327 (1995); *Fla. Stat. § 921.137(8)* (Supp.2002); *Ga.Code Ann. § 17-7-131(j)* (1997); *Ind.Code § 35-36-9-6* (1998); *Rondon v. State*, 711 N.E.2d 506, 512 (Ind.1999); *Kan. Stat. Ann. §§ 21-4623(d), 21-4631(c)* (1995); *Ky.Rev.Stat. Ann. § 532.140(3)* (1999); *Md. Ann.Code, Art. 27, § 412(g)* (1996); *Booth v. State*, 327 Md. 142, 166-167, 608 A.2d 162, 174 (1992); *Mo.Rev.Stat. § 565.030(7)* (Supp.2001); N.Y.Crim. Proc. Law § 400.27.12(c) (McKinney Supp.2002); 1995 N.Y. Laws, ch. 1, § 38; *Tenn.Code Ann. § 39-13-203(b)* (1997); *Van Tran v. State*, 66 S.W.3d 790, 798-799 (Tenn.2001).

FN2. The Kansas statute defines "mentally retarded" as "having significantly subaverage general intellectual functioning ... to an extent which substantially impairs one's capacity to appreciate the criminality of one's conduct or to conform one's conduct to the requirements of law." *Kan. Stat. Ann. § 21-4623(e)* (2001). This definition of retardation, petitioner concedes, is analogous to the Model Penal Code's definition of a "mental disease or defect" excusing responsibility for criminal conduct, see ALI, *Model Penal Code § 4.01* (1985), which would not include mild mental retardation. Reply Brief for Petitioner 3, n. 4.

But let us accept, for the sake of argument, the Court's faulty count. That bare number of States alone—18—should be enough to convince any reasonable person that no "national consensus" exists. How is it possible that agreement among 47% of the death penalty jurisdictions amounts to "consensus"? Our prior cases have generally required a much higher degree of agreement before finding a punishment cruel and unusual on "evolving standards" grounds. In *Coker*, *supra*, at 595-596, 97 S.Ct. 2861, we proscribed the death penalty for rape of an adult woman after finding that only one jurisdiction, Georgia, authorized such a punishment. In *Enmund*, *supra*, at 789, 102 S.Ct. 3368, we invalidated the death penalty for mere participation in a robbery in which an accomplice took a

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life, a punishment not permitted in 28 of the death penalty States (78%). In *Ford*, 477 U.S., at 408, 106 S.Ct. 2595, we supported the common-law prohibition of execution of the insane with the observation that “[t]his ancestral legacy has not outlived its time,” since not a single State authorizes such punishment. In *Solem v. Helm*, 463 U.S. 277, 300, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983), we invalidated a life sentence without parole under a recidivist statute by which the criminal “was treated more severely than he would have been in any other State.” What the Court calls evidence of “consensus” in the present case (a fudged 47%) more closely resembles evidence that we found inadequate *344 to establish consensus in earlier cases. *Tison v. Arizona*, 481 U.S. 137, 154, 158, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987), upheld a state law authorizing capital punishment for major participation in a felony with reckless indifference to life where only 11 of the 37 death penalty States (30%) prohibited such punishment. *Stanford*, 492 U.S., at 372, 109 S.Ct. 2969, upheld a state law permitting execution of defendants who committed a capital crime at age 16 where only 15 of the 36 death penalty States (42%) prohibited death for such offenders.

Moreover, a major factor that the Court entirely disregards is that the legislation of all 18 States it relies on is still in its infancy. The oldest of the statutes is only 14 years old; ^{FN3} five were enacted last **2263 year, ^{FN4} over half were enacted within the past eight years. ^{FN5} Few, if any, of the States have had sufficient experience with these laws to know whether they are sensible in the long term. It is “myopic to base sweeping constitutional principles upon the narrow experience of [a few] years.” *Coker*, 433 U.S., at 614, 97 S.Ct. 2861 (Burger, C. J., dissenting); see also *Thompson*, 487 U.S., at 854-855, 108 S.Ct. 2687 (O’CONNOR, J., concurring in judgment).

FN3. Ga.Code Ann. § 17-7-131(j).

FN4. *Ariz.Rev.Stat. Ann. § 13-703.02*; *Conn. Gen.Stat. § 53a-46a(h)*; *Fla. Stat. § 921.137*; *Mo.Rev.Stat. §§ 565.030(4)-(7)*; *N.C. Gen.Stat. § 15A-2005*.

FN5. In addition to the statutes cited n. 4 *supra*, see *S.D. Codified Laws § 23A-27A-26.1* (enacted 2000); *Neb.Rev.Stat. §§ 28-105.01(2)-(5)* (1998); *N.Y.Crim. Proc. Law § 400.27(12)* (1995); *Ind.Code § 35-36-9-6* (1994); *Kan. Stat. Ann. § 21-4623* (1994).

The Court attempts to bolster its embarrassingly feeble

evidence of “consensus” with the following: “It is not so much the number of these States that is significant, but the *consistency* of the direction of change.” *Ante*, at 2249 (emphasis added). But in what *other* direction *could* we possibly see change? Given that 14 years ago *all* the death penalty statutes included the mentally retarded, any change (except precipitate undoing of what had just been done) was *bound* *345 to be in the one direction the Court finds significant enough to overcome the lack of real consensus. That is to say, to be accurate the Court’s “*consistency-of-the-direction-of-change*” point should be recast into the following unimpressive observation: “No State has yet undone its exemption of the mentally retarded, one for as long as 14 whole years.” In any event, reliance upon “trends,” even those of much longer duration than a mere 14 years, is a perilous basis for constitutional adjudication, as Justice O’CONNOR eloquently explained in *Thompson*:

“In 1846, Michigan became the first State to abolish the death penalty In succeeding decades, other American States continued the trend towards abolition Later, and particularly after World War II, there ensued a steady and dramatic decline in executions In the 1950’s and 1960’s, more States abolished or radically restricted capital punishment, and executions ceased completely for several years beginning in 1968

“In 1972, when this Court heard arguments on the constitutionality of the death penalty, such statistics might have suggested that the practice had become a relic, implicitly rejected by a new societal consensus.... We now know that any inference of a societal consensus rejecting the death penalty would have been mistaken. But had this Court then declared the existence of such a consensus, and outlawed capital punishment, legislatures would very likely not have been able to revive it. The mistaken premise of the decision would have been frozen into constitutional law, making it difficult to refute and even more difficult to reject.” 487 U.S., at 854-855, 108 S.Ct. 2687.

Her words demonstrate, of course, not merely the peril of riding a trend, but also the peril of discerning a consensus where there is none.

*346 The Court’s thrashing about for evidence of “consensus” includes reliance upon the *margins* by which state legislatures have enacted bans on execution of the retarded. *Ante*, at 2249. Presumably, in applying our Eighth Amendment “evolving-standards-of-decency” jurispru-

dence, we will henceforth weigh not only how many States have agreed, but how many States have agreed by *how much*. Of course if the percentage of legislators voting for the bill is significant, surely the number of people *represented* by the legislators voting for the bill is also significant: the fact that 49% of the legislators in a State with a population of 60 million voted *against* the bill should be more impressive than the fact that 90% of the legislators in ****2264** a State with a population of 2 million voted *for* it. (By the way, the population of the death penalty States that exclude the mentally retarded is only 44% of the population of all death penalty States. U.S. Dept. of Commerce, Bureau of Census, Statistical Abstract of the United States 21 (121st ed.2001).) This is quite absurd. What we have looked for in the past to "evolve" the Eighth Amendment is a consensus of the same sort as the consensus that *adopted* the Eighth Amendment: a consensus of the sovereign States that form the Union, not a nose count of Americans for and against.

Even less compelling (if possible) is the Court's argument, *ibid.*, that evidence of "national consensus" is to be found in the infrequency with which retarded persons are executed in States that do not bar their execution. To begin with, what the Court takes as true is in fact quite doubtful. It is not at all clear that execution of the mentally retarded is "uncommon," *ibid.*, as even the sources cited by the Court suggest, see *ante*, at 2249, n. 20 (citing D. Keyes, W. Edwards, & R. Perske, People with Mental Retardation are Dying Legally, 35 Mental Retardation (Feb.1997) (updated by Death Penalty Information Center, available at <http://www.advocacyone.org/deathpenalty.html> (as visited ***347** June 12, 2002) (showing that 12 States executed 35 allegedly mentally retarded offenders during the period 1984-2000)). See also Bonner & Rimer, Executing the Mentally Retarded Even as Laws Begin to Shift, N.Y. Times, Aug. 7, 2000, p. A1 (reporting that 10% of death row inmates are retarded). *If*, however, execution of the mentally retarded is "uncommon"; and if it is not a sufficient explanation of this that the retarded constitute a tiny fraction of society (1% to 3%), Brief for American Psychological Association et al. as *Amici Curiae* 7; then surely the explanation is that mental retardation is a constitutionally mandated mitigating factor at sentencing, *Penry*, 492 U.S., at 328, 109 S.Ct. 2934. For that reason, even if there were uniform national sentiment in *favor* of executing the retarded in appropriate cases, one would still expect execution of the mentally retarded to be "uncommon." To adapt to the present case what the Court itself said in *Stanford*, 492 U.S., at 374, 109 S.Ct. 2969: "[I]t is not only possible, but overwhelmingly probable,

that the very considerations which induce [today's majority] to believe that death should *never* be imposed on [mentally retarded] offenders ... cause prosecutors and juries to believe that it should *rarely* be imposed."

But the Prize for the Court's Most Feeble Effort to fabricate "national consensus" must go to its appeal (deservedly relegated to a footnote) to the views of assorted professional and religious organizations, members of the so-called "world community," and respondents to opinion polls. *Ante*, at 2249-2250, n. 21. I agree with THE CHIEF JUSTICE, *ante*, at 2254-2256 (dissenting opinion), that the views of professional and religious organizations and the results of opinion polls are irrelevant.^{FN6} Equally irrelevant are the practices of the ***348** "world community," whose notions of justice are (thankfully) not always those of our people. "We must never forget that it is a Constitution for the United States of America that we are expounding. ... [W]here there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution." ****2265** *Thompson*, 487 U.S., at 868-869, n. 4, 108 S.Ct. 2687 (SCALIA, J., dissenting).

FN6. And in some cases positively counterindicative. The Court cites, for example, the views of the United States Catholic Conference, whose members are the active Catholic Bishops of the United States. See *ante*, at 2249-2250, n. 21 (citing Brief for United States Catholic Conference et al. as *Amici Curiae* 2). The attitudes of that body regarding crime and punishment are so far from being representative, even of the views of Catholics, that they are currently the object of intense national (and entirely ecumenical) criticism.

III

Beyond the empty talk of a "national consensus," the Court gives us a brief glimpse of what really underlies today's decision: pretension to a power confined *neither* by the moral sentiments originally enshrined in the Eighth Amendment (its original meaning) *nor* even by the current moral sentiments of the American people. "['T]he Constitution,' the Court says, 'contemplates that in the end *our own judgment* will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.'" *Ante*, at 2247 (quoting *Coker*, 433 U.S., at 597, 97 S.Ct. 2861) (emphasis added). (The unexpressed

reason for this unexpressed "contemplation" of the Constitution is presumably that really good lawyers have moral sentiments superior to those of the common herd, whether in 1791 or today.) The arrogance of this assumption of power takes one's breath away. And it explains, of course, why the Court can be so cavalier about the evidence of consensus. It is just a game, after all. " ' [I]n the end, ' " *Thompson, supra*, at 823, n. 8 (plurality opinion (quoting *Coker, supra*, at 597 (plurality opinion))), it is the *feelings* and *intuition* of a majority of the Justices that count—"the perceptions of decency, or of penology, or of mercy, entertained ... by a majority of the small and *349 unrepresentative segment of our society that sits on this Court." *Thompson, supra*, at 873, 108 S.Ct. 2687 (SCALIA, J., dissenting).

The genuinely operative portion of the opinion, then, is the Court's statement of the reasons why it agrees with the contrived consensus it has found, that the "diminished capacities" of the mentally retarded render the death penalty excessive. *Ante*, at 2250-2252. The Court's analysis rests on two fundamental assumptions: (1) that the Eighth Amendment prohibits excessive punishments, and (2) that sentencing juries or judges are unable to account properly for the "diminished capacities" of the retarded. The first assumption is wrong, as I explained at length in *Harmelin v. Michigan*, 501 U.S. 957, 966-990, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (opinion of SCALIA, J.). The Eighth Amendment is addressed to always-and-everywhere "cruel" punishments, such as the rack and the thumbscrew. But where the punishment is in itself permissible, "[t]he Eighth Amendment is not a ratchet, whereby a temporary consensus on leniency for a particular crime fixes a permanent constitutional maximum, disabling the States from giving effect to altered beliefs and responding to changed social conditions." *Id.*, at 990, 111 S.Ct. 2680. The second assumption—inability of judges or juries to take proper account of mental retardation—is not only unsubstantiated, but contradicts the immemorial belief, here and in England, that they play an *indispensable* role in such matters:

"[I]t is very difficult to define the indivisible line that divides perfect and partial insanity; but it must rest upon circumstances duly to be weighed and considered both by the judge and jury, lest on the one side there be a kind of inhumanity towards the defects of human nature, or on the other side too great an indulgence given to great crimes" 1 Hale, Pleas of the Crown, at 30.

Proceeding from these faulty assumptions, the Court gives

two reasons why the death penalty is an excessive punishment for all mentally retarded offenders. First, the "diminished*350 capacities" of the mentally retarded raise a "serious question" whether their execution contributes to the "social purposes" of the death penalty, viz., retribution and deterrence. *Ante*, at 2250-2251. (The Court conveniently ignores a third "social purpose" of the death penalty—"incapacitation of dangerous criminals and the consequent prevention of crimes that they may otherwise commit in the future," **2266 *Gregg v. Georgia*, 428 U.S. 153, 183, n. 28, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.). But never mind; its discussion of even the other two does not bear analysis.) Retribution is not advanced, the argument goes, because the mentally retarded are *no more culpable* than the average murderer, whom we have already held lacks sufficient culpability to warrant the death penalty, see *Godfrey v. Georgia*, 446 U.S. 420, 433, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) (plurality opinion). *Ante*, at 2251. Who says so? Is there an established correlation between mental acuity and the ability to conform one's conduct to the law in such a rudimentary matter as murder? Are the mentally retarded really more disposed (and hence more likely) to commit willfully cruel and serious crime than others? In my experience, the opposite is true: being childlike generally suggests innocence rather than brutality.

Assuming, however, that there is a direct connection between diminished intelligence and the inability to refrain from murder, what scientific analysis can possibly show that a mildly retarded individual who commits an exquisite torture-killing is "no more culpable" than the "average" murderer in a holdup-gone-wrong or a domestic dispute? Or a moderately retarded individual who commits a series of 20 exquisite torture-killings? Surely culpability, and deservedness of the most severe retribution, depends not merely (if at all) upon the mental capacity of the criminal (above the level where he is able to distinguish right from wrong) but also upon the depravity of the crime—which is precisely why this sort of question has traditionally been thought answerable not by a categorical rule of the sort the Court today *351 imposes upon all trials, but rather by the sentencer's weighing of the circumstances (both degree of retardation and depravity of crime) in the particular case. The fact that juries continue to sentence mentally retarded offenders to death for extreme crimes shows that society's moral outrage sometimes demands execution of retarded offenders. By what principle of law, science, or logic can the Court pronounce that this is wrong? There is none. Once the Court admits (as it does) that mental retardation does not render

the offender morally *blameless*, *ante*, at 2250-2251, there is no basis for saying that the death penalty is *never* appropriate retribution, no matter *how* heinous the crime. As long as a mentally retarded offender knows "the difference between right and wrong," *ante*, at 2250, only the sentencer can assess whether his retardation reduces his culpability enough to exempt him from the death penalty for the particular murder in question.

As for the other social purpose of the death penalty that the Court discusses, deterrence: That is not advanced, the Court tells us, because the mentally retarded are "less likely" than their non-retarded counterparts to "process the information of the possibility of execution as a penalty and ... control their conduct based upon that information." *Ante*, at 2251. Of course this leads to the same conclusion discussed earlier—that the mentally retarded (because they are less deterred) are more likely to kill—which neither I nor the society at large believes. In any event, even the Court does not say that *all* mentally retarded individuals cannot "process the information of the possibility of execution as a penalty and ... control their conduct based upon that information"; it merely asserts that they are "less likely" to be able to do so. But surely the deterrent effect of a penalty is adequately vindicated if it successfully deters many, but not all, of the target class. Virginia's death penalty, for example, does not fail of its deterrent effect simply because *some* criminals are unaware that Virginia has the death penalty. In other words, the supposed fact that *some* *352 retarded criminals cannot fully appreciate the death penalty has nothing to do with the deterrence rationale, but is simply an echo of the arguments denying a retribution rationale, discussed and rejected **2267 above. I am not sure that a murderer is somehow less blameworthy if (though he knew his act was wrong) he did not fully appreciate that he could die for it; but if so, we should treat a mentally retarded murderer the way we treat an offender who may be "less likely" to respond to the death penalty because he was abused as a child. We do not hold him immune from capital punishment, but require his background to be considered by the sentencer as a mitigating factor. *Eddings v. Oklahoma*, 455 U.S. 104, 113-117, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

The Court throws one last factor into its grab bag of reasons why execution of the retarded is "excessive" in all cases: Mentally retarded offenders "face a special risk of wrongful execution" because they are less able "to make a persuasive showing of mitigation," "to give meaningful assistance to their counsel," and to be effective witnesses.

Ante, at 2252. "Special risk" is pretty flabby language (even flabbier than "less likely")—and I suppose a similar "special risk" could be said to exist for just plain stupid people, inarticulate people, even ugly people. If this unsupported claim has any substance to it (which I doubt), it might support a due process claim in all criminal prosecutions of the mentally retarded; but it is hard to see how it has anything to do with an *Eighth Amendment* claim that execution of the mentally retarded is cruel and unusual. We have never before held it to be cruel and unusual punishment to impose a sentence in violation of some *other* constitutional imperative.

* * *

Today's opinion adds one more to the long list of substantive and procedural requirements impeding imposition of the death penalty imposed under this Court's assumed power to invent a death-is-different jurisprudence. None of those *353 requirements existed when the Eighth Amendment was adopted, and some of them were not even supported by current moral consensus. They include prohibition of the death penalty for "ordinary" murder, *Godfrey*, 446 U.S., at 433, 100 S.Ct. 1759, for rape of an adult woman, *Coker*, 433 U.S., at 592, 97 S.Ct. 2861, and for felony murder absent a showing that the defendant possessed a sufficiently culpable state of mind, *Enmund*, 458 U.S., at 801, 102 S.Ct. 3368; prohibition of the death penalty for any person under the age of 16 at the time of the crime, *Thompson*, 487 U.S., at 838, 108 S.Ct. 2687 (plurality opinion); prohibition of the death penalty as the mandatory punishment for any crime, *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) (plurality opinion), *Sumner v. Shuman*, 483 U.S. 66, 77-78, 107 S.Ct. 2716, 97 L.Ed.2d 56 (1987); a requirement that the sentencer not be given unguided discretion, *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (*per curiam*), a requirement that the sentencer be empowered to take into account all mitigating circumstances, *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (plurality opinion), *Eddings v. Oklahoma*, *supra*, at 110, 102 S.Ct. 869; and a requirement that the accused receive a judicial evaluation of his claim of insanity before the sentence can be executed, *Ford*, 477 U.S., at 410-411, 106 S.Ct. 2595 (plurality opinion). There is something to be said for popular abolition of the death penalty; there is nothing to be said for its incremental abolition by this Court.

This newest invention promises to be more effective than any of the others in turning the process of capital trial into

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a game. One need only read the definitions of mental retardation adopted by the American Association on Mental Retardation and the American Psychiatric Association (set forth in the Court's opinion, *ante*, at 2245, n. 3) to realize that the symptoms of this condition can readily be feigned. And whereas the capital defendant who feigns insanity risks commitment to a mental institution until he can be cured (and then tried and executed), ****2268***Jones v. United States*, 463 U.S. 354, 370, and n. 20, 103 S.Ct. 3043, 77 L.Ed.2d 694 (1983), the capital defendant who feigns mental retardation risks nothing at all. The mere pendency ***354** of the present case has brought us petitions by death row inmates claiming for the first time, after multiple habeas petitions, that they are retarded. See, e.g., *Moore v. Texas*, 535 U.S. 1044, 122 S.Ct. 1814, 152 L.Ed.2d 668 (2002) (SCALIA, J., dissenting from grant of applications for stay of execution).

Perhaps these practical difficulties will not be experienced by the minority of capital-punishment States that have very recently changed mental retardation from a mitigating factor (to be accepted or rejected by the sentencer) to an absolute immunity. Time will tell-and the brief time those States have had the new disposition in place (an average of 6.8 years) is surely not enough. But if the practical difficulties do not appear, and if the other States share the Court's perceived moral consensus that *all* mental retardation renders the death penalty inappropriate for *all* crimes, then that majority will presumably follow suit. But there is no justification for this Court's pushing them into the experiment-and turning the experiment into a permanent practice-on constitutional pretext. Nothing has changed the accuracy of Matthew Hale's endorsement of the common law's traditional method for taking account of guilt-reducing factors, written over three centuries ago:

"[Determination of a person's incapacity] is a matter of great difficulty, partly from the easiness of counterfeiting this disability ... and partly from the variety of the degrees of this infirmity, whereof some are sufficient, and some are insufficient to excuse persons in capital offenses. ...

"Yet the law of England hath afforded the best method of trial, that is possible, of this and all other matters of fact, namely, by a jury of twelve men all concurring in the same judgment, by the testimony of witnesses ..., and by the inspection and direction of the judge." 1 Pleas of the Crown, at 32-33.

I respectfully dissent.

U.S., 2002.

Atkins v. Virginia

536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335, 70 USLW 4585, 02 Cal. Daily Op. Serv. 5439, 2002 Daily Journal D.A.R. 6937, 15 Fla. L. Weekly Fed. S 397

END OF DOCUMENT

Legislative Research Services

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



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

January 15, 1997

MEMORANDUM

TO: Representative Al Vezey

FROM: Patricia Young
Legislative Analyst

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

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

Summary

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

The Death Penalty in Alaska

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

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

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

Regardless of the exact source or date of inception, the death penalty was used early in Alaska's history. Although records are sketchy and informal, it appears that capital punishment was condoned, if not legal, in Alaska from the time of its purchase from Russia in 1867. The available historical records suggest that seven persons were hanged by the army or miners' courts between 1869 and 1899.³ Another eight persons were hanged for crimes deemed to warrant death between the advent of criminal and civil codes in Alaska and the abolition of capital punishment in 1957.⁴

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

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

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

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

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

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

EXECUTIONS IN ALASKA				
Name	Race	Sex	Location of Hanging	Date of Hanging
Scutdoo	Indian	male	Wrangell	December 29, 1869
unknown	Indian	male	Wrangell	1869
Boyd	Caucasian	male	Wrangell	Fall, 1877
Sad Kajun (?)	Indian	male	Juneau	July, 1882
Kakusakuch Kajun (?)	Indian	male	Juneau	July, 1882
unknown	unknown	male	Valdez	1898
Michael Dennin	Caucasian	male	Lituya Bay	1899
Fred Hardy	Caucasian	male	Nome	September 9, 1902
Homer Bird	Caucasian	male	Sitka	March 6, 1903
Mailo P. Segura	Immigrated from Montenegro; presumed Caucasian	male	Fairbanks	April 15, 1921
Hamilton	Indian	male	Fairbanks	October 7, 1921
Constantine Beaver	Indian	male	Fairbanks	September 7, 1929
Nelson Charles	Indian	male	Juneau	November 10, 1939
Austin A. Nelson	African-American	male	Juneau	March 1, 1948
Eugene LaMoore	African-American	male	Juneau	April 14, 1950
<i>Prepared by Legislative Research Services, January 1997 (97.029).</i>				
Source: Documents provided by the Historical Collections of the Alaska State Library, and information in <i>Glacier Bay: The Land and the Silence</i> , published by the Alaska National Parks and Monuments Association.				

Representative Vezey
January 15, 1997
Page 4

Efforts to Reinstitute the Death Penalty in Alaska

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

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

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

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

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

Attachments

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

ALASKA LEGISLATION PERTAINING TO CAPITAL PUNISHMENT (1959-1996)

1974 - Eighth Legislature

House Bill 675

Prime Sponsor: A.M. Saylor

Referred to House Judiciary; committee substitute passed Judiciary; failed to pass House.
(CS made minor text changes).

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

1981 - Twelfth Legislature

Senate Bill 73

Prime Sponsor: Brad Bradley

Referred to Senate State Affairs and Judiciary; did not pass out of State Affairs.

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

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

Prime Sponsor: Vern Hurlbert

Referred to House Judiciary; did not pass out of committee.

ALASKA LEGISLATION PERTAINING TO CAPITAL PUNISHMENT (1959-1996)

1983 - Thirteenth Legislature

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

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

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

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

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

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

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

House Bill 235

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

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

ALASKA LEGISLATION PERTAINING TO CAPITAL PUNISHMENT (1959-1996)

1985 - Fourteenth Legislature

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

Prime Sponsor: Paul Fischer

Co-Sponsors: Tim Kelly, Ann DeVries, Jack Coghill, Jan Faiks, and Mitch Abood

Referred to Health, Education, and Social Services, Judiciary and Finance; did not pass out of Health, Education, and Social Services.

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

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

Prime Sponsor: Fritz Pettyjohn

Co-Sponsors: Roger Jenkins, Dick Shultz, Robin Taylor, Andre Marrou, Max Gruenberg

Referred to House Health, Education, and Social Services, Judiciary and Finance; did not pass out of Health Education, and Social Services.

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

1987 - Fifteenth Legislature

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

Prime Sponsor: Mitch Abood

Co-Sponsors: Tim Kelly, Jan Faiks, Paul Fischer

Referred to Senate Health, Education, and Social Services, Judiciary, and Finance; did not pass out of Judiciary.

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

ALASKA LEGISLATION PERTAINING TO CAPITAL PUNISHMENT (1959-1996)

1987 - Fifteenth Legislature (continued)

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

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

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

Prime Sponsor: Paul Fischer

Co-Sponsors: Tim Kelly and Jan Faiks

Referred to Senate Health, Education, and Social Services, Judiciary and Finance; did not pass out of Health, Education, and Social Services.

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

1989 - Sixteenth Legislature

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

Prime Sponsor: Paul Fischer

Co-Sponsors: Tim Kelly, Drue Pearce, Rick Halford and Jan Faiks

CSSB 17 (Jud) (ct rules & efds fld) passed the Senate; referred to House Judiciary and Finance; failed to pass Judiciary.

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

CSSB 17 (Jud)

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

ALASKA LEGISLATION PERTAINING TO CAPITAL PUNISHMENT (1959-1996)

1989 - Sixteenth Legislature (continued)

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

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

1991 - Seventeenth Legislature

Senate Bill 13

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

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

1993 - Eighteenth Legislature

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

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

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

ALASKA LEGISLATION PERTAINING TO CAPITAL PUNISHMENT (1959-1996)

1993 - Eighteenth Legislature (continued)

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

Prime Sponsor: Senate Judiciary Committee

Referred to Senate Judiciary and Finance; did not pass out of Judiciary.

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

1995 - Nineteenth Legislature

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

Prime Sponsor: Jerry Sanders

Co-Sponsor: Vic Kohring

Referred to House State Affairs, Judiciary, and Finance; did not pass out of State Affairs.

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

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

Prime Sponsor: Robin Taylor

Co-Sponsor: Drew Pearce

Referred to Judiciary and Finance; committee substitute for sponsor substitute passed Senate; referred to House Judiciary and Finance; did not pass out of Finance.

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

SSSB 52 *Text became identical to HB 45.*

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

ALASKA LEGISLATION PERTAINING TO CAPITAL PUNISHMENT (1959-1996)

1995 - Nineteenth Legislature (continued)

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

Prime Sponsor: Beverly Masek

Co-Sponsors: Vic Kohring and Scott Ogan

Referred to House State Affairs and Judiciary; did not pass out of Judiciary.

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

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



NATIONAL CONFERENCE of STATE LEGISLATURES

The Forum for America's Ideas

Capital Case Sentencing Procedure

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

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

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

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

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

Thirty-six states have a death penalty.

Date: June 2008

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

Clemency Process By State

Governor Has Sole Authority (14)

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

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

Arizona	Indiana	Oklahoma
Delaware	Louisiana	Pennsylvania
Florida*	Montana	Texas

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

Arkansas	Mississippi	Ohio
Illinois	Missouri	South Dakota
Maryland	New Hampshire	Tennessee

Board or Advisory Group Makes Determination (3)

Connecticut

Georgia

Idaho

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

Nebraska

Nevada

Utah

Notes:

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

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

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

2008 enactments:

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

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

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

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

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

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

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

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

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

6) 2007 enactments:

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

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

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

Missouri HB 820

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

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

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

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

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

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

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

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

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

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

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

7) 2006 enactments:

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

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

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

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

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

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

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

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

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

8) 2005 enactments:

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

Nevada AB 6

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

North Carolina H 1436

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

Oklahoma S. 329

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

Texas S 1791

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



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Death Penalty and the Mentally Retarded
Updated January 2007

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

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

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

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

Statutory Definitions:

- ARIZ. REV. STAT. §13-703 and §13-703.02
Defines mental retardation as a condition based on a mental deficit that involves significantly subaverage general intellectual functioning. Existing concurrently with significant impairment in adaptive behavior, where the onset of the foregoing conditions occurred before the defendant reached the age of eighteen. Creates a rebuttable presumption when the defendant has an IQ of 65 or less. Defendant has the burden of proving by clear and convincing evidence. The court determines whether the defendant is mentally retarded prior to trial, however the defendant may present evidence of mental retardation during the sentencing proceeding, even if deemed not mentally retarded prior to trial.
- ARK. CODE ANN. §5-4-618
Defines mental retardation as significantly subaverage general intellectual functioning accompanied by significant deficits or impairments in adaptive functioning manifest in the development period, but no later than age 18; and deficits in adaptive behavior. Creates a rebuttable presumption when a defendant has an I.Q. of 65 or below. Defendant has the burden of proving by a preponderance of the evidence. Prior to trial, the court determines whether the defendant is mentally retarded, but the defendant may bring the issue up again during the sentencing phase if the court determined prior to trial that the defendant was not mentally retarded.
- CALIFORNIA PENAL CODE 1376
Defines mental retardation as significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before the age of 18.
- COLO. REV. STAT. ANN. §16-9-401 through 405
Defines “mentally retarded defendant” as one with significantly subaverage general intellectual functioning existing concurrently with substantial deficits in adaptive behavior and manifested and documented during the developmental period. Allows documentation excused if court finds extraordinary circumstances. Requires the defendant prove by clear and convincing evidence and that the court enter its findings on the defendant’s pre-trial motion. Mandates the court to order evaluations of defendant when defendant’s pre-trial motion is filed. Permits the use of defendant’s statements and medical history in determining whether the defendant is mentally retarded.
- CONN. GEN. STAT. §1-1g and §53a-46a
Defines “mentally retarded” as having significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period which is between birth and age 18.

- DEL. SB 450
Defines “serious mental retardation” as having significantly subaverage intellectual functioning that exists concurrently with substantial deficits in adaptive behavior that were both manifested before the individual became 18 years of age.
- FLA. STAT. ANN. §921.137
Defines “mentally retarded” as having significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to 18. Defendant must notify the court of intent to raise mental retardation bar to execution. After being convicted and sentenced to death, defendant may then file motion to determine whether mental retardation exists. Court then appoints two experts to evaluate the defendant. Court must find by clear and convincing evidence that defendant is mentally retarded. State may appeal a determination of mental retardation.
- GA. CODE ANN. §17-7-131
Defines mentally retarded as having significantly subaverage general intellectual functioning resulting in or associated with impairments in adaptive behavior which manifested during the developmental period. Requires the defendant be examined by a licensed psychologist or psychiatrist prior to acceptance of defendant’s guilty by mentally retarded plea. Specifically states that trials commencing on or after July 1, 1988 cannot impose the death penalty on mentally retarded defendants.
- IDAHO STATUTES §19-2515A
“Mentally retarded” means significantly subaverage general intellectual functioning that is accompanied by significant limitations in adaptive functioning in a least two of the following skill areas: communication, self-care, home living, social or interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety. The onset of significant limitations in adaptive functioning must occur before the age of 18. “Significant subaverage general intellectual functioning” means an intelligence quotient of 70 or below.
- ILLINOIS COMPILED STATUTES §725 ILCS 5/114-15
The mental retardation must have manifested itself by the age of 18. AN intelligence quotient (IQ) of 75 or below is presumptive evidence of mental retardation. IQ tests and psychometric tests administered by the defendant must be the kind and type recognized by experts in the field of mental retardation. In order for the defendant to be considered mentally retarded, a low IQ must be accompanied by significant deficits in adaptive behavior in at least 2 of the following skill areas: communication, self-care, social or interpersonal skills, home living, self-direction, academics, health and safety, use of community resources, and work.

- IND. CODE ANN. §35-36-9 through 9-7
Defines mental retardation as significantly subaverage intellectual functioning and substantial impairment of adaptive behavior prior to becoming 22 years of age that is documented in a court ordered evaluative report. Requires the court to order an evaluation and the defendant must prove by clear and convincing evidence.
- KAN. STAT. ANN. §76-12b01, §21-4623 & 4634
Defines mental retardation as significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from birth to age 18. Requires an examination of the defendant.
- KY. REV. STAT. ANN. §532-130, 135 & 140
Defines mental retardation as significant subaverage intellectual functioning existing concurrently with substantial deficits in adaptive behavior and manifested during the developmental period. Defines significantly subaverage as an I.Q. of 70 or below. Applies to trials commenced after the effective date.
- LA. ACTS 698, CODE OF CRIMINAL PROCEDURE, ARTICLE 905.5.1
Defines mental retardation as a disability characterized by significant limitations in both intellectual functioning and adaptive behavior as expressed in conceptual, social, and practical adaptive skills. Onset must have occurred before the age of 18.
- MD. CODE ANN. §27-412
Defines mentally retarded as significantly subaverage intellectual functioning as evidenced by an I.Q. of 70 or below on an individually administered I.Q. test and impairment in adaptive behavior, and the mental retardation is manifested prior to the age of 22. Requires the defendant prove by a preponderance of the evidence.
- MO. REV. STAT. §565.030
Defines mental retardation as significantly subaverage intellectual functioning with continual extensive related deficits and limitations in two or more adaptive behaviors which conditions are manifested and documented before 18 years of age. Issue of mental retardation can be decided prior to trial or can be submitted later to the trier of fact.
- NEB. REV. STAT. §28-105.01
Defines mental retardation as significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and an I.Q. of 70 or below on a reliable test is presumptive evidence. The court must find by a preponderance of the evidence. Allows defendants sentenced prior to the

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

- NEVADA - NRS 174
Defines mental retardation as significant subaverage general intellectual functioning which exists concurrently with deficits in adaptive behavior and manifested during the developmental period.
- N.M. STAT. ANN. §31-20A-2.1
Defines mental retardation as significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and an I.Q. of 70 or below on a reliable test is presumptive evidence. The court must find by a preponderance of the evidence.
- N.Y. CPL LAW §400.27
Defines mental retardation as significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior existing prior to age 18. The court must find by a preponderance of the evidence. Allows the use of psychiatric evidence.
- NC SB 173
Defines mental retardation as significantly subaverage general intellectual functioning (IQ of 70 or below), existing concurrently with significant limitations in adaptive functioning (having significant limitations in two or more of the following adaptive skill areas: communications, self-care, home, living, social skills, community use, self-direction, health and safety, functional academics, leisure skills and work skills), both of which were manifested before the age of 18. Allows for post-conviction determination of mental retardation.
- S.D. CODIFIED LAWS §23A-27A-26.1 and 26.2
Defines mental retardation as significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive skill areas existing prior to age 18. An I.Q. exceeding 70 on a reliably standardized measure is presumptive evidence that defendant is not mentally retarded. The court must find by a preponderance of the evidence. Applies to trials commenced after the effective date.
- TENN. CODE ANN. §39-13-203
Defines mental retardation as significantly subaverage general intellectual functioning as evidenced by a functional I.Q. of 70 prior to the age of 18 and deficits in adaptive behavior. Requires the defendant prove by a preponderance of the evidence.
- UTAH CODE §77-15A-101
Defines mental retardation as significant subaverage general intellectual functioning that results in and exists concurrently with significant deficiencies in adaptive

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

- VIRGINIA CODE §19.2-264.3

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

- WASH. REV. CODE §10.95.030

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

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

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

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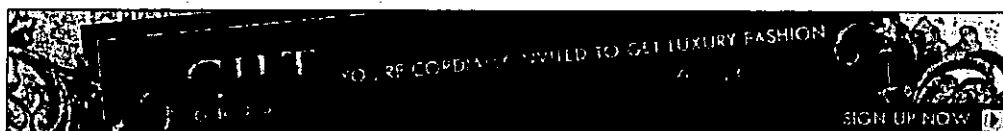
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Citing Cost, States Consider End to Death Penalty

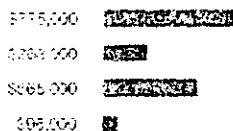


A county jail in Lawrenceville, Va., was designed for half as many inmates as it houses. Many states are trying to cut prison costs.

By IAN URBINA
Published February 24, 2009

ANNAPOLIS, Md. — When Gov. Martin O'Malley appeared before the Maryland Senate last week, he made an unconventional argument that is becoming increasingly popular in cash-strapped states: abolish the death penalty to cut costs.

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Graphic

The Cost of Capital Cases

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Mr. O'Malley, a Democrat and a Roman Catholic who has cited religious opposition to the death penalty in the past, is now arguing that capital cases cost three times as much as homicide cases where the death penalty is not sought. "And we can't afford that," he said, "when there are better and cheaper ways to reduce crime."

Lawmakers in Colorado, Kansas, Nebraska and New Hampshire have made the same argument in recent months as they push bills seeking to repeal the death penalty, and experts say such bills have a good chance of passing in Maryland, Montana and New Mexico.

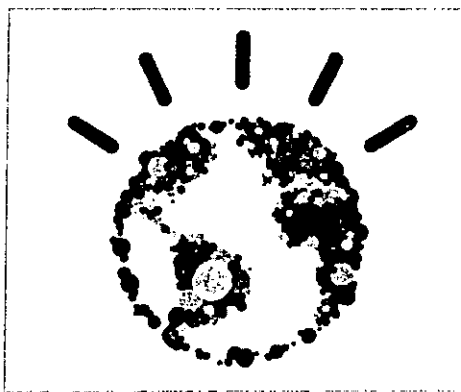
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Gov. Martin O'Malley

Death penalty opponents say they still face an uphill battle, but they are pleased to have allies raising the economic argument.

Efforts to repeal the death penalty are part of a broader trend in which states are trying to cut the costs of being tough on crime. Virginia and at least four other states, for example, are considering releasing nonviolent offenders early to reduce costs.

The economic realities have forced even longtime supporters of the death penalty, like Gov. Bill Richardson of New Mexico, to rethink their positions.

Mr. Richardson, a Democrat, has said he may sign a bill repealing capital punishment that passed the House last week and is pending in a Senate committee. He cited growing concerns about miscarriages of justice, but he added that cost was a factor in his shifting views and was "a valid reason in this era of austerity and tight budgets."

Capital cases are expensive because the trials tend to take longer, they typically require more lawyers and more costly expert witnesses, and they are far more likely to lead to multiple appeals.

In New Mexico, lawmakers who support the repeal bill have pointed out that despite the added expense, most defendants end up with life sentences anyway.

That has been true in Maryland. A 2008 study by the Urban Institute, a nonpartisan public policy group, found that in the 20 years after the state reinstated the death penalty in 1978, prosecutors sought the death penalty in 162 felony-homicide convictions, securing it in 56 cases, most of which were overturned; the rest of the convictions led to prison sentences.

Since 1978, five people have been executed in Maryland, and five inmates are on death row.

Opponents of repealing capital punishment say such measures are short-sighted and will result in more crime and greater costs to states down the road. At a time when police departments are being scaled down to save money, the role of the death penalty in deterring certain crimes is more important than ever, they say.

"How do you put a price tag on crimes that don't happen because threat of the death penalty deters them?" said Scott Shellenberger, the state's attorney for Baltimore County, Md., who opposes the repeal bill.

Kent Scheidegger, legal director of the Criminal Justice Legal Foundation, an organization in Sacramento that works on behalf of crime victims, called the anticipated savings a mirage. He added that with the death penalty, prosecutors can more easily offer life sentences in a plea bargain and thus avoid trial costs.

But Eric M. Freedman, a death penalty expert at Hofstra Law School, said studies had shown that plea bargaining rates were roughly the same in states that had the death penalty as in states that did not.

"It makes perfect sense that states are trying to spend their criminal justice budgets better," he said, "and that the first place they look to do a cost-benefit analysis is the death penalty."

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States are looking elsewhere as well.

Last year, in an effort to cut costs, probation and parole agencies in Arizona, Kentucky, Mississippi, New Jersey and Vermont reduced or dropped prison time for thousands of offenders who violated conditions of their release. In some states, probation and parole violators account for up to two-thirds of prison admissions each year; typical violations are failing drug tests or missing meetings with parole officers.

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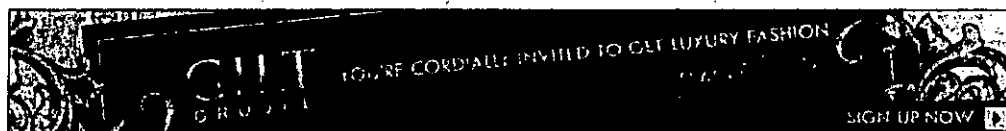
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Citing Cost, States Consider End to Death Penalty

Published: February 24, 2009

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As prison crowding has become acute, lawsuits have followed in states like California, and politicians find themselves having to choose among politically unattractive options: spend scarce tax dollars on expanding prisons, loosen laws to stem the flow of incarcerations, or release some nonviolent offenders.

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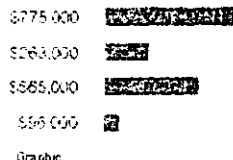
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The costs of death penalty cases can be extraordinarily high.

The Urban Institute study of Maryland concluded that because of appeals, it cost as much as \$1.9 million more for a state prosecutor to put someone on death row than it did to put a person in prison. A case that resulted in a death sentence cost \$3 million, the study found, compared with less than \$1.1 million for a case in which the death penalty was not sought.

Multimedia



Graphic

The Cost of Capital Cases

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In Kansas, State Senator Carolyn McGinn introduced a bill this month that would abolish the death penalty in cases sentenced after July 1. "We are in such a dire deficit situation, and we need to look at things outside the box to solve our budget problems," said Mrs. McGinn, a Republican. Kansas is facing a budget shortfall of \$199 million, and Mrs. McGinn said that opting for life imprisonment without parole rather than the death penalty could save the state over \$500,000 per capital case.

But skeptics contend that prosecutors will still be on salary and will still spend the same amount, just on different cases. In Colorado, lawmakers plan to consider a bill this week that would abolish the death penalty and use the savings to create a cold-case unit to investigate the state's roughly 1,400 unsolved murders. While the police must continue investigating these cases, there is no money in the budget for that. A group of families who lost relatives in unsolved murders has lobbied lawmakers on the bill.

In Virginia, competing sentiments are evident in the legislature.

While lawmakers have proposed allowing prison officials to release low-risk offenders up to 90 days before the end of their sentences, citing a potential saving of \$50 million, they are also considering expanding who is eligible for capital punishment to people who assist in killings but do not commit them and to people convicted of murdering fire marshals or auxiliary police officers who are on duty.

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It is considered unlikely, however, that Gov. Tim Kaine, a Democrat who opposes capital punishment, would sign such a bill.

In 2007, New Jersey became the first state in a generation to abolish the death penalty.

That same year, a vote in Maryland to abolish the death penalty came up one vote short of passing. In December, however, a state commission on capital punishment recommended that Maryland abolish the death penalty because of the high cost and the danger of executing an innocent person.

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Capital Cases Stall as Costs Grow Daunting

By SHAILA DEWAN and CHENYU GOODMAN
Published November 4, 2007

ATLANTA, Nov. 3 — When Hilton M. Fuller Jr., a semiretired judge of the silver-haired, Southern-gentleman variety, agreed to preside over the trial in a notorious courthouse shooting here, he took a job no one else wanted — the legal community was still in shock over the death of a judge, a court reporter, a sheriff's deputy and a federal agent.



But now, two years later, the truly thankless nature of Judge Fuller's task has become evident. The legislature has threatened to impeach him.

Columnists have taken him to task. On Friday, the district attorney sued him in State Supreme Court. Even fellow judges have abandoned their usual reticence. On a recent afternoon, he received a copy of an e-mail message from a colleague calling him a "debacle," an "embarrassment" and a "fool." And the trial has yet to begin.



Top: Courthouse shooting. Bottom: Judge Hilton M. Fuller Jr. has faced impeachment threats, a lawsuit and ridicule over his handling of the murder trial of Brian Nichols. Bottom.

The anger directed at Judge Fuller revolves around an issue more and more states are being forced to confront — the rising cost of an adequate defense in death-penalty cases. Even as an examination of lethal injection by the Supreme Court has seemingly suspended the practice across the country, many experts predict that the cost issue will have far broader implications for the future of the death penalty.

States unwilling to pay the huge costs of defending people charged in capital cases may be unable to conduct executions.

For Brian Nichols, accused of killing four in the courthouse shooting in March 2005, the costs have already reached \$1.2 million. That, together with legislative cuts, has left the state public defender system with no money. Until the bills are paid, the judge has delayed the trial, saying that it is unconstitutional not to pay the defense and thus pointless to proceed. In turn, lawmakers have accused him of conspiring to end the death penalty in

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Georgia.

The state could avoid the multimillion-dollar trial by dropping the death penalty option. Mr. Nichols has offered to plead guilty in exchange for a sentence of life without parole, but the district attorney, Paul L. Howard Jr., has declined.

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Judge Fuller is not the only jurist to try to force states to pay for a defense that will pass muster with higher courts. Last month, the New Mexico Supreme Court suspended the prosecution of two prison inmates accused of killing a guard, saying their lawyers' pay was so low it was unlikely they could be effective. In Utah, a judge has asked if he can force a lawyer to represent a convicted killer on appeal because, at fees amounting to less than \$10 an hour, no one wants the job.

In California, a federal judge complained in May that death row inmates were waiting more than three years to get a lawyer because the state would not raise the hourly rate. Arizona, Texas and Louisiana are having similar troubles.

"I don't think there's any question that lethal injection is going to be allowed, it's just a question of how," said Stephen B. Bright, a capital defense lawyer and president of the Southern Center for Human Rights in Atlanta. "But the right to counsel is as fundamental as it gets — every other right depends on it."

Defense costs are just one factor in the steep price states are beginning to consider. A 2005 study by New Jersey Policy Perspective, a liberal research group, estimated that capital punishment had cost the state \$256 million since 1983, including \$60 million for defense, and the state has not executed a single inmate in that time. A bill to abolish the death penalty is given a fair chance of passing.

But the issue has come into sharpest relief here, thanks to the scrutiny of the courthouse case, arguably the most complicated murder case in state history.

State Senator Preston W. Smith, the Republican chairman of the Judiciary Committee, has complained that Mr. Nichols is receiving a "high-end, O.J.-style defense" that most taxpayers could not afford. But while the price sounds high, especially for a man whose guilt no one doubts, the cost of even a minimal capital defense has been driven up by technology and the increasing sophistication of law enforcement.

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Capital Cases Stall as Costs Grow Daunting

Published: November 4, 2007

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Mr. Nichols faces a 54-count indictment, a team of five prosecutors, and 400 potential prosecution witnesses. Prosecutors gave the defense team 32,000 pages of documents and 400 hours of taped telephone calls. The defense team has an obligation to review all of the information and investigate each witness. To the irritation of lawmakers, Judge Fuller has kept budget requests sealed to keep the defense strategy from becoming public.

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Ideas & Trends: It's Not Whether to Kill, but How (November 4, 2007)

Judge Fuller is bound by recent Supreme Court decisions that have underscored the importance of the defense counsel's performance during the sentencing phase of the trial, when juries consider mitigating and aggravating factors in deciding whether to impose the death penalty. In a 2003 case, the court

ordered a new sentencing hearing because defense lawyers failed to fully investigate their client's background and present evidence of severe childhood sexual and physical abuse. In a 2005 case, the Supreme Court again found that a more thorough review by the defense would have unearthed information that the jury should have heard.

In both cases, the court cited guidelines issued by the American Bar Association in 2003, which detail the special skills capital defenders must have and the "extraordinary efforts" they must undertake because of the irreversible punishment. Capital defendants must have at least two lawyers, the guidelines say, and each phase of the appeals process should include an independent investigation.

Exonerations have also highlighted the need for a competent defense. "We have all this new evidence being discovered 10 years later," said George H. Kendall, who has monitored capital defense in Georgia and now works in the New York office of Holland & Knight. "If there was a real defense at the time, it would have come up then."

The Nichols defense team, which plans to argue that its client was suffering from a mental disorder, says the anger at Judge Fuller is misplaced. The defense budgets are first presented to the Georgia Public Defender Standards Council, which has not objected to any of the requests as unreasonable. It has simply said it cannot pay.

But neither the judge nor the council has been spared.

The council was established as a statewide public defense system in 2005 in response to widespread problems, including divorce lawyers assigned to capital cases and lawyers

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sleeping through trials. Three months later, the Nichols trial became the first major test of lawmakers' commitment to the new system. They have seized control of the council and gutted its capital defense budget, cutting it to \$4.8 million from \$7 million a year.

Courts have repeatedly demanded a better defense in capital cases, but states have repeatedly refused to pay for it. In 1996, Congress established a "fast track" that would shorten federal deadlines in capital cases if states agreed to provide competent representation to death row inmates. No state has fulfilled the requirements.

Capital defense lawyers face the highest possible stakes, but in many states the job is one of the lowest-paid in the legal system. In New Mexico, for example, appointed capital defenders work under a contract system that caps their fee at \$24,500, a salary that amounts to an hourly wage of just \$19.50 for the average death penalty case, not enough to cover their overhead, according to a brief filed by the New Mexico Criminal Defense Lawyers. In contrast, private criminal defense lawyers in New Mexico made an average of \$161 per hour in 2004.

The lead lawyer in the Nichols case, Henderson Hill, is billing \$175 an hour instead of his usual \$325. Another of his four lawyers has waived her fee. None have been paid since July.

Lawmakers say Judge Fuller and the defense lawyers are deliberately driving up the costs to make sure that the death penalty is too expensive for the state.

And in fact, better-financed systems do reduce the number of capital cases — coming closer, advocates say, to ensuring that the death penalty is reserved for the worst of the worst offenders. North Carolina, which instituted what is often pointed to as a model capital defense system in 2001, has gone from an average of 24 capital convictions a year to 5. It is too soon to know if the reversal rate, extraordinarily high in death penalty cases, has also been reduced.

When Judge Fuller took on the Nichols trial, prosecutors and defense lawyers alike praised the choice, saying he had rarely, if ever, been overturned on appeal. But his reputation has since taken a beating.

"I'm beginning to think I am a fool for taking this case," the judge said, rereading the e-mail message in which a fellow judge called him one. "I thought people would give me the benefit of the doubt. That was naïve."

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February 19, 2009

Study Calls for Oversight of Forensics in Crime Labs

By **SOLOMON MOORE**

Crime laboratories around the country are grossly underfunded, lack a scientific foundation and are compromised by critical delays in analyzing physical evidence, according to a broad study of forensic techniques published Wednesday by the National Academy of Sciences, the nation's premier scientific body.

Among its many criticisms, the study counted a backlog of 359,000 requests for forensic analysis in 2005, a 24 percent increase in delays since 2002. A survey of crime laboratories found 80 percent of them to be understaffed.

A new federal agency is needed to regulate these laboratories, standardize forensic techniques and pay for research, according to the report, which was financed by Congress in 2005.

The study recommends that an agency, to be called the National Institute of Forensic Science, be created and be independent of the Justice Department, which has traditionally been the nation's primary forensics research agency. Crime laboratories should be managed separately from police departments to ensure that their findings are protected from bias, the report said.

"The potential for conflicts of interest between the needs of law enforcement and the broader needs of forensic science are too great," the authors wrote.

The report, the product of a two-year review by the academy, an independent body, is not legally binding. But legislators from both parties have already committed to holding hearings on the study, and officials from all the federal law enforcement agencies are reviewing the document in anticipation of possible policy changes.

"I am troubled by the report's general finding that far too many forensic disciplines lack the standards necessary to ensure their scientific reliability in court," said Senator Patrick J. Leahy, Democrat of Vermont and chairman of the Judiciary Committee.

Senator Arlen Specter of Pennsylvania, the ranking Republican on the committee, said he was also troubled by the findings.

The report calls into question the scientific merit of virtually every commonly used forensic method, including analysis of fingerprints, hair, fibers, blood spatters, ballistics and arson. Only DNA, which the panel said had benefited from rigorous scientific scrutiny and peer review outside of the forensics discipline, escaped significant criticism.

"The fact is that many forensic tests, such as those used to infer the source of tooth marks and bite marks,

have never been exposed to stringent scientific scrutiny," the report said. The report highlights crime laboratory scandals involving hundreds of tainted cases handled by police agencies in Michigan, Texas and West Virginia, and by the Federal Bureau of Investigation. At least 10 wrongly convicted men have been exonerated as a result of those laboratory investigations, and the cases of hundreds of other people convicted with the help of those facilities are under review.

The panel also found that most of the nation is served by death investigation offices that lack accreditation. It cited an 18-year-old high school student in Indiana who was recently elected deputy coroner after a short training course.

The academy said that in addition, judges and lawyers generally lacked the scientific expertise necessary to "comprehend and evaluate forensic evidence in an informed manner."

Attorney General Eric H. Holder Jr. said his office would be reviewing the report over the next several days.

"We have the potential to solve a lot of crimes, to find people who are guilty and to absolve a lot of people who are not through the use of these great forensic techniques," Mr. Holder said.

Justice Department officials declined to comment on specific recommendations, including the establishment of a National Institute of Forensic Science.

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February 5, 2009

Science Found Wanting in Nation's Crime Labs

By **SOLOMON MOORE**

Forensic evidence that has helped convict thousands of defendants for nearly a century is often the product of shoddy scientific practices that should be upgraded and standardized, according to accounts of a draft report by the nation's pre-eminent scientific research group.

The report by the National Academy of Sciences is to be released this month. People who have seen it say it is a sweeping critique of many forensic methods that the police and prosecutors rely on, including fingerprinting, firearms identification and analysis of bite marks, blood spatter, hair and handwriting.

The report says such analyses are often handled by poorly trained technicians who then exaggerate the accuracy of their methods in court. It concludes that Congress should create a federal agency to guarantee the independence of the field, which has been dominated by law enforcement agencies, say forensic professionals, scholars and scientists who have seen review copies of the study. Early reviewers said the report was still subject to change.

The result of a two-year review, the report follows a series of widely publicized crime laboratory failures, including the case of Brandon Mayfield, a lawyer from Portland, Ore., and Muslim convert who was wrongly arrested in the 2004 terrorist train bombing in Madrid that killed 191 people and wounded 2,000.

American examiners matched Mr. Mayfield's fingerprint to those found at the scene, although Spanish authorities eventually convinced the Federal Bureau of Investigation that its fingerprint identification methods were faulty. Mr. Mayfield was released, and the federal government settled with him for \$2 million.

In 2005, Congress asked the National Academy to assess the state of the forensic techniques used in court proceedings. The report's findings are not binding, but they are expected to be highly influential.

"This is not a judicial ruling; it is not a law," said Michael J. Saks, a psychology and law professor at Arizona State University who presented fundamental weaknesses in forensic evidence to the academy. "But it will be used by others who will make law or will argue cases."

Legal experts expect that the report will give ammunition to defense lawyers seeking to discredit forensic procedures and expert witnesses in court. Lawyers could also use the findings in their attempts to overturn convictions based on spurious evidence. Judges are likely to use the findings to raise the bar for admissibility of certain types of forensic evidence and to rein in exaggerated expert testimony.

The report may also drive federal legislation if Congress adopts its recommendations. Senator Richard C. Shelby, Republican of Alabama, who has pushed for forensic reform, said, "My hope is that this report will

provide an objective and unbiased perspective of the critical needs of our crime labs.”

Forensics, which developed within law enforcement institutions — and have been mythologized on television shows from “Quincy, M.E.” to “CSI: Miami” — suffers from a lack of independence, the report found.

The report’s most controversial recommendation is the establishment of a federal agency to finance research and training and promote universal standards in forensic science, a discipline that spans anthropology, biology, chemistry, physics, medicine and law. The report also calls for tougher regulation of crime laboratories.

In an effort to mitigate law enforcement opposition to the report, which has already delayed its publication, the draft focuses on scientific shortcomings and policy changes that could improve forensics. It is largely silent on strictly legal issues to avoid overstepping its bounds.

Perhaps the most powerful example of the National Academy’s prior influence on forensic science was a 2004 report discrediting the F.B.I. technique of matching the chemical signatures of lead in bullets at a crime scene to similar bullets possessed by a suspect. As a result, the agency had to notify hundreds of people who potentially had been wrongfully convicted.

In its current draft report, the National Academy wrote that the field suffered from a reliance on outmoded and untested theories by analysts who often have no background in science, statistics or other empirical disciplines.

Although it is not subject to significant criticism in the report, the advent of DNA profiling clearly set the agenda. DNA evidence is presented in less than 10 percent of all violent crimes but has revolutionized the entire science of forensics. While DNA testing has helped to free more than 200 wrongfully convicted people, “DNA was a shock to police culture and created an alternative scientific model, which promoted standardization, transparency and a higher level of precision,” said Paul Giannelli, a forensic science expert at Case Western Reserve University School of Law who presented his research to the National Academy. Enforcement officials, Mr. Giannelli said, “chose to say they never make mistakes, but they have little scientific support, and this report could blow them out of the water.”

Peter J. Neufeld, a co-director of the Innocence Project, a nonprofit group that uses DNA evidence to exonerate the wrongfully convicted, presented to the academy a study of trial transcripts of 137 convictions that were overturned by DNA evidence and found that 60 percent included false or misleading statements regarding blood, hair, bite mark, shoe print, soil, fiber and fingerprint analyses.

The courts have long struggled with the proper role of scientific evidence. In a 1993 landmark decision, *Daubert v. Merrell Dow Pharmaceuticals*, the Supreme Court held that scientific testimony had to meet an objective standard. Federal courts have occasionally excluded evidence like handwriting and hair analysis.

Donald Kennedy, a Stanford scientist who helped select the report’s authors, said federal law enforcement agencies resented “intervention” of mainstream science — especially the National Academy — in the courts.

He said the National Institute of Justice, a research arm of the Justice Department, tried to derail the forensic study by refusing to finance it and demanding to review the findings before publication. A bipartisan

vote in Congress in 2005 broke the impasse with a \$1.5 million appropriation.

Mr. Shelby also accused the National Institute of Justice of trying to infiltrate the forensic study panel with lobbyists for private DNA analysis companies, who were seeking to limit the research to DNA studies.

The National Institute of Justice said it would not comment until the report was released. But a preview of potential turf wars played out in the presentations to the National Academy in December 2007. A forensic expert from the Secret Service blasted the F.B.I. for developing questionable techniques "on an ad-hoc basis, without proper research."

He said the Secret Service wanted the National Academy "to send a message to the entire forensic science community that this type of method development is not acceptable practice."

Everyone interviewed for this article agreed that the report would be a force of change in the forensics field.

One person who has reviewed the draft and who asked not to be identified because of promises to keep the contents confidential said: "I'm sure that every defense attorney in the country is waiting for this report to come out. There are going to be challenges to fingerprints and firearms evidence and the general lack of empirical grounding. It's going to be big."

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Reciprocal Discovery

Westlaw.

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(Cite as: 948 P.2d 469)

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H

Supreme Court of Alaska.
STATE of Alaska, Petitioner,
v.
David E. SUMMERVILLE, Respondent.
No. S-7869.

Nov. 14, 1997.

Rehearing Denied Jan. 2, 1998.

Defendant charged with sex offenses moved for protective order in response to state's request for reciprocal discovery. The Superior Court, Fourth Judicial District, Fairbanks, Richard D. Savell, J., granted protective order, and State appealed. The Court of Appeals, 926 P.2d 465, affirmed, and defendant appealed. The Supreme Court held that amendment to criminal rules allowing reciprocal discovery violated state constitutional privilege against self-incrimination.

Affirmed.

West Headnotes

Criminal Law 110 ⚡ 393(1)

110 Criminal Law

110XVII Evidence

110XVII(1) Competency in General

110k393 Compelling Self-Incrimination

110k393(1) k. In General. Most Cited

Cases

Criminal Law 110 ⚡ 627.5(3)

110 Criminal Law

110XX Trial

110XX(A) Preliminary Proceedings

110k627.5 Discovery Prior to and Incident

to Trial

110k627.5(3) k. Prosecution's Right to

Disclosure. Most Cited Cases

Amendment to criminal rules allowing reciprocal discovery violated state constitutional privilege against self-incrimination. Const. Art. 1, § 9; Rules

Crim.Proc., Rule 16.

*469 Eric A. Johnson, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Bruce M. Botelho, Attorney General, Juneau, for Petitioner.

William R. Satterberg, Jr., Law Offices of William R. Satterberg, Jr., Fairbanks, for Respondent.

Marcia E. Holland, Assistant Public Defender, Fairbanks, and Barbara K. Brink, Public Defender, Anchorage, for Amicus Curiae Alaska Public Defender Agency.

James H. McComas, Pro Bono Counsel, Anchorage, for Amicus Curiae Office of Public Advocacy.

Before MATTHEWS, C.J., and COMPTON,
EASTAUGH and FABE, JJ.

OPINION

PER CURIAM.

The decision in this case is controlled by Scott v. State, 519 P.2d 774 (Alaska 1974), unless we are persuaded to overrule Scott. In State v. Dunlop, 721 P.2d 604 (Alaska 1986), we stated:

We do not lightly overrule our past decisions.... [I]t is a "salutory policy to follow past decisions." ...[W]here we are "clearly convinced the rule was originally erroneous or is no longer sound because of changed conditions, and that more good than harm would result from a departure from precedent," we will so depart.

Id. at 610 (footnote omitted) (quoting State v. Souther, 606 P.2d 399, 400 (Alaska 1980)). We are not persuaded that these standards are met, at least with respect to Scott's holding that the production of the names of non-alibi *470 witnesses and their statements cannot be constitutionally compelled. Because the reciprocal discovery provisions enacted in section 1 of Chapter 95 SLA 1996 are non-severable, and at least one of those provisions violates article 1, section 9 of Alaska's constitution, the entire section is

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invalid. The pre-existing version of Alaska Criminal Rule 16 must remain in effect. AFFIRMED.

BRYNER, J., not participating.
Alaska, 1997.
State v. Summerville
948 P.2d 469

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Reciprocal Discovery

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519 P.2d 774

519 P.2d 774

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P

Supreme Court of Alaska.

Roy Anthony SCOTT, a/k/a Roy Anthony Stropkai,
Petitioner,

v.

STATE of Alaska, Respondent.
No. 1968.

March 1, 1974.

The Superior Court, Third Judicial District, Anchorage, Ralph E. Moody, J., issued a pretrial discovery order which required accused to disclose certain information, and petition for review was granted. The Supreme Court, Fitzgerald, J., held that requiring accused to disclose names and addresses of witnesses, statements of witnesses, and evidence relating to alibi defense violated accused's privilege against self-incrimination under the State Constitution, but that requiring accused to give notice of alibi defense was proper.

Vacated and remanded.

West Headnotes

[1] Criminal Law 110 ⚡ 627.5(3)

110 Criminal Law

110XX Trial

110XX(A) Preliminary Proceedings

110k627.5 Discovery Prior to and Incident to Trial

110k627.5(3) k. Prosecution's Right to Disclosure. Most Cited Cases

Order requiring accused to produce information not expressly provided for in rules for criminal procedure did not constitute an improper promulgation of new rule of criminal procedure. Rules of Criminal Procedure, rule 16(c); Const. art. 4, § 15.

[2] Criminal Law 110 ⚡ 632(1)

110 Criminal Law

110XX Trial

110XX(A) Preliminary Proceedings

110k632 Dockets and Pretrial Procedure

110k632(1) k. In General. Most Cited

Cases

(Formerly 110k632)

Broad latitude must be accorded trial court in conduct and management of pretrial procedures.

[3] Criminal Law 110 ⚡ 627.5(3)

110 Criminal Law

110XX Trial

110XX(A) Preliminary Proceedings

110k627.5 Discovery Prior to and Incident to Trial

110k627.5(3) k. Prosecution's Right to Disclosure. Most Cited Cases

Mere fact that court ordered accused to submit pretrial information which was not specifically included in rule relating to discovery in criminal case did not establish that court abused its discretion. Rules of Criminal Procedure, rule 16(a, c).

[4] Criminal Law 110 ⚡ 1991

110 Criminal Law

110XXXI Counsel

110XXXI(D) Duties and Obligations of Prosecuting Attorneys

110XXXI(D)2 Disclosure of Information

110k1991 k. Constitutional Obligations Regarding Disclosure. Most Cited Cases

(Formerly 110k700(2.1), 110k700(2), 110k700) Prosecution has affirmative duty to disclose to accused any information within its control which tends to negate defendant's guilt.

[5] Courts 106 ⚡ 97(1)

106 Courts

106II Establishment, Organization, and Procedure

106II(G) Rules of Decision

106k88 Previous Decisions as Controlling or as Precedents

106k97 Decisions of United States Courts as Authority in State Courts

106k97(1) k. In General. Most Cited Cases

State Supreme Court is not bound to follow blindly a federal constitutional construction of fundamental principle if state court is convinced that result is based on unsound reason or logic.

[6] Criminal Law 110 ⚡ 393(1)

110 Criminal Law

110XVII Evidence

110XVII(1) Competency in General

110k393 Compelling Self-Incrimination

110k393(1) k. In General. Most Cited

Cases

Privilege against compelled self-incrimination under Alaska Constitution prohibits extensive pretrial prosecutorial discovery in criminal proceedings. Rules of Criminal Procedure, rule 16(c); Const. art. 1, § 9.

[7] Criminal Law 110 ⚡ 393(1)

110 Criminal Law

110XVII Evidence

110XVII(1) Competency in General

110k393 Compelling Self-Incrimination

110k393(1) k. In General. Most Cited

Cases

Fundamental right not to incriminate one's self should apply at every stage of criminal inquiry or proceedings regardless of judge-made exclusionary or evidentiary rules. Rules of Criminal Procedure, rule 16(c); Const. art. 1, § 9; U.S.C.A. Const. Amend. 5.

[8] Criminal Law 110 ⚡ 393(1)

110 Criminal Law

110XVII Evidence

110XVII(1) Competency in General

110k393 Compelling Self-Incrimination

110k393(1) k. In General. Most Cited

Cases

Pretrial order requiring accused to disclose names and addresses of witnesses violated accused's privilege against self-incrimination under state Constitution. Rules of Criminal Procedure, rule 16(c); Const. art. 1, § 9.

[9] Criminal Law 110 ⚡ 393(1)

110 Criminal Law

110XVII Evidence

110XVII(1) Competency in General

110k393 Compelling Self-Incrimination

110k393(1) k. In General. Most Cited

Cases

Pretrial order requiring accused to produce for inspection and copying all written or recorded statements of prospective defense or government witnesses which accused possesses violated accused's right against self-incrimination under State Constitution. Rules of Criminal Procedure, rule 16(c); Const. art. 1, § 9.

[10] Criminal Law 110 ⚡ 393(1)

110 Criminal Law

110XVII Evidence

110XVII(1) Competency in General

110k393 Compelling Self-Incrimination

110k393(1) k. In General. Most Cited

Cases

Pretrial discovery order which required accused to produce advance notice of alibi defense together with information indicating place or places he claimed to have been violated accused's right against self-incrimination under State Constitution. Rules of Criminal Procedure, rule 16(c); Const. art. 1, § 9.

[11] Criminal Law 110 ⚡ 393(1)

110 Criminal Law

110XVII Evidence

110XVII(1) Competency in General

110k393 Compelling Self-Incrimination

110k393(1) k. In General. Most Cited

Cases

Pretrial discovery order requiring accused to furnish notice of alibi defense did not violate accused's privilege against self-incrimination under State Constitution. Rules of Criminal Procedure, rule 16(c); Const. art. 1, § 9.

*775 Herbert D. Soll, Public Defender, Larry A. Jordan, Asst. Public Defender, Anchorage, for petitioner.

John E. Havelock, Atty. Gen., Juneau, Seaborn J. Buckalew, Jr., Dist. Atty., Louis Agi, Asst. Dist. Atty., Anchorage, for respondent.

Before RABINOWITZ, C. J., and CONNOR, ER-

WIN, BOOCHEVER, and FITZGERALD, JJ.

OPINION

FITZGERALD, Justice.

This petition for review raises the question of the constitutionality of a superior court pretrial order authorizing broad prosecutorial discovery.

The petitioner Scott was arraigned in superior court on an indictment charging him with rape [FN1]. The court in conformity to Rule 16(f) of the Alaska Rules of Criminal Procedure scheduled a pretrial omnibus hearing. A few days before the hearing, the respondent State of Alaska filed a motion for a sweeping discovery order. Petitioner filed opposition to the motion, but his objections were overruled. The superior court granted respondent's motion such ordered petitioner to disclose: motion and ordered petitioner to disclose:

- (1) the names and addresses of all prospective defense witnesses, other than defendant himself.
- (2) the production or inspection and copying of any written or recorded statements in defendant's possession of prospective defense or government witnesses, other than defendant himself.
- (3) advance notice of an alibi defense, together with information indicating the place or places defendant claims to have been and the names of witnesses upon whom he intends to rely.

Petitioner promptly sought interlocutory appellate review of the discovery order by way of a petition for review.

We granted the petition for review in this case because we concluded that postponement of appellate review until a final judgment may 'result in injustice because of impairment of a legal right' and because 'the order . . . sought to be reviewed is of such substance and importance as to justify deviation from the normal appellate procedure by way of appeal and to require the immediate attention of this court.' [FN2]

FN2. Alaska App.R. 23(e), 24(a).

In his petition for review, Scott claims error on the part of the trial court in several respects. He suggests that the court, *776 in ordering the pretrial production of certain information not expressly provided for in Rule 16(c) of the Alaska Rules of Criminal Procedure, promulgated a new rule of criminal procedure. This is, he argues, constitutionally impermissible since article IV, section 15 of the Alaska constitution placed the rule-making authority in this court. Petitioner also claims that the discovery order infringes upon his privilege against compulsory self-incrimination under article I, section 9 of the Alaska constitution and the fifth and fourteenth amendments of the United States Constitution. Furthermore, he argues that the discovery order violates his right to effective confrontation and cross-examination secured by article I, section 11 of the Alaska constitution and the sixth and fourteenth amendments to the United States Constitution. Petitioner also advances one claim of procedural error. He argues that the superior court abused its discretion in making a discovery order which goes beyond the express provisions of Criminal Rule 16(c).

[1] We find no merit in Scott's claim that the superior court, in ordering the production of certain information not expressly mentioned in Criminal Rule 16(c), [FN3] effectively promulgated a new rule of criminal procedure and thereby usurped this court's constitutional rule-making authority. The record does not establish that the superior court intended to promulgate new rules to govern pretrial procedure in criminal proceedings. Moreover petitioner's reliance upon Lee v. State [FN4] is misplaced. While in Lee we did observe that the 'superior court has no responsibility or authority to promulgate rules of practice and procedure,' [FN5] the statement was not made in the context of a pretrial order by the superior court. In Lee the appellants contended that the trial court was in error for having failed to promulgate rules of procedure by which appeals could be taken from the magistrate's court. In the case before us now, the trial court was ruling upon a motion for discovery brought under existing rules of criminal procedure. Since the underlying facts of the Lee case are essentially different, its rationale is not applicable to the case at bar.

FN3. Alaska R.Crim.P. 16(c) provides:

- (1) Non-Testimonial Identification Procedures. A judicial officer may upon motion

for good cause shown, require the accused to do or submit to any or all of the following:

- (i) Appear in a line-up;
- (ii) Speak for identification by witnesses to an offense;
- (iii) Be fingerprinted;
- (iv) Pose for photographs not involving re-enactment of a scene;
- (v) Try on articles of clothing;
- (vi) Permit the taking of specimens of material under his fingernails;
- (vii) Permit the taking of samples of his blood, hair and other materials of his body which involve no unreasonable intrusion thereof;
- (viii) Provide specimens of his handwriting;
- (ix) Submit to a reasonable physical or medical inspection of his body.

(2) Reports or Statements of Experts. The trial court may require that the prosecuting attorney be informed of and permitted to inspect and to copy or photograph any reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments or comparisons which are intended by the defendant to be used at trial. Information obtained by the state under the provisions of this section shall be used only for cross-examination or rebuttal of defense testimony.

(3) Notice of Intent to Raise Insanity Defense. Following substantial compliance by the state with section (b) of this rule a defendant who intends to offer evidence of a defense of insanity shall inform the state of such intention at the time of plea or at such other time as may be designated by the trial court. The court may order the defendant to

submit to psychiatric examination by a psychiatrist or psychologist selected by the court, and the report shall be made available to both parties. Notice of intent to raise a defense of insanity shall not be commented on by the prosecution at trial.

FN4. 374 P.2d 868 (Alaska 1962).

FN5. Id. at 869.

We also disagree with petitioner's contention that since the order in question exceeds the scope of materials discoverable under Criminal Rule 16(c), it constitutes *777 an abuse of trial court discretion. Criminal Rule 16(c) permits the trial court, upon proper motion by the prosecution, to order the accused to submit to certain non-testimonial identification procedures, to allow discovery of experts' reports or statements and to require notice if the accused intends to raise insanity as a defense. The discovery order before us, however, goes beyond the material enumerated in the rule and orders the petitioner to produce the names and addresses of defense witnesses, written statements taken from defense and government witnesses, advance notice of an alibi defense, together with names of prospective alibi witnesses and information concerning the locations to be relied upon for alibi purposes.

[2][3] In our opinion, broad latitude must be accorded a trial court in the conduct and management of pre-trial procedures. This interpretation is in keeping with the spirit and purpose of discovery rules generally, and comports with the expressed term of Criminal Rule 16(a).

(a) Scope of Discovery. In order to provide adequate information for informed pleas, expedite trial, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process, discovery prior to trial should be as full and free as possible consistent with protection of persons, effective law enforcement, and the adversary system. (emphasis added)

Reading sections (a) and (c) of Rule 16 together, we conclude that a ruling compelling the production of items not expressly mentioned in section (c) of the rule is within the 'broad discretion of the trial court.' We find no abuse of discretion merely because

information not specifically included in the rule is ordered to be disclosed.

The most serious constitutional claim advanced by petitioner is that the broad prosecutorial discovery order contravenes his privilege against self-incrimination[FN6] under the fifth and fourteenth amendments to the United States Constitution[FN7] and article 1, section 9 of the Alaska constitution[FN8]. In other words, we must determine whether petitioner has a constitutional right to refuse to disclose some or all of the evidentiary material required to be disclosed by the discovery order.

FN6. Recently, the tension existing between prosecutorial discovery and the constitutional privilege against self-incrimination has received considerable attention from legal commentators. See, e. g., Everett, *Discovery in Criminal Cases-In Search of a Standard*, 1964 Duke L.J. 477, 492-94, 503-05; Moran, *Federal Criminal Rules Changes: Aid or Illusion for the Indigent Defendant?*, 51 A.B.A.J. 64 (1965); Nakell, *Criminal Discovery for the Defense and the Prosecution-the Developing Constitutional Considerations*, 50 N.C.L.Rev. 437 479-516 (1972); Reznick, *Justice Brennan and Discovery in Criminal Cases*, 4 Rutgers-Camden L.J. 85 (1972); Symposium, *Discovery in Federal Criminal Cases*, 33 F.R.D. 47-128 (1965); Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L.Rev. 228 (1964); Wilder, *Prosecution Discovery and the Privilege Against Self-Incrimination*, 6 Am.Crim.L.Q. 3 (1967); Zagel and Carr, *State Criminal Discovery and the New Illinois Rules*, 1971, U.Ill.L.Forum 557 (1971); Annot., 45 A.L.R.3d 959 (1972); Annot., 96 A.L.R.2d 1224 (1964); Comment, *Developments in the Law-Discovery*, 74 Harv.L.Rev. 940 (1961); Note, *The Self-Incrimination Privilege: Barrier to Criminal Discovery?*, 51 Calif.L.Rev. 135 (1963); Note, *Prosecutorial Discovery Under Proposed Rule 16*, 85 Harv.L.Rev. 994 (1972); 35 Colo.R.Rev. 290 (1963); 63 Colum.L.Rev. 361 (1963); 76 Harv.L.Rev. 838 (1963); 49 Ia.L.Rev. 176 (1963); 61 Mich.L.Rev. 987 (1963); 15 Stan.L.Rev. 700 (1963).

FN7. The fifth amendment to the United States Constitution provides in part:

No person . . . shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property, without due process of law . . .

5th Am.
U.S.
Constitution

The fifth amendment has been made applicable to the states through the fourteenth amendment to the United States Constitution. *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964).

FN8. Art. I, s 9 of the Alaska constitution provides:

No person shall be compelled in any criminal proceeding to be a witness against himself.

Art. 1 § 9
Ala.
Constitution

*778 [4] We begin our analysis by examining the historical development of criminal discovery in the context of the privilege against self-incrimination under the fifth amendment to the United States Constitution. The common law recognized no right of discovery in a criminal case by either the prosecution or the defendant. Nor was such a right said to exist under traditional concepts of due process.[FN9] In recent years, however, several exceptions have emerged. The prosecution has an affirmative duty to disclose to an accused any information within its control which tends to negate defendant's guilt.[FN10] It has now become well-settled in many jurisdictions that trial courts have broad discretionary power to order the prosecution to disclose to the defendant any relevant information in the possession or control of the prosecution.[FN11]

FN9. *Cicenia v. LaGav*, 357 U.S. 504, 510, 78 S.Ct. 1297, 1301, 2 L.Ed. 1523, 1529 (1958); *State v. Thompson*, 11 Terry 456, 134 A.2d 266, 268 (Del.1957); *Commonwealth v. Bartolini*, 299 Mass. 503, 13 N.E.2d 382, 386 (1938), cert. denied, 304 U.S. 565, 58 S.Ct. 950, 83 L.Ed. 1531 (1938); *State v. Goldberg*, 261 N.C. 181, 134 S.E.2d 334, 340-341 (1964).

FN10. Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); United States ex rel. Butler v. Maroney, 319 F.2d 662, 627 (3d Cir. 1963); People v. Hoffman, 32 Ill.2d 96, 203 N.E.2d 873 (1965).

FN11. State v. Coon, 2 Alaska L.J. No. 1 at 3 (Super.Ct.1964); State ex rel. Polley v. Superior Court of Santa Cruz County, 81 Ariz. 127, 302 P.2d 263, 265 (1956); People v. Riser, 47 Cal.2d 566, 305 P.2d 1, 12 (1956), cert. denied, 358 U.S. 646, 79 S.Ct. 537, 3 L.Ed.2d 568 (1959); State v. Haas, 188 Md. 643, 51 A.2d 647, 649 (1947); Commonwealth v. Bartolini, 299 Mass. 503, 13 N.E.2d 382, 385 (1938), cert. denied, 304 U.S. 565, 58 S.Ct. 950, 83 L.Ed. 1531 (1938); People v. Johnson, 356 Mich. 619, 97 N.W.2d 739, 741-743 (1959); People v. Calandrillo, 29 Misc.2d 495, 215 N.Y.S.2d 364, 366 (Suffolk County Ct.1961); State v. Leland, 190 Or. 598, 227 P.2d 785, 793 (1961), aff'd, 343 U.S. 790, 793, 72 S.Ct. 1002, 1004, 96 L.Ed. 1302 (1952).

Prosecutorial discovery was strongly condemned in early American jurisprudence. The United States Supreme Court in 1886 announced strong opposition to compulsory self-incrimination through discovery orders. In Boyd v. United States, [FN12] Mr. Justice Bradley, speaking for the court, stated:

FN12. 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886).

Now it is elementary knowledge that one cardinal rule of the court of chancery is never to decree a discovery which might tend to convict the party of a crime, or to forfeit his property. And any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power, but it cannot abide the pure atmosphere of political liberty and personal freedom. [FN13]

FN13. Id. at 631-632, 6 S.Ct. at 533, 29 L.Ed. at 751 (footnote omitted).

Similar views have since been expressed by Professor Wigmore:

It follows that the production of documents or chattels by a person (whether ordinary witness or party witness) in response to a subpoena, or to a motion to order production, or to other form of process relying on his moral responsibility for truthtelling, may be refused under the protection of the privilege (against self-incrimination). This is universally conceded. (emphasis in original) [FN14]

FN14. 8 J. Wigmore, Evidence s 2264 (McNaughton rev. 1961) (footnote omitted).

As recently as 1967, a federal district court observed that the fifth amendment privilege against self-incrimination operated to bar prosecutorial discovery of evidence to be used in the government's case-in-chief. [FN15]

FN15. In United States v. Fratello, 44 F.R.D. 444 (S.D.N.Y.1967), the trial court declined to condition defense discovery upon the defendant's provision to the prosecution of documentary evidence under the former's control. The court concluded that 'the right of a defendant in a criminal case to remain silent in face of accusations against him, even at the discovery stage, seems clear.'

*779 The constitutional questions arising out of prosecutorial discovery are reflected in Rule 16(c) of the Federal Rules of Criminal Procedure. That rule by its terms does not directly compel the defendant to provide prosecutorial discovery. Rather, it permits the court to condition discovery when sought by the defense by requiring the defense to make a reciprocal exchange with the government. [FN16] Any possible conflict with fifth amendment rights is thought to be avoided on theories of implied consent or waiver by the defendant. Thus the Federal Rules of Criminal Procedure have preserved without resolving the constitutional questions raised by prosecutorial discovery. [FN17]

Federal
Rules
of
Discovery

FN16. Fed.R.Crim.P. 16(c) provides:

(c) Discovery by the Government. If the court grants relief sought by the defendant under subdivision (a)(2) or subdivision (b) of this rule, it may, upon motion of the government, condition its order by requiring that the defendant permit the government to inspect and copy or photograph scientific or medical reports, books, papers, documents, tangible objects, or copies or portions thereof, which the defendant intends to produce at the trial and which are within his possession, custody or control, upon a showing of materiality to the preparation of the government's case and that the request is reasonable. Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, his agents or attorneys.

FN17. The Advisory Committee on Rules suggested:

'Mutual disclosure so far as consistent with the privilege against self-incrimination would seem as appropriate as in civil cases.' Fed.R.Crim.P. 16, 18 U.S.C.A. Rule 16, at 19 (1969).

Possibly one of the greatest influences in the development of new concepts of criminal discovery generally and prosecutorial discovery in particular has been Justice Roger J. Traynor, formerly Chief Justice of the Supreme Court of California. Writing for that court in 1962, Justice Traynor upheld broad prosecutorial discovery in Jones v. Superior Court of Nevada County. [FN18] The defendant in the case had been charged with rape. He asserted an affirmative defense of impotency. The Supreme Court of California upheld the prosecution's right to discover the names of witnesses upon whom the defendant intended to rely in advancing his affirmative defense as well as any relevant medical reports and X-rays. [FN19]

FN18. 58 Cal.2d 56, 22 Cal.Rptr. 879, 372

P.2d 919 (1962).

FN19. For critical constitutional commentary upon the holding reached in Jones, supra n. 19, see Smith and McCollom, Counterdiscovery in Criminal Cases: Fifth Amendment Privileges Abridged, 54 A.B.A.J. 256 (1968); Wilder, Prosecution Discovery and the Privilege Against Self-Incrimination, 6 Am.Crim.L.Q. 3 (1967); Note, 63 Colum.L.Rev. 361 (1963); Note, 15 Stan.L.Rev. 700 (1963).

Justice Traynor reasoned that prosecutorial discovery of information relating to issues raised by the affirmative defense

"does not violate the privilege against self-incrimination. Nor to this extent does it violate the attorney-client privilege. It simply requires petitioner to disclose information that he will shortly reveal anyway. Such information is discoverable." [FN20]

FN20. 22 Cal.Rptr. at 882, 372 P.2d at 922.

Justice Traynor has discussed the holding in Jones in a law review article and has further explained his reasoning that prosecutorial discovery merely accelerated the timing of the defendant's strategic midtrial decisions.

(Notice-of-alibi) statutes have been sustained over the objection that they violate constitutional privileges against self-incrimination, for they do not compel the defendant to reveal or produce anything, but merely regulate the procedure*780 by which he presents his case. We found this reasoning persuasive. The trial court's order that the defendant reveal the names of witnesses he intended to call and produce reports and X-rays he intended to introduce in evidence simply required him to disclose information that he would shortly reveal in any event. He was thus required only to decide at a point earlier in time than he would ordinarily have to whether to remain silent or to disclose the information. He lost only the possible tactical advantage of taking the prosecution by surprise at the trial, an advantage that in any event would easily have gone for naught given the probability that the trial court would have granted the prosecution a continuance to prepare a rebuttal. [FN21]

FN21. Traynor, Ground Lost and Found in Criminal Discovery, 39 N.Y.U.L.Rev. 228, 247 (1964) (footnote omitted).

In the same discussion, Justice Traynor went on to analogize criminal discovery to civil discovery in which pretrial discovery is a 'two-way street' for both litigants.

Likewise, nothing is lost of the privilege, and much is gained in orderly procedure, if the defendant is required to give advance notice of the evidence he intends to offer in defense after he has himself received pretrial discovery of the prosecution's case. He can hardly demand pretrial discovery and still insist on reserving his own surprises for the trial. The good coin of discovery gains in value when it is fairly exchanged at the appropriate procedural hours.

The Jones case, indicating the two-sidedness of the discovery process, suggests that we may be on the way to abandoning our preoccupation with surprise tactics just as we have substantially abandoned the technicalities of pleading that in their time were also overvalued.[FN22]

FN22.Id. at 248, 250.

Seven years after Jones the California Supreme Court decided People v. Pike.[FN23] In that case, a prosecution for first degree murder, the court held that the state was entitled to pretrial discovery of the names, addresses and expected testimony of defense witnesses. But within a year, the California Supreme Court retrenched somewhat from its leading position on prosecutorial discovery. In Prudhomme v. Superior Court of Los Angeles County,[FN24] another prosecution for murder, a trial court was restrained from enforcing a discovery order which would have compelled the defendant's attorney to disclose to the prosecution the names, addresses and expected testimony of defense witnesses. Concluding that the 'trial court failed to inquire into the incriminatory nature of the information sought,'[FN25] the Supreme Court of California was apparently influenced by the limited and conditional nature of the provisions of Rule 16(c) of the Federal Rules of Criminal Procedure.[FN26] The court may also have been cautiously anticipating a negative decision by the United States Supreme Court on the constitutionality of prosecutorial dis-

covery.[FN27] Thus having substantially advanced the concept of prosecutorial discovery, the California court in Prudhomme, after carefully reviewing the policy consideration underlying the privilege against self-incrimination, retreated from its vanguard position.

FN23. 71 Cal.2d 595, 78 Cal.Rptr. 672, 455 P.2d 776 (1969).

FN24. 2 Cal.3d 320, 85 Cal.Rptr. 129, 466 P.2d 673 (1970).

FN25. 85 Cal.Rptr. at 134, 466 P.2d at 678.

FN26. Regarding Fed.R.Crim.P. 16(c), the court stated:

Thus, federal rule 16, subdivision (c) is limited to the 'reasonable' disclosure of physical evidence; there is no provision authorizing disclosure of names, addresses or expected testimony of defense witnesses.

Id., 85 Cal.Rptr. at 131, 466 P.2d at 675-676 (footnote omitted.)

FN27. Regarding the forthcoming United States Supreme Court decision on notice-of-alibi statutes, the court observed:

Finally, the United States Supreme Court recently granted certiorari in Williams v. Florida (C.A.Fla.) 224 So.2d 406, which had upheld Florida's alibi statute against the claim that it violated the accused's Fifth Amendment rights.

85 Cal.Rptr. at 132, 466 P.2d at 676.

*781 Ironically perhaps the case which may have influenced the California court to draw back in Prudhomme was decided the other way by the United States Supreme Court. The Court in Williams v. Florida[FN28] upheld a Florida notice-of-alibi rule[FN29] against a claim of fifth amendment privilege, adopting the rationale of Jones v. Superior Court of Nevada County. In that case, the defendant in a robbery prosecution challenged the constitutionality of a Florida rule of criminal procedure which

compelled him in advance of trial to provide the prosecution with the names and addresses of prospective alibi witnesses as well as information pertaining to the place where he claimed to have been. Rejecting the defendant's fifth amendment claim, the Supreme Court cited *Jones v. Superior Court of Nevada County* and Justice Traynor's law review article.^[FN30] Speaking for six members of the court, Justice White concluded that:

FN28. 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970).

FN29. For state cases that have upheld notice-of-alibi defense and alibi witnesses requirements, see *State v. Stump*, 254 Iowa 1181, 119 N.W.2d 210, 219-220 cert. denied, 375 U.S. 853, 84 S.Ct. 113, 11 L.Ed.2d 80 (1963); *State v. Baldwin*, 47 N.J. 379, 221 A.2d 199, 204-205 cert. denied, 385 U.S. 980, 87 S.Ct. 527, 17 L.Ed.2d 442 (1966); *People v. Rakiec*, 260 App.Div. 452, 23 N.Y.S.2d 607, 612-613 (1940); *Commonwealth v. Vecchiolli*, 208 Pa.Super. 483, 224 A.2d 96, 99 (1966).

FN30. 399 U.S. at 83, n. 13, 90 S.Ct. at 1897, 26 L.Ed.2d at 451.

However 'testimonial' or 'incriminating' the alibi defense proves to be, it cannot be considered 'compelled' within the meaning of the Fifth and Fourteenth Amendments.^[FN31]

FN31. *Id.* at 84, 90 S.Ct. at 1897, 26 L.Ed.2d at 451.

Accepting Justice Traynor's rationale in *Jones* that pretrial prosecutorial discovery merely accelerated the defendant's mid-trial strategy decisions, Justice White reasoned that:

(T)he notice-of-alibi rule by itself in no way affected petitioner's crucial decision to call alibi witnesses or added to the legitimate pressures leading to that course of action. At most, the rule only compelled petitioner to accelerate the time of his disclosure, forcing him to divulge at an earlier date information that the petitioner from the beginning planned to divulge at trial. Nothing in the Fifth Amendment privi-

lege entitles a defendant as a matter of constitutional right to await the end of the State's case before announcing the nature of his defense, any more than it entitles him to await the jury's verdict on the State's case-in-chief before deciding whether or not to take the stand himself.^[FN32]

FN32. *Id.* at 85, 90 S.Ct. at 1898, 26 L.Ed.2d at 452.

The holding of the court squarely upheld the prosecution right in advance of trial to obtain the names of witnesses and the location of defendant's alibi against his claim of self-incrimination.

We decline to hold that the privilege against compulsory self-incrimination guarantees the defendant the right to surprise the State with an alibi defense.^[FN33]

FN33. *Id.* at 86, 90 S.Ct. at 1898, 26 L.Ed.2d at 452.

Justice Black, with whom Justice Douglas concurred, forcefully dissented from the majority's holding on the prosecutorial discovery question. According to Justice Black, the Florida notice-of-alibi rule violated the defendant's fifth amendment privilege against self-incrimination, and the majority's decision constituted a dangerous move towards the erosion of a constitutional scheme which imposes upon the prosecution the complete burden of proof. Justice Black reasoned:

Although this case itself involves only a notice-of-alibi provision, it is clear that the decision means that a State can require a defendant to disclose in advance of trial any and all information he might possibly use to defend himself at trial. This decision, in my view, is a radical and dangerous departure from the historical*782 and constitutionally guaranteed right of a defendant in a criminal case to remain completely silent, requiring the State to prove its case without any assistance of any kind from the defendant himself.^[FN34]

FN34. *Id.* at 107-108, 90 S.Ct. at 1909-1910, 26 L.Ed.2d at 480.

The dissenting justice disputed the central premise

upon which the court based its holding.

The core of the majority's decision is an assumption that compelling a defendant to give notice of an alibi defense before a trial is no different from requiring a defendant, after the State has produced the evidence against him at trial, to plead alibi before the jury retires to consider the case That statement is plainly and simply wrong as a matter of fact and law, and the Court's holding based on that statement is a complete misunderstanding of the protections provided for criminal defendants by the Fifth Amendment and other provisions of the Bill of Rights.[FN35]

FN35. Id. at 108, 90 S.Ct. at 1910, 26 L.Ed.2d at 480-481 (footnote omitted).

The rationale of Justice Black's objection to the majority's reasoning is that a defendant's 'pretrial decision cannot be analyzed as simply a matter of 'timing,' influenced by the same factors operating at trial itself.'[FN36] Moreover, Justice Black expressed his concern that the 'timing' rationale employed by the Court would predictably be applied to justify the prosecutorial discovery of other information in the defendant's possession.

FN36. Id. at 110, 90 S.Ct. at 1911, 26 L.Ed.2d at 482.

The rationale of today's decision is in no way limited to alibi defenses, or any other type or classification of evidence. The theory advanced goes at least so far as to permit the State to obtain under threat of sanction complete disclosure by the defendant in advance of trial of all evidence, testimony, and tactics he plans to use at that trial. In each case the justification will be that the rule affects only the 'timing' of the disclosure, and not the substantive decision itself. This inevitability is clearly revealed by the citation to *Jones v. Superior Court* . . .[FN37]

FN37. Id. at 114, 90 S.Ct. at 1913, 26 L.Ed.2d at 484 (citation omitted).

A substantial number of states in addition to Florida have by rule or statute imposed upon the defendant an obligation to disclose his defenses to the prosecution in advance of trial. Almost without exception

provisions of this type have been upheld. In reaching that result the courts have grounded their decision on a variety of reasons. Some of the decisions would seem to apply notice-of-alibi provisions without discussing the constitutional considerations. E.g., *State v. Baldwin*, 47 N.J. 379, 221 A.2d 119, 204-205 (1966); *State v. Thayer*, 124 Ohio St. 1, 176 N.E. 656, 657 (1931); *Commonwealth v. Vecchioli*, 208 Pa.Super. 483, 224 A.2d 96, 99 (1966); *State v. Kopacka*, 261 Wis. 70, 51 N.W.2d 495, 498 (1952). Still other decisions do not extensively discuss or analyze the constitutional problems but subordinate the issues to matters of procedure. E.G., *State v. George*, 100 Ariz. 350, 414 P.2d 730, 733 (1966); *People v. Shulenberg*, 279 App.Div. 1115, 112 N.Y.S.2d 374, 375 (1952).

One state decision which does squarely face the constitutional issues arising out of a notice-of-defense statute is *State ex rel. Sikora v. District Court of the Thirteenth Judicial District*, 154 Mont. 241, 462 P.2d 897, decided by the Supreme Court of Montana in 1969. Sikora arose under the following circumstances. Under Montana law the defendant in a criminal case is required to give advance notice of his intention to interpose the defenses of insanity, self-defense or alibi and to file with the clerk names and addresses of supporting witnesses. Marie Sikora and two others were charged with murder. After an unfavorable ruling on a pretrial motion, the defendants filed petitions with the Supreme Court of Montana challenging the constitutionality of the statute. Addressing*783 itself first to the notice provision of the statute, the court found no apparent constitutional infirmity. This was so, the court reasoned, since merely giving notice of an intended defense at a procedural stage is ordinarily not incriminating.[FN38] Turning to the statutory requirement compelling pretrial disclosure of supporting witnesses, the court concluded that not all information obtained from a defendant is privileged under the fifth amendment.[FN39] Nevertheless, the court recognized that the application of the statute might itself lead to an invasion of the privilege against self-incrimination. Essentially, the court's holding comes down to this: while much of the statute requiring a defendant to make a pretrial disclosure of his defense and his witnesses may not be on its face unconstitutional, the use or application of the statute may lead to an unconstitutional result. The principal significance of Sikora is that it points out the difficulty in upholding disclosure provisions when courts do attempt to deal

Montana

directly with constitutional issues of self-incrimination arising out of compelled pretrial disclosure.

FN38. Justice Haswell dissented in part contending that required disclosure of claims of self defense or insanity violated the constitutional privilege against self-incrimination.

FN39. This has been widely recognized. E. g., Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967); United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967); Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966); Roberts v. State, 458 P.2d 340 (Alaska 1969).

The rather extended review which we have taken furnishes a backdrop against which we are prepared to consider the question in the light of our own state's legal history and our own state's constitution.

[5] In Baker v. City of Fairbanks, FN40 we acknowledged our responsibility to depart whenever necessary from constitutional interpretations enunciated by the United States Supreme Court and to develop rights and privileges under the Alaska constitution in accordance with our own unique legal background. In particular we stated:

FN40. 471 P.2d 386 (Alaska 1970).

While we must enforce the minimum constitutional standards imposed upon us by the United States Supreme Court's interpretation of the Fourteenth Amendment, we are free, and we are under a duty, to develop additional constitutional rights and privileges under our Alaska Constitution if we find such fundamental rights and privileges to be within the intention and spirit of our local constitutional language and to be necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage. We need not stand by idly and passively, waiting for constitutional direction from the highest court of the land. Instead, we should be moving concurrently to develop and expound the principles embedded in our constitutional law. [FN41]

FN41. Id. at 401-402 (footnote omitted).

We are not bound to follow blindly a federal constitutional construction of a fundamental principle if we are convinced that the result is based on unsound reason or logic.

We agree with the general principle that the court has a substantial interest in reducing the element of surprise in criminal proceedings. So to this extent at least we must be concerned with the constitutional administration of criminal justice as well as with efficient management of prosecutions and other trial activities. However, we share Justice Black's concern for the integrity of the privilege against self-incrimination and agree with his conclusion that the 'timing' rationale employed by the United States Supreme Court in Williams v. Florida to justify pretrial prosecutorial discovery is unpersuasive.

"timing" rationale unpersuasive

It is our view that a defendant's midtrial strategy choices are not identical to his pretrial decisions; nor are the problems and opportunities contemplated by an accused in formulating the course of action to be followed during the presentation of *784 his defense at trial identical to the same considerations before trial. The weakness of this 'timing' rationale has been accurately pointed out by at least one commentator:

But Justice White's analysis-which equates the defendant's at-trial choice, either to open a source of potentially incriminating information or to forego the opportunity to present a defense, with a parallel choice before trial-confuses one issue and begs a second. Of course, there is some similarity between defendant's pretrial and at-trial choices: in each case the defendant must weigh his critical need to produce exculpatory evidence against the risks of revealing incriminating information. But because of the prosecutor's heavy burden of proof, the defendant is best advised not to open up any source of potentially adverse information unless he feels that the state has in all likelihood proved its case; and it is only after the prosecutor has presented his evidence in court that the defendant can adequately make this judgment. By contrast, there is no way the defendant can know before trial the actual strength of the evidence against him as it will appear to the trier of fact, even if he has himself benefited from extensive discovery; witnesses' testimony under oath and cross-examination may radically depart from their versions of the events as given to the police or defense counsel prior to

Ak may depart from U.S. Constitution

trial.[FN42]

FN42. Note, Prosecutorial Discovery Under Proposed Rule 16, 85 Harv.L.Rev. 994, 1007-1008 (1972) (footnote omitted).

★ Our form of government has imposed an extraordinary burden of proof upon the state in criminal litigation. We think that the appropriate constitutional analysis is not the mere balancing of the state's interests in facilitating efficient law enforcement with the interest of the citizenry in maintaining maximum liberty.[FN43]

FN43. Cf. Baker v. City of Fairbanks, 471 P.2d 386, 394 (Alaska 1970):

Substantial reasons of policy must play an important part in any disposition of (the question whether petty offenses fall within the right to a jury trial). These naturally divide themselves into two major groups. On the one hand, we have considerations of convenience or expediency for the state and its legal subdivisions. It imposes a certain burden upon the machinery of government to make every offense triable by jury . . .

The argument from expediency contains inherent defects. If an individual right is vested by the Constitution, the overriding demands of governmental efficiency must be of a compelling nature and must be identifiable as flowing from some enumerated constitutional power. To allow expediency to be the basic principle would place the individual constitutional right in a secondary position, to be effectuated only if it accorded with expediency. (footnote omitted)

As Justice Black observed:

A criminal trial is in part a search for truth. But it is also a system designed to protect 'freedom' by insuring that no one is criminally punished unless the State has first succeeded in the admittedly difficult task of convincing a jury that the defendant is guilty. That task is made more difficult by the Bill of Rights, and the Fifth Amendment may be one of the most difficult of the barriers to surmount. The Framers decided

that the benefits to be derived from the kind of trial required by the Bill of Rights were well worth any loss in 'efficiency' that resulted.[FN44]

FN44. Williams v. Florida, 399 U.S. at 113-114, 90 S.Ct. at 1912, 26 L.Ed.2d at 484 (concurring and dissenting opinion).

★ Nor are we convinced that discovery in criminal proceedings is completely analogous to discovery in civil litigation; pretrial-criminal discovery is not a 'two-way street.' The analogy to civil discovery fails for a number of reasons. A criminal proceeding from its very inception is quite unlike civil litigation. There is ordinarily available to the prosecution substantial and effective avenues of discovery, such as the investigative resources of the police, access to official records, the power to compel testimony by way of grand jury subpoena which are not equally at the hand of the accused. Even more, as Justice Peters noted*785 in his dissent in Jones v. Superior Court:

The simple fact is that our system of criminal procedure is founded upon the principle that the ascertainment of the facts is a 'one-way street.' It is the constitutional right of the defendant, who is presumed to be innocent, to stand silent while the state attempts to meet its burden of proof, that is, to prove the defendant's guilt beyond a reasonable doubt. (emphasis in original) [FN45]

FN45. Jones v. Superior Court of Nevada County, 58 Cal.2d 56, 22 Cal.Rptr. 879, 884, 372 P.2d 919, 924 (1962) (dissenting opinion). Similarly, in Prudhomme v. Superior Court of Los Angeles County, 2 Cal.3d 320, 85 Cal.Rptr. 129, 134, 466 P.2d 673, 678 (1970) (concurring opinion), Justice Peters stated:

Discovery is not a 'two-way street' because of the constitutional rights of defendants not accorded the prosecution . . .

In our examination of the constitutional issues we found difficulty in accepting the reasoning of Jones v. Superior Court of Nevada County[FN46] and Williams v. Florida.[FN47] The dissenting opinions of Justice Peters in Jones and Justice Black in Williams seem to us more logical and better reasoned. ★

FN46. 58 Cal.2d 56, 22 Cal.Rptr. 879, 372 P.2d 919 (1962).

FN47. 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970).

★ ★ [6] We are therefore persuaded to interpret article I, section 9, of the Alaska constitution more broadly ★ ★ than the United States Supreme Court construed the fifth amendment in Williams. We hold that the privilege against compelled self-incrimination under the Alaska constitution prohibits extensive pretrial prosecutorial discovery in criminal proceedings. [FN48]

FN48. At least one legal commentator construes the privilege against self-incrimination under the fifth amendment to the United States Constitution in a similar manner.

. . . (T)he policies inherent in the fifth amendment privilege against self-incrimination indicate that the prosecutorial discovery provisions of the proposed amendment to (federal criminal) Rule 16 are unconstitutional and should be rejected . . . (and) that the contention that increased defense discovery must be dependent upon increased prosecutorial discovery exaggerates the risk of defense discovery and is unpersuasive.

Note, Prosecutorial Discovery Under Proposed Rule 16, 85 Harv.L.Rev. 994 (1972).

The principles we choose to follow in deciding whether or not compelled disclosure of defenses may undermine the privilege against self-incrimination involve a three-fold test: Is the evidence testimonial; is it incriminating; and is it compelled? Applying this three-part rule to the court's discovery order in the case now before us leads to the conclusion that the order is in a large part constitutionally impermissible.

The discovery order directs petitioner to produce 'the names and addresses of all prospective defense witnesses, other than the defendant himself,' including 'the names of (alibi) witnesses upon whom he intends

to rely.'

The requirement that petitioner produce a list of names and addresses of witnesses meets the testimonial or communicative criterion of the constitutional analysis. That is, a document containing such facts transmitted from one party to another constitutes a communication of cognizable information from one source to another. Secondly, we are of the opinion that the list of names of prospective witnesses may, at least in some instances, tend to be incriminating. Although the list might not appear to be incriminating on its face, certain of the persons identified in such a list may be known felons, perjurers, accomplices, co-defendants, or individuals under suspicion or police surveillance. Moreover, the police may possess additional incriminating information about some of the witnesses and an accused's reference to such persons may tend to arouse suspicion about his relationship with the witness or may tend to implicate him in the criminal activities of such witness.

[7][8] The incriminating nature of requiring a defendant to disclose the names and addresses of his witnesses prior to *786 trial may be more readily understood if placed in another context. We doubt, for instance, whether any court would uphold a statute or rule which would require the defendant to make such disclosure to the police at the station house. It can be said with assurance that such a procedure would be universally found to be a rank violation of the defendant's privilege against self-incrimination. There are, of course, important substantive differences between the investigatory stage of a criminal proceeding and the point of pretrial procedure. Our purpose is using the example is to make clear the incriminating nature of the disclosure. However, we feel the stage of the proceedings is irrelevant to the analysis of this constitutional privilege. The fundamental right not to incriminate one's self should apply at every stage of criminal inquiry or proceedings regardless of judge-made exclusionary or evidentiary rules. As Justice Connor noted in his majority opinion in McConkey v. State:

The privilege extends not only to answers that would in themselves support a conviction but also to those which might furnish 'a link in the chain of evidence' leading to a conviction. [FN49]

FN49. 504 P.2d 823, 826 (Alaska 1972)

(footnote omitted).

Finally, we agree with petitioner's contention that the names and addresses of the witnesses would by the terms of the order be 'compelled' from him in a constitutional sense. Since the production of a list of names and addresses of witnesses is testimonial in nature, incriminating, and compelled by court order, we hold that this portion of the superior court's discovery order violates petitioner's privilege against self-incrimination under article I, section 9, of the Alaska constitution.

[9] The discovery order next commands 'the production or inspection and copying of any written or recorded statements in defendant's possession of prospective defense or government witnesses . . .'. Again, we are of the view that written or recorded statements are 'testimonial' or 'communicative' in nature. Nor do we think it inconceivable that some, although not necessarily all, of such statements will be incriminating and will tend to furnish a link in the chain of evidence leading to a conviction. The potential incriminating nature of such statements was recognized by the Supreme Court of California in *Prudhomme v. Superior Court*:

For example, if a defendant in a murder case intended to call witness A to testify that defendant killed in self-defense, pre-trial disclosure of that information could provide the prosecution with its sole eyewitness to defendant's homicide. Similarly, consider the effect of disclosing the name or expected testimony of witness B, whom defendant intends to call only as a 'last resort' to testify that defendant only committed a lesser-included offense.[FN50]

FN50. See *Prudhomme v. Superior Court of Los Angeles County*, 2 Cal.3d 320, 85 Cal.Rptr. 129, 466 P.2d 673, 677 (1970).

As in the case of the list of names and addresses of witnesses, we conclude that the witness statements are being 'compelled' in a constitutional sense. Indeed, we are of the opinion that among the species of information sought to be discovered by respondent, disclosure of pretrial recorded statements of defense witnesses presents the most serious infringement upon petitioner's privilege against self-incrimination. Hence, we hold that this section of the superior court's discovery order is unconstitutional under

article I, section 9 of our constitution.

[10] Finally, the discovery order requires petitioner to produce 'advance notice of an alibi defense, together with information indicating the place or places defendant claims to have been . . .'. As with the list of witnesses' names, addresses and recorded statements, information going to alibi is, in our opinion, 'communicative' or 'testimonial.' Again, the information is verbal rather than physical, direct rather than indirect, and immediately cognizable. Documents containing written information are simply not fingerprints, voice samples, physical appearances *787 or line-up identifications. Additionally, for the reasons set forth above, we conclude that the information commanded by this portion of the discovery order is 'compelled' in a constitutional sense from petitioner. And we are of the view that information pertaining to an alternate location where an accused claims to have been tends to be incriminating and may provide the state with another 'link' in its chain of evidence. The information sought could be particularly incriminating if the state were able to demonstrate that no one else in such alternative location had seen the accused during the relevant time period. Further, compelled disclosure of the place the defendant claims to have been is as constitutionally infirm as coerced disclosure of witnesses' names, for it may serve to identify the witnesses. Often the place a defendant will specify will be a residence or a place of business, and in many instances the residents of the home or the proprietor of the place of business will have been present. These persons may be able to provide the police with information probative of the defendant's guilt information the police might never have found but for the compelled disclosure.

It is no answer to say that the defendant would have to disclose the same facts at trial anyway if he intended to rely on an alibi defense, for the state's case may be so weak that the defendant will choose not to expose himself to further criminal liability by revealing incriminating evidence which was nonetheless exculpatory of the crime for which he stands charged. Hence, we hold that the portion of the superior court's order which commands the production of alibi information concerning the place or places the accused claims to have been also offends petitioner's privilege against self-incrimination under the Alaska constitution.

[11] Whether the mere notice of an alibi defense tends to be incriminating to an accused, however, is more questionable. We find it difficult to conceive how a notice of this particular defense, standing by itself, might tend to be incriminating. Nor has petitioner persuasively demonstrated to us how such notice alone would disclose the substance of his defense theory or any incriminating weaknesses or inconsistencies therein. Rather, we are of the view that the advance notice of an alibi defense is in the nature of any pretrial plea, much like a plea of 'not guilty.' We find nothing incriminating about this inquiry. Accordingly, we hold that the portion of the superior court's discovery order which calls upon petitioner to furnish respondent with advance notice of an alibi defense does not violate article I, section 9, of the Alaska constitution.[FN51]

FN51. We do not, however, mean to express our view of the constitutionality of portions of Criminal Rule 16(c) or other pretrial prosecutorial discovery orders not presently before us.

We do not believe that our decision in the instant case will leave respondent in a disadvantaged posture during future prosecutions. Certainly in the past, the state has experienced no substantial inability to conduct prosecutions without the benefit of extensive pretrial discovery. We anticipate that it will continue to perform as effectively in the future. In the event that the state should be unfairly surprised or prejudiced at trial by unexpected defense witnesses, statements or theories, we assume that the trial courts will exercise sound discretion in the regulation of trial proceedings and grant the state a continuance or other appropriate remedy. We recognize that in some cases this may result in delays and inconvenience at trial, but we are not prepared to exchange a fundamental constitutional right for expediency.

We vacate the superior court's pretrial order and remand the case for further proceedings.[FN52]

FN52. Due to our holdings and disposition in this petition for review, we decline to reach petitioner's claim that the discovery order violated his right to effective confrontation and cross-examination under article I, section 11 of the Alaska constitution or the sixth and fourteenth amendments to the

United States Constitution.

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'I AM JIVERY WONG SHOOTING THE PEOPLE'

The man who gunned down 13 people in an immigrant center in Binghamton, N.Y., thought police had harassed him for years, even spreading rumors about him and touching him in his sleep, he wrote in a letter mailed to a TV station the day of the massacre. — *The Associated Press*

**NEWS DIGEST****NATION****D. C.****Prolonged, secret questioning isn't allowable, high court says**

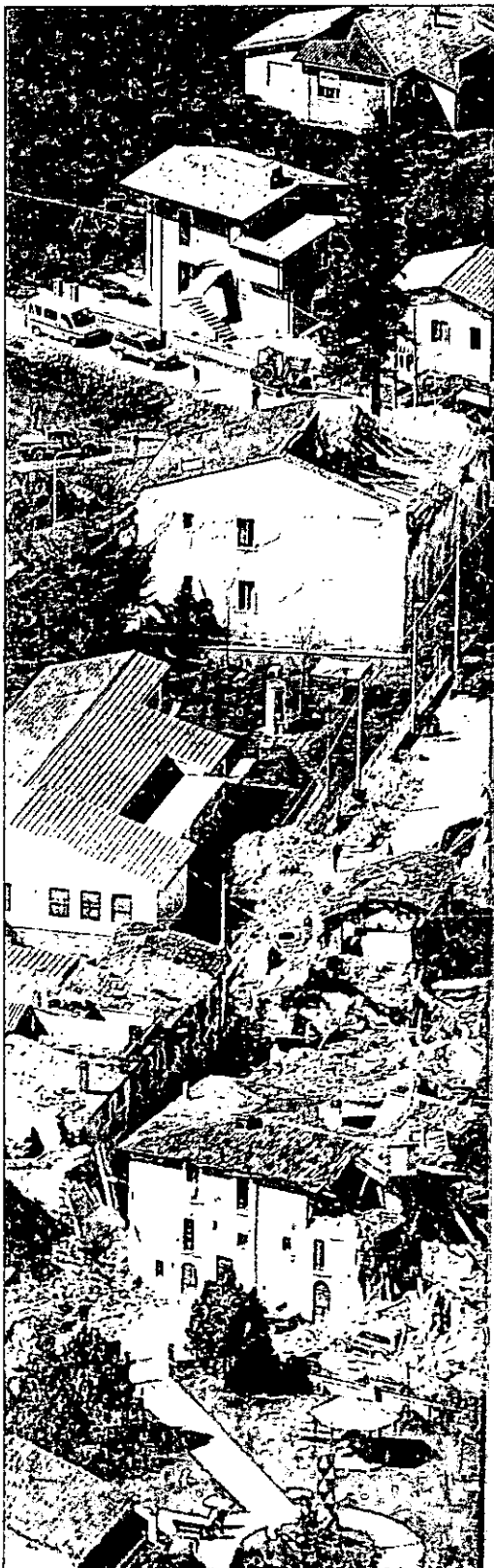
WASHINGTON — The Supreme Court refused 5-4 Monday to permit prolonged, secret questioning of crime suspects, ruling that even voluntary confessions may not be used in a federal court if the defendant was held more than six hours before he talked. Justice David Souter pointed to the number of people who have been shown to be innocent through DNA evidence, but who nonetheless had confessed to the crime. Police questioning "isolates and pressures the individual," he said, "and there is mounting empirical evidence that these pressures can induce a frighteningly high percentage of people to confess to crimes they never committed."

MASSACHUSETTS**DNA test for cancer virus praised over Pap smear**

BOSTON — A new DNA test for the virus that causes cervical cancer does so much better than current methods that some gynecologists hope it will replace the Pap smear in wealthy countries and cruder tests in poor ones. Not only could the new test for human papillomavirus, or HPV, save lives, but scientists also say that women over 30 could drop annual Pap smears and instead have the DNA test just once every three, five or even 10 years. The study was published last week in the New England Journal of Medicine.

ILLINOIS**1 in 5 American 4-year-olds is obese, report suggests**

CHICAGO — A striking new study says almost 1 in 5 American 4-year-olds is obese, and the rate is alarmingly higher among American Indian children, with nearly a third of them obese. Overall, more than half a million 4-year-olds are obese, the study suggests. Almost 13 percent of Asian children were obese, along with 16 percent of whites, almost 21 percent of blacks, 22 percent of Hispanics, and 31 percent of American Indians. The study appeared in Monday's Archives of Pediatrics & Adolescent Medicine.

Italian qu**WORLD**