LEGISLATIVE FINANCE-HOUSE/SENATE FINANCE COMM. FILES 8879

SB 17 cont. 1989-1990 584 175

ALASKA COURT SYSTEM
CS SB 17 (Judiciary) – Capital Punishment
Fiscal Impact

Personal Services	Salary	Benefits	Total
Law Clerk I, Range 13D, Anchorage, PFT – 12 Months	$29,340	$11,095	$40,435
Law Clerk I, Range 13D, Fairbanks, PFT – 12 Months	33,816	12,080	45,896
Total Personal Services			86,331
Travel			
Jury sequestration – meals and lodging			112,500
Contractual			
Security guard services for courts outside Anchorage			10,000
Jury fees			96,000
Bailiff costs			10,000
Transcription			50,000
Total Contractual			166,000
Equipment (one-time items)			
Standard office equipment and reference materials for law clerks			3,249
Walk-through metal detectors for Anchorage, Fairbanks, Juneau, and Ketchikan and hand-held metal detectors for other superior courts			12,450
Total Equipment			15,699
Total First Year Cost			$380,530

R/O SFC 3-13-90

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION: CSSB 17 (JUD)
PUBLISH DATE:

FISCAL NOTE

REQUEST:

Revision Date: March 12, 1990
Title: "An Act authorizing capital punishment..."
Sponsor: Senate Judiciary
Requestor: Senate Finance

Agency Affected: Department of Law
BRU: Prosecution
Components: Criminal Appeals and Special Prosecutions

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES	-0-	380.7	695.9	995.7	995.7	995.7
TRAVEL	-0-	138.5	266.5	394.5	394.5	394.5
CONTRACTUAL	-0-	222.4	506.4	724.4	724.4	724.4
SUPPLIES	-0-	27.9	40.8	55.2	46.2	46.2
EQUIPMENT	-0-	47.5	42.0	41.0	-0-	-0-
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	817.0	1,551.6	2,210.8	2,160.8	2,160.8
						PLUS
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	817.0	1,551.6	2,210.8	2,160.8	2,160.8
FEDERAL FUNDS						PLUS
OTHER						
TOTAL						

POSITIONS:

FULL-TIME	-0-	7	13	19	19	19
PART-TIME						PLUS
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Please see the attached analysis.

Prepared by: Richard L. Pegues
Richard I. Pegues, Director
Division: Administrative Services
Phone: 465-3672
Date: March 12, 1990

Approved by Commissioner: Richard L. Pegues /PDR/
Douglas B. Baily, Attorney General
Date: March 12, 1990
Agency: Department of Law

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

* DOLAW FISCAL NOTE

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. CSSB 17 (Jud)

The Department of Law has been requested to revise its fiscal note for this bill, dated March 3, 1989, on the basis of its current homicide caseload, in order to determine if the caseload assumptions used in the March 3, 1989 fiscal note are still valid. Because of the high cost, which the department could foresee would be necessary to implement the bill, the fiscal note costs were developed in as conservative a manner as possible, as were the assumptions upon which those costs were based.

The department's criminal division currently has sixteen pending murder trials where aggravating factors are present that would justify the death penalty, had the bill already been the law. Likewise, the department's Office of Special Prosecutions and Appeals is currently handling eight first degree murder appeals where these factors are also present. Based on this current data, there cannot be any suggestion that the assumptions used in the 1989 fiscal note were overstated. If anything, they may be understated by as much as one-third or more. However, because the number of murders committed in Alaska varies somewhat from year-to-year, the department believes that the realistic approach is to use the assumptions given in the March 3, 1989 fiscal note. Consequently, this analysis is repeated below.

The department believes firmly that the costs are fairly presented and represent the minimum amount that it would require to carry out the bill's provisions.

This bill would authorize capital punishment, classify murder in the first degree as a capital felony, and establish sentencing procedures for capital felonies. Section 9 of the Senate Judiciary Committee substitute for the bill adds a new chapter to AS 12, which grants prosecutors the discretion whether to seek the death penalty against a defendant. As was pointed out in the Department of Law's fiscal note of January 20, 1989, the death sentence would not be imposed unless at least one of several specified aggravating factors was found to exist and the aggravating factor, or factors, was not outweighed by mitigating factors.

Overview

Capital felony trials would be bifurcated, or held in two parts. The first part would determine innocence or guilt; the second part would determine whether aggravating factors exist sufficient to justify the death penalty; whether mitigating factors exist that outweigh the aggravating factors; and whether the defendant should be sentenced to a term of imprisonment or to death. At the current time, there are 10 to 12 first degree murder convictions each year where circumstances may be present that could result in bifurcated trials. In view of the discretion provided to prosecutors by the committee substitute; however, the department anticipates that about six bifurcated trials would be required annually if the bill is enacted.

Consequently, the Department of Law estimates that four capital felony convictions, with aggravating factors sufficient to justify a death sentence (and where a sentence of death is imposed) will occur each year. The department also estimates that it will attempt to seek the death penalty in two additional capital felony cases, where it may not be successful. Thus, the department must be prepared to prosecute capital felonies on six occasions each year, and it must also be prepared to handle a multi-year appellate review process that will grow at an accumulating rate of four cases per year. The experience in other states is that capital trials require far more in the way of prosecution and investigative resources than first degree murder cases that do not include the death penalty.

In its several reviews of capital penalty laws, the United States Supreme Court has repeatedly stated, "death is different." Consequently, the Supreme Court has required that states accord capital defendants procedural and substantive protections that go far beyond those required for noncapital defendants. The Court has, in effect, mandated that capital defendants be accorded "super" due process. The federal courts have consistently held that capital cases demand special consideration, both at trial and on appellate review, because of the exceptional and irrevocable nature of the penalty involved.

In order to meet this heightened level of due process, it will be necessary for the state to employ far greater prosecution resources. Many of the thirty-seven states having a death penalty, for instance, provide two defense attorneys to capital defendants to insure that the due process safeguards required by the courts are met. Likewise, the state's prosecution case must also be properly represented. During and prior to the trial phase, crime scene evidence will have to be examined and presented by highly qualified forensic experts, because the state's burden of proof will become more severe under these heightened standards. Psychiatric experts will also be required during the trial phase, during sentencing proceedings, and during the appellate review, to rebut and overcome competency and psychiatric defenses to both the substantive charge and the capital sentence. Recent cost studies of capital trials in other states indicate that expert witness expenses for both the trial and sentencing proceedings cost about $60,000, on the average. A lesser, but still significant, cost for experts is also required for appellate reviews.

A sentencing proceeding, or the penalty phase of a capital trial, is categorically different in character, procedure, and magnitude from any counterpart in a noncapital trial, and it accounts for a large part of the increase in costs. The heightened due process requirements, and the right to effective assistance of counsel, apply equally to the sentencing phase as they do to the trial phase. At this stage of the proceeding, the defense may be expected to use many of the socio-psychiatric witnesses employed during the trial phase. Additionally, the defense may also use the defendant's family, friends, neighbors, co-workers, school personnel, and social workers as witnesses. The defense's sentencing phase investigations will involve a complete retrospective analysis of every positive aspect of the defendant's life from the day of birth to the date of sentence. The prosecution, on the other hand, must interview each of the defense's witnesses to rebut mitigation evidence, and present its own witnesses to prove its aggravating factors. In a recent California case, 240 persons were investigated and interviewed as potential witnesses and 120 were eventually called as witnesses in a single sentencing proceeding. In view of the foregoing, it appears likely that the same level of state resources, needed for the John Kenneth Peel and Neil Mackay trials, will also be needed for many of the capital murder trials. For example, a fivefold increase in pretrial motion practice, often involving a state's supreme court, has occurred in other states between capital and noncapital first degree murder cases.

Lastly, post-conviction appellate reviews of death sentences will also require a substantial expenditure of state resources. Initially, challenges to the law itself can be expected to be taken to the Alaska Supreme Court on the basis of both state and federal constitutional due process, equal protection, and cruel and unusual punishment doctrines. Such challenges should be expected during the first two or three years after the provisions of the bill go into effect. Otherwise, the bill provides for a straightforward appeals process to the Alaska Supreme Court, but death sentences will nonetheless result in lengthy and complicated appellate litigation. This is because of the substantial appellate avenues available to capital defendants in the federal court system, primarily

on claims of due process, competency, and newly discovered evidence. Typically, these cases move up and down throughout the state and federal court systems, and involve the state superior and supreme courts, the U.S. Supreme Court, and the U.S. Circuit Court of Appeals, and the U.S. District Court. In the federal system, it is standard and accepted practice for the defense to raise each issue on appeal as a separate action, and new issues are not raised until after the earlier issue has been completely adjudicated, further lengthening the appellate review process. As a result, it should be expected that many years will pass before a death sentence can be carried out.

Implementation

The Department of Law anticipates that the time from when an offense is committed until a capital felony trial takes place will be between one and two years after the bill takes effect, although up to two trials may begin during the first year. Likewise, the post-conviction appellate review process will not commence until sometime during the second year. For these reasons, the department has developed a multi-year implementation plan for this fiscal note.

During the first year, it will be necessary to add three attorneys, two paraprofessionals, and two legal secretaries to handle capital felony prosecutions. Although only two bifurcated trials may actually get underway during the first year, substantial time will be required preparing for trial. This includes advising police investigators, examining evidence, interviewing witnesses, consulting with psychiatric and forensic experts, and initiating, responding to, and arguing pretrial motions. Also, preparation work on all six capital felonies expected to occur during the first year must begin as soon as possible after an offense is committed.

The "super" due process required by the courts in death penalty cases, and the requirement for a separate sentencing proceeding, will more than triple the work of the department's staff who handle these cases, compared with noncapital first degree murder cases. Extraordinary amounts of attorney and paraprofessional time will be needed to satisfy these minimum, mandatory requirements. As a consequence, capital felony prosecutions could not readily be undertaken in any of the department's offices, except for Anchorage and Fairbanks, without providing special prosecution staff on a case-by-case basis. And, even at Anchorage and Fairbanks, the existing staff would have to be substantially augmented each time a capital felony is handled. All of the positions to be added to handle capital trials and post-conviction death sentence appeals would be located in the department's Office of Special Prosecutions and Appeals, in Anchorage.

During the second year, four or more additional capital felonies are expected to go to trial, and six new capital felony offenses will occur. At this point, it will be necessary to add one attorney, one paraprofessional, and one legal secretary to help handle the increasing capital felony trial caseload. It will also be necessary to establish a capital felony appeals staff during the second year, when appeals from the first two trials are expected to begin the appellate review process. Initially, one attorney, one paraprofessional, and one legal secretary will be needed to handle capital felony appeals.

During the third year, the number of bifurcated trials should equal the number of new capital offenses, although some compression and overlapping of the caseload will likely occur. Consequently, it will be necessary to increase the trial staff during the third year, in order to handle the total annual workload, and to insure against speedy

trial problems. Post-conviction capital felony appeals will have reached six by year three, and they will continue to increase at the rate of four new cases each year, thereafter. It will, therefore, be necessary to increase the appeals staff in the third year.

It is not possible to accurately predict the eventual annual costs of a capital felony law beyond its first three or four years. There are simply too many unknowns. However, the costs that have been predicted are conservative. The following factors have been considered in arriving at these costs.

1) Capital felony due process and bifurcated trial requirements will more than triple the cost and time spent in prosecuting six first degree murder offenses, at a minimum.

2) The time required for a bifurcated trial will probably vary between two months and six months, although time lines are completely uncertain, and extremes will most likely be the rule. Serious overlapping and scheduling conflicts between investigations, trials, and available staff time will undoubtedly occur.

3) Pretrial motion practice will increase dramatically, resulting in additional scheduling problems.

4) Logistics problems will occur at most locations, except Anchorage and Fairbanks, and these problems will become more severe the smaller and more remote the location.

5) Witness travel and subsistence will be expensive because of the large number of witnesses that will be required for both the trial and the sentencing phases of capital felony prosecutions, and in many cases this includes out-of-state travel.

6) Staff travel and per diem will likewise be expensive for trials held outside of Anchorage. Extensive staff travel expense will also be necessary, for trials held at all locations, to interview both prosecution and defense witnesses who will appear at sentencing proceedings.

7) One of the most complex murder prosecutions ever held in Alaska was the John Kenneth Peel trial. Because this case involved extraordinary evidence problems, it probably represents costs that are outside the norm. Due to this and other complications, Peel case costs included two grand jury proceedings and two trials. But there can be no question that the state will have to provide a nearly comparable effort if it is to prevail in death penalty cases. By comparison, capital felony trials will be held in two parts, necessitate considerable expert testimony and depositions, involve two separate sets of witnesses, and require extensive staff travel. For this reason, the average prosecution costs of a bifurcated capital felony case has been projected to be $ 284,300 or 48% of the $ 597,000 cost of the first Peel trial.

8) The cost for appeals is shown only through the third year; however, this cost will ultimately grow enormously. The average length of time between a death sentence conviction and an execution in the United States is ten years, and this average is growing each year. At some point, the state will have to provide enough resources to respond to the appeals of forty or more capital felony defendants, annually.

9) Consequently, the following per trial expense estimates have been used to calculate the costs of this fiscal note.

Capital Felony Trials

- Witness travel and Subsistence, $50,000 per case.
- Staff travel and Per Diem, $7,500 per attorney, $5,000 per paraprofessional, $3,000 per secretary, per annum.
- Expert Witness Fees, $60,000 per case.
- Witness fees paid to others, $6,000 per case.
- Deposition/court reporter charges, $20,000 per case.

Death Sentence Appellate Review

- Staff Travel, $7,500 per attorney, $5,000 per paraprofessional, per annum.
- Expert Witness Fees, legal scholars for years two and three only, $30,000, each year. Socio-psychiatric experts, $25,000, per annum.
- Deposition/court reporter costs, $10,000 per annum.

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. CSSB 17 (Jud)

Fiscal Analysis

Cost Summary (First Year - FY 92 - Capital Trials)

Object	Atty V	Atty IV	Atty IV	Assoc. Atty I	P/A II	Legal Sec I	Legal Sec I	TOTAL
100 - Salaries & Benefits	77.8	73.2	73.2	47.4	44.3	32.4	32.4	380.7
	77.8	73.2	73.2	47.4	44.3	32.4	32.4	380.7
200 - Travel								
Witness Travel & Subsist	20.0	20.0	20.0	20.0	20.0	-0-	-0-	100.0
Staff Travel and Per Diem	7.5	7.5	7.5	5.0	5.0	3.0	3.0	38.5
	27.5	27.5	27.5	25.0	25.0	3.0	3.0	138.5
300 - Contractual								
Communications, Copy,								
Document Production,	3.6	3.6	3.6	2.4	2.4	2.4	2.4	20.4
Expert Witness	24.0	24.0	24.0	24.0	24.0	-0-	-0-	120.0
Witness Fees	2.4	2.4	2.4	2.4	2.4	-0-	-0-	12.0
Depositions	8.0	8.0	8.0	8.0	8.0	-0-	-0-	40.0
Office Space Leases	3.9	3.9	3.9	2.7	2.2	2.2	2.2	21.0
WP Maintenance	-0-	-0-	-0-	-0-	-0-	1.5	1.5	3.0
Westlaw	1.2	1.2	1.2	1.2	1.2	-0-	-0-	6.0
	43.1	43.1	43.1	40.7	40.2	6.1	6.1	222.4
400 - Supplies								
Office Consumables	1.8	1.8	1.8	1.8	1.8	1.2	1.2	11.4
Law Library	1.2	1.2	1.2	1.2	1.2	-0-	-0-	6.0
New Position Supplies	1.5	1.5	1.5	1.5	1.5	1.5	1.5	10.5
	4.5	4.5	4.5	4.5	4.5	2.7	2.7	27.9
500 - Equipment								
New Position Equipment	2.5	2.5	2.5	2.5	1.5	1.5	1.5	14.5
PC/Word Processing	4.0	4.0	4.0	4.0	4.0	6.5	6.5	33.0
	6.5	6.5	6.5	6.5	5.5	8.0	8.0	47.5
TOTAL	159.4	154.8	154.8	124.1	119.5	52.2	52.2	817.0

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. CSSB 17 (Jud)

Page 8 of 10

Fiscal Analysis CSSB 17 (Jud)

Cost Summary (Second and Third Years Additions - FY93 and FY94 - Capital Trials)

	Second Year				Third Year			
Object	Atty V	Assoc Atty I	Legal Sec I	TOTAL	Atty IV	P/A II	Legal Sec I	TOTAL
100 - Salaries & Benefits	77.8	47.4	32.4	157.6	73.2	44.3	32.4	149.9
	77.8	47.4	32.4	157.6	73.2	44.3	32.4	149.9
200 - Travel								
Witness Travel & Subsist	50.0	50.0	-0-	100.0	50.0	50.0	-0-	100.0
Staff Travel and Per Diem	7.5	5.0	3.0	15.5	7.5	5.0	3.0	15.5
	57.5	55.0	3.0	115.5	57.5	55.0	3.0	115.5
300 - Contractual								
Communications, Copy,								
Document Production,	3.6	3.6	2.4	9.6	3.6	3.6	2.4	9.6
Expert Witness	60.0	60.0	-0-	120.0	60.0	60.0	-0-	120.0
Witness Fees	6.0	6.0	-0-	12.0	6.0	6.0	-0-	12.0
Depositions	20.0	20.0	-0-	40.0	20.0	20.0	-0-	40.0
Office Space Leases	3.9	2.7	2.2	8.8	3.9	2.2	2.2	8.3
WP Maintenance	-0-	-0-	1.5	1.5	-0-	-0-	1.5	1.5
Westlaw	1.2	1.2	-0-	2.4	1.2	1.2	-0-	2.4
	94.7	93.5	6.1	194.3	94.7	93.0	6.1	193.8
400 - Supplies								
Office Consumables	1.8	1.8	1.2	4.8	1.8	1.8	1.2	4.8
Law Library	1.2	1.2	-0-	2.4	1.2	1.2	-0-	2.4
New Position Supplies	1.5	1.5	1.5	4.5	1.5	1.5	1.5	4.5
	4.5	4.5	2.7	11.7	4.5	4.5	2.7	11.7
500 - Equipment								
New Position Equipment	2.5	2.5	1.5	6.5	2.5	2.5	1.5	6.5
PC/Word Processing	4.0	4.0	6.5	14.5	4.0	4.0	6.5	14.5
	6.5	6.5	8.0	21.0	6.5	6.5	8.0	21.0
TOTAL	241.0	206.9	52.2	500.1	236.4	203.3	52.2	491.9

Fiscal Analysis CSSB 17 (Jud)

Cost Summary (Second and Third Years Additions - FY93 and FY94 - Appellate Review Process)

	Second Year				Third Year			
Object	Atty V	Asst Atty I	Legal Sec I	TOTAL	Atty IV	P/A II	Legal Sec I	TOTAL
100 - Salaries & Benefits	77.8	47.4	32.4	157.6	73.2	44.3	32.4	149.9
	77.8	47.4	32.4	157.6	73.2	44.3	32.4	149.9
200 - Travel								
Staff Travel and Per Diem	7.5	5.0	-0-	12.5	7.5	5.0	-0-	12.5
	7.5	5.0	-0-	12.5	7.5	5.0	-0-	12.5
300 - Contractual								
Communications, Copy,								
Document Production,	3.6	3.6	2.4	9.6	3.6	3.6	2.4	9.6
Expert Witness	30.0	25.0	-0-	55.0	-0-	-0-	-0-	-0-
Depositions	5.0	5.0	-0-	10.0	-0-	-0-	-0-	-0-
Office Space Leases	3.9	2.7	2.2	8.8	3.9	2.2	2.2	8.3
WP Maintenance	-0-	-0-	1.5	1.5	-0-	-0-	1.5	1.5
Westlaw	2.4	2.4	-0-	4.8	2.4	2.4	-0-	4.8
	44.9	38.7	6.1	89.7	9.9	8.2	6.1	24.2
400 - Supplies								
Office Consumables	1.8	1.8	1.2	4.8	1.8	1.8	1.2	4.8
Law Library	1.2	1.2	-0-	2.4	1.2	1.2	-0-	2.4
New Position Supplies	1.5	1.5	1.5	4.5	1.5	1.5	1.5	4.5
	4.5	4.5	2.7	11.7	4.5	4.5	2.7	11.7
500 - Equipment								
New Position Equipment	2.5	2.5	1.5	6.5	2.5	2.5	1.5	6.5
PC/Word Processing	4.0	4.0	6.5	14.5	4.0	4.0	6.5	14.5
	6.5	6.5	8.0	21.0	6.5	6.5	8.0	21.0
TOTAL	141.2	102.1	49.2	292.5	101.6	67.5	49.2	218.3

Fiscal Analysis CSSB 17 (Jud)

Cumulative Implementation Cost by Year

	Prosecution Costs				Appellate Review Costs			
Object	Year 1	Year 2	Year 3	Year 4+	Year 1	Year 2	Year 3	Year 4+
100 - Personal Services	380.7	538.3	688.2	688.2	-0-	157.6	307.5	307.5
200 - Travel	138.5	254.0	369.5	369.5	-0-	12.5	25.0	25.0
300 - Contractual	222.4	416.7	610.5	610.5	-0-	89.7	113.9	113.9
400 - Supplies	27.9	29.1	36.3	31.8	-0-	11.7	18.9	14.4
500 - Equipment	47.5	21.0	21.0	-0-	-0-	21.0	20.0	-0-
TOTAL	817.0	1,259.1	1,725.5	1,700.0	-0-	292.5	485.3	460.8

R/O SFC 3-13-90

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION: CSSB 17 (Jud)
PUBLISH DATE:

FISCAL NOTE

REQUEST:

Revision Date: 3/12/90
Title: "An Act authorizing capital punishment,..."
Sponsor: Senator Fischer
Requestor: Senate Finance

Agency Affected: Administration
BRU: Office of Public Advocacy
Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES	-0-	239.2	248.8	258.8	269.2	280.0
TRAVEL		35.0	36.4	37.9	39.4	41.0
CONTRACTUAL		486.2	505.6	525.8	546.8	568.7
SUPPLIES		4.0	4.2	4.4	4.6	4.8
EQUIPMENT		18.3	0	0	0	0
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	782.7	795.0	826.9	860.0	894.5

CAPITAL						

REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	782.7	795.0	826.9	860.0	894.5
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	782.7	795.0	826.9	860.0	894.5

POSITIONS:

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

ANALYSIS: (Attach a separate page if necessary)

FY90 impact is zero. See attached for analysis.

Prepared by: Brant McGee, Public Advocate
Division: Office of Public Advocacy
Phone: 274-1684
Date: 3/12/90

Approved by Commissioner: Frank Baxter
Agency: Department of Administration
Date: 3/12/90

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

DOA FISCAL NOTE / PUBLIC ADVOCACY

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. CSSB 17 (Jud)

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

Section 9 of the Senate Judiciary Committee substitute for this bill adds a new chapter to AS 12, which grants prosecutors the discretion whether to seek the death penalty against a defendant. The Department of Law has estimated that it would seek the death penalty in approximately six cases annually. Therefore, Office of Public Advocacy anticipates that it would be responsible for two capital cases in FY92. This estimate is dependent upon the following two assumptions: (1) a slight numerical increase in the number of capital felony cases which fall within the OPA statutory mandate, and (2) the Department of Law will not seek the death penalty in more than six cases annually.

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

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

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

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. CSSB 17 (Jud)

Personal Services		
Anchorage		
Attorney V Salary & Benefits	=	$ 79.6
Attorney IV Salary & Benefits	=	74.8
Investigator III Salary & Benefits	=	52.0
Legal Secretary I	=	32.8
Subtotal Personal Services		$239.2
Travel		
Necessary travel for court hearings, investigation, expert witnesses, etc.		35.0
Contractual		
Additional office for four positions in Anchorage = $16,200		16.2
Expert witness fees based on two cases per year at $60,000 per case		120.0
Contract representation for one case per year where OPA has a conflict of interest at $350,000 per case		350.0
Subtotal Contractual		$486.2
Supplies		
Stationary, library and office supplies for four new positions at $1,000 per position = $4,000		4.0
Equipment		
Office furniture and equipment for three professional positions at $3,635 each and one legal secretary at $7,369		18.3
TOTAL:		$782.7

R/O SFC 3-13-90

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION: CS SB 17
PUBLISH DATE:

FISCAL NOTE

REQUEST:

Revision Date: 3/12/90
Title: "An Act authorizing capital punishment..."
Sponsor: Senators Fischer, Kelly, Pearce
Requestor: Senate Finance

Agency Affected: Dept. of Administration
BRU: Public Defender Agency
Components: Third and Fourth Judicial Districts

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES		239.1	740.8	770.4	801.2	833.2
TRAVEL		50.0	150.0	156.0	162.2	168.7
CONTRACTUAL		95.0	301.0	313.0	325.5	338.5
SUPPLIES		6.0	18.0	18.7	19.4	20.2
EQUIPMENT		20.0	40.0	-0-	-0-	-0-
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	410.1	1249.8	1258.1	1308.3	1360.6

CAPITAL						

REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	410.1	1249.8	1258.1	1308.3	1360.6
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	410.1	1249.8	1258.1	1308.3	1360.6

POSITIONS:

FULL-TIME	-0-	4.0	12.0	12.0	12.0	12.0
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

(See attached analysis)

Prepared by: John B. Salemi, Public Defender
Phone: 279-7541
Division: Public Defender Agency
Date: 3/12/90

Approved by Commissioner: Frank Baxter
Date: 3/12/90
Agency: Department of Administration

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

DOA FISCAL NOTE (PUBLIC DEFENDER)

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

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

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

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

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. CS;SB 17

The figures in this fiscal note are based on an estimation of the number of cases which would qualify under the bill as capital cases, and based further on the Department of Law's estimate that they would be seeking the death penalty in six capital cases per year. The specific figures included in this fiscal note are based on the following:

1. Personal Services

Given the complexity and intensity of effort involved in each death penalty trial and penalty phase, many states recommend or require by statute that a minimum of two attorneys handle each death penalty case. Based on an estimated 6 cases per year, this agency would need one death penalty team of two attorneys to handle the trial and penalty phases of these cases. A second death penalty team of two attorneys would be necessary to handle the additional cases which would accumulate during the second year of enactment of this bill. In addition, during that second year an appellate attorney team of two attorneys would be necessary to handle the appeals of these cases. No appellate attorney team would be added the first fiscal year as it is unlikely that any of these cases would reach the appellate stage during the first year of enactment of the bill. In addition, each team of attorneys would require an investigator and legal secretary.

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

2. Travel and Contractual Fees.

The New York State Defender Association has estimated that a minimum figure for expert witness fees and travel must be $30,000 for the penalty phase per case. Experts in forensics, ballistics, blood analysis, hair analysis, eyewitness identification, psychiatry, and psychology could be necessary during the trial phase in each case, and many of these would be traveling from out-of-state. During the penalty phase friends and family members of the defendant as well as psychiatrists, psychologists and social workers would be involved. Thus the contractual and travel costs for expert witnesses has been calculated at $60,000 per case. This figure does not include any expert fees which might be necessary at the appellate stages. The amount of contractual fees estimated in this fiscal note is based on an estimated 6 cases per year.

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. CS SB 17

3. Equipment and Supplies.

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

BUDGET SUMMARY

FY 92

Personal Services:			
Guilt and Penalty Team-Anchorage			
Attorney V	79.6		
Attorney IV	74.8		
Investigator III	51.9		
Legal Secretary I	32.8		
		TOTAL	239.1
Travel:			
Based on 6 Capital cases per year Employee and non-employee (experts)			50.0
Contractual:			
Based on 6 Capital cases per year			
Experts	80.0		
Office space			
Anchorage	8.0		
Printing	2.0		
Communications	5.0	TOTAL	95.0
Supplies:			
Office, law library			6.0
Equipment:			
Office furniture and machines (one time)			20.0
		TOTAL	410.1

FY 93 - Additional Costs

Personal Services:			
Appellate Team - Anchorage			
Attorney V	79.6		
Attorney IV	74.8		
Investigator III	51.9		
Legal Secretary I	32.8		
Guilty and Penalty Team-Fairbanks			
Attorney V	90.2		
Attorney IV	84.7		
Investigator III	53.8		
Legal Secretary I	33.9		
		TOTAL	501.7
Travel:			
Based on 6 Capital cases per year			100.0

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. CS SB 17

Contractual:		
Based on 6 Capital cases per year	190.0	206.0
Office space: Anchorage, Fairbanks	16.0	
Supplies:		12.0
Equipment:		
Two teams (one time)		40.0
	TOTAL	859.7

R/O SFC 3-13-90

Offered: 2/27/89
Referred: Finance

6-0343J

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

IN THE SENATE BY THE JUDICIARY COMMITTEE

CS FOR SENATE BILL NO. 17 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - FIRST SESSION

A BILL

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

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

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

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

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

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

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

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

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

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

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

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

(d) An attempt is

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

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

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

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

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

C felony;

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

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

(c) Solicitation is a

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

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

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

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

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

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

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

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

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

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 other persons and the community.

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

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

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

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

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

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

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

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

CHAPTER 58. CAPITAL PUNISHMENT.

ARTICLE 1. ELECTION TO SEEK DEATH PENALTY.

Sec. 12.58.010. PROSECUTOR'S ELECTION TO SEEK DEATH PENALTY. The district attorney assigned to the prosecution of a capital felony shall determine whether to seek the death penalty against the defendant. If the prosecutor elects to seek the death penalty, the prosecutor shall give notice of election to the court, the defendant, and the defendant's attorney within 10 days of arraignment of the defendant on the capital felony indictment, or within 10 days of arraignment of the defendant if indictment has been waived.

ARTICLE 2. IMPOSITION OF SENTENCE.

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

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

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

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

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

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

(3) the defendant should be sentenced to death.

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

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

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

outweighed by the mitigating factors; and

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

(c) The court may not impose the death sentence

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

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

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

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

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

(2) mitigating factors considered by the court.

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

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

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

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

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

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

of another jurisdiction with substantially similar elements;

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

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

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

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

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

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

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

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

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

ARTICLE 3. SENTENCE REVIEW.

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

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

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

(1) the sentence was imposed under the influence of passion, prejudice, or other arbitrary factor;

(2) the evidence supports the finding of an aggravating factor under AS 12.58.120 and whether the court has properly considered mitigating factors under AS 12.58.130;

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

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

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

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

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

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

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

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

(b)(4) of this section.

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

ARTICLE 4. EXECUTION.

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

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

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

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

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

the news media as a condition of attendance.

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

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

Sec. 12.58.350. PROVISIONS GOVERNING ATTENDANCE AT EXECUTION. (a) Persons attending an execution are subject to a reasonable search as a condition of attendance.

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

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

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

ARTICLE 5. STAY OF EXECUTION.

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

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

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

(c) If the sentencing court finds that the defendant is competent, the court shall immediately certify the finding to the supreme court and the commissioner. The supreme court shall issue and deliver another warrant to the commissioner under AS 12.58.210, together with a copy of the certified finding. Unless the sentencing court's finding is appealed in accordance with applicable court rule, the warrant shall specify a date of execution that is not less than 30 days nor more than 60 days after the date of the warrant.

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

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

warrant.

ARTICLE 6. GENERAL PROVISIONS.

Sec. 12.58.900. DEFINITIONS. In this chapter,

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

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

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

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

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

(2) post-conviction relief;

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

(4) extradition;

(5) habeas corpus;

(6) probation and parole; and

(7) bail.

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

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

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

in substantially the following form:

Q U E S T I O N

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

Yes [ ] No [ ]

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

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

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

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

Adopted 3/12/90
Rescinded

6-0343M
Chenoweth
3/12/90

Original sponsor(s): SEN. FISCHER, Kelly, Pearce, Halford, Faiks

IN THE SENATE

CS FOR SENATE BILL NO. 17 ( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act authorizing capital punishment, classifying murder in the first degree as a capital felony, and establishing sentencing procedures for capital felonies; directing an advisory vote on whether the capital punishment law should take effect; and providing for an effective date."

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

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

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

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

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

(4) conforms to contemporary standards of decency in that there is no evidence that Alaska's tradition and history suggest a significantly different attitude toward capital punishment in this state from those that prevail nationwide, and there is a widely held belief in the society that

capital punishment is an appropriate penalty for murder in the first degree;

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

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

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

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

(d) An attempt is

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

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

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

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

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

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

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

(c) Solicitation is a

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

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

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

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

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

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

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

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

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

ance of the person, or will pose a danger to other persons and the community.

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

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

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

(b) On or before the expiration of the initial 90-day period of commitment the court shall conduct a hearing to determine whether or not the defendant remains incompetent. If the court finds by a preponderance of the evidence that the defendant remains incompetent, the court may recommit the defendant for a second period of 90 days. The court shall determine at the expiration of the second 90-day period whether the defendant has become competent. If at the expiration of the second 90-day period the court determines that the defendant continues to be incompetent to stand trial, the charges against the defendant shall be dismissed without prejudice and continued commitment of the defendant shall be governed by the provisions relating to civil commitments under AS 47.30.700 - 47.30.915 unless the defendant is charged with a crime involving force against a person and the court finds that the defendant presents a substantial danger of physical injury to other persons and that there is a substantial probability that the defendant will regain competency within a reasonable period of time, in which case the court may extend the period of commitment for an additional six months. If the defendant remains incompetent at the expiration of the additional six-month period, the charges shall be dismissed without prejudice and either civil commitment proceedings shall be instituted or the court shall order the release of the defen-

dant. If the defendant remains incompetent for five years after the charges have been dismissed under this subsection, the defendant may not be charged again for an offense arising out of the facts alleged in the original charges, except if the original charge is a class A felony, [OR] unclassified felony, or capital felony.

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

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

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

CHAPTER 58. CAPITAL PUNISHMENT.

ARTICLE 1. ELECTION TO SEEK DEATH PENALTY.

Sec. 12.58.010. PROSECUTOR'S ELECTION TO SEEK DEATH PENALTY. The district attorney assigned to the prosecution of a capital felony shall determine whether to seek the death penalty against the defendant. If the prosecutor elects to seek the death penalty, the prosecutor shall give notice of election to the court, the defendant, and the defendant's attorney within 10 days of arraignment of the defendant on the capital felony indictment, or within 10 days of arraignment of the defendant if indictment has been waived.

ARTICLE 2. IMPOSITION OF SENTENCE.

Sec. 12.58.100. SENTENCING PROCEDURE FOR A CAPITAL FELONY. (a) If, after trial by jury, the defendant is convicted of a capital felony in which the district attorney has elected under AS 12.58.010 to seek the death penalty, the court shall conduct a separate sentencing proceeding before the trial jury as soon as practicable. If a jury trial has been waived or if the defendant pleads guilty, the sentencing proceeding shall be held before a jury impaneled for the

purpose.

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

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

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

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

(3) the defendant should be sentenced to death.

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

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

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

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

(c) The court may not impose the death sentence

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

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

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

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

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

(2) mitigating factors considered by the court.

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

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

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

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

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

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

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

governor of this state;

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

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

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

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

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

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

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

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

Sec. 12.58.140. ISSUANCE OF DEATH WARRANT. If the court imposes a sentence of death, the court shall issue a death warrant that specifies a date of execution. Unless the sentencing court's finding is appealed under applicable court rule, the warrant shall specify a date of execution not less than 30 days nor more than 60 days after the

date of the warrant. The death warrant shall be delivered to the commissioner of corrections.

ARTICLE 3. EXECUTION.

Sec. 12.58.200. EXECUTION UNDER DEATH WARRANT. After receiving a warrant issued under AS 12.58.140, the commissioner shall specify the time and place of execution.

Sec. 12.58.210. EXECUTION BY LETHAL INJECTION. After consulting a licensed physician, the commissioner shall select a method of injection and a drug or combination of drugs to be used for an execution by lethal injection.

Sec. 12.58.220. WITNESSES. The commissioner and a licensed physician chosen by the commissioner shall be present at an execution under this chapter.

Sec. 12.58.230. INVITEES. The commissioner may invite not more than nine citizens, who are 19 years of age or older, to be present at an execution, including the prosecuting attorney, the defense attorney, relatives and friends of the defendant, or religious representatives designated by the defendant. A person who is invited by the commissioner may not attend an execution as a matter of right.

Sec. 12.58.240. COVERAGE BY NEWS MEDIA. (a) The commissioner shall permit at an execution the attendance of not more than six members of the print and broadcast news media selected by the commissioner in accordance with regulations adopted by the department. The selected news media members shall serve as a pool for other members of the news media as a condition of attendance.

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

disturbed.

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

Sec. 12.58.250. PROVISIONS GOVERNING ATTENDANCE AT EXECUTION. (a) Persons attending an execution are subject to a reasonable search as a condition of attendance.

(b) Persons other than the physician and necessary staff designated by the commissioner and others permitted under AS 12.58.230 - 12.58.240 may not be permitted to attend an execution, nor may any person under the age of 19 attend.

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

Sec. 12.58.260. RETURN OF DEATH WARRANT. After the execution the commissioner shall make a return upon the death warrant, showing the time and place at which the defendant was executed.

ARTICLE 4. STAY OF EXECUTION.

Sec. 12.58.300. INCOMPETENCY OR PREGNANCY OF PERSON SENTENCED TO DEATH. If, after a sentence of death is imposed, the commissioner has reason to believe that the defendant has become incompetent to proceed with the execution or that the defendant is pregnant, the commissioner shall immediately give written notice to the court in which the sentence of death was imposed, the prosecuting attorney, and counsel for the defendant. The execution of sentence shall be stayed pending further order of the court.

Sec. 12.58.310. EXAMINATION INTO COMPETENCY. (a) On receipt of notice under AS 12.58.300 that the defendant is believed to be incompetent, the sentencing court shall examine the mental condition of the defendant in the same manner as provided for examining persons for competency to stand trial under AS 12.47.070.

(b) If the sentencing court finds that the defendant is incompetent, the court shall immediately certify that finding to the commissioner, and shall enter an order for commitment in the same manner as provided for commitment under AS 12.47.110.

(c) If the sentencing court finds that the defendant is competent, the court shall immediately certify the finding to the commissioner. The court shall issue and deliver another warrant to the commissioner under AS 12.58.140, together with a copy of the certified finding. Unless the sentencing court's finding is appealed in accordance with applicable court rule, the warrant shall specify a date of execution that is not less than 30 days nor more than 60 days after the date of the warrant.

Sec. 12.58.320. DISPOSITION PENDING PREGNANCY. (a) If the defendant is pregnant, the sentencing court shall immediately certify that finding to the commissioner. The court shall issue an order staying the execution of the sentence of death during the pregnancy.

(b) When the defendant is no longer pregnant, the sentencing court shall immediately certify the finding to the commissioner. The court shall issue and deliver another warrant under AS 12.58.140, together with a copy of the certified finding. Unless the sentencing court's finding is appealed under applicable court rule, the warrant shall specify a date of execution not less than 30 days nor more than 60 days after the date of the warrant.

ARTICLE 5. GENERAL PROVISIONS.

Sec. 12.58.900. DEFINITIONS. In this chapter,

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

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

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

(a) The court of appeals has appellate jurisdiction in actions

and proceedings commenced in the superior court involving:

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

(2) post-conviction relief;

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

(4) extradition;

(5) habeas corpus;

(6) probation and parole; and

(7) bail.

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

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

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

Q U E S T I O N

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

Yes [ ] No [ ]

* Sec. 13. Except for sec. 12 of this Act, this Act takes effect August 15, 1991.

* Sec. 14. Section 12 of this Act takes effect immediately under AS 01.10.070(c).

STATE OF ALASKA
THE LEGISLATURE

POUCH Y STATE CAPITOL
JUNEAU, ALASKA 9981
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

M E M O R A N D U M March 12, 1990

SUBJECT: Draft CSSB 17 ( )

TO: Senator Paul Fischer
ATTN: David Moses

FROM: Jack Chenoweth
Legislative Counsel

The bill draft that accompanies this memo, version "M," was prepared in response to a request to prepare a draft that eliminates all reference to court rule changes, if possible. The draft differs from one prepared late last week by eliminating bill section 13, noting that the effect of AS 12.58.100 - 12.58.130, added in bill section 9, is to "[modify] the sentencing provisions of Rule 32(c), Alaska Rules of Criminal Procedure, by establishing exclusive procedures for determining mitigating and aggravating factors applicable to imposition of a death sentence in a capital felony." The sections noted in bill section 9--AS 12.58.100 - 12.58.130, relating to the determination of whether the death sentence shall be imposed--are not amended.

Under current law, the application of aggravating and mitigating factors in the imposition of a sentence is reserved to the court (i.e. the judge). The jury has no role. See, in this regard, AS 12.55.015 and following sections. In this measure establishing capital punishment, the jury would be assigned responsibility for sentence imposition through the evaluation of aggravating and mitigating factors. 1/

1/ The role of the jury in determining whether to impose the death sentence is not central to recent decisions sustaining capital punishment against constitutional challenges. Indeed, there are recent decisions concluding that there is no federal constitutional requirement that the death sentence be imposed by a jury rather than by the trial court. Spaziano v. Florida, 468 U.S. 447, 82 L.Ed.2d 340, 104 S.Ct. 3154 (1984), Richmond v. Arizona, 434 U.S. 1323, 54 L.Ed.2d 34, 98 S.Ct. 8 (1977), reh. den. 434

The constitutional provision applicable to legislative amendment of court rules is article IV, section 15:

> The supreme court shall make and promulgate rules governing the administration of all courts. It shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts. These rules may be changed by the legislature by two-thirds vote of the members elected to each house.

To avoid application of the requirements of art. IV, sec. 15, one would have to assert that the material proposed in AS 12.58.100 - 12.58.130 does not constitute a change to an existing court rule dealing with practice and procedure. The court rule in question, Criminal Rule 32(c), sets out the procedures under which the trial court is to address application of aggravating and mitigating factors when required to do so under applicable sentencing laws.

I offer an argument to defend the legislature's adoption of a capital punishment measure without reference to a court rule change without offering an evaluation of whether the

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(1/ continued)
U.S. 976, 54 L.Ed.2d 469, 98 S.Ct. 537 (1977); State v. Gillies, 691 P.2d 655 (Ariz. 1984), cert. den. sub nom. Gillies v. Arizona, 470 U.S. 1059, 84 L.Ed.2d 834, 105 S.Ct. 1775 (1985).

The Spaziano decision notes that, at that time (1984), four states--Arizona, Idaho, Montana, and Nebraska--provide that the trial court judge, not the jury, is to impose sentence. See 82 L.Ed.2d 340, at 354, 355, note 9. The state authorities cited in the decision note are Ariz. Rev. Stat. Ann. §13-703, Idaho Code §19-2515, Mont. Code Ann. §46-18-301, and Neb. Rev. Stat. §29-2520. In light of those precedents, I suggest that this bill could be redrafted to provide that the trial court, not the jury, is assigned responsibility for determination of imposition of the death sentence through consideration of applicable aggravating and mitigating factors.

argument would prevail. 2/ I respectfully suggest that these notes be made a part of the legislature's consideration of the measure. 3/ Under the argument, because the material being added by AS 12.58.100 - 12.58.130 entirely addresses the exercise of responsibility by the jury in determining whether or not to apply the death sentence, the principal effect is to enact substantive law, not to alter the law applicable to current sentencing practices and procedures wherein sentencing is reserved to the court. Thus, it is only incidentally, if at all, that the material

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2/ I have a sense that the argument might prevail. In Channel Flying, Inc. v. Bernhardt, 451 P.2d 570 (Alaska 1969), the court resolved an art. IV, sec. 15 based challenge on the basis of whether matter purporting to affect a court rule was substantive or procedural. Terming subject matter that is "substantive in nature" as "matter within [the] legislative prerogative," the supreme court found a distinction from procedural law as law that "prescribes the method of enforcing rights." Arguably, under an extension of the analysis, the material in AS 12.58.100 - 12.58.130 is set out to assure that the jury treats a defendant facing the possibility of a death sentence fairly, without prejudice that may amount to a violation of the constitutional prohibition against imposition of cruel and unusual punishment.

3/ Elimination of the court rule change reference does not, of course, eliminate all requirements in this measure that relate to securing a two-thirds vote. There is an effective date clause covering all sections of the bill except the public vote provision. That effective date clause delays the effective date of the legislation until August, 1991, pending the advisory question vote. Should the two-thirds vote fail on the effective date clause, the bill would take effect 90 days after gubernatorial signature or taking effect without gubernatorial signature, or 90 days after final legislative approval over the governor's veto. That would open up the strong possibility that the measure may become law prior to the advisory vote.

proposed in AS 12.58.100 - 12.58.130 may be said to amend or change existing rules bearing upon how the court shall consider statutory aggravating and mitigating factors in all other sentencing situations.

* * *

Version "M," like version "D" before it, eliminates all provisions for mandatory appellate review of death sentences. Under either of the two drafts, appellate review would be permissive, albeit all such appeals would be heard by the Alaska Supreme Court and not by the Alaska Court of Appeals. See, in this regard, sections 10 and 11 of both versions.

The earlier drafts of this bill (and previous versions of other death sentence measures) incorporated a mandatory review feature. That mandatory review was incorporated to both ascertain that the imposition of a death sentence in a particular crime was appropriate in that it was proportionate to sentences imposed for similar crimes, and to assure that each death penalty was not so randomly, arbitrarily, or capriciously determined so as to amount to a violation of constitutional prohibitions against imposition of cruel and unusual punishment. However, a leading United States Supreme Court case has determined that the absence of a special appellate review to conduct a so-called proportionality review is not per se unconstitutional, 4/ so it appears that the elimination of mandatory appellate review in this draft may not necessarily be constitutionally fatal.

JC:pl
WKP3/038

Enclosure

4/ Pulley v. Harris, 465 U.S. 37, 79 L.Ed.2d 29, 104 S.Ct. 871 (1984), on remand 726 F.2d 569 (9th Circ. 1984), appeal after remand 852 F.2d 1546 (9th Circ. 1988). See also Wright v. State, 494 So.2d 726 (Ala. App. 1985) (citing Pulley, supra), aff. sub nom. Ex parte Wright, 494 So.2d 745 (Ala. 1986), cert. den., 479 U.S. 1101, 94 L.Ed.2d 183, 107 S.Ct. 1331 (1987).

~~3/~~/90
3/7/90

Charles Campbell
Juneau, Alaska March 1990

TWELVE REASONS WHY ALL ALASKANS SHOULD OPPOSE THE DEATH PENALTY

More often than not, debate over the death penalty involves discussion of irresolvable philosophical, ethical and theological considerations. Opponents are convinced that violence begets violence and that use of the death penalty brutalizes all of us. Proponents tell us, on the other hand, that certain crimes are so reprehensible as to place a requirement on society to take the life of the perpetrator. Most religious leaders oppose the death penalty on theological and moral grounds, but ministers in a few of the more conservative Christian churches manage to find justification in the scriptures (primarily in the Old Testament) for use of the death penalty. I offer here twelve reasons for my opposition to the death penalty, none of which are based on philosophical or religious grounds. I will not deny that my personal convictions would prevent me from approving of the death penalty even if these practical reasons for opposing it did not exist, but these compelling considerations do exist. You may find certain of them debatable, but by no means all of them; the first of them, for example:

1. <u>The death penalty is irreversible</u>: James Adams was executed by the State of Florida in 1984. He had unwaveringly maintained his innocence throughout the trial and during the years of the appeal process. Substantial evidence has subsequently come to light, including forensic evidence gathered by the Florida Office of Law Enforcement, that almost certainly would have resulted in Adam's acquittal. Other persons who had substantial claims of innocence were Timothy Baldwin, executed in Louisiana in 1984, Edward Earl Johnson, executed in Mississippi in 1987 and Willie Jasper Darden, executed in Florida in March 1988. Perhaps all of these latter three were guilty, but reasonable doubts have been raised and there is no bringing them back. A study published by the Stanford University Press in 1987 documents the innocence of twenty three persons executed in our country during this century. One hundred sixteen others were sentenced to death and would have been executed had it not been for the belated appearance of witnesses establishing innocence, or the discovery of suppressed evidence. We will never know how many innocent people have been executed. ~~Amnesty International estimates the number to be about 350~~. In any case, an absolute certainty is that innocent people have been killed by the state, and will be killed occasionally, as long as we continue to retain the death penalty as a criminal sanction.

2. <u>The death penalty has no value as a deterrent</u>: The overwhelming consensus among criminologists and others qualified to perform and evaluate empirical studies is that the deterrent value of the death penalty, as opposed to other criminal

sanctions, has not been demonstrated. This is true despite an almost frenzied effort to prove a deterrent value to capital punishment since the 1972 Furman v. Georgia decision. Moreover, certain highly respected studies strongly suggest that the death penalty may have the opposite effect. Glenn Pierce and William Bowers of Northeastern University analyzed data on all of the executions that occurred in New York State over a period of fifty seven years. The evidence presented by this study indicates that individuals who are predisposed to violent crime are more likely to be incited than deterred by executions. This finding should not be surprising, given the bizarre thought processes of especially brutal, vicious murderers. No social scholar has yet been able to refute the findings of Robert Rantoul, who conducted his extensive studies over a hundred years ago, and demonstrated an unmistakable pattern of increases in homicide rates following increased use of the death penalty. Incidentally, a recent F.B.I. Uniform Crime Reports publication, "Crime in the U.S." reported that murder rates in states that have abolished the death penalty average 4.9 murders per 100,000 population; states still using the death penalty average 7.4 murders. We can't know the precise meaning of these figures, or the exact significance of the lower incidence of murder in Canada since abolition of the death penalty in that country in 1976, but these facts are hardly supportive of arguments for restoration of the death penalty in Alaska.

3. <u>The death penalty is exorbitantly expensive:</u> In its 1976 Gregg v. Georgia ruling, which restored the legality of the death penalty, the U.S Supreme Court established stringent guidelines that render prosecutions of capital cases far more expensive than non-capital 1st degree murder cases, and far more expensive than holding the offender in prison for life. The "death is different" concept emerged from this ruling. Thus, the guidelines established provide the defendant with what lawyers call "super due process," a many layered labyrinth of appeals that invariably require many years to complete. It is unrealistic to expect an execution to take place in less than seven years from time of conviction. Hundreds of defendants have been on death rows across the country for more than ten years. The process has been successful in correcting errors. More than a third of all death penalty sentences have been set aside or commuted since 1976. Florida and Texas have spent more than $100 million in order to execute forty nine people since 1976 (one of them almost certainly innocent.) The 121 executions carried out during the past twelve years have cost the taxpayers from two to six million dollars each. At present there are more than two thousand three hundred people on death rows across the country, comprising a dollar drain that will reach into the billions.

4. <u>The death penalty weakens law enforcement:</u> Every case designated for death penalty prosecution requires an inordinate investment of law enforcement resources. An extensive amount of investigative work is uniquely required in capital cases and an exceedingly heavy load falls on the office of the prosecutor.

Because of the unique appeal process the burden continues long after conviction and sentencing. We are thus deprived of effort and resources that would otherwise be devoted to solving crimes. The "death is different" concept, which issues from U.S. Supreme Court rulings on the death penalty, results in an additional disadvantage for law enforcement. Lower courts are inclined to exercise more stringent standards than might otherwise be required in ruling on Miranda questions, search and seizure and other such matters. These rulings can adversely effect the prosecution of non-capital cases.

5. The death penalty is capricious: Since 1977 there have been about 200,000 homicides in the United States. There have been only 121 executions. By no means could all of those executed be considered more deserving of death than thousands of others convicted and sent to prison during the period. Most of those executed were victims of the luck of the draw. As often as not, decisions to seek the death penalty are based on the quality of the evidence, the availability of witnesses and other considerations that may have nothing to do with the offense itself. If a case is filed at a time when the prosecuting agency has funds and the staff isn't too busy, the death penalty is more likely to be sought than at times when funds are tight and caseloads are heavy. There is an intrinsic capriciousness in the use of the death penalty and no way to correct it in a justice system governed by our constitution.

6. The death penalty is unfair: Available data tells us that poor people who must depend on court appointed counsel during the original trial phase are far more likely to be executed than defendants who can afford "the best defense money can buy." Because of certain court rulings, further unfairness is inherent in the way juries are selected in death penalty cases. When a defendant goes on trial for his or her life, guilt or innocence will invariably be decided by a "death qualified jury," one in which there can be found "no taint of bias against the death penalty." What this means, of course, is that jurors who try capital cases are more likely to be conviction prone than certain members of juries that try non-capital cases. In a mystifying departure from the usual standard of fairness, the Supreme Court decided that a state's right to a jury, all of whose members are morally untroubled by the death penalty, must take precedence over the defendant's right to trial by a jury from which individuals more likely to be sympathetic to the defense have not been systematically excluded. In effect, the majority of the Court took the position that it is acceptable for persons on trial for their lives to have a trial that is less fair than the trials of defendants in non-capital cases.

7. The death penalty is cruel and unusual: The history of the use of the death penalty during recent years is replete with accounts of botched executions. Death specialists in Florida, Texas, Louisiana and Texas have acquired reasonable proficiency, but expertise in this line of work is hard to find elsewhere in

our society. Especially when done infrequently, chances of a botched execution are very high. John Louis Evans, Alabama's first victim since the Gregg v. Georgia decision, underwent a gruesome fourteen minutes of agony before he died. The ordeal was so horrifying as to cause the authorities to drop the curtain in front of the witnesses viewing window while Evans was still smoking and writhing in the electric chair. As recently as July 1989, again in Alabama, a mentally retarded man was subjected to nineteen minutes of macabre ineptitude before dying. Indiana botched at least one of its executions even worse. The advent of lethal injections has not solved the problem. In 1988 executioners in Texas, despite all of their experience, took forty minutes of probing the arms and legs of Steven Peter Morin before finding a vein that would accept the poison. It is absolutely true that many executed offenders have been convicted of inflicting more horrifying cruelties on their innocent victims, but should we allow our government to sink to the level of such behavior?

8. <u>The death penalty is destructive to the families of victims</u>: Because of the many long years of appeal, the families of victims are unable to begin the process of giving closure to their grief. In Canada, in Mexico, in Australia, in most of South America and all of western Europe, as well as in the fourteen jurisdictions in our country where the death penalty is not an option, successful first degree murder prosecutions can be concluded with relative speed, typically resulting in sentences of life or ninety nine years. The families of victims are then able to begin the hard process of working through their grief and putting the ordeal behind them. Not so when the death penalty has been ordered. As often as not, family members feel a requirement to remain involved and to nurture their bitterness and grief over the many years of the appeal process.

9. <u>The death penalty is creating an ever growing problem for correctional systems across the country</u>: More than two thousand three hundred individuals are presently under sentence of death in the United States. From 200 to 300 are added to this number each year, while an average of fewer than eleven have been executed each year during the past thirteen years. Supporters of the death penalty offer no realistic proposals as to what should be done about the burgeoning population on death row. Each person under sentence of death requires expensive, high security housing, as well as twenty four hour close supervision and an inordinate amount of staff time for other reasons. Offenders sentenced to life imprisonment tend to be tractable. Typically, they become productive workers who are managed in the prisoner population at minimal cost. The prison industries earnings of such prisoners often go toward the support of their families, and should also be directed toward a fund for compensation of the victims of violent crime.

10. <u>The death penalty is a relic of less civilized times, not favored by the American people</u>: During the course of public

testimony before the Alaska Senate Judiciary Committee on the Senate Bill 17, sixty seven Alaskans spoke in opposition to the death penalty; forty one were in favor of it. This does not appear to be in accord with polls conducted in Alaska. In any case, most of us do not know the whole truth about the polls that presume to tell us that seventy to eighty percent of our fellow Americans approve of the death penalty. A more careful look at these polls provides some surprising insights. In Georgia, for example, one of the most death penalty prone states in the country, a recent study indicated that while 75% of Georgians approve of the death penalty, 52% would favor abolition of the death penalty if replaced by life imprisonment with no parole eligibility for twenty five years, combined with a work program with earnings going to the families of victims. Similar polls conducted elsewhere have shown similar results. A national survey commissioned by the Justice Department two years ago resulted in only 37% of the respondents polled choosing the death penalty over legislatable options. With the exception of South Africa, the United States is the only industrialized country in the western world in which the death penalty continues to be used. Many Americans are becoming increasingly uncomfortable about our keeping company with the likes of Libya, Iraq, Syria, and Iran, where use of the death penalty is concerned. We should take note of the rapidity with which democratization in Eastern Europe will result in the abolition of the death penalty.

11. <u>The death penalty is racially biased</u>: In McClesky v. Kemp the U.S. Supreme Court acknowledged racial bias in the use of the death penalty in Georgia, but allowed the execution in question to proceed because racial bias had not been proven in that particular case. Thus, the Court's implied concession was that previous death penalty convictions in Georgia were tainted by empirically proven racial bias. The Alaskan system of criminal jurisprudence and Alaskan juries might, or might not, be able to perform better than the system in Georgia, in avoiding racial bias in the trial process. But we are similar to Georgia in that most of the people who come before our criminal courts are economically disadvantaged members of an ethnic minority. Implementation of a death penalty law in our racially and culturally diverse state would become a cause celebre, and almost certainly arouse divisive, bitter, destructive conflict among the people of Alaska.

12. <u>The death penalty serves no purpose</u>: Alaska's criminal code is very tough on violent crime, and there has surely been no tendency to leniency among the state's Superior Court judges. Charles Meach, who killed four teen-agers in Anchorage in 1982, is now serving a sentence of 396 years. Had he been sentenced to death his case would most likely still be under appeal, with perhaps another one or two million dollars in expense to the state. Senate Bill 17, which proposes to reinstate use of the death penalty, was introduced in the Alaska State Legislature early in the 1989 session. For reasons unrelated to its merits, the bill did not advance to a floor vote. In any case, during

committee hearings on the bill, remarkably little effort to make a case for it was made by its sponsors or other members of the legislature. There was no articulation of a purpose to be served, need to be met, problem to be solved or advantage to be gained, by resumption of capital punishment in Alaska after its abolition by the territorial legislature more than thirty years ago. Perhaps the explanation is that neither deterrence nor cost savings are persuasive justifications. Proponents of the death penalty are left with vengeance. Very few Alaskans, many of whom take biblical injunctions seriously, will be supportive of such a profound redirection in criminal justice policy when they realize that the essential rationale is based on vengeance.

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

POUCH Y · STATE CAPITOL
JUNEAU, ALASKA 99811
907 465-3800

MEMORANDUM February 7, 1989

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

TO: Senator Jan Faiks, Chair
Senate Judiciary Committee

FROM: Jack Chenoweth
Legislative Counsel

Article I, section 12 of the Alaska Constitution provides:

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

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

It is my opinion that it would not.

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

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

LEGAL SERVICES OPINION ON CONSTITUTIONALITY

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

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

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

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

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

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

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

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

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

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

When first offered, the proposed language in question read:

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

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

> PRESIDENT EGAN: . . . Mr. Emberg.
>
> DELEGATE EMBERG: I would like to ask a question in regard to the last sentence of Section 10, page 4, lines 3, 4, and 5. It reads, "The administration of criminal justice shall be founded on principles of reformation, and not vindictiveness." Now, I have no quarrel with the thought expressed here, except as it relates to the establishment of a code which might provide forfeiture of life, capital punishment, in other words. Is there any relation between the two?
>
> DELEGATE AWES (chair of the Bill of Rights and Preamble Committee): Is your question whether or not this would eliminate capital punishment?
>
> DELEGATE EMBERG: Yes.
>
> DELEGATE AWES: That was brought up in the Committee, and this provision is found in several other state constitutions, and in those states the courts have ruled that this language does not prohibit capital punishment.
>
> . . . .

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

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

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

DELEGATE RALPH RIVERS: I submit one.

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

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

. . .

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

PRESIDENT EGAN: Mr. McLaughlin.

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

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

PRESIDENT EGAN: Mr. Doogan.

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

PRESIDENT EGAN: Mrs. Hermann.

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

> reformation of people who seem criminally inclined rather than the need of constantly stressing punishment for them. When we learn to have preventive instead of punitive measures on our statute books[,] we are going a long ways further toward really administering criminal justice.
>
> PRESIDENT EGAN: Is there further discussion? If not, the question is, "Shall the proposed amendment as offered by Mr. Ralph Rivers be adopted by the Convention?" All those in favor of the adoption will signify by saying "aye", all opposed by saying "no". The "ayes" have it and the proposed amendment is ordered adopted. . . . .

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

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

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

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

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

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

2/ Specifically, the Indiana Supreme Court said:

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

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

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

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

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

JC:gc
WKG6/101

STATE OF ALASKA

DEPARTMENT OF LAW

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REPLY TO:

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February 14, 1989

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

FEB 15 1989

Dear Senator Szymanski:

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

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

The touchstone of interpretation of a law is to ascertain the intent of its drafters. Kenai Peninsula Borough v. State of Alaska, 612 F.2d 1210 (9th Cir. 1980), aff'd, 451 U.S. 259 (1981). Similarly, in interpreting a constitutional provision its history and the insight it provides into the intent of the drafters is important. See, e.g., North Slope Borough v. Sohio Petroleum Corp., 585 P.2d 534 (Alaska 1978). The language utilized in Artile I, Section 12 was specifically discussed at the Alaska Constitutional Convention.

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

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[1]Ind. Const., art. I, §18.

DEPT. OF LAW OPINION ON CONSTITUTIONALITY

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

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

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

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

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

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

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

[6]Id. (emphasis added).

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

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

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

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

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

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

constitutionally required dividing line between capital and noncapital defendants.[8]

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

Very truly yours,

GRACE BERG SCHAIBLE
ATTORNEY GENERAL

By: _____
Laurie H. Otto
Assistant Attorney General

Attachment: Appendix A
cc: Bob Evans
✓bcc: The Honorable Paul Fisher

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

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

NORDALE: I second the motion.

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

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

RECESS

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

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

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

R. RIVERS: I submit one.

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

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

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

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

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

KNIGHT: I second the motion.

PRESIDENT EGAN: Please read the amendment again.

(The Chief Clerk read the amendment again.)

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

PRESIDENT EGAN: Mr. McLaughlin.

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

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

PRESIDENT EGAN: Mr. Doogan.

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

PRESIDENT EGAN: Mrs. Hermann.

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

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

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

TAYLOR: I am preparing one, Mr. President.

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

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

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

TAYLOR: I move the adoption of the amendment.

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

DAVIS: May we have it read again slowly?

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

(The Chief Clerk read the amendment again.)

TAYLOR: You left out the word "penalties".

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

Alaska State Legislature

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MEMORANDUM

TO: Senator Rick Uehling, Co-Chairman
Senate Finance Committee

FROM: Senator Paul Fischer PF.

SUBJECT: Committee Substitute for Senate Bill 17 (Judiciary)
(capital punishment)

DATE: February 28, 1989

I would appreciate your scheduling the above referenced bill for a hearing before the Senate Finance Committee at the earliest possible time.

As you may be aware, the Senate Judiciary Committee conducted numerous public hearings on this legislation and new fiscal notes from the affected departments accompanied the committee substitute. I have attached a report from the Bureau of Justice Statistics entitled "Capital Punishment 1987" to be included in the member's files. Additional materials are available from my office if the committee so desires.

Your consideration would be greatly appreciated.

PAF/sgn

Attachments

cc: Senator Johne Binkley, Co-Chairman
Senate Finance Committee

Report of the N.Y. Bar Association attached

Statement of Charles Campbell on CSSB 17 before the Senate Finance Committee
March 8, 1989

Thank you Mr. Chairman. My name is Charles Campbell. I am a resident of Juneau. I served as Director of Corrections for Alaska for three years beginning early in 1979. I am speaking as a private citizen from the perspective of 38 years experience in the criminal justice field.

Those of you who have managed to get your mail read over the past 48 hours may have heard all you want to hear from me on the death penalty question. I've tried to make it clear to you why deterrence cannot be depended on as a justification for reinstitution of the death penalty in Alaska. I have cautioned you that some of the more extensive and well regarded empirical studies strongly suggest that executions are more likely to trigger violence than deter- especially in the sort of twisted individual most apt to commit the particularly heinous, brutal crime. You know my arguments as to the inevitable capriciousness and the unavoidable unfairness of the death penalty, given the enormous discretion required by our criminal justice system.

With respect to the subject more specifically the concern of this committee- if anyone here continues to believe the death penalty is a cheap, efficient criminal sanction, I am confident you will be persuaded otherwise, by the fiscal notes and the testimony that will follow. If we are looking for an affordable, effective way of responding to the worst kinds of violent crime- we really shouldn't be talking about the death penalty at all. It is an enormously expensive, protracted process- and because of the Supreme Court's 1977 ruling in Gregg v. Georgia and the other decisions that locked the "death is different" concept into this nation's criminal justice structure, the death penalty can never be anything but an enormously expensive, protracted, troublesome process. As a matter of fact, in that ruling, a ruling that was desperately needed in order to reduce the slovenliness that characterized use of the death penalty prior to the Furman v. Georgia decision, the Court pronounced something of a protracted, but well deserved death sentence on capital punishment in the U.S. I am not at all sure the death penalty will survive this century. It is not a viable option under our constitution.

75% of the 106 executions that have occurred since the 1977- the resumption year- have been carried out by four states- Florida, Georgia, Louisiana and Texas. Needless to say the people of those states are paying the price- with executions costing from two to three million dollars each, modestly estimated. There have been increases, not decreases in the murder rates. In fact, those states have realized nothing of benefit. They have squandered, and continue to squander, desperately needed resources.

The death penalty has been a rare phenomenon in other parts of the country, but still there are about two thousand, two hundred people on death row throughout the United States. Two to three hundred are added every year, but there has been an average of fewer than nine executions a year during the past twelve years. Think about where that's taking us. And every single member of that vast, growing snakepit requires expensive, twenty four hour special handling by the correctional system and every one of them is a continuing legal drain on the State that's trying to put them to death. Let me read you two sentences from last year's report of the Criminal Justice section of the N.Y.Bar Association on the proposed reinstitution of the death penalty in that state, directed to men and women in the same situation you are in right now: "We believe that reinstitution of death as a punishment for crime in New York would create grave and irreversible crises in our state at every level of government. We observe that in every other state which now imposes death as punishment such crises exist and have not been avoided even with the expenditure of enormous and

unprecedented resources."

I have copies of the report for you that spells out the sober details.

Finally, let me pass along to you some information that relates to the politics of the death penalty. We read and are told constantly that 75% to 80% of Alaskans favor the death penalty- indeed that 75% to 80% of people across the country favor the death penalty. This is information that needs to be challenged. I haven't seen any poll on death penalty attitudes among Alaskans, but a careful look at polls conducted elsewhere around the country provides some surprising insights. In Georgia, for example, one of the most death penalty prone states in the country, a recent study indicated that while 75% of Georgians approve of the death penalty, 52% would favor abolition of the death penalty if replaced by life imprisonment with no parole eligibility for 25 years, combined with a program of work with earnings going to the families of victims. A national survey commissioned by the Justice Department indicates that only 36% of respondents polled nationally choose the death penalty when given acceptable options. This final piece of information about the politics of the death penalty. Finally, this instructive little study conducted in Nebraska. Voters in Nebraska were reminded that their unicameral legislature had voted on abolition of the death penalty during the session just past. They were asked how their representatives voted. 95% of the respondents didn't know or couldn't recall. Only 23% of them indicated that they would be less likely to vote for their representative as result of a vote to abolish the death penalty. These kinds of studies convince me that support for the death penalty is no where near as strong as generally supposed- Furthermore it's very obvious that many of the 75% of Alaskans who are reported to be in favor of the death penalty, approve of it because of inaccurate assumptions. Those of you who would choose to do so could do much toward correcting those wrong assumptions. In any case, ladies and gentlemen, I plead with you to consider the critical needs of law enforcement, corrections, drug abuse and alcoholism treatment, schools, child care agencies and all of the agencies of our state that deal with human problems- before giving consideration to funding so much as a dime for such a failed idea as the death penalty. Thank you.

REPORT OF THE CRIMINAL JUSTICE SECTION
REINSTITUTION OF DEATH AS PUNISHMENT

Introduction

There are many issues associated with the discussion of the appropriateness of the reinstatement in New York of the use of the imposition of death as the punishment for crime. Most familiar are the moral issue of killing by the state, the question of whether the death penalty is a deterrent, whether there is discriminatory imposition of the death penalty on racial minorities and the poor, and the risk of horrible irreversible mistake in the execution of innocent persons. Our resolution at this time does not focus on these important issues. Instead, at this time we wish to give emphasis to another most critical aspect which has not been part of the public discussion. The Criminal Justice Section, composed of judges, prosecutors and defense attorneys has much to say and is in agreement. We are compelled to conclude that reinstatement of the death penalty in New York should not be approved.

Our point is that the unprecedented crises which reinstitution of the use of death as a penalty would cause because of impact on the administration of criminal justice, the enormous costs associated with such a measure, and the serious negative impact on the delivery of prosecution and defense services to the communities throughout the state that will result.

We believe that reinstitution of death as punishment for crime in New York would create grave and irreversible crises in our state at every level of government (and in every county). We observe that in every other state which now imposes death as punishment such crises exist and have not been avoided even with the expenditure of enormous and unprecedented resources.

Following are factors which contribute to the crises if the death penalty were reinstated in New York.

I. The nature of death penalty litigation.

The Supreme Court has recognized that "Death is different." Cases involving the potential imposition of death as punishment require an elevated level of effort by the prosecution, defense and the court system.

A. Proceedings at the trial level. Death penalty cases require two separate trials, one on the guilt issue; one on the penalty - death or life imprisonment. This alone makes such cases consume substantially greater resources than other serious felony cases. Additionally, the importance of capital cases requires more resources for investigation, social scientists, psychological investigation, forensic experts. Where five to ten substantive motions might be argued and decided in a typical serious felony matter, three or four times that number are necessary in a properly contested death penalty case. Because of the highly charged circumstances which lead to the decision to charge a capital offense, such cases are likely to be the cases resulting in change of venue and other extraordinary measures designed to protect the right to a fair trial.

B. Appellate review of convictions. Apart from the intensity of trial level proceedings, there would be at least 11 stages in the review process of a properly defended death sentence. There would be a mandatory direct review to the State Court of Appeals, then a Petition for Certiorari, to the Supreme Court a motion pursuant to CPL Art. 440 in the Trial Court and review of that motion in the appellate courts and petition for Certiorari. Next would come Federal habeas corpus, with an appeal, en banc petition and Certiorari petition. Then there would be the clemency application process. The listing of these proceedings assumes no other extraordinary applications are warranted and of course does not include the proceedings which might eventuate if a retrial or remand is ordered at any stage of the proceedings.

II. The demands of death penalty litigation on our system. Those things which make death penalty cases dramatically different from other major felony litigation likely to be encountered by local prosecutors around the state impose tremendous demands on our system.

1. The court system.

Our Trial Courts are now overburdened. In no respect are proper funds available to meet the present demands made on our court system. We consider the situation no better than in 1965 when the State Temporary Commission on Revision of the Penal Law and Criminal Code recommended abolition of the death penalty. Indeed, the situation is now worse than then, and expectations of the intensity of death penalty litigation are greater. We quote:

> . . .[O]wing to their importance, capital cases take longer to litigate at the trial level and obstruct the general administration of criminal justice accordingly; . . . the appellate ramifications are intricate and extensive;
> . . .the pursuit of other post-judgment remedies leads to many courts, both state and federal, involving substantial segments of the judiciary;. . .the battle to save the "doomed" man reaches into the executive branch of the government; and, in general,. . .capital cases are disruptive of the orderly process of criminal justice.
>
> ****
>
> [W]hatever aspect of the death penalty one examines, one finds nothing but obstruction, confusion and waste.

(Leg. Doc. No 25 at p. 97 [1965] -- Fourth Interim Report: Special Report on Capital Punishment, 1965).

Appellate courts in other States repeatedly point out the excessive amount of time spent on the relatively small number of death penalty cases. Our appellate courts are already overburdened.

2. The provision of defense services.

Because of the elevated level of advocacy required for competent representation in death penalty cases, it is inconceivable that such representation will be available wherever such cases might arise. Grave questions already exist about the ability of New York to provide consistent effective representation to those accused of serious crimes across the state --

from the most populous to the most rural regions. The standards which must be met in capital cases are, of course, much greater. See, Standards for the Appointment and Performance of Counsel in Death Penalty Cases (NLADA, 1988); Goodpaster, "The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases," 58 N.Y.U.L. Rev. 299 (1983).

There can be no serious suggestion that these standards could be met at the present time or that New York is somehow inherently going to be able to accomplish in this regard what has uniformly been proven to be unachievable in states which presently have death as punishment.

Inadequate defense services will lead to greater costs as cases progress. The dangers of additional extraordinary and successful post-conviction applications increases, with the likelihood for new trials, if counsel at the trial level is not thoroughly effective. Problems of effectiveness of counsel were poignantly addressed in the recent column by Professor Alan Dershowitz about the arguments before the United States Supreme Court in the case involving the death sentence imposed on a mentally retarded person. There were grave questions raised about the competence of counsel even before that Court.

In New York State there are 62 counties with more than 80 separate plans for providing counsel to persons unable to afford the assistance of private counsel. There is no mechanism for central administration of death penalty defense. It is hard to imagine any person being able to afford the costs of defending a capital charge.

We have the gravest reservations about placing the burden of defending such cases on a system which is strained to the extent that our current public defense system is.

3. Prosecution services.

Prosecutors, even from the largest metropolitan areas acknowledge the reinstitution of the death penalty would wreak havoc on the maintenance of an acceptable level and distribution of prosecution effort, especially at a time when resources needed for presently indicated effort are not available.

The additional effort which would be required on the part of prosecutors must be recognized. Here too, most prosecutors in this state have never tried a capital murder case. Being confronted with the circumstances which compel them to seek the death penalty would not only destroy their general effort at law enforcement by the diversion of resources, but, by inexperience or inability to control other events, make the occurrence of error at the trial level more likely with the risk of compounding the damage if the case must be retried.

II. Costs.

We believe that there are necessarily associated with the quality of prosecution and defense services and the administration of justice, enormous financial costs which also have not been publicly discussed.

It has been estimated that the cost of a trial involving the death penalty in New York State would be at least $1.8 million. "Capital Losses: The Price of the Death Penalty for New York State," a Report from the Public Defense Backup Center to the Senate Finance Committee, the Assembly Ways and Means Committee and the Division of the Budget (1982).

In Texas the cost has been estimated at $2,000,000 per case. (Houston Chronicle, March 13, 1988 p.6). In Florida the publicly stated costs of execution were $57 million between 1973 and 1988, during which time there were only 18 executions, at a cost of $3,178,623 per execution. (Miami Herald, July 10, 1988 p. 1A, Von Drehle, "Capital Punishment in Paralysis." One Pennsylvania journalist estimated the cost of a capital case to be $5 to $7 million.

Just at the federal level, the report for the Criminal Justice Act Division of the Administrative Office of the United States Courts (Spangenberg Group 1987) projects $15,000,000 for CJA representation (defense alone) in habeas corpus petitions in federal courts in capital cases. See, Garey, The Cost of Taking a Life: Dollars and Sense in the Death Penalty, 18 U.C. Davis L. Rev. 1221 (1985). Counties in Nevada, California and

elsewhere have taken action to convert cases in which the death penalty has been sought to non-capital cases because of the enormity of the costs. "Lawyers, County Battle over Funds for El Centro Trial," Los Angeles Daily Journal, January 13, 1983.

Since 1977 there have nationally been over 200,000 homicides. Two thousand people are on death row. There have been 104 executions. The enormity of the funds expended must be compared to the small number of cases which have resulted in execution. At no time -- even before the criminal procedure "revolution" of the 1960's has the number of persons executed been more than a tiny percentage of those accused, tried and convicted for capital offenses. Although this would be relevant to the question of whether deterrence is possible when the frequency of implementation of death is so low, here we are concerned with the disproportion between the enormous costs -- financially and in terms of scarce, overburdened judicial prosecution, and defense services – and the putative "benefit" of the actual infrequent imposition of death, given its infrequency.

Summary

We think it clear that our judicial system and our prosecution and defense service systems are strained, even under the present demands made upon them. We believe that the impact on these systems, and the economic impact of the reinstitution of the death penalty are not only of momentous proportion, but we believe that these consequences have not been properly or responsibly considered or confronted by those proposing reinstatement. We believe that popular support for the death penalty would diminish dramatically if the public were aware of the enormity of the impact and cost of such action, and the infrequent nature of the "benefit" supposed to be achieved: the execution of offenders.

Our pressing needs for basic police services and equipment, emergency 911 systems, support for efforts to prevent and prosecute serious offenses against children and trafficking in narcotics, the need for additional judges and probation services, crime

victims' assistance, and so on, all overshadow the argued benefits of reinstatement of the death penalty.

It is our conclusion, on these considerations alone, that the wise and rational allocation of the resources of our state should not contemplate bearing these enormous costs to achieve the small number of executions that can be expected, even if it were assumed that such executions provided the benefits which death penalty proponents believe.

This is especially so given there can be no reasonable assurance that it is possible to return to the use of death as punishment without irreversible crises to our system of criminal justice and to the delivery of effective prosecution and defense services.

Criminal Justice Section, New York State Bar Association

U.S. Department of Justice
Bureau of Justice Statistics

pg-446 198

Bureau of Justice Statistics Bulletin

Capital Punishment 1987

Eight States executed 25 prisoners during 1987, bringing the total number of executions to 93 since 1976, the year that the U.S. Supreme Court reinstated the death penalty. Those executed during 1987 had spent an average of 7 years and 2 months awaiting execution.

During 1987, 299 prisoners were received under sentence of death from the courts. Seventy-nine persons had their death sentences vacated or commuted during the year, and 11 died while under a death sentence. At year-end, 34 States reported a total of 1,984 prisoners under sentence of death; all but 1 had been convicted of murder (an inmate admitted during 1986 for the capital rape of a child in Mississippi). The median time since the death sentence was imposed for the 1,984 prisoners was 3 years and 7 months.

About 2 in 3 offenders under sentence of death for whom such information was available had a prior felony conviction; about 1 in 9 had a prior homicide conviction. About 2 in 5 condemned prisoners were in some criminal justice status at the time of the capital offense. Half of these were on parole; the rest were in prison, on escape from prison, or on probation, or they had charges pending against them.

The majority of those under sentence of death (1,138) were white (57.4%); 821 were black (41.4%); 16 were American Indian (.8%); and 9, Asian (.5%). Twenty-one of those under a death sentence were female (1.1%). The median age of all inmates under a death sentence was nearly 33 years.

About 62% of those under sentence of death were held by States in the South. Western States held an additional 18%; Midwestern States, 15%; and the Northeastern States of Connecticut, New Jersey, and Pennsylvania, more than 5%. Florida had the largest number of condemned inmates (277), followed by Texas (256), California (200), Georgia (116), and Illinois (108).

Status of death penalty as of 12/31/87 and 1987 executions

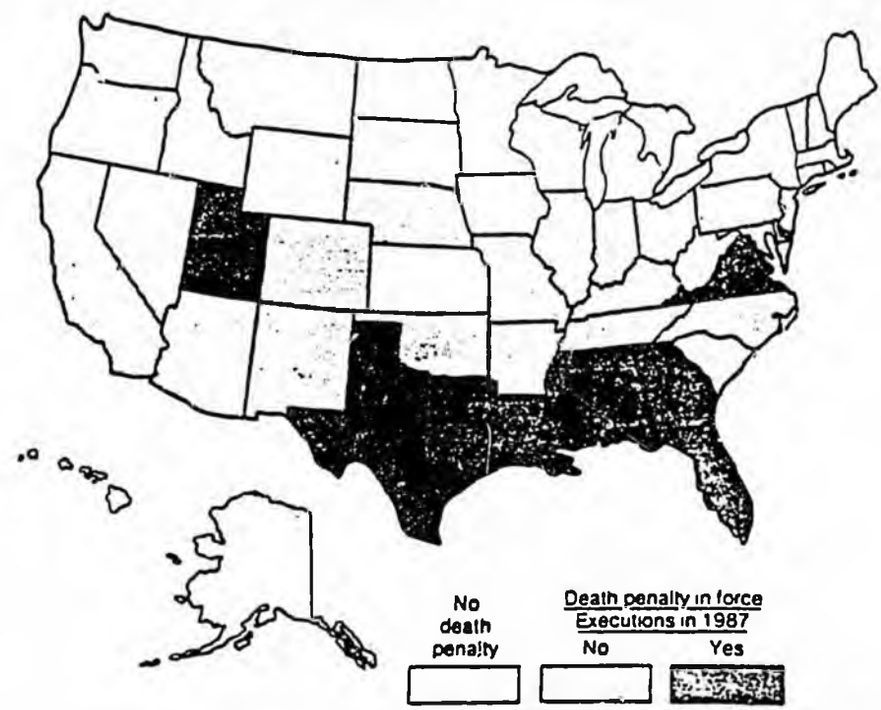

Figure 1

During 1987, 32 State prison systems received prisoners under sentence of death from the courts. Connecticut received its first inmate under sentence of death; the last Connecticut inmate under a death sentence died in prison in August 1973. Florida (44 admissions), Texas (36 admissions), and California (27 admissions) accounted for more than a third of the inmates entering prison under a death sentence during the year.

The 25 executions in 1987 were carried out by 8 States: 8 in Louisiana, 6 in Texas, 5 in Georgia, 2 in Mississippi, and 1 each in Alabama, Florida, Utah,

July 1988

The capital punishment statistical series has now completed 57 years of continuous Federal sponsorship. The series is designed to provide detailed national information on prisoners under death sentences. This year's report contains special appendices on the current status of all those sentenced to death between 1973 and 1987 and on Federal death penalty statutes contained in the United States Code. The Bureau of Justice Statistics gratefully acknowledges the cooperation and participation of officials throughout the States whose generous assistance makes this reporting program possible.

Steven R. Schlesinger
Director

[illegible] BACKGROUND MATERIALS

and Virginia. Thirteen of those executed were white males, and 12 were black males.

From the beginning of 1977 to the end of 1987, a total of 93 executions were carried out by 12 States. Over the same period, 2,743 admissions under sentence of death occurred (for 2,660 individuals), and 1,086 removals occurred as a result of dispositions other than executions (resentencing, retrial, commutation, or death while awaiting execution).

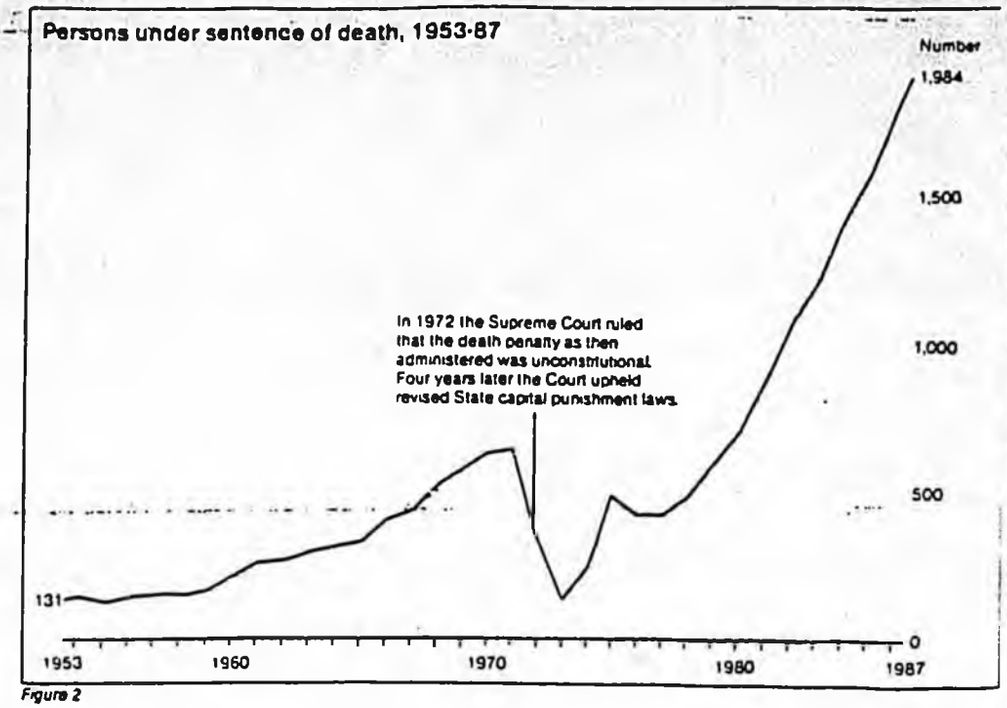

Figure 2

Capital punishment in the courts

On January 27, 1987, the Supreme Court in California v. Brown handed down a decision relating to jury instructions on aggravating and mitigating circumstances during the penalty phase of a capital trial. After finding the defendant guilty of the forcible rape and murder of a 15-year-old, the jury received testimony from the defendant's family, a psychiatrist, and the defendant regarding his usual behavior and psychological problems. The trial court advised the jury to consider the mitigating evidence presented by the defendant but cautioned them to "not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." The defendant was subsequently sentenced to death.

On appeal to the Supreme Court of California, the death sentence was reversed based upon the conclusion that the trial court's instruction denied the defendant the right to have the jury weigh the "sympathy factor" raised by the testimony during the penalty phase. The High Court, however, concluded that the use of the term "mere sympathy" in the instruction was simply a directive to the jury to focus on the evidence presented in aggravation and mitigation and to ignore extraneous emotional factors, and it violated neither the eighth nor the fourteenth amendment. The decision of the California Supreme Court was reversed, and the case was remanded for further proceedings.

In Tison v. Arizona (decided April 21, 1987) the Supreme Court dealt with the issue of capital sentencing for accomplices to felony murder. In July 1978 three brothers entered the Arizona State Prison armed with a large number of weapons and effected the escape of their father and his cellmate. The automobile in which they were riding broke down, and a passing automobile occupied by two adults and two children was flagged down for assistance. The two prison escapees subsequently murdered its occupants.

Two of the brothers were convicted of four murders each under the accomplice liability and felony-murder statutes of the State. The trial judge found three statutory aggravating circumstances present, including one that defined conduct that created a grave risk of death to others, and he imposed capital sentences for each. The Arizona Supreme Court, in its review, upheld two of the aggravating circumstances and the death sentence; only the "grave risk to others" circumstance was found to be unsupported by the evidence. In a subsequent post-conviction challenge, the Arizona Supreme Court also concluded that the requisite "intent to kill" for accomplices was also satisfied by the defendants' active role in the prison breakout and abduction of the victims.

The U.S. Supreme Court upheld the death sentences, but it rejected the Arizona Supreme Court's interpretation of the "intent to kill" circumstance. It held that "reckless indifference to human life" in felony murder would satisfy eighth amendment concerns. The case was remanded for further proceedings by the State.

The Supreme Court addressed the issue of nonstatutory mitigating circumstances in Hitchcock v. Dugger (decided April 22, 1987). The death sentence was imposed in a Florida case arising from the strangulation murder of a 13-year-old female. In the penalty phase the sentencing judge instructed the advisory jury to consider only mitigating circumstances enumerated in statute and then indicated that his own deliberations were based exclusively on statutorily defined aggravating and mitigating circumstances. The Supreme Court reversed the death sentence, concluding that the sentencer may not refuse to consider any relevant mitigating evidence.

On April 22, 1987, the High Court in McCleskey v. Kemp dealt with the question of whether the capital sentencing process in Georgia was being administered in a racially biased manner in violation of the eighth and fourteenth amendments. The petition used statistical data on capital sentences imposed in Georgia to argue that black defendants who killed white victims have the highest probability of receiving a death sentence. The High Court rejected this claim, concluding that:
(1) there was no evidence of racial discrimination by decisionmakers in the petitioner's case;
(2) there was no evidence that the legislature of Georgia adopted or maintained capital punishment for racially discriminatory purposes; and
(3) there was no merit to the argument that the sentence was disproportionate, arbitrary, or capriciously imposed.

Arizona v. Mauro (decided May 4, 1987) addressed the issue of fifth amendment protection against self-incrimination. The petitioner, convicted of child abuse and the murder of his son and sentenced to death, had been taken into custody by police and was twice warned of his Miranda rights. While in the police station, his wife

requested an opportunity to talk with him. The police agreed to the meeting with the stipulation that a police officer would be present, with a tape recorder, to safeguard against potential violence or an escape attempt and to assure that there was no attempt to exchange statements about the crime. The tape-recorded meeting was subsequently used as evidence to rebut the defendant's claim of insanity at the time of the offense. The Arizona Supreme Court reversed the death sentence, concluding that the police had violated Miranda and impermissibly interrogated the defendant. The High Court, however, held that the actions by the police did not constitute an interrogation and that the defendant's statements had been voluntary.

Gray v. Mississippi (decided May 18, 1987) dealt with the issue of juror selection in a Mississippi kidnaping-murder case. During the voir dire proceeding, the trial judge in eight instances rejected motions by the prosecutor to dismiss for cause jurors who had indicated hesitancy about their ability to impose the death penalty. As a result, the prosecutor utilized peremptory challenges to remove these potential jurors. Subsequently, the judge accepted the prosecutor's motion to remove for cause, after he had exhausted all of his peremptory challenges, a prospective juror who, though initially confused about the death penalty, indicated she could impose it. The trial judge acknowledged that he had made the prosecutor use peremptory challenges to reject potential jurors opposed to the death penalty. The Mississippi Supreme Court ultimately upheld the conviction and death sentence, concluding that, although the juror was not excludable for cause, the result was simply to correct previous errors in not permitting earlier juror challenges for cause. The High Court, however, found that the process was flawed since the composition of the entire jury panel could have been affected by the error, and the case was remanded for further proceedings.

Another issue addressed by the Supreme Court during the year was the use of victim impact statements during the sentencing phase of a capital murder trial. In Booth v. Maryland (reported June 15, 1987), a double robbery-murder case involving elderly victims, a victim impact statement was prepared, in accordance with Maryland law, by the Division of Probation and Parole. The report contained information drawn from interviews with family members of the victims. The defendant's counsel moved to suppress the report, contending that its use violated the eighth amendment because of its inflammatory content. The trial court, however, permitted the victim impact statement to be read to the jury by the prosecutor. The Maryland Court of Appeals ultimately upheld the death sentence that was imposed. The High Court, however, struck down the use of such statements in capital cases, concluding that such statements shifted the focus of sentencing away from the defendant's record and character, depended too heavily on the ability of family members to express their grief, and may result in a "minitrial" on the victim's character.

In Sumner v. Sherman (decided June 22, 1987) the Supreme Court struck down a Nevada statute that imposed a mandatory death sentence for murder committed by an inmate serving a life sentence without possibility of parole. The Court's decision noted that capital sentences could only be imposed after consideration of relevant mitigating circumstances, if any, and that mandatory death sentences for life prisoners violated the eighth and fourteenth amendments.

The double jeopardy clause of the fifth amendment was a central issue in Ricketts v. Adamson (decided June 22, 1987), an Arizona capital murder case arising from the fatal bombing of a reporter. Originally, the defendant pleaded guilty to a plea-bargained charge of second-degree murder after agreeing to testify against other parties involved in the murder, and he received a confinement sentence of 20 years and 2 months. The plea agreement provided that the original first-degree murder charge would be reinstated if the defendant failed to testify against the other parties. At the trial of the other individuals, the respondent did provide the requisite testimony, and they were convicted. However, the Arizona Supreme Court later reversed these convictions and ordered new trials. The respondent subsequently refused to testify at pretrial proceedings against these other participants, contending that his obligation under the plea agreement had been satisfied. The prosecutor subsequently filed an information charging him with first-degree murder. The Arizona Supreme Court, despite a motion to reject the information on double jeopardy grounds, vacated the second-degree murder conviction and reinstated the first-degree murder charges. The respondent was ultimately convicted and sentenced to death, and the death sentence was upheld on appeal to the Arizona Supreme Court. The Court of Appeals, however, concluded that the State had violated his double jeopardy protection and had not waived such rights under the original plea agreement. The Supreme Court reversed the finding of the Court of Appeals, concluding that the respondent had breached his promises to testify and could be prosecuted again since second-degree murder was a lesser included offense of first-degree murder.

Burger v. Kemp (decided June 26, 1987) dealt with the sixth amendment issue of the effectiveness of counsel in a Georgia case. The petitioner was convicted, along with another individual, of the abduction, robbery, sodomy, and murder of a taxi driver and was sentenced to death. Throughout the trial and initial appeal, the petitioner was represented by an appointed counsel whose law partner had been appointed to represent the other individual involved in the murder. At each trial, the defense strategy was to emphasize the coindictee's greater culpability in the crimes. At the sentencing phase, defense counsel did not offer any evidence of mitigating circumstances. With a new attorney, the petitioner sought relief from the death sentence on the grounds of inadequate counsel, claiming a conflict of interest arose when the law partners each represented the two defendants and because no mitigating evidence was offered at sentencing.

The District Court and the Court of Appeals both rejected the defendant's claim of ineffective representation. The Supreme Court in its review concluded that overlapping counsel did not in and of itself violate constitutional guarantees of effective counsel and that the original attorney had adequately investigated the possibility of presenting mitigating evidence.

Capital punishment laws

At yearend 1987 the death penalty was authorized by the statutes of 37 States and by Federal statute (table 1).[1] During 1987 there were no successful challenges to the constitutionality of State death penalty laws, and no State enacted any new legislation authorizing capital punishment.

Statutory changes

Nine States altered their existing death penalty statutes during 1987. Four States, Colorado, Illinois, Maryland, and Montana, revised the enumerated aggravating circumstances to be considered at the sentencing phase of a capital trial. Colorado added felony murder as an aggravating circumstance; Illinois amended the multiple murder circumstance to include acts that would be likely to cause death or great bodily harm as aggravating situations; Maryland expanded the definition of law enforcement officers used in their listing of aggravating conditions; and Montana added the death of a kidnaping victim or a person rescuing a kidnaping victim. Indiana added both an aggravating and a mitigating circumstance to its statutes. Murder of a victim younger than 12 years old was included as an aggravating factor, and an offender younger than 18 at the time of the capital offense was to be considered a mitigating factor.

Four States amended their laws relating to the minimum age at the time of an offense for which a person could be sentenced to death. Indiana and Kentucky raised the age to 16, North Carolina set the minimum age at 17, and Maryland enacted a minimum age of 18. Other amendments during the year included:

- Maryland created the sentencing option of life without possibility of parole for first-degree murder convictions;
- New Hampshire changed the method of execution from hanging to lethal injection; and
- Washington modified procedures for reissuing death warrants after the passage of an execution date.

[1]See Appendix II for a listing of all Federal death penalty statutes currently in existence.

Table 1. Capital offenses, by State, 1987

Alabama. Murder during kidnaping, robbery, rape, sodomy, burglary, sexual assault, or arson; murder of peace officer, correctional officer, or public official; murder while under a life sentence; murder for pecuniary gain or contract murder; multiple murders; aircraft piracy; murder by a defendant with a previous murder conviction; murder of a witness to a crime (13A-5-40).

Arizona. First-degree murder.

Arkansas. Capital murder as defined by Arkansas statute (5-10-101).

California. Treason; aggravated assault by a prisoner serving a life term; first-degree murder with special circumstances; train wrecking.

Colorado. First-degree murder; first-degree kidnaping with death of victim; felony murder.

Connecticut. Murder of a public safety or correctional officer; murder for pecuniary gain; murder in the course of a felony; murder by a defendant with a previous conviction for intentional murder; murder while under a life sentence; murder during a kidnaping; illegal sale of cocaine, methadone, or heroin to a person who dies from using these drugs; murder during first-degree sexual assault; multiple murders.

Delaware. First-degree murder with aggravating circumstances.

Florida. First-degree murder.

Georgia. Murder; kidnaping with bodily injury when the victim dies; aircraft hijacking; treason.

Idaho. First-degree murder; aggravated kidnaping.

Illinois. Murder.

Indiana. Murder.

Kentucky. Aggravated murder; kidnaping when victim is killed.

Louisiana. First-degree murder.

Maryland. First-degree murder, either premeditated or during the commission of a felony.

Mississippi. Capital murder includes murder of a peace officer or correctional officer, murder while under a life sentence, murder by bomb or explosive, contract murder, murder committed during specific felonies (rape, burglary, kidnaping, arson, robbery, sexual battery, unnatural intercourse with a child, nonconsensual unnatural intercourse), and murder of an elected official; capital rape is the forcible rape of a child under 14 years old by a person 18 years or older; aircraft piracy.

Missouri. First-degree murder (565.020 RSM0).

Montana. Deliberate homicide; aggravated kidnaping when victim or rescuer dies; attempted deliberate homicide, aggravated assault, or aggravated kidnaping by a State prison inmate with a prior conviction for deliberate homicide or who has been previously declared a persistent felony offender.

Nebraska. First-degree murder.

Nevada. First-degree murder.

New Hampshire. Contract murder; murder of a law enforcement officer; murder of a kidnaping victim.

New Jersey. Purposeful or knowing murder; contract murder.

New Mexico. First-degree murder (30-2-1A NMSA).

North Carolina. First-degree murder.

Ohio. Assassination; contract murder; murder during escape; murder while in a correctional facility; murder after conviction of a prior purposeful killing or prior attempted murder; murder of a peace officer; murder arising from specified felonies (rape, kidnaping, arson, robbery, burglary); murder of a witness to prevent testimony in a criminal proceeding.

Oklahoma. Murder with malice aforethought; murder arising from specified felonies (forcible rape, robbery with a dangerous weapon, kidnaping, escape from lawful custody, first-degree burglary, arson); murder when the victim is a child who has been injured, tortured, or maimed.

Oregon. Aggravated murder.

Pennsylvania. First-degree murder.

South Carolina. Murder with statutory aggravating circumstances.

South Dakota. First-degree murder; kidnaping with gross permanent physical injury inflicted on the victim; felony murder.

Tennessee. First-degree murder.

Texas. Murder of a public safety officer, fireman, or correctional employee; murder during the commission of specified felonies (kidnaping, burglary, robbery, aggravated rape, arson); murder for remuneration; multiple murders; murder during prison escape; murder by a State prison inmate.

Utah. First-degree murder.

Vermont. Murder of a police officer or correctional officer; kidnaping for ransom.

Virginia. Murder during the commission of specified felonies (abduction, armed robbery, rape); contract murder; murder by a prisoner while in custody; murder of a law enforcement officer; multiple murders; murder of a child under 12 years old during an abduction.

Washington. Aggravated first-degree premeditated murder.

Wyoming. First-degree murder including felony murder.