

ALASKA LEGISLATURE  
JANUARY 1961

HOUSE AND SENATE COMMITTEES  
JANUARY 1961

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be abhorrent by its very nature. It is a matter of sinking to the level of the persons we execute.

8. *The death penalty is destructive to the families of victims:* 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, the agony of uncertainty is over at the end of the trial. When the death penalty is not an available option, or is not sought, first-degree murder prosecutions are concluded with relative speed, typically resulting in sentences to 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, all too often, are encouraged to nurture their bitterness and grief over the many years of the appeal process.

9. *The death penalty is creating an ever-growing problem for correctional systems across the country:* More than 2800 individuals are presently under sentence of death in the United States. About 200 are added to this number each year, while an average of fewer than sixteen have been executed each year during the past fifteen 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 serving life sentences tend to be tractable. Typically, they are productive workers who are managed in the prisoner population at minimal cost. The work assignment 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. *The death penalty is a relic of less civilized times not favored by the American people:* The popular media tell us of poll results that indicate approval of the death penalty by from 70% to 80% of the American people. For some reason, it is rarely reported that fewer than half of the respondents in most of these surveys prefer the death penalty when an acceptable option is available, a life term without parole for example. A careful look at the polls provides some surprising insights. In Georgia, 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 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.

11. *The death penalty is racially biased:* 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. (The defendant was an Afro-American.) Among the undisputed statistical evidence was a finding that "the average odds of receiving a death sentence among all indicted cases were 4.3 times higher in cases with white victims. It appears that the Court could not bring itself to deny that previous death penalty convictions in Georgia were to some extent tainted by empirically proven racial bias, but chose to dismiss the matter with the dubious contention that "a constitutionally significant risk of racial bias" was not proven.

There is a wealth of evidence of racial bias in administration of the death penalty in other jurisdictions. 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 many of the people who come before our criminal courts are economically disadvantaged members of ethnic minorities. 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. *The death penalty serves no purpose:* 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. They have consistently seen to it that perpetrators of heinous, pre-meditated murders are locked up, for all intents and purposes, for life. Bills intended to reauthorize capital punishment have been repeatedly introduced in the Legislature over the past dozen years. But the sponsors and supporters of such legislation are rarely heard advancing their reasons. Why is it that we hear so little articulation of purposes to be served, needs to be met, problems to be solved or advantages to be gained, by resumption of capital punishment in Alaska after its abolition by the territorial legislature thirty five 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, would be supportive of such

a profound redirection in criminal justice policy if they should learn that the essential rationale is based on vengeance.

**Note:** Charles Campbell was Director of Corrections in Alaska from February 1979 to February 1982. He has had a variety of other jobs in the criminal justice field over a period of more than forty years.

26 January 1994 RE: HB 162 AK Death Penalty bill  
TO: HOUSE JUDICIARY FR: CONSTANCE F. GRIFFITH

I OPPOSE HB 162. I OPPOSE KILLING; THE DEATH PENALTY IS KILLING. I BELIEVE THE STATE'S RESOURCES OUGHT TO BE DIRECTED TO PREVENTING KILLING. THAT IS NOT EASY. ADMITTEDLY, IT IS EASIER FOR YOU TO "GET TOUGH" AND KILL KILLERS. HOWEVER, IF YOU LOOK AT WHO KILLS, AT THE CIRCUMSTANCES SURROUNDING KILLING, YOU WILL FIND THAT SOME KILLINGS (DRIVE-BY SHOOTINGS, FOR EXAMPLE) ARE "SENSELESS". YOU NEED TO MAKE SENSE OF THESE REPREHENSIBLE EVENTS. A DRIVE-BY KILLER IS A PERSON WITH "NOTHING BETTER TO DO" BECAUSE THAT PERSON WAS NEVER CHALLENGED BY HOME OR SCHOOL TO BECOME PURPOSEFUL, PRODUCTIVE, CREATIVE, AND SENSITIVE TO OTHERS. OTHER KILLERS ARE CHILDREN-GROWN-UP WHO WERE SEVERELY ABUSED BY ADULTS WITH NO INTERVENTION BY ANYONE, WHOSE ANGER SEETHES AND WHO TAKE THAT ANGER OUT ON OTHERS AS THEY LEARNED: BY VIOLENCE. AND ALL OF US KNOW THAT ALCOHOL AND DRUGS ARE BEHIND MANY OF THE KILLINGS. WHAT ARE YOU DOING TO PROVIDE ALTERNATIVES TO DRUG USE? ARE YOU TEACHING CHILDREN THE CONSEQUENCES OF DRUG ABUSE AND ALCOHOL USE?

UNLESS YOU ADDRESS THE UNDERLYING ISSUES, MORE PEOPLE WILL BE KILLED SENSELESSLY, AND YOU WILL KILL THE KILLERS, AND YOU WILL NOT HAVE BROUGHT ANY VICTIMS BACK TO LIFE. ARE YOU NOT REALLY SENSITIVE TO THE RIGHTS OF POTENTIAL VICTIMS (ALL OF US) WHEN YOU PROVIDE RESOURCES TO PREVENT OUR POSSIBLE DEATHS? EXCELLENT EDUCATIONAL AND ALTERNATIVE-TO-DRUGS PROGRAMS TO BUILD SELF-ESTEEM IN "IDLE" YOUTH; FAMILY HELPER PROGRAMS TO END CHILD ABUSE ARE WAYS TO USE RESOURCES TO PROTECT US FROM POSSIBLE DEATH. THE FALL-OUT FROM SUCH PROGRAMS WILL BE MORE CITIZENS WHO ARE A BENEFIT TO SOCIETY, AS OPPOSED TO BEING LOCKED AWAY IN EXPENSIVE MAUSOLEUMS CALLED PRISONS. I CONCUR WITH AADP'S POSITION.



# Alaska State Legislature

Received

JAN 26 1994



Please enter into the record my testimony to the \_\_\_\_\_ committee name  
 \_\_\_\_\_ committee on Capital Punishment , dated \_\_\_\_\_  
HB 162 bill/subject

Thank-you for hearing me on this matter. My silence may indicate that I condone capital punishment, and that would, in itself be a crime!

As I read + re-read this bill, it reminded me of the dark ages when people who attempted to commit suicide were put to death for their crime! This is 1994. Are we still playing God, deciding who lives and who dies, who can be forgiven and who can't? Do we still think we can solve social problems with murder. That's what this bill should be named - 'Murder for murder'.

Well, "revenge", you say. "They've committed a sin that can never be forgiven". "Justice", you cry. "A life for a life".....

In my 36 years, I have never seen anyone healed by revenge. Revenge is NOT justice. Forgiveness is justice. I've heard it said, "forgiveness is the ultimate revenge". Perhaps, but in my opinion, forgiveness is the opposite of revenge.

Signed: Mary S. Soltis \_\_\_\_\_  
 Testifier

see pg. 2

\_\_\_\_\_  
 Representing (Optional)  
1615 DeGroof  
 Address  
747-5624  
 Phone No.

pg. 1 of 2

IF others don't respect life or brutally take a life, then it's our job to confine them, remove them from society FOREVER (more on that later), minister to them, but it is never our job to kill them. For then, we would also disrespect life.

Life imprisonment with no chance of parole should be a fate worse than death. Since there are no statistics that say death is a deterrent to crime, why not work on something less irrevocable than death, less final in case of an innocent prisoner. How about self-sustaining farms where they would make or grow everything needed, or do without; recycling farms; making license plates in the Arctic Circle!! Whatever - the point being - No chance of parole needs enforcing, and here is an untapped labor source.

Sect. 12.58.320 Disposition Pending Pregnancy is a contradiction to the rest of the bill. A sentence of death EXCEPT in the case of pregnancy. Many would say, "the child is not a person, just a blob of tissue that would be a future burden to the State of ~~the~~ Alaska", "Why should the fetus of a murderer matter?" or "If death is the answer, why not abort the child's life also?"

It's time to make a choice. No more fence-sitting. Will you choose life, or will you choose death?

It is my humble opinion that we should leave capital punishment in the dark ages and focus on life imprisonment with NO CHANCE of parole. Please vote against capital punishment.

## PUBLIC TESTIMONY

TO: CHAIRMAN OF THE HOUSE JUDICIARY COMMITTEE

DATE: JANUARY 25, 1994

FROM: MICHAEL W. LAQUIRE  
BOX 6369  
SITKA, ALASKA  
(907)-747-4880

RE: HB 162 CAPITOL PUNISHMENT FOR MURDER

## MESSAGE:

I URGE YOU NOT TO SUPPORT THE TAKING OF HUMAN LIFE.  
I FAVOR LIFE TIME INCARCERATION, OVER CAPITOL PUNISHMENT,  
NOT AS THE SYSTEM IS SET UP NOW, INSTEAD I ADVOCATE FORFEITURE  
OF PRISONERS RIGHTS/PRIVILEGES, SUCH AS TV, GYMS, AND FREE  
TIME TO PULL SCAMS INSIDE AND OUTSIDE PRISON, REPLACE THE FRILLS  
WITH HARD LABOR, MAKE THE PRISONS SELF SUPPORTING, AND KNOCK  
OFF EARLY PAROLE.

Sincerely  
M.W. Laquire

Date: January 25, 1994

Fax To: Representative Porter

Fax # 965-3834

House Judiciary

From: Sara Boesser

Fax: 789-7450

PO Box 34202, Juneau, AK 99803

Voice: 586-5230

Regarding: Opposition to the Death Penalty.

Dear Representative Porter:

I am writing you because I strongly oppose the death penalty. Please do not vote for HB162.

Studies repeatedly show that death penalties are no deterrent to violent crime. For that reason alone, the House should abandon this bill as a bad use of our shortfall budget.

Another severe deterrent to passing a death penalty bill is the fact that the death penalty is inherently skewed to kill more poor and non-caucasian persons than anyone else. Our courts, police and juries unfortunately still act overwhelmingly against people of color -- white persons are apt to be arrested less often and given lighter sentences for the very same crimes. This imbalance makes the death penalty inherently unacceptable.

If you want to work against crime, I urge you and your colleagues to put our valuable state dollars where they're most needed: in crime prevention. Not just more police, but more prosecution of sexual violence, domestic violence, incest, and other crimes that put youth at risk of falling out of the system and into lives of despair where they become criminals themselves. Put more money into collecting child support payments from non-custodial parents -- so that children aren't so poor they feel they have to steal to have what they want.

The death penalty is too costly and unjust a means for a non-deterrent end-- and comes too late to make a difference for anyone. Crime prevention is where the money has to go to make streets and homes safer for all of us.

Thank you --  
Sara Boesser

EIGHTEENTH ALASKA LEGISLATURE - SECOND SESSION

BEFORE THE HOUSE JUDICIARY COMMITTEE  
REPRESENTATIVE BRIAN PORTER, CHAIRMAN

WRITTEN TESTIMONY OF  
SCOTT ATWOOD STERLING  
REGARDING SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 162

JANUARY 26, 1994

CHAIRMAN PORTER AND MEMBERS OF THE HOUSE JUDICIARY COMMITTEE:

My purpose in testifying today is to register my profound opposition to capital punishment in general and Sponsor Substitute for House Bill 162 in particular. I wish to emphasize the fact that although I am a lawyer I am testifying solely as a private citizen, that I am not representing a client, and that my views are my own. I request that my written testimony be put on the record.

In my opinion capital punishment should not be restored in Alaska for the following reasons:

1. It is hypocritical to punish heinous crimes by means of a heinous crime--the deliberate taking of another human life.
2. Research does not confirm the claim that capital punishment is an effective general deterrent. Studies instead tend to confirm the old English story about pickpockets working the crowds attending the hangings of pickpockets.
3. Once inflicted, the death penalty's irreversibility prevents correcting those instances in which the criminal justice system convicts the wrong person. While absolute truth on such matters is unattainable, there are strong suspicions - and, more

recently, empirical evidence - that some innocent persons have received the death sentence.

In this regard the Eighteenth Legislature would do well to remember that courts - including the Supreme Court of the United States - consider the concept of "innocence" to have two meanings. A person is "innocent" if he or she is not the one who committed crime. So far as I know the sponsors of House Bill 162 have yet to explain how the bill's statutory scheme would operate to prevent the execution of a person convicted of a crime which he or she did not commit. The irreversibility of the sentence of death is one of the best reasons for condemning its use.

A person is also innocent, regardless of whether he or she is the one who committed the crime, if his or her conviction was improperly secured. The statutory scheme for appellate review of capital offense convictions accompanied by imposition of a death sentence as set out in House Bill 162 cannot assure an accused - or society - that improprieties in the process will be identified and remedied before the sentence of death is carried out - particularly since the bill requires that appellate review be undertaken no later than sixty (60) days from the date of imposition of sentence.

4. Administration of capital punishment in law and practice is inconsistent with retributive theories of punishment, for under such theories we would punish by death all of those convicted of premeditated murder but would punish no other crime in.

this manner. House Bill 162 (whether its sponsors, drafters and supporters realize it or not) follows a retributive theory of punishment because it would authorize capital punishment only for premeditated murder and only for certain persons convicted of that offense, and punish no other crime or accused in that manner.

The logic of retribution entails punishing cruelly and unusually those who murder in a cruel and unusual fashion, but the Eighth Amendment, and Section 12 of the Alaska Constitution, forbid just that retributive logic.

5. Research on who receives the death penalty shows that the penalty is not applied in proportion to the seriousness of the crime. What really happens is that death is imposed on a randomly selected subset of those convicted of capital offenses. Prosecutorial discretion in charging and plea bargaining virtually assures this randomness - a fact which this committee should require the Department of Law to fully address because the actual effects of such randomness - including insidious as well as overt racism, appointment of inadequate defense counsel, and bias in jury selection among others - if for no other reason than to document how the department will, as a matter of policy, avoid discriminatory imposition of the death penalty to Alaska Natives, Asians, Pacific Islanders and other minorities.

Alaska legislators who represent Alaska Native constituencies would do well to remember that the death penalty is

far more frequently imposed on blacks who victimize whites than on those who victimize blacks before casting their votes in favor of House Bill 162.

Alaska legislators who represent Alaska Native constituencies should read for themselves the so-called "Baldus Study," which was conducted by a team of researchers lead by David Baldus for the NAACP in the early 1980's. The researchers analyzed the relationship between sentencing outcomes and racial characteristics in 2,484 homicide cases charged and sentenced in Georgia from 1973 to 1979. The data suggested strong race-of-victim discrimination as well as more punitive treatment of black offenders in white-victim cases.

Alaska legislators who represent Alaska Native constituencies should also be aware of the fact that despite the incontestable evidence adduced by the Baldus Study, the Supreme Court of the United States under Chief Justice William Rehnquist has firmly put an end to statistical challenges to the administration of the death penalty by the expedient of holding that while proof of racially discriminatory sentencing patterns in capital cases can establish arbitrariness in violation of the Eighth Amendment, the burden of proving such discrimination is higher - much higher - than the burden required to prove discrimination in jury discrimination and employment discrimination cases! See McCleskey v. Kemp (1987).

6. As a class paroled murderers show lower recidivism rates for their crimes than do most classes of felons. There is no evidence that the death penalty, as opposed to long-term imprisonment, is an effective specific deterrent. Murderers on death row are, in fact, more likely to engage in violent crimes within prison than are those serving life terms.

Another reason to cast a cold eye on House Bill 162 is that if it becomes law (the advisory vote provision I consider nothing more than a shameless effort by the bill's sponsors and supporters to get out the vote for their re-election) it will, sooner or later, produce a travesty of justice such as that which occurred in Louisiana in the case of Perry v. Louisiana (1990).

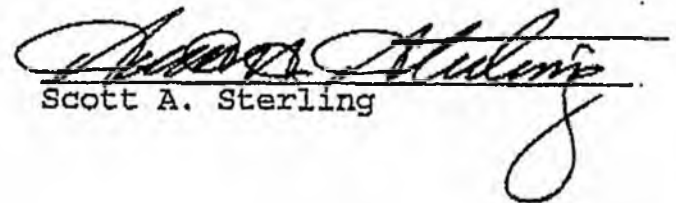
At issue in Perry was whether a state can forcibly medicate insane people for the sole purpose of making them mentally competent to be executed. Louisiana sought to restrain convicted murderer Michael Perry and inject him with a psychotropic drug that would calm his disordered mind so that he would know what was happening to him when he was electrocuted.

Louisiana defended its position as being consistent with what the "majority" of its citizens wanted, or, to put the matter bluntly, the authorities were more than willing to accommodate the public's bloodlust no matter how cruel - no matter how barbaric - no matter how degrading - satisfaction of that bloodlust required the authorities to be.

Where, then, is the line beyond which the Alaska Legislature will not go in accommodating the bloodlust of the majority of Alaskans who supposedly support capital punishment? How far we will go if capital punishment is authorized and imposed in various cases but murder and recidivism rates do not change in proportion to changes in our population? How far will we go if capital punishment is authorized and imposed in various cases but one more innocent people are executed? Will we treat the families and friends of those people with solicitude for their "rights" as "victims?"

I submit that no member of the Alaska Legislature is capable of definitively answering those questions just as no one of us - legislator or not - is capable of assuring that capital punishment will achieve the ends of justice.

Far better that we concentrate our limited resources on attacking the root causes of crime in Alaska, and simply avoid altogether the quagmire which House Bill 162 would create.

  
Scott A. Sterling



# Representative Jerry Sanders

District 19

Vice Chair, Rules Committee  
Vice Chair, Community & Regional Affairs Committee  
House State Affairs Committee  
Special Committee on Oil & Gas  
Legislative Council  
International Trade & Tourism

## S P O N S O R S T A T E M E N T

House Bill 162

Because of what I was hearing, from my constituents and other Alaskans, I made it a priority to introduce legislation which would reinstate the death penalty in Alaska. Based on polls taken last year, over 75% of Alaskans polled favor capital punishment in cases of first degree murder. Nationally, the number is even higher -- 87% of the people say there should be a death penalty, according to one recently published study. And when it comes down to it, in the eyes of the people, it isn't about cost-effectiveness. It isn't about over-crowded prisons. It isn't even about revenge. It's about justice. It's about making it impossible for the Gustafsons of this world to mail bombs from prison, continuing to murder, with nothing to lose.

When society feels there is no justice, vigilantism will fast become the order of the day. There are some acts so heinous, the only way to deal with them, and maintain the people's faith in the integrity of the system they entrust to protect them, is for society to rid itself of those who choose to commit such acts. I emphasize the word choose. In the legislation I've introduced, House Bill 162, we're talking about only one crime as being so particularly heinous as to warrant death as punishment. That crime is murder in the first degree, with the presence of statutory aggravating factors not outweighed by any mitigating factors.

House Bill 162 provides the defendant, in capital cases, with the "SUPER DUE PROCESS" our United States Supreme Court has held must be allowed such defendants. House Bill 162 has built in protections to ensure the defendant every last chance for a fair, thorough review of his or her case. I only wish we could come up with a law which would guarantee the same procedural protections for murder victims before they are murdered. Then, nobody would have to die.

We owe it to both potential victims, and potential murderers, to have a death penalty in Alaska. Without one, we are creating not only murder victims, but murderer victims -- people who may not have premeditatedly killed had they been raised understanding the consequence of their actions would be their own death.

# DIVISION OF LEGAL SERVICES

## LEGISLATIVE AFFAIRS AGENCY STATE OF ALASKA

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Juneau, Alaska 99801-2105

### MEMORANDUM

January 25, 1994

**SUBJECT:** Sectional Summary of SSHB 162 (Work Order No. 8-LS0414\E)

**TO:** Representative Jerry Sanders  
Attn: Bob Krogseng

**FROM:** Jerry Luckhaupt *JL*  
Legislative Counsel

You have requested a sectional summary of the above-described bill. As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill - the bill itself is the best statement of its contents.

Section 1 of the bill amends AS 11.41.100(b) to provide that murder in the first degree is a capital offense.

Section 2 of the bill amends AS 12.30.100(b) to provide that a person charged with a capital offense is not eligible for release before trial.

Section 3 of the bill amends AS 12.30.040(b) to provide that a person convicted of a capital felony may not be released on bail either before sentencing or pending appeal.

Section 4 of the bill amends AS 12.47.110(b) to provide that a person that has been found to incompetent to stand trial and has remained incompetent for five years may still be retried if the original charge is a capital felony.

Section 5 of the bill amends AS 12.55.025(i) to exclude capital sentencing proceedings from application of the preponderance of the evidence standard of proof. To impose the death penalty the trier of fact must find the existence of an aggravating factor beyond a reasonable doubt.

Section 6 of the bill amends AS 12.25.125(a) to add the death sentence as a permitted sentence upon conviction of murder in the first degree.

**Section 7 of the bill** amends AS 12.55.125(f) to provide that a sentence of death may not be suspended under the suspension of execution of sentence statute, AS 12.55.080.

**Section 8 of the bill** amends AS 12.55.145(a) to provide that a previous conviction for a capital felony may be considered and used by a court, regardless of when the conviction occurred, as a previous conviction when imposing sentence for those offenses for which the legislature has prescribed presumptive terms.

**Section 9 of the bill** amends AS 12.55.155(f) to clarify that that subsection only applies to the establishment of aggravating and mitigating factors at sentencing for offenses for which the legislature has prescribed presumptive terms.

**Section 10 of the bill** is the statutory "meat" of the bill. This section adds a new chapter to AS 12 with the following sections:

**AS 12.58.010** provides that (a) when a defendant is convicted of a capital felony the court shall commence a separate sentencing proceeding before the same jury that convicted the defendant or, if the jury trial was waived or the defendant pled guilty, the court will impanel a jury for the sentencing; (b) during the sentencing proceeding evidence may be presented as to any aggravating or mitigating factor the court determines to have probative value; (c) after hearing the evidence the jury shall deliberate and issue a recommended sentence with written findings of whether the jury unanimously finds the existence of at least one aggravating factor listed in AS 12.58.030, unanimously determines by a preponderance of the evidence that the aggravating factor or factors outweigh any mitigating factors that the one or more members of the jury may have found to exist by a preponderance of the evidence, and unanimously find that the defendant should be sentenced to death.

**AS 12.58.020** provides procedures for the imposition of sentence by the court. If the jury finds as provided in AS 12.58.010(c) then the court must impose the death penalty but if the jury does not find an aggravating factor, or finds the aggravating factor or factors outweighed by the mitigating factors, or does not recommend that the defendant be sentenced to death, then the court may not impose the death sentence but must impose a term of imprisonment as provided in AS 12.25.125(a). When a sentence of death is imposed under this section it is subject to automatic review by the Alaska Supreme Court under AS 12.58.200.

**AS 12.58.030** provides a list of aggravating factors which may be considered by a jury and, if at least one of these factors is found to exist, upon which a death sentence may be based.

**AS 12.58.040** provides a list of mitigating factors which must be considered by the jury along with any other mitigating factors that may exist and which must be outweighed by the aggravating factor or factors in order to support a sentence of death.

**AS 12.58.100** provides procedures for an automatic, priority review by the Alaska Supreme Court of the judgment of conviction of any capital felony in which the death sentence is imposed.

**AS 12.58.110** provides that after review of the conviction and sentence the Alaska Supreme Court shall issue a death warrant and set a date of execution if the court upholds the conviction and sentence.

**AS 12.58.200** requires the commissioner of corrections to establish a procedure for the execution of a sentence of death.

**AS 12.58.210** requires the commissioner of corrections to specify the time and date of execution after receiving a death warrant from the Alaska Supreme Court.

**AS 12.58.220** specifies that the death sentence shall be inflicted by lethal injection within a state correctional facility.

**AS 12.58.230** requires the commissioner of corrections to make a return upon the death warrant showing the time and place in which the defendant was executed.

**AS 12.58.300** requires the commissioner of corrections to give notice if the commissioner believes the defendant has become incompetent or is pregnant and provides a stay of execution.

**AS 12.58.310** provides procedures for determining and reviewing the competency of the defendant.

**AS 12.58.320** provides that if the defendant is pregnant the sentence of death shall be stayed during the pregnancy and when the defendant is no longer pregnant that the sentencing court shall notify the Alaska Supreme Court and the commissioner of corrections and the supreme court will issue a new death warrant.

**AS 12.58.900** provides definitions.

**Section 11 of the bill** amends AS 22.07.020(a) and provides that the court of appeals does not have appellate jurisdiction in a case involving criminal prosecution when the death sentence has been imposed.

Representative Jerry Sanders  
January 25, 1994  
Page 4

Section 12 of the bill amends AS 22.07.020(b) to provide that the court of appeals does not have appellate jurisdiction to review appeals of death sentences.

Section 13 of the bill provides for an advisory vote of the qualified voters at the November 1994 general election on the question of whether capital punishment for murder in the first degree should take effect.

Section 14 of the bill provides that the advisory vote provision (section 13 of the bill) takes effect immediately.

Section 15 of the bill provides a June 1, 1995 effective date for the rest of the bill other than the advisory vote provision. Special effective date provisions require a two-thirds vote of each house to be effective under the constitution.

GPL:pl  
94-067.plm



## Representative Jerry Sanders

District 19

Vice Chair, Rules Committee  
Vice Chair, Community & Regional Affairs Committee  
House State Affairs Committee  
Special Committee on Oil & Gas  
Legislative Council  
International Trade & Tourism

November 22, 1993

In the interest of providing Alaskans with accurate information, and as the sponsor of House Bill 162, which seeks reinstatement of the death penalty in Alaska, I am compelled to address inaccuracies in the Anchorage Daily News' November 16 Compass piece, "Bill based on false assumptions about death penalty", by Kathy Kainer.

First, the author refers to myself and Representative Harley Olberg as the ones who "introduced" House Bill 162. In fact, we are sponsor and cosponsor, respectively; additional cosponsors of HB 162 are Representatives Con Bunde, Jeanette James, Pete Kott, and Al Vezey. In addition, the Senate Judiciary Committee is also sponsoring legislation seeking reinstatement of the death penalty, through Senate Bill 127. The primary difference between the two bills is that the House version calls for prosecutorial discretion, and the Senate version (currently) does not; because both bills are in their first committees of referral, these and other elements may be amended before reaching the floor. This is a critical period for citizen input; the final version of the bill should be crafted to reflect, as closely as possible, the will of the people and the mandates of both the Alaska and federal constitutions.

Next, Ms. Kainer suggests that because there are no conclusive studies regarding the deterrent value of capital punishment, we shouldn't have it available as a criminal sentence. The implications of this attitude are distressing; the lack of conclusive evidence goes in both directions -- in other words, there are no conclusive studies indicating capital punishment is not a deterrent. As legislators, should we err on the side which is in direct opposition to what our constituents are saying they want? Or should we, in the absence of statistics either way, honor the wishes of those we have pledged to serve? If only one Alaskan's life is saved because a potential murderer decides his or her own life is too precious to place at risk, the law is worth having on the books. Anyone doubting that murderers would ever consider the possible sentence while calculating their crimes should read the transcript from Andy Nelson's murder trial, which I have available at my office. Incidentally, it is my personal opinion that, for optimal deterrent value, executions should be mandatorily televised -- the solemnity of the occasion will be brought into the psyche of the citizenry much more effectively than simply reading about it in the paper or hearing about it on the radio or television news. Potential jurors would

also be reminded that death is a sentence to be recommended only under the most special of circumstances.

Ms. Kaine goes on to say that HB 162 "claims that capital punishment allows society to most severely condemn the premeditative taking of human life. In other words, we are going to teach that it is wrong to kill by killing the killers. I hope our legislators can see the fallacy in this sort of logic." The flawed logic lies with Ms. Kaine's incomplete digestion and woefully distorted regurgitation of the words found in sub 2 of Section 1 of the bill: "[the legislature finds that imposition of the death penalty for the crime of murder in the first degree] 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." How Ms. Kaine interprets the above words to mean simply that "we are going to teach that it is wrong to kill by killing the killers" is beyond me. At present, murder is grossly violative of society's norms. If the legislature works as it should, when the day comes that murder is considered, by the majority of citizens, to be a less serious crime (perhaps because of overpopulation?), you will see a consequent reduction of the severity of possible sentences. At least in the eyes of most Alaskans, premeditated murder is still viewed as a heinous enough act to justify, in certain circumstances, a sentence of death. Let's not simplify, underestimate, or disregard the importance of the collective norms of society (including, but not limited to, members of Amnesty International) -- for it is these norms which legislators must consider in enacting laws, and which ultimately define the parameters of our social interaction.

In the next paragraph, Ms. Kainer lists countries which do not have capital punishment, apparently in an attempt to persuade the readers that Alaska should join these countries. In the first paragraph, however, she accuses political leaders of "jumping on the death penalty bandwagon." Which "bandwagon" is preferable -- the "international bandwagon" banning capital punishment, or the "Alaska bandwagon" seeking reinstatement of the death penalty at the request of a majority of the constituency? While I find statistics from other countries interesting, as an elected representative, ultimately I consider two things: What my constituents want, and the confines of the Alaska and federal constitutions -- not the social policies or purposes of punishment in Nicaragua or Romania (two of the countries Ms. Kainer cited as examples we should follow). In addition, Ms. Kainer's implication that capital punishment is acceptable for "exceptional circumstances. . . such as treason", strikes me as inconsistent, and a sadly shortsighted minimization of the profound "exceptionalness" of premeditated murder.

Ms. Kainer goes on to claim that the death penalty punishes the "poor, minority, mentally retarded and uneducated members of society." She cites no statistics to back this up; Amnesty International tends, however to use Professor Michael Radelet's In Spite of Innocence: Erroneous Convictions in Capital Cases,

(Northeastern University Press, 1992) as a tome in decrying the arbitrariness of sentences of death. I have read the book; obviously a good deal of research went into putting it together, but most of the cases cited were from about 1900 to 1930. Many of the protections we take for granted -- indeed, we consider them rights -- were nonexistent when most of those cases were heard. The Miranda rule, Furnam v Georgia, not to mention other rules of evidence and procedure, have brought us a long way from the gross past miscarriages of justice. Furthermore, a 1989 study cited by the Anchorage Daily News (June 19, 1989 "Death Penalty: U.S. system produces an agonizing legal limbo") is in direct contradiction to Ms. Kainer's assertions of adverse impact upon minorities. The study, provided by the NAACP Legal Defense and Educational Fund, Inc., reported that, since capital punishment was reinstated in 1976, 52% of prisoners on death row have been white; and 56% of those executed have been white.

Ms. Kainer's comment that a prosecutor "decides to go after the death penalty based on whether or not he thinks he can get a conviction" further reflects her misunderstanding of the process, and of the bills. The imposition of the death penalty is independent of the first degree murder conviction. With both the House and Senate bills -- (though more so with the House Bill, which provides prosecutorial discretion, so that cases not containing the requisite aggravating factors are eliminated from consideration for the death penalty from the onset) -- there are specific statutory aggravating factors, one of which the sentencing jury must unanimously find to exist, beyond a reasonable doubt, before the death penalty can realistically become a possible sentence. In addition, the jury must unanimously find that the aggravating factors are not outweighed by mitigating factors. Last, the jury must unanimously recommend death, and may decline from doing so even if the first two conditions are met. The jury's decision, if it does not recommend death, is final (if it does recommend death, on the other hand, it is light years away from being final, thanks to the "Super Due Process" mandated by our United States Supreme Court). Ms. Kainer's assumption that "powerful relatives" or "political influence" or "money" would influence jurors represents an underestimation of the integrity of the average Alaskan.

I can well understand the Ms. Kainer's desire, as a member of Amnesty International, to place HB 162, and those legislators willing to act upon the wishes of their constituencies by sponsoring such a bill, in the least favorable light possible. But by the same token, I would hope she could understand my commitment, as an elected representative of Alaskans both in District 19 and statewide, to do all I can to advance the collective desires of those I am honor bound to represent. Perhaps such mutual empathy is too much to expect; I can accept that. What I cannot allow to pass without comment, however, is her apparent unwillingness or inability to actually read the text of the bill, resulting in the perpetuation of the types of assumptions (false ones, that is) which Ms. Kainer herself decries in her closing paragraph.

Jay Sander

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**MEMORANDUM**

October 27, 1993

**SUBJECT:** Constitutionality of House Bill 162, imposing capital punishment

**TO:** Representative Brian Porter, Chair  
House Judiciary Committee

**FROM:** Jack Chenoweth  
Legislative Counsel

I am substituting for Jerry Luckhaupt, who is in lay-off status, for the purpose of responding to your recent request.

You have asked, broadly and without citing reference to any particular provision of the state or federal constitutions, whether House Bill 162 is constitutional. The measure, reimposing the death penalty, has been assigned to the House Judiciary Committee.

I have reviewed the files of this bill and its Senate companion (SB 127) and of the files of the bills on this subject with which I worked during the Sixteenth Legislature. Except as specifically noted in the matter discussed below, I believe HB 162 would be found constitutional.

I

The principal line of constitutional challenge to death penalty provisions has been through the Eighth Amendment to the United States Constitution <sup>1/</sup> and the parallel

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<sup>1/</sup> The Eighth Amendment to the United States Constitution provides:

**BAILS, FINES AND PUNISHMENTS.** Excessive bails shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

state constitutional provisions--in Alaska, article I, section 12 of the state constitution.<sup>2/</sup>

The chief features of House Bill 162 have been drafted to conform to the requirements enunciated by the United States Supreme Court that apply to death penalty cases. Those requirements derive from a series of capital punishment-related decisions beginning with 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)) (striking down death penalty statutes under the application of the Eighth Amendment when state law permitted trial juries random, unguided discretion in the imposition of a capital sentence) and culminating in the opinions issued in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (upholding against an Eighth Amendment-based challenge statutes that provide guidance to judge and juries that effectively prevented arbitrary imposition of death sentences) and Woodson v. North Carolina, 428 U.S. 280, 49 L.Ed. 2d 944, 96 S.Ct. 2978 (1976) (finding that a **mandatory** death sentence upon conviction for first degree murder violated the Eighth Amendment). The Gregg decision gives helpful direction in the drafting of capital punishment legislation, for it includes discussion relating to the requirement of a divided or bifurcated procedure in which the jury separately considers the sentence, the requirement that the jury recommending a sentence make specific findings as to the presence of applicable aggravating or mitigating factors to support its sentencing recommendation, and the requirement of mandatory appellate review.

This measure incorporates those provisions in its principal substantive section, bill section 11. In that bill section are to be found provisions to require a separate sentencing proceeding before the same jury that convicted the defendant or, if the jury trial was waived or the defendant pled guilty, the court is to impanel a jury for the sentencing. It directs that during the sentencing proceeding evidence may be presented as to any aggravating or mitigating factor the court determines to have probative value, and that after hearing the evidence the jury shall deliberate and issue a recommended sentence with written findings of whether the jury unanimously finds the existence of at least one aggravating factor listed in a later section, unanimously determines by a preponderance of the evidence that the aggravating factor or factors outweigh any mitigating factors that the one or more members of the jury may have found to exist by a preponderance of the evidence, and unanimously find that the defendant should be sentenced to death. The procedures also provide for an automatic review of a death sentence by the Alaska Supreme Court.

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<sup>2/</sup> Article I, section 12 of the Alaska Constitution provides:

**EXCESSIVE PUNISHMENT.** 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.

Additionally, the measure provides a list of aggravating factors which may be considered by a jury and, if at least one of these factors is found to exist, upon which a death sentence may be based, and includes a series of mitigating factors which must be considered by the jury along with any other mitigating factors that may exist and which must be outweighed by the aggravating factor or factors in order to support a sentence of death.

## II

The question has been asked whether, independently of the federal constitutional protection against cruel and unusual punishment, article I, section 12 of the Alaska Constitution would 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 element of the state constitutional provision tracks the Eighth Amendment of the federal constitution. The Eighth Amendment prohibition is applicable to the states through the due process clause of the Fourteenth Amendment. Robinson v. California, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962), reh. den. 371 U.S. 905, 83 S.Ct. 202, 9 L.Ed.2d 166 (1962). The United States Supreme Court has concluded that imposition of the death penalty is not inherently cruel and unusual punishment and therefore not in all cases an Eighth Amendment violation. Furman v. Georgia and Gregg v. Georgia, *loc. cit.* 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 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 found 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 683 (N.M. 1976); Commonwealth v. Zettlemyer, 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. . . .

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. den., 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.<sup>3/</sup> 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."<sup>4/</sup>

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<sup>3/</sup> 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.

<sup>4/</sup> 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,

(continued...)

Alaska's constitution omits that term, substituting in its place a reference to "protecting 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.

### III

I want now to speak to several other issues of constitutional dimension that have been addressed to my attention during the course of my review of this legislation.

#### A

The House bill specifies that the death sentence shall be inflicted by hanging or, at the option of the defendant, by lethal injection. The fact that a defendant would be required to make a choice about the manner of the defendant's execution <sup>5/</sup> should not render the proposed legislation unconstitutional.

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<sup>4/</sup>(...continued)

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.

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

<sup>5/</sup> Technically, as the bills are drafted, the defendant is not required to make a choice. The statute requires the defendant to be hanged, but gives the defendant the opportunity to exercise the alternative of lethal injection.

Washington's statutes, like the proposed bills discussed here, offer a defendant the choice between hanging and lethal injection, with the former--hanging--made the preferred manner of execution. See RCW 10.95.180(1). Considering the question, the Washington Supreme Court determined that a statutory requirement that the defendant make a choice did not violate the "cruel and unusual punishment" clauses of the state and federal constitutions. State v. Rupe, 683 P.2d 571, 593 - 594 (Wash. 1984) (imposition of death penalty reversed on other grounds), on further consideration after remand and reimposition of death sentence, 743 P.2d 210 (Wash. 1987), cert. den. 486 U.S. 1061, 100 L.Ed.2d 934, 109 S.Ct. 2834 (1988), reh. den. 487 U.S. 1263, 101 L.Ed.2d 976, 109 S.Ct. 25 (1988).<sup>6/</sup> Considering the same capital

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<sup>6/</sup> On the point of whether or not the provision of a choice of methods of execution was constitutional, the Washington Supreme Court responded:

Defendant's final constitutional challenge to the death penalty statute raises the issue of whether allowing an individual a choice between two methods of execution is unconstitutional. . . .

. . . The broader question, of whether a choice between hanging or lethal injection is unconstitutional, has never been at issue in this state.

Neither defendant nor the State offers authority to support their position. Contrary to both parties' assertions, logic dictates neither result. Individual reactions to the various methods of execution and the right to choose vary greatly. In some cases, a person may be so appalled by the thought of physically hanging by the neck that the option of death by lethal injection is welcome. To others, the idea of lying strapped upon a gurney awaiting the lethal poison to seep into one's veins at an unknown time may be equally abhorrent. These individuals embrace the idea of choosing the method of their death as a way to avoid their own private terrors. But to a third type of individual, the choice itself is cruel. As they await the day of their death, they are faced not only with the terror of death itself but also with the terror of making the wrong choice on how to die. These individuals do not embrace the idea of choice; they dread its requirement that they take an active part in their own demise.

To resolve this issue either way would require that, in one case or the other, the court's personal view of cruelty prevails over the views of condemned felons. By removing the choice, we impose a cruel punishment upon those who dread a particular method of execution. Retaining the right of choice on the other hand, may impose severe psychological pressure on those who are frightened of the decision itself.

On balance, on this record, we cannot agree with defendant's assertion that the choice in and of itself is necessarily cruel punishment. The record before us is devoid of any evidence relating to what psychological effect the choice of execution method has upon those sentenced to death.

(continued...)

punishment statute, the Ninth Circuit recently reached a like conclusion on just the federal constitutional question. Campbell v. Blodgett, 978 F.2d 1502, 1517 (9th Cir. 1992).

B

The fact that the death penalty is imposable on juveniles should not render capital punishment unconstitutional under the Eighth Amendment of the United States Constitution.

In companion cases, Stanford v. Kentucky and Wilkins v. Missouri, 492 U.S. 361, 106 L.Ed.2d 306, 109 S.Ct. 2969 (1989), reh. den. 106 L.Ed.2d 635, 110 S.Ct. 23 (1989), a five-member majority of the United States Supreme Court concluded that the Eighth Amendment's "cruel and unusual punishment" provision did not forbid a state from executing persons who were juveniles when they committed the offenses for which they had been convicted. By implication, the court seemed to conclude that it would be unconstitutional, as a violation of the Eighth Amendment, for a state to impose the death penalty on one younger than 16 at the time of commission of the offense. <sup>2/</sup>

As a result of these decisions, and of the effect of one other, it appears that, as Justice O'Connor's concurring opinion in Thompson v. Oklahoma, 487 U.S. 815, 101 L.Ed.2d 702, 108 S.Ct. 2687 (1988) relates, there is some age below which a juvenile's crimes cannot be constitutionally punished by death. Persons convicted for offenses committed when they were 16 or 17 years old are not protected by an Eighth Amendment-based claim that they are too young to be executed. Persons convicted

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<sup>2/</sup>(...continued)

Moreover, defendant does not even allege that he has or will undergo emotional trauma by having to select the method of his demise. He merely asks, as part of a general constitutional attack on the statute, that this court address the issue in the abstract. To accept defendant's argument would require that we speculate as to whether it is more cruel to impose a choice or a given method of execution. This we decline to do.

Rupc, 683 P.2d at 593 - 594.

<sup>2/</sup> The reference to age 16 derives in part from a Court decision the previous year, Thompson v. Oklahoma, 487 U.S. 815, 101 L.Ed.2d 702, 108 S.Ct. 2687 (1988). In Thompson, four members of the Court determined that the application of the Oklahoma death penalty statute to a defendant who was 15 years old at the time of the offense did constitute a violation of the Eighth Amendment, while Justice O'Connor, casting a fifth vote to vacate the juvenile's death sentence, determined that the evidence in the case would not support a finding that the Oklahoma legislature had given special care and deliberation in its decision to impose a death penalty that might lead to its use against a juvenile.

for offenses committed when they were younger than 16 years old may be protected under the Eighth Amendment from execution. However, that protection may not be available if there is evidence from which a reviewing court could find that the legislature had given the requisite special care and deliberation in its decision to allow executions of juveniles of an age younger than 16. That evidence would likely incorporate a statement in the legislation itself of the minimum age of the defendant on whom the state may impose the death penalty and the reason(s) for reaching that decision. <sup>8/</sup>

It is, of course, always possible that Alaska's appellate courts, construing and applying article I, section 12 of the state constitution, could reach a different conclusion on this point. <sup>9/</sup>

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<sup>8/</sup> As drafted, neither HB 162 nor SB 127 now contains that kind of provision.

<sup>9/</sup> The question, of course, is whether, in the event this capital punishment measure becomes law, the Alaska Supreme Court would read the state constitution's article I, section 12 to find that the execution of a youth for an offense committed while under the age of 18 violates the "cruel and unusual punishment" clause of that provision. The federal jurisdictions that have considered the question have determined that imposition of the death penalty on youthful offenders does not violate the Eighth Amendment. Prejean v. Blackburn, 743 F.2d 1091, 1098 - 1099 (5th Cir. 1984) (considering the capital punishment statute of Louisiana), modified on rehearing on other grounds, 765 F.2d 482 (5th Cir. 1985), cert. den. 492 U.S. 925, 106 L.Ed.2d 604, 109 S.Ct. 604 (1989); High v. Kemp, 819 F.2d 988, 993 (11th Cir. 1987) (considering sentence under Florida law), cert. den. sub nom. High v. Zant, 492 U.S. 926, 106 L.Ed.2d 609, 109 S.Ct. 3264 (1989), reh. den. 492 U.S. 937, 106 L.Ed.2d 635, 110 S.Ct. 23 (1989). See also Graham v. Lynaugh, 854 F.2d 715, 718 (5th Cir. 1988) (considering Texas law). A number of state courts have reached the same conclusion, but all based the conclusion principally on a reading and application of the United States Constitution's Eighth Amendment. State v. Valencia, 602 P.2d 807, 809 (Ariz. 1979), Ward v. State, 733 S.W.2d 728, 733 - 734 (Ark. 1987), State v. Harris, 359 N.E.2d 67, 71 - 72 (Ohio 1976), vacated on other gds. sub nom. Harris v. Ohio, 438 U.S. 911, 57 L.Ed.2d 1155, 98 S.Ct. 3148 (1978), Ice v. Commonwealth, 667 S.W.2d 671, 679 - 680 (Ky. 1984), High v. Zant, 300 S.E.2d 654, 662 (Ga. 1983), Trimble v. State, 478 A.2d 1143, 1158 - 1164 (Md. 1984), Cannaday v. State, 455 So.2d 713, 725 (Miss. 1984).

Article I, section 12 of the state constitution provides the Alaska court a different basis by which to consider the question. The current test of whether or not a particular punishment amounts to a cruel and unusual punishment derives from Green v. State, 390 P.2d 433, 435 (Alaska 1964):

Only those punishments which are cruel and unusual in the sense that they are inhuman or barbarous, or so disproportionate to the offense committed as to be completely arbitrary and shocking to the sense of justice may be stricken as violating the due process clauses of the state and federal constitution. Such punishments would also be void under article I, section 12 of the Alaska Constitution which declares that cruel and unusual

(continued...)

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2/ (...continued)

punishments shall not be inflicted.

(Emphasis added; footnotes omitted). See also Thomas v. State, 566 P.2d 630, 635 (Alaska 1977); Allam v. State, 830 P.2d 435, 441 (Alaska App. 1992). Under that test, it is open to the Alaska court to conclude that the execution of persons under the age of majority--that is, minors under the age of 18--constitutes the imposition of a punishment that is "completely arbitrary" and "shocking to the sense of justice."

My sense is that the Alaska Supreme Court would probably not reach a decision at variance with the decisions in the majority of other jurisdictions, but I cannot be certain of it.

To set a legislative mark on the matter as it considers this measure, the legislature may wish to follow the model provided in the majority of the states that impose the death penalty inserting a provision into the respective death penalty enactments prohibiting its imposition on persons who committed capital crimes as minors. In states that have set statutory minimums, the range of years that are the minimum ages for which capital punishment may be imposed spans ages between 10 and 18:

age 10:

South Dakota S.Dak. Comp. Law § 23A-26-8a-2

age 14:

Arkansas Ark. Code Ann. § 9-27-318(a)(1) and (b)(1)  
Utah Utah Code Ann. §78-3a-25

age 15:

Louisiana La. Children's Code, art. 305  
Virginia Va. Code Ann. § 16.1-269(A)(1)

age 16:

Indiana Ind. Code Ann. § 35-50-2-3(b)  
Kentucky Ky. Rev. Stat. § 640.040(1)  
Missouri Mo. Rev. Stat. § 565.020  
Nevada Nev. Rev. Stat. § 176.025  
Oklahoma by court decision, Thompson v. Oklahoma, 487 U.S. 815 (1988)  
Wyoming Wyo. Stat. § 6-2-101(b)

age 17:

Georgia Ga. Code Ann. § 17-9-3  
New Hampshire N.H. Rev. Stat. § 630:1(V)  
North Carolina N.C. Gen. Stat. § 14-17 (w/exceptions)  
Texas Texas Pen. Code Ann. § 8.07(d)

age 18:

California Cal. Penal Code § 190.5

(continued...)

C

When Jerry Luckhaupt first drafted this bill, he cautioned on one point of the measure:

... [S]tates sometimes limit the applicability of the death penalty to certain types of first degree murder, for example situations similar to those cases for which a 99 year mandatory term of imprisonment are required under Alaska law. See AS 12.55.125(a)(1)-(3). . . .

... I am deeply concerned with the range of sentences available to someone convicted of a capital offense, murder in the first degree. AS 12.55.125(a) currently provides for a prison term of not less than 20 years nor more than 99 years for most murders in the first degree and for mandatory terms of 99 years for some murders. Under the bill draft, to this current sentencing range would be added the punishment of death in cases determined by the jury to warrant the death sentence. The possibility that someone convicted of murder in the first degree in one case may only receive 20 years and someone convicted of murder in the first degree in another case may receive death is troubling due to the disparate range of possible sentences. This is not always a problem in other states with the death penalty, for at least in those states whose statutes I have examined, the legislature has apparently authorized only two possible sentences for a capital felony, life imprisonment or death. The disparity between life imprisonment and

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2/ (...continued)

Colorado	Colo. Rev. Stat. § 16-11-103(1)(a)
Connecticut	Conn. Gen. Stat. Ann. § 53a-46a(f)(1)
Illinois	Ill. Comp. Stat. Ann. ch. 720 § 5/9-1(b)
Maryland	Md. Ann. Code art. 27, §412(f)
Nebraska	Neb. Rev. Stat. § 28-105.01
New Jersey	N.J. Stat. Ann. §§ 2A: 4A-22(a); 2C: 11-3(g)
New Mexico	N.Mex. Stat. Ann. §§ 28-6-1(A); 31-18-14(A)
Ohio	Ohio Rev. Code Ann. § 2929.02(A)
Oregon	Ore. Rev. Stat. §§ 161.620 and 419.476(1)
Tennessee	Tenn. Code Ann. § 37-1-134(1)

A number of these jurisdictions have, in addition to setting a statutory minimum for imposition of the death penalty, codified consideration of the defendant's age as a mitigating factor in capital cases, as the bill you are considering would do.

I found the Tennessee provision interesting in this respect: If a minor is charged with first degree murder for which capital punishment is imposable, the waiver of the minor from juvenile proceedings to stand trial as an adult is contingent upon the prosecutor's not having the right to seek imposition of the death penalty of a person who was a minor when the offense was committed.

death, while great, is not as great as the disparity between death and 20 years imprisonment. This "problem" is a cause of concern for me and, at this stage of my research in this area, I am not prepared to say that I believe it would not be a constitutional problem.

(Emphasis added). As background, let me note that in my own review, I was able to confirm that about two-thirds of the states that impose capital punishment do so, as Jerry indicated, in the context in which only two sentences are possible: death-or life imprisonment without possibility of parole. Of the balance of the jurisdictions, a large number set out a third sentencing possibility--life imprisonment **with** possibility of parole only after the passage of a long term of incarceration, usually at least 25 to 30 years. <sup>10/</sup>

Implicit in Jerry's statement is a concern that the sentencing scheme for capital felonies that would be in place by the enactment of the changes proposed in the House Bill could be found disproportional in effect, that it would not pass muster under a "proportionality" test that the United States Supreme Court has identified in conjunction with review of capital punishment cases under the Eighth Amendment to the United States Constitution.

As I understand the proportionality requirement, the bill should not present an Eighth Amendment problem.

In the context of capital punishment cases, a "proportionality review" is a determination by the appellate court as to whether or not the imposition of the **death penalty** in the case under review is consistent with the punishment imposed on others who have been convicted of the same offense. See Pulley v. Harris, 465 U.S. 37, 43, 79

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<sup>10/</sup> It would be my observation that the revision of this state's first degree murder punishment as proposed by HB 162 would leave Alaska anchored at the "short" end of the spectrum in that, under some circumstances, the statute would authorize imposition of a term of imprisonment for a conviction for a capital felony of perhaps as little as 20 years. On a minimum 20 year sentence, then, allowing for the statutory reduction of time served for good behavior under AS 33.20.010(a), at least theoretically, the defendant's sentence could result in a period of actual incarceration of about 13 years.

The jurisdictions that provide an alternative to life imprisonment without possibility of parole to capital felons not sentenced to death usually set a mandatory minimum period of time that the person convicted must serve before the person becomes eligible for parole. So, for example, the pertinent Florida statute requires a defendant convicted of a capital felony to serve a minimum of 25 years of a sentence before becoming eligible for parole, Fla. Stat. Ann. § 775.082(1), while Oregon law requires that a defendant convicted of aggravated murder and sentenced to life imprisonment must be confined for a minimum period of 30 years, but becomes eligible for parole consideration after passage of 20 years of that sentence. Ore. Rev. Stat. § 163.105(1)(c) and (2).

L.Ed.2d 29, 36, 104 S.Ct. 871, 875 (1984). In Pulley, the Supreme Court held that a proportionality review, while useful, is not constitutionally required of an appellate court in all capital cases. Proportionality review, then, goes an inquiry into or consideration of the effect of the jury's application of aggravating and mitigating factors that culminate in a decision as to whether or not to recommend imposition of the death sentence. In the event the jury determines that the weight of mitigating factors outweighs the effect of any aggravators and does not recommend the capital penalty, the court's authority to impose sentence is essentially unchanged: in order to impose the 99-year mandatory sentence, the court must find evidence of at least one of the statutory factors listed in AS 12.55.125(a); if it does not, it has discretion, within the range identified, to determine the sentence. In short, though the span of punishment for a capital felony proposed by the measure is relatively large, spanning from 20 years to 99 years or death, the range of the possible sentence that the defendant faces should not, in and of itself, give rise to a successful Eighth Amendment-based challenge.

#### IV

As a concluding point to this memo, I want to raise a question not related to your inquiry.

I had not thought about it until now, but the research I undertook in the preparation of this memo raised a question in my mind about the handling of executions, the attendance of witnesses, and coverage by the media. The bill before you is silent on the subjects of attendance at an execution by witnesses and of press access to executions. <sup>11/</sup> Do you not want to give those subjects some consideration? One or the other, or both, could become a disputed topic giving rise to future litigation.

JBC:lmb:gc  
93-211.lmb

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<sup>11/</sup> It appears that some 36 states now authorize imposition of the death penalty. Table 8.3, "State Death Penalty (As Of October 1990), set out in The Book of the States, 1992-1993 Edition, pp. 549 - 551. Of them, 12 have laws that specifically authorize the presence of members of the media during an execution, 21 authorize the presence of selected public members to witness an execution, and 4 permit the presence only of certain specially designated officials and friends or relatives of the condemned who are invited to be present by the condemned. Noted in footnotes 13 and 15, pp. 1043 - 1045, "First Amendment Analysis of State Regulations Prohibiting the Filming of Prisoner Executions," Geo. Washington Law Review 60 (1992), pp. 1042 - 1080. [Vermont, identified in the compilation, has, in fact, revised its statute defining first degree murder for which the death penalty may be imposed to eliminate provisions for the imposition of capital punishment, though its body of statutes continues to contain sections that spell out the circumstances for confinement and execution of condemned prisoners.]

# Legislative Research Agency

Alaska State Legislature



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September 1, 1993

## MEMORANDUM

TO: Senator Robin Taylor

FROM: Christine M. Cheff *CWC*  
Legislative Analyst

RE: Capital Punishment: An Update  
Research Request 94.021

You asked that we update a previous memorandum prepared by this agency concerning capital punishment (LRA Memorandum 91.035). In particular, you asked for current information about costs related to carrying out the death penalty.

There are still just 37 states with death penalty statutes. According to recent information published by the Bureau of Justice Statistics, at year end 1991 there were 2,482 prisoners under sentence of death in 34 states and within the federal prison system (Attachment A).<sup>1</sup> That represents a 5.8 percent increase over the number held at the end of 1990. Fourteen prisoners were executed in 8 states in 1991--Texas (5), Florida (2), Virginia (2), Georgia (1), Louisiana (1) Missouri (1) North Carolina (1) and South Carolina (1)--which brought to 157 the number of executions since the death penalty was reinstated in 1976.

A comprehensive discussion of death penalty costs is presented in the attached July 1993 Legislative Research Agency Memorandum 93.224.<sup>2</sup> It provides an overview of various studies and reports concerning the issue, including a report prepared by Duke University that was published in May of this year.<sup>3</sup>

I hope this information will be useful. Please do not hesitate to call if we can be of further assistance.

# Alaska State Legislature

Legislative Research Agency



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November 15, 1990

## MEMORANDUM

TO: Senator Paul Fischer

ATTN: Sandy Nusbaum

FROM: Christine M. Cheff *one*  
Legislative Analyst

RE: Capital Punishment  
Research Request 91.035

You asked several questions about capital punishment and capital punishment laws in states other than Alaska. Each of your questions is addressed below.

### States Where Capital Punishment is Legal

Capital punishment, commonly referred to as the death penalty, is currently legal in 37 states. Over time it has been abolished or declared unconstitutional in many of these states, and then reinstated. The most significant recent event which impacted death penalty laws was the 1972 U.S. Supreme Court ruling in *Furman v. Georgia*. The Court found that procedures for imposing the death penalty in Georgia and Texas were in violation of the Eighth and Fourteenth amendments of the U.S. Constitution. Because virtually all other state death penalty laws were modeled on the Georgia and Texas statutes, they were also considered to be in violation. As a result of the *Furman* decision, many states revised their statutes to meet constitutional requirements. In 1976, laws in Georgia, Florida and Texas were upheld by the U.S. Supreme Court and the death penalty was reinstated.<sup>1</sup>

Vermont has a death penalty statute, but it was nullified by the *Furman v. Georgia* ruling and has not been revised. According to Janet Ansell, a Vermont legislative researcher, the sentence of death has been removed from most crimes, and treason is probably the only one for which it might still be imposed. The last execution in Vermont took place in 1959.

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<sup>1</sup>Mary Fairchild, "Death Penalty Laws," National Conference of State Legislatures, 1989.

Senator Fischer  
November 14, 1990  
Page 3

the adoption of a constitutional amendment. As of October 1990, both bills were still in committee (Attachment C and D).

In West Virginia, four bills for reinstatement of the death penalty died in committee. Proposals ranged from imposing the death penalty for first degree murder to a narrowly focused House Bill which called for the death penalty in cases of first degree murder by an inmate in a West Virginia correctional facility. By a vote of 18 to 16, the Senate defeated a Senate Joint Resolution asking for a statewide referendum to reinstate the death penalty.

Four of the six bills for reinstatement in Wisconsin asked for the death penalty in homicide cases if the defendant is 16 years of age or older. Application of the death penalty for certain controlled substance offenses was called for in a Senate bill. All of the bills died in committee.

#### Fiscal Impact of the Death Penalty

Most studies about the fiscal impact of the death penalty conclude that, overall, it is more costly than the alternative of life imprisonment. The amount of money spent from pretrial investigation to final appeal is estimated to be as much as ten times more than the amount spent on noncapital cases.<sup>4</sup>

For capital punishment bills introduced during the 1989 Wisconsin legislative session, a cost estimate of \$102,061 for each death penalty case was projected by the State Public Defender. The Wisconsin Department of Health and Social Services estimated the cost of constructing between eight and 30 death row cells at \$1 to \$2 million, and annual staffing and maintenance costs at between \$280,800 and \$530,167. The estimate was based on the number of crimes for which the death penalty was imposed and the length of time required for the appeals process. In 1986 - 1987, Wisconsin spent \$15,568 annually for each prisoner confined to Waupun State Prison.<sup>5</sup>

A study published by the New York State Defenders Association in 1982 "identified 11 levels of review and defined a minimum of 144 cost centers that determine the total price-tag of capital punishment."<sup>6</sup> By projecting costs across just the first three levels of review--the trial and penalty phase, appeals court and supreme court review--a death penalty case was estimated to

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<sup>4</sup>Jonathan Gradess, "Execution Does Not Pay," *Washington Post*, February 28, 1988.

<sup>5</sup>A. Peter Cannon, *Capital Punishment in Wisconsin and the Nation*, (State of Wisconsin, Legislative Reference Bureau 1990), p. 9.

<sup>6</sup>"Capital Losses: The Price of the Death Penalty for New York State," New York State Defenders Association, April 1, 1982.

ATTACHMENT A  
South Dakota Death Penalty, 1979 Session Law

23A-20-28. A court may direct that not more than six jurors in addition to the regular jury members be called and impaneled to sit as alternate jurors. Alternate jurors, in the order in which they were called, shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be disqualified, discharged, or unable to perform their duties. Alternate jurors shall be drawn at the same time and in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict.

Section 50. That § 23A-20-29 be amended to read as follows:

23A-20-29. If, before the jury retires, a juror or alternate or a member of his immediate family dies, or if he or a member of his immediate family becomes ill, or upon other good cause shown to the court, the court may order him discharged.

Approved March 27, 1979

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CHAPTER 160

(S.B. 53)

DEATH PENALTY PROVIDED FOR CERTAIN CRIMES

AN ACT

ENTITLED, An Act to provide the death penalty for certain crimes and the procedure for implementing such a sentence.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

Section 1. That subdivision (1) of § 22-6-1 be amended to read as follows:

- (1) Class A felony: death or life imprisonment in the state penitentiary. A lesser sentence than death or life imprisonment may not be given for a Class A felony;

Section 2. That § 22-16-4 be amended to read as follows:

22-16-4. Homicide is murder when perpetrated without authority of law and with a premeditated design to effect the death of the person killed or of any other human being, or when committed by a person engaged in the perpetration of, or attempt to perpetrate, any arson, rape, robbery, burglary, kidnapping, or unlawful throwing, placing, or discharging of a destructive device or explosive.

Section 2A. That § ~~22-16-9~~ be amended to read as follows:

22-16-9. Homicide is manslaughter in the first degree when perpetrated without any design to effect death by a person engaged in the commission of any felony other than as provided in § 22-16-4.

shall include in his instructions to the jury for it to consider, any mitigating circumstances and any of the following aggravating circumstances which may be supported by the evidence:

- (1) The offense was committed by a person with a prior record of conviction for a Class A felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions;
- (2) The defendant by his act knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;
- (3) The defendant committed the offense for himself or another, for the purpose of receiving money or any other thing of monetary value;
- (4) The defendant committed the offense on a judicial officer, former judicial officer, prosecutor or former prosecutor while such prosecutor, former prosecutor, judicial officer or former judicial officer was engaged in the performance of his official duties or where a major part of the motivation for the offense came from the official actions of such judicial officer, former judicial officer, prosecutor or former prosecutor;
- (5) The defendant caused or directed another to commit murder or committed murder as an agent or employee of another person;
- (6) The offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim;
- (7) The offense was committed against a law enforcement officer, employee of a corrections institution or fireman while engaged in the performance of his official duties;
- (8) The offense was committed by a person in, or who has escaped from, the lawful custody of a law enforcement officer or place of lawful confinement; and
- (9) The offense was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

Section 8. Upon a verdict or judgment of death made by a jury or a judge, it shall be the duty of the judge presiding at the trial to sentence such convicted person to death and to make such sentence in writing, which shall be filed with the papers in the case against such convicted person. A certified copy thereof shall be sent by the clerk of the court in which the sentence is pronounced to the warden of the state penitentiary, not less than ten days prior to the time fixed in the sentence of the court for the execution of the sentence.

Section 9. If the death penalty is imposed, and if the judgment becomes final in the trial court, the sentence shall be reviewed on the record by the South Dakota Supreme Court. The clerk of the trial court, within ten days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court together with a notice prepared

ously sentenced to death for a Class A felony shall have such person brought before the court, and the court shall sentence such person to life imprisonment.

Section 17. When judgment of death is rendered, the judge must forthwith sign and deliver to the sheriff of the county a warrant duly attested by the clerk under the seal of the court stating the conviction and sentence and appointing the week within which sentence must be executed. The warrant must be directed to the warden of the state penitentiary at Sioux Falls, commanding the warden to execute the sentence on some day within the week appointed.

Section 18. Within ten days after the issuing of a warrant under section 17 of this Act the sheriff must deliver the defendant together with the warrant to the warden or his deputies at the state penitentiary. From the time of delivery to the warden until the infliction of the punishment of death upon him, unless he is lawfully discharged from such imprisonment, the defendant shall be kept in solitary confinement at the penitentiary and no person shall be allowed access to him without an order of the trial court except the officers of the prison, his counsel, his physician, a priest or minister if he shall desire one, and the members of his family.

Section 19. The week so appointed must begin not less than six months nor more than eight months after the date of judgment. The time of execution within such week shall be left to the discretion of the warden to whom the warrant is directed, who shall cause the execution to be performed between the hours of 12:01 a.m. and 6:00 a.m. on some day of such week, but no previous announcement of the day or hour of the execution shall be made except to the persons as may be invited or permitted to be present as provided in sections 36 and 37 of this Act.

Section 20. The judge of any court imposing sentence of death shall immediately thereafter transmit by registered or certified mail to the Governor a certified copy of such judgment together with a brief statement of the facts and circumstances of the case over his signature.

Section 21. The Governor may thereupon make such investigation of the case as he may deem proper and may require the assistance of the attorney general.

Section 22. The Governor shall have power to reprieve or suspend the execution of the sentence for such reasonable time as he may see fit for the purpose of completing his investigation or other like proper purpose but the period of reprieve or suspension shall not in any event, exceed ninety days except as provided in section 26 or 30 of this Act.

Section 23. No judge, officer, commission or board, other than the Governor, can reprieve or suspend the execution of a judgment of death except where the warden or deputy warden of the penitentiary is authorized so to do in a case and in the manner prescribed in this Act. This section does not apply to a stay of proceedings upon appeal or to the issuance of a writ of habeas corpus, certiorari or other original remedial writ of the Supreme Court.

Section 24. If a defendant confined under sentence of death appears to be mentally incompetent to proceed the warden having him in custody shall forthwith notify the Governor, who shall appoint a commission of not less than three nor more than five disinterested duly licensed physicians, one

Section 31. In case the execution of a sentence is suspended pursuant to section 30 of this Act, the Governor, as soon as he is satisfied that the defendant is no longer pregnant, shall forthwith issue his warrant appointing a week for her execution, pursuant to her sentence, beginning within a period of not less than thirty nor more than ninety days from the date of the warrant.

Section 32. If the physicians summoned pursuant to section 29 of this Act report that the female defendant is not pregnant a copy of the report shall be transmitted by the warden to the Governor but the same shall not work a stay or suspension of the execution of the sentence.

Section 33. Whenever, for any reason, or under any circumstances not otherwise specifically provided for in this Act, a defendant sentenced to death has not been executed pursuant to the sentence at the time specified and the sentence or judgment inflicting the death penalty stands in full force, the Supreme Court, upon application of the attorney general or the state's attorney of the county where the crime was committed, shall make an order to the warden in whose custody the defendant may be, commanding him to bring the defendant before the court or commanding him to apprehend the defendant if at large and bring him before the court. Upon the defendant being brought before the court, the court shall inquire into the facts and if no legal reason exists against the execution of the judgment the court shall issue its warrant to the warden of the state penitentiary directing the execution of the judgment during a week specified in the warrant and the warden shall execute the warrant accordingly.

Section 34. The punishment of death must be inflicted within the walls of some building at the state penitentiary or within the yard or enclosure adjoining thereto. The punishment of death must be inflicted by causing to pass through the body of the defendant a current of electricity of sufficient intensity to cause death and continuing the application thereof until the defendant is dead. It shall be executed by the warden of the state penitentiary or by one of his deputies.

Section 35. The board of charities and corrections shall arrange for and provide a proper and suitable place at the state penitentiary for the custody of persons awaiting sentence of death and for the execution of the death sentence together with any and all proper equipment and appliances for the infliction of such punishment.

Section 36. The warden of the penitentiary shall request, by at least two days' previous notice, the presence of the attorney general, the trial judge before whom the conviction was had or his successor in office, the state's attorney and sheriff of the county where the crime was committed, and not more than ten reputable adult citizens, including at least one member of the news media, to be selected by the warden at the execution. The warden shall also arrange for the attendance of the prison physician and two other licensed physicians of this state. The warden shall arrange for the attendance of such prison guards and peace officers as he may deem proper.

Section 37. The warden of the state penitentiary must also, at the request of the defendant, permit such ministers of the gospel, priests or clergymen of any denomination as the defendant may desire, not exceeding two, to be present at the execution and any relatives or friends requested by the defendant not exceeding five.

ATTACHMENT B  
Oregon Death Penalty Statute

1989

# OREGON REVISED STATUTES

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Volume 3

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PENAL CODE

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TITLES

14. PROCEDURE IN CRIMINAL MATTERS GENERALLY
15. PROCEDURE IN CRIMINAL ACTIONS IN JUSTICES' COURTS
16. CRIMES AND PUNISHMENTS

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PUBLISHED by the  
LEGISLATIVE COUNSEL COMMITTEE of the  
LEGISLATIVE ASSEMBLY of the STATE OF OREGON

**137.452 Satisfaction of monetary obligation imposed as part of sentence; authority of Attorney General.** When a person is convicted of an offense and sentenced to pay any monetary obligation, the following provisions apply to obtaining a satisfaction, full or partial, of the money judgment imposing the monetary obligation:

(1) The Attorney General, by rule, may do any of the following:

(a) Authorize the Attorney General's office, a district attorney's office, any state agency within the executive branch of government or any specific individual or group within any of these to issue satisfactions, full or partial, relating to money judgments from criminal actions or proceedings.

(b) Establish procedures and requirements that any person described under paragraph (a) of this subsection must follow to issue satisfactions, full or partial, relating to money judgments from criminal actions or proceedings.

(2) Authorization of a person under subsection (1) of this section is permissive and such person is not required to issue satisfactions if authorized. However, if a person is authorized under subsection (1) of this section and does issue satisfactions, the person must comply with the procedures and requirements established by the Attorney General by rule.

(3) If the Attorney General establishes a program under subsection (1) of this section, the Attorney General's office shall issue satisfactions under the program unless the Attorney General determines that there are sufficient other agencies authorized under subsection (1) of this section who are actually participating in the program to provide reasonable access to satisfactions on a statewide basis.

(4) This section does not authorize any of the following:

(a) The issuance of any satisfactions where the monetary obligation runs to any party other than the state.

(b) Issuance of satisfactions for any part of the judgment other than a money judgment.

(5) Any satisfaction issued by a person authorized under this section may be entered in the same manner and has the same effect on the money judgment as a satisfaction issued for a judgment from a civil action or proceeding. This subsection applies even if the full amount of monetary obligations established under the original judgment is not paid. [1989 c.472 §4]

Note: 137.452 was enacted into law by the Legislative Assembly but was not added to or made a part of ORS chapter 137 or any series therein by legislative

action. See Preface to Oregon Revised Statutes for further explanation.

137.460 [Renumbered 137.270]

**(Death Sentence)**

**137.463 Death warrant; delivery to sheriff; automatic review by Supreme Court.** (1) When a judgment of death is pronounced, a warrant signed by the trial judge and attested by the clerk of the court, with the seal of the court affixed, shall be drawn and delivered to the sheriff of the county. The warrant shall state the conviction and judgment and shall direct the sheriff to deliver the defendant within 20 days from the time of the judgment to the Superintendent of the Oregon State Penitentiary pending the determination of the automatic and direct review by the Supreme Court.

(2) If the Supreme Court affirms the sentence of death, a warrant, signed by the trial judge of the court in which the judgment was rendered and attested by the clerk of that court, shall be drawn and delivered to the Superintendent of the Oregon State Penitentiary. The warrant shall appoint a day on which the judgment is to be executed and shall authorize and command the superintendent to execute the judgment of the court. [1984 c.3 §5]

137.465 (1979 c.2 §5; repealed by 1981 c.873 §9)

**137.467 Delivery of warrant when place of trial changed.** If the place of trial has been changed, the death warrant shall be delivered to the sheriff of the county in which the defendant was tried. [1984 c.3 §6]

137.470 (1979 c.2 §6; repealed by 1981 c.873 §9)

**137.473 Means of inflicting death; place and procedures; acquisition of lethal substance.** (1) The punishment of death shall be inflicted by the intravenous administration of a lethal quantity of an ultra-short-acting barbiturate in combination with a chemical paralytic agent until the defendant is dead. The judgment shall be executed by the superintendent of the Department of Corrections institution in which the execution takes place, or by the designee of that superintendent. All executions shall take place within the enclosure of a Department of Corrections institution designated by the Director of the Department of Corrections. The superintendent of the institution shall be present at the execution and shall invite the presence of one or more physicians, the Attorney General and the sheriff of the county in which the judgment was rendered. At the request of the defendant, the superintendent shall allow no more than two clergymen designated by the defendant to be present at the execution. At the discretion of the superintendent, no more than five

ATTACHMENT C  
Michigan State Senate Joint Resolution L

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# Senate Joint Resolution L

November 30, 1989, Introduced by Senators DI NELLO,  
WELBORN, GEO. HART, BARCIA, MACK, CARL, DE GROW,  
N. SMITH, FREDRICKS, SCHWARZ, SHINKLE, GEAKE,  
CROSEY, FESSLER and GAST and referred to the  
Committee on Judiciary.

A joint resolution proposing an amendment to the state constitution of 1963, by amending section 46 of article IV, to provide for the death penalty in certain circumstances.

Resolved by the Senate and House of Representatives of the state of Michigan, That the following amendment to the state constitution of 1963, to permit the death penalty in certain circumstances, is proposed, agreed to, and submitted to the people of the state:

1

## ARTICLE IV

2

3

Sec. 46. (1) No law shall be enacted providing for the penalty of death EXCEPT FOR FIRST DEGREE MURDER.

4

5

6

7

(2) IF A DEFENDANT IS CONVICTED OF FIRST DEGREE MURDER, THE COURT SHALL CONDUCT A SEPARATE SENTENCING PROCEEDING TO DETERMINE WHETHER THE DEFENDANT SHOULD BE SENTENCED TO DEATH OR SENTENCED AS OTHERWISE PROVIDED BY LAW.

SENATE JOINT RESOLUTION L

1 (B) A STATEMENT AS TO WHETHER SUFFICIENT MITIGATING  
2 CIRCUMSTANCES EXIST UNDER SUBSECTION (9) TO OUTWEIGH THE  
3 AGGRAVATING CIRCUMSTANCES UNDER SUBSECTION (8).

4 (C) A STATEMENT AS TO WHETHER THE DEFENDANT SHOULD BE SEN-  
5 TENCED TO DEATH.

6 (5) WHETHER OR NOT A MAJORITY OF THE JURY RECOMMENDS A SEN-  
7 TENCE OF DEATH THE COURT, AFTER WEIGHING THE AGGRAVATING AND MIT-  
8 IGATING CIRCUMSTANCES, SHALL SENTENCE THE DEFENDANT. IF THE  
9 COURT IMPOSES A SENTENCE OF DEATH, THE COURT SHALL SET FORTH IN  
10 WRITING THE FINDINGS UPON WHICH THE SENTENCE OF DEATH IS BASED.  
11 THE COURT SHALL SUPPORT A SENTENCE OF DEATH BY SPECIFIC WRITTEN  
12 FINDINGS OF FACT BASED UPON THE CIRCUMSTANCES ENUMERATED IN SUB-  
13 SECTIONS (8) AND (9), THE RECORDS OF THE TRIAL AND THE SENTENCING  
14 PROCEEDINGS, AND A FINDING THAT SUFFICIENT AGGRAVATING CIRCUM-  
15 STANCES EXIST UNDER SUBSECTION (8) TO SUPPORT A SENTENCE OF DEATH  
16 AND THAT MITIGATING CIRCUMSTANCES UNDER SUBSECTION (9) DO NOT  
17 OUTWEIGH THE AGGRAVATING CIRCUMSTANCES.

18 (6) THE APPROPRIATENESS OF A SENTENCE OF DEATH SHALL BE  
19 REVIEWED BY A PANEL APPOINTED BY THE SUPREME COURT OF THIS STATE,  
20 UPON PETITION BY THE DEFENDANT. THE REVIEW SHALL OCCUR WITHIN 60  
21 DAYS AFTER THE SENTENCE OF DEATH IS IMPOSED, UNLESS THAT TIME IS  
22 EXTENDED BY THE SUPREME COURT OF THIS STATE FOR AN ADDITIONAL  
23 PERIOD NOT TO EXCEED 30 DAYS. THE PANEL SHALL CONSIST OF A JUS-  
24 TICE OF THE COURT OF APPEALS, A CIRCUIT COURT JUDGE WITH NOT LESS  
25 THAN 6 YEARS' EXPERIENCE AS A CIRCUIT COURT JUDGE, AND THE TRIAL  
26 JUDGE. MEMBERS OF THE PANEL OTHER THAN THE TRIAL JUDGE SHALL BE  
27 SELECTED AT RANDOM BY THE SUPREME COURT OF THIS STATE FROM AMONG

1 (B) THE MURDER WAS COMMITTED BY A PERSON WHO WAS SENTENCED  
2 TO SERVE, OR WAS SERVING, A TERM OF IMPRISONMENT AT THE TIME THE  
3 MURDER WAS COMMITTED.

4 (C) THE DEFENDANT WAS PREVIOUSLY CONVICTED OF A FELONY  
5 INVOLVING THE USE OF VIOLENCE OR THE THREAT OF VIOLENCE TO A  
6 PERSON.

7 (D) THE DEFENDANT KNOWINGLY CREATED A GREAT RISK OF DEATH TO  
8 OTHER PERSONS IN ADDITION TO THE DECEDENT.

9 (E) THE MURDER WAS COMMITTED BY THE DEFENDANT WHILE HE OR  
10 SHE WAS COMMITTING OR ATTEMPTING TO COMMIT ANY OF THE FOLLOWING:

11 (i) ANY ROBBERY.

12 (ii) CRIMINAL SEXUAL CONDUCT IN ANY DEGREE.

13 (iii) ANY ARSON.

14 (iv) ANY BREAKING AND ENTERING.

15 (v) KIDNAPPING.

16 (vi) AIRCRAFT PIRACY.

17 (vii) ANY UNLAWFUL THROWING, PLACING, OR DISCHARGING OF AN  
18 EXPLOSIVE, INCENDIARY DEVICE, OR BOMB.

19 (F) THE MURDER WAS COMMITTED TO AVOID OR PREVENT A LAWFUL  
20 ARREST, OR TO EFFECT AN ESCAPE FROM CUSTODY.

21 (G) THE MURDER WAS COMMITTED FOR PECUNIARY GAIN.

22 (H) THE MURDER WAS COMMITTED TO DISRUPT OR HINDER THE LAWFUL  
23 EXERCISE OF A GOVERNMENTAL FUNCTION, OR TO DISRUPT OR HINDER THE  
24 ENFORCEMENT OF A LAW.

25 (I) THE MURDER WAS UNUSUALLY HEINOUS, ATROCIOUS, OR CRUEL.

26 (9) MITIGATING CIRCUMSTANCES INCLUDE ANY OF THE FOLLOWING:

ATTACHMENT D  
Michigan State House of Representatives Joint Resolution L

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HOUSE JOINT RESOLUTION L

## HOUSE JOINT RESOLUTION L

July 13, 1989, Introduced by Reps. Jaye, Runco, Dunaskiss, London, Middaugh, Willis Bullard, Walberg, Gnodtke, Rocca, Nye, Wartner, Weeks and Stacey and referred to the Committee on House Oversight.

A joint resolution proposing an amendment to the state constitution of 1963, by amending section 46 of article IV, to provide for the death penalty in certain circumstances.

Resolved by the Senate and House of Representatives of the state of Michigan, That the following amendment to the state constitution of 1963, to permit the death penalty in certain circumstances, is proposed, agreed to, and submitted to the people of the state:

### ARTICLE IV

1  
2       Sec. 46. No law shall be enacted providing for the penalty  
3 of death EXCEPT FOR MURDER IN THE FIRST DEGREE OF A POLICE OFFI-  
4 CER OR CONSERVATION OFFICER, MURDER IN THE FIRST DEGREE COMMITTED  
5 IN CONNECTION WITH SEXUAL MISCONDUCT, OR MURDER IN THE FIRST  
6 DEGREE COMMITTED IN CONNECTION WITH A CONTROLLED SUBSTANCE  
7 OFFENSE. THE LEGISLATURE SHALL PROVIDE BY LAW FOR THE  
8 IMPLEMENTATION OF THIS SECTION.

HOUSE JOINT RESOLUTION L

# Alaska State Legislature

Legislative Research Agency



P. O. Box Y  
Juneau, AK 99811-3100  
Phone: (907) 485-3941  
Fax: (907) 483-3351

November 15, 1990

## MEMORANDUM

TO: Senator Paul Fischer  
ATTN: Sandy Nusbaum  
FROM: Christine M. Cheff *mc*  
Legislative Analyst  
RE: Capital Punishment  
Research Request 91.035

You asked several questions about capital punishment and capital punishment laws in states other than Alaska. Each of your questions is addressed below.

### States Where Capital Punishment is Legal

Capital punishment, commonly referred to as the death penalty, is currently legal in 37 states. Over time it has been abolished or declared unconstitutional in many of these states, and then reinstated. The most significant recent event which impacted death penalty laws was the 1972 U.S. Supreme Court ruling in *Furman v. Georgia*. The Court found that procedures for imposing the death penalty in Georgia and Texas were in violation of the Eighth and Fourteenth amendments of the U.S. Constitution. Because virtually all other state death penalty laws were modeled on the Georgia and Texas statutes, they were also considered to be in violation. As a result of the *Furman* decision, many states revised their statutes to meet constitutional requirements. In 1976, laws in Georgia, Florida and Texas were upheld by the U.S. Supreme Court and the death penalty was reinstated.<sup>1</sup>

Vermont has a death penalty statute, but it was nullified by the *Furman v. Georgia* ruling and has not been revised. According to Janet Ansell, a Vermont legislative researcher, the sentence of death has been removed from most crimes, and treason is probably the only one for which it might still be imposed. The last execution in Vermont took place in 1959.

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<sup>1</sup>Mary Fairchild, "Death Penalty Laws," National Conference of State Legislatures, 1989.

Senator Fischer  
November 14, 1990  
Page 2

There are no death penalty statutes in Alaska, Hawaii, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, New York, North Dakota, Rhode Island, West Virginia, Wisconsin or the District of Columbia. The Wisconsin legislature abolished the death penalty law as early as 1853, and there has been no capital punishment statute in Maine or Minnesota since at least 1930.<sup>2</sup>

#### Reinstatement of the Death Penalty in the Last 25 Years

Of those states which had abolished the death penalty prior to *Furman v. Georgia*, two have reinstated it.

The South Dakota death penalty statute was abolished for the first time in 1915 and then restored in 1939. After the 1972 *Furman v. Georgia* ruling, it was abolished again. Recodification of state Criminal Procedure statutes to meet federal guidelines in 1979 resulted in enactment of the current law. A copy of the 1979 legislation for reinstatement is attached (Attachment A).

Voters in Oregon repealed the death penalty in a 1964 initiative. Bills to reinstate it have been introduced in virtually every session of the legislature since then. When the Criminal Code was revised in 1971, no death penalty provision was included. Although a 1978 initiative to make aggravated murder a capital offense was approved by the voters, the Oregon Supreme Court ruled it unconstitutional in 1980. Finally in 1984, public opinion and strong support from the governor resulted in passage of a ballot measure to reinstate the death penalty.<sup>3</sup> (Attachment B)

#### 1990 Bills Proposing Reinstatement of the Death Penalty

Bills for reinstatement of the death penalty were introduced in Michigan, West Virginia and Wisconsin during the 1990 legislative session.

Michigan is the only state in which capital punishment is prohibited by the Constitution. The Michigan Senate and the House of Representatives introduced joint resolutions for constitutional amendments to provide for the death penalty in first degree murder cases. The more specific House resolution asks that the death sentence be applied in cases of first degree murder of a police or conservation officer and to first degree murder committed in connection with sexual misconduct or with a controlled substance. The Senate resolution includes a jury override provision. Ratification by the voters is required for

---

<sup>2</sup>*The Universal Almanac*, 1990, ed. John W. Wright, pp. 204 - 206.

<sup>3</sup>Nancy Pease, "Reinstating the Death Penalty," Alaska State Legislature, House Research Agency Memorandum 84.002, 1984.

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Page 3

the adoption of a constitutional amendment. As of October 1990, both bills were still in committee (Attachment C and D).

In West Virginia, four bills for reinstatement of the death penalty died in committee. Proposals ranged from imposing the death penalty for first degree murder to a narrowly focused House Bill which called for the death penalty in cases of first degree murder by an inmate in a West Virginia correctional facility. By a vote of 18 to 16, the Senate defeated a Senate Joint Resolution asking for a statewide referendum to reinstate the death penalty.

Four of the six bills for reinstatement in Wisconsin asked for the death penalty in homicide cases if the defendant is 16 years of age or older. Application of the death penalty for certain controlled substance offenses was called for in a Senate bill. All of the bills died in committee.

#### Fiscal Impact of the Death Penalty

Most studies about the fiscal impact of the death penalty conclude that, overall, it is more costly than the alternative of life imprisonment. The amount of money spent from pretrial investigation to final appeal is estimated to be as much as ten times more than the amount spent on noncapital cases.<sup>4</sup>

For capital punishment bills introduced during the 1989 Wisconsin legislative session, a cost estimate of \$102,061 for each death penalty case was projected by the State Public Defender. The Wisconsin Department of Health and Social Services estimated the cost of constructing between eight and 30 death row cells at \$1 to \$2 million, and annual staffing and maintenance costs at between \$280,800 and \$530,167. The estimate was based on the number of crimes for which the death penalty was imposed and the length of time required for the appeals process. In 1986 - 1987, Wisconsin spent \$15,568 annually for each prisoner confined to Waupun State Prison.<sup>5</sup>

A study published by the New York State Defenders Association in 1982 "identified 11 levels of review and defined a minimum of 144 cost centers that determine the total price-tag of capital punishment."<sup>6</sup> By projecting costs across just the first three levels of review--the trial and penalty phase, appeals court and supreme court review--a death penalty case was estimated to

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<sup>4</sup>Jonathan Gradess, "Execution Does Not Pay," *Washington Post*, February 28, 1988.

<sup>5</sup>A. Peter Cannon, *Capital Punishment in Wisconsin and the Nation*, (State of Wisconsin, Legislative Reference Bureau 1990), p. 9.

<sup>6</sup>"Capital Losses: The Price of the Death Penalty for New York State," New York State Defenders Association, April 1, 1982.

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Page 4

cost \$1.8 million dollars as opposed to the cost of \$602,000 for 40 years of life imprisonment.

In 1988 the Miami Herald reported that since 1973, \$57.2 million was spent to execute 18 people in Florida. That cost amounted to over \$3 million per execution, which is approximately six times the cost of imprisoning those same people for their entire lives.<sup>7</sup>

#### Number of Inmates Currently on Death Row

As of December 1988, there were 2,124 persons on death row in the United States.<sup>8</sup> There were over 200 persons each in the states of California, Florida and Texas awaiting execution, and 118 in Indiana. From two to ninety-eight individuals are on death row in each of the remaining states, except for New Hampshire, South Dakota and Vermont, where there are none.

#### Number of Executions Carried Out Since 1970

Because of the Supreme Court decision in *Furman v. Georgia*, no executions were carried out between 1968 and 1978. However there have been 104 executions since the Court reinstated the death penalty in 1976. All of those executions occurred in twelve of the 37 states which authorize the death penalty.<sup>9</sup>

Alabama	3	Nevada	2
Florida	19	North Carolina	3
Georgia	13	South Carolina	2
Indiana	2	Texas	29
Louisiana	18	Utah	3
Mississippi	3	Virginia	7

I hope this information will be helpful to you. Please do not hesitate to call if we can be of further assistance with this or other matters.

#### Attachments

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<sup>7</sup>Ronald J. Tabak and J. Mark Lane, "The Execution of Injustice: A Cost and Lack-of-Benefit Analysis of the Death Penalty," *Loyola of Los Angeles Law Review*, 1989, p. 23.

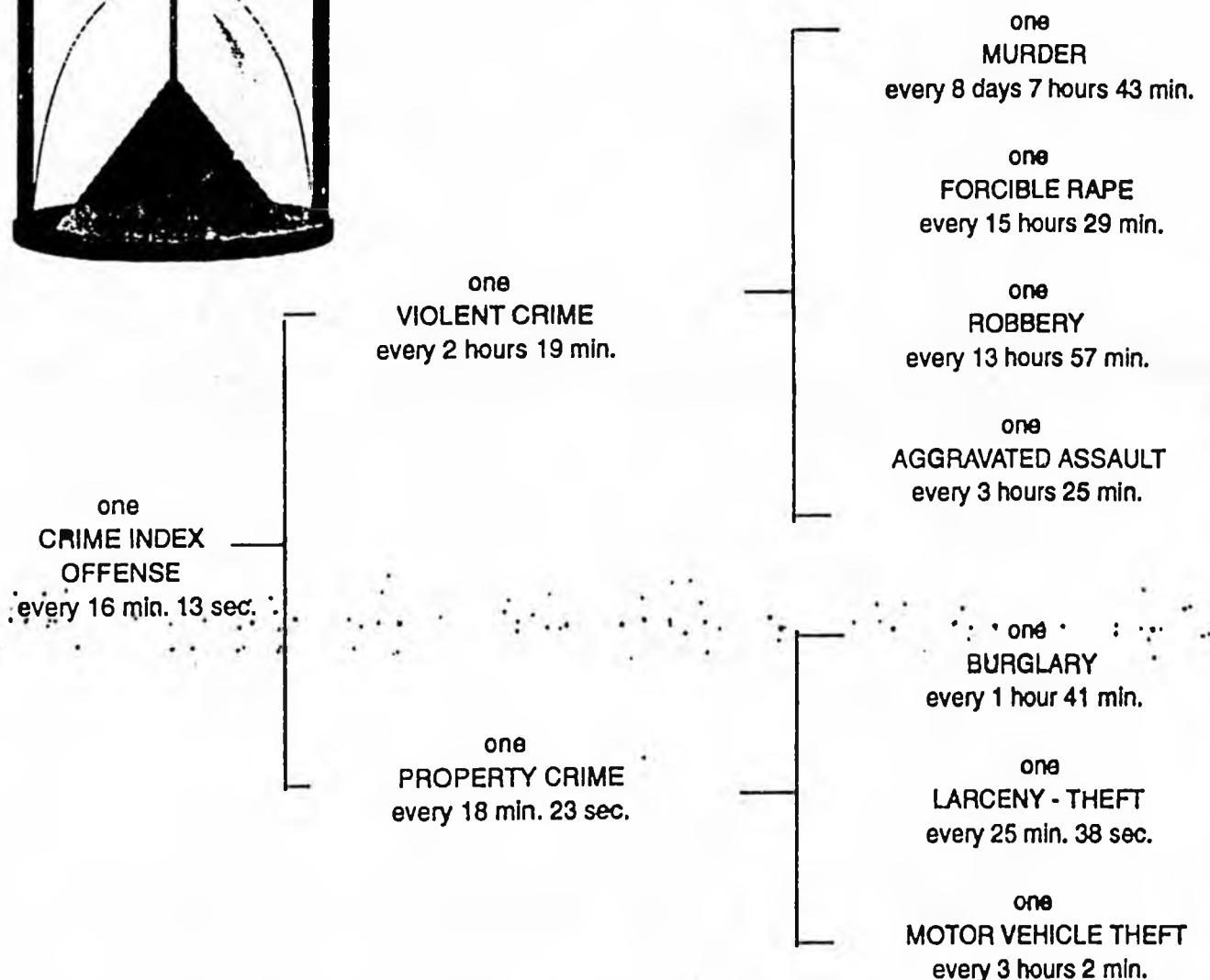
<sup>8</sup>*The Book of States*, Council of State Governments, 1990 - 1991, p. 28.

<sup>9</sup>Cannon, pp. 13 - 14.

# REPORTED CRIME FREQUENCY 1992

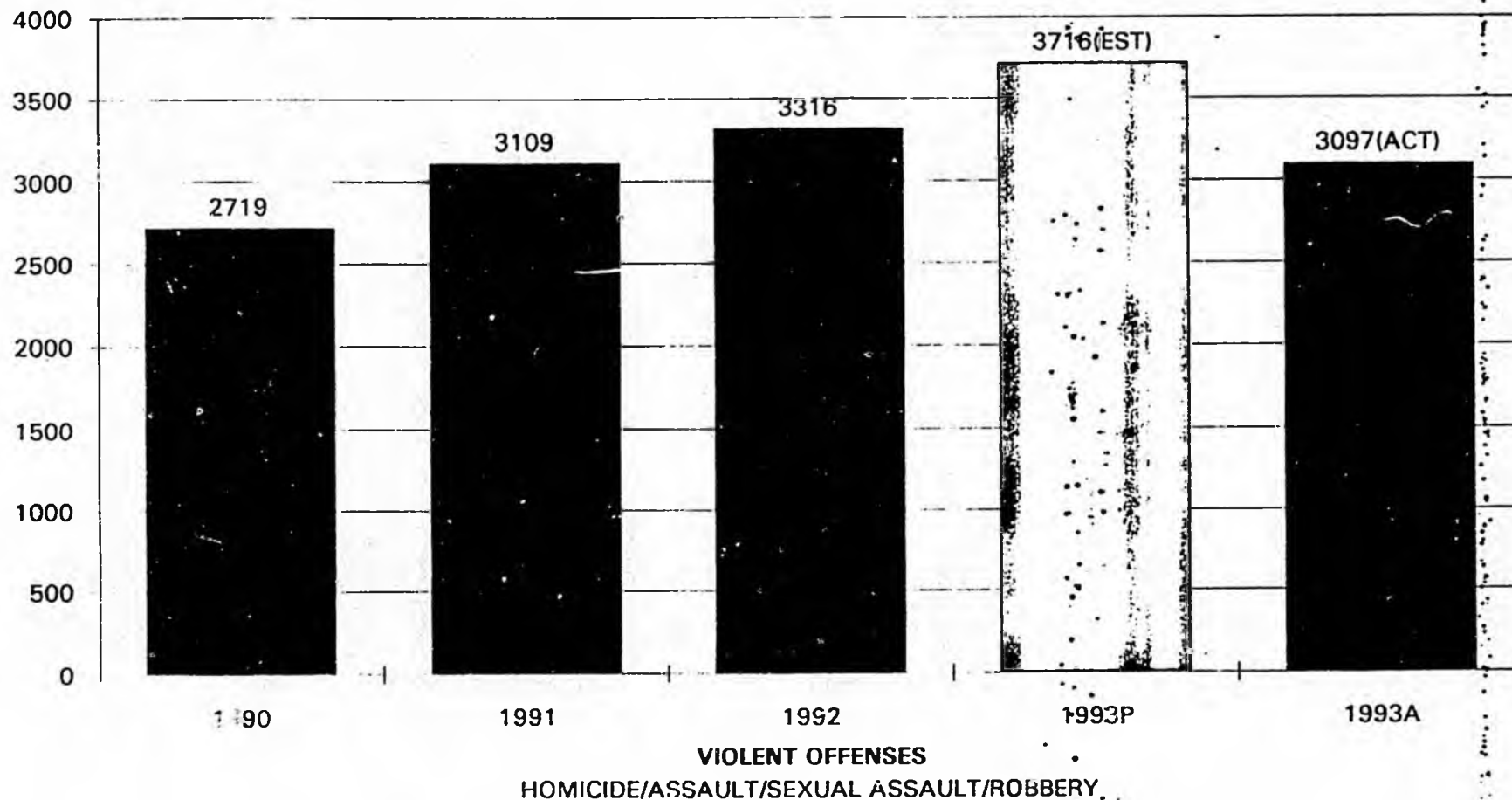


## ALASKA CRIME CLOCK 1992

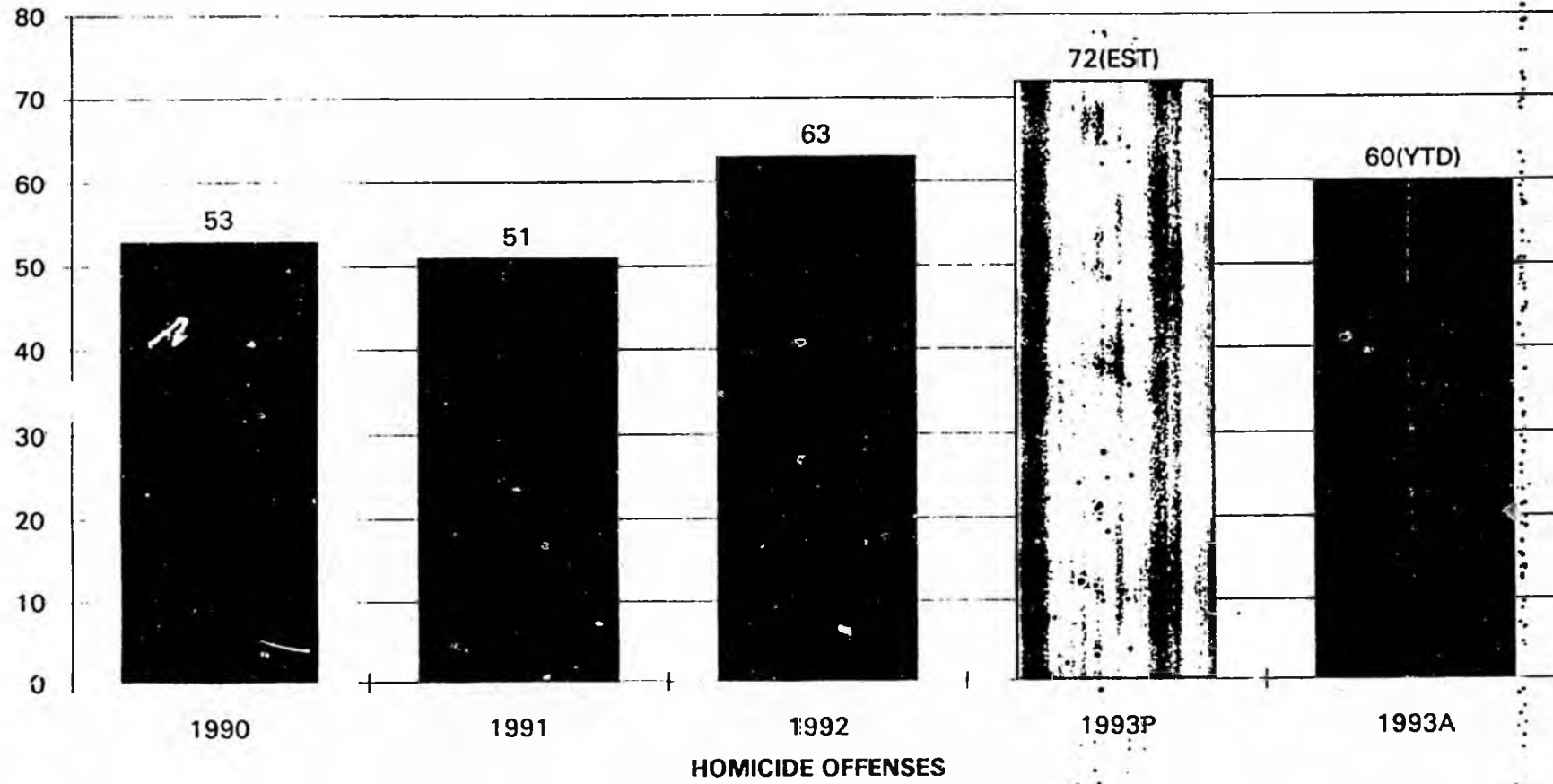


The crime clock should be viewed with care. Being the most aggregate representation of UCR data, it is designed to convey the annual reported crime experience by showing the relative frequency of occurrence of the Index Offenses. This mode of display should not be taken to imply a regularity in the commission of the Part I Offenses; rather, it represents the annual ratio of reported crime to fixed time intervals.

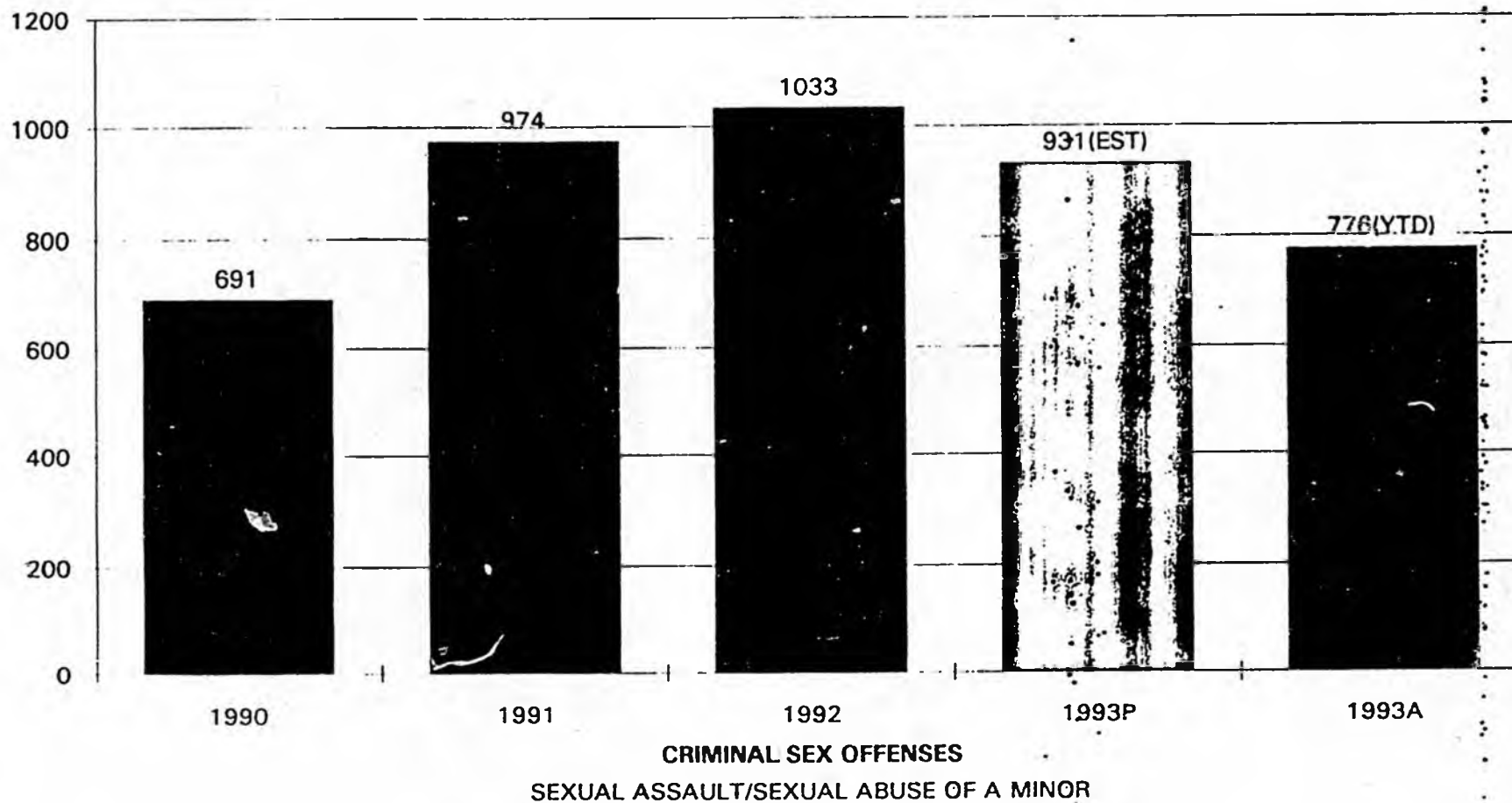
# ALASKA STATE TROOPERS



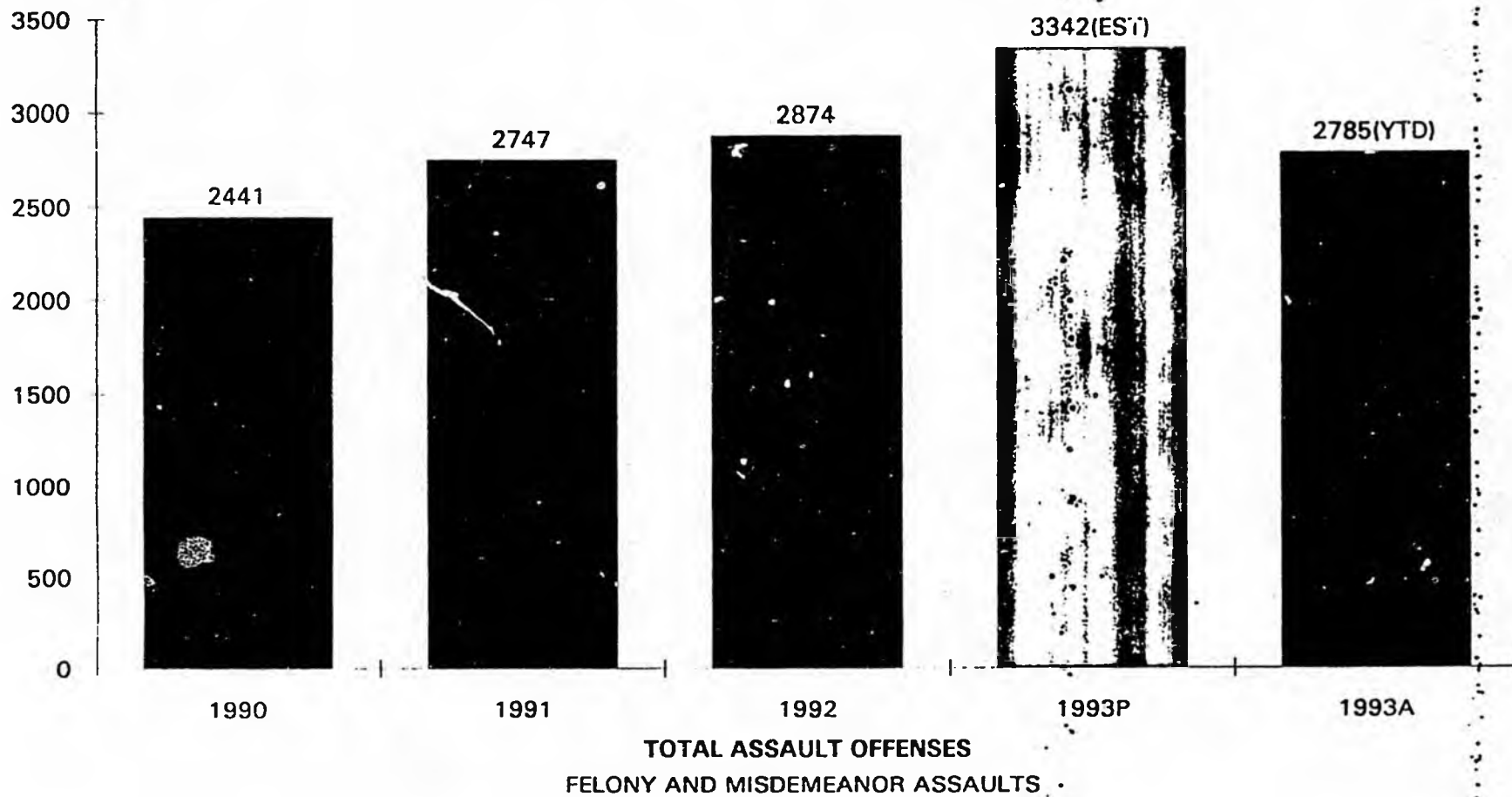
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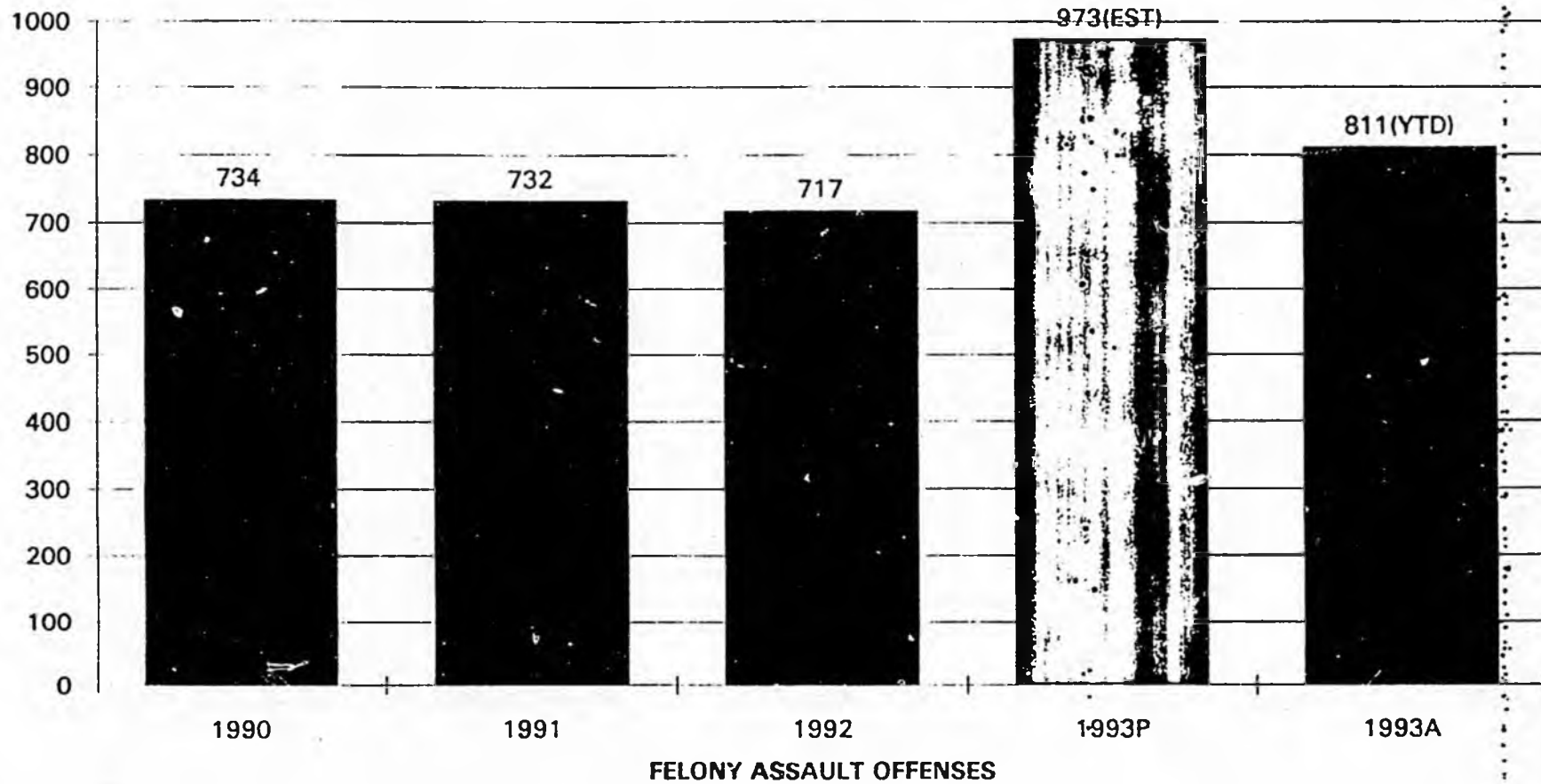
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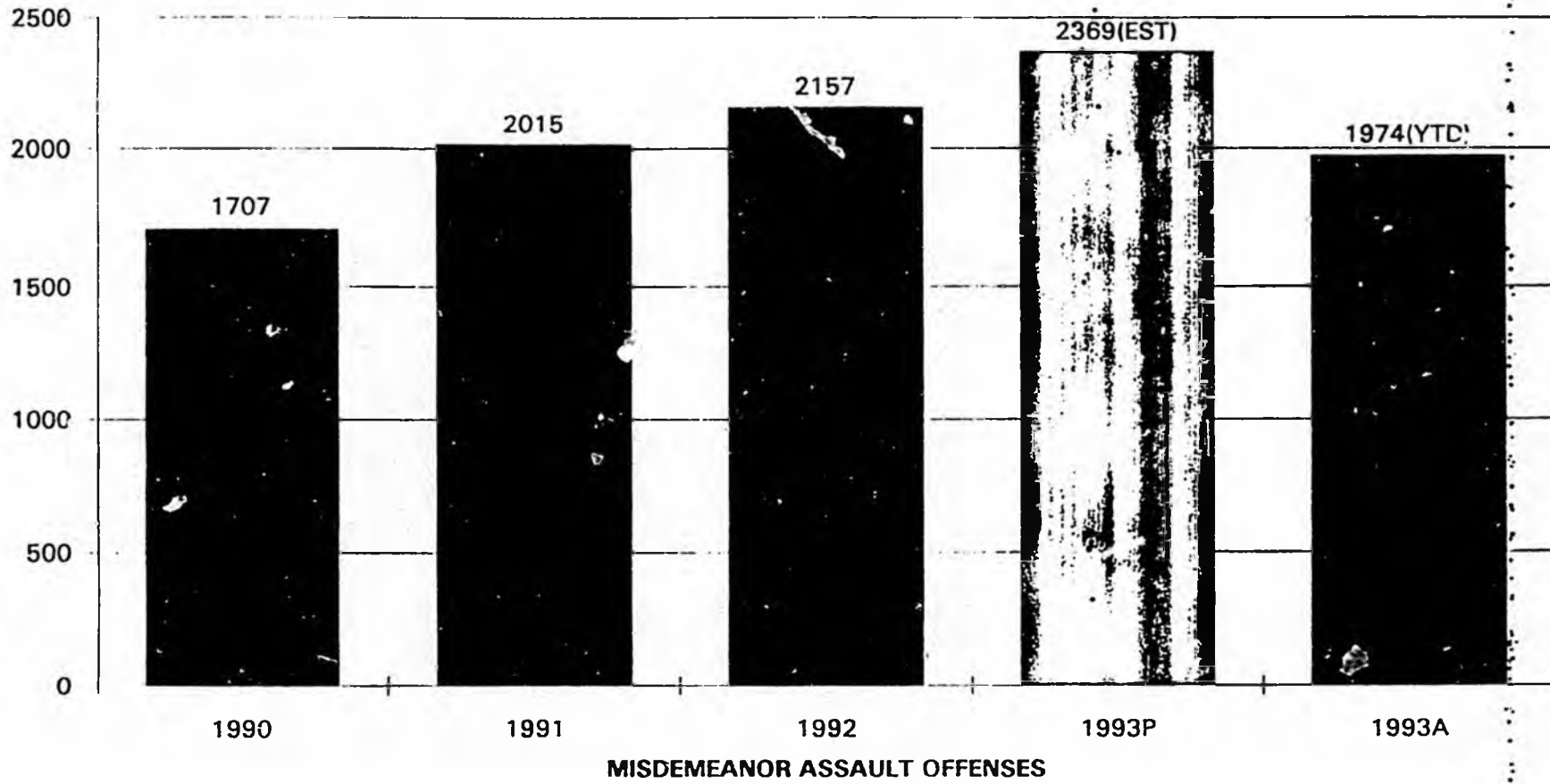
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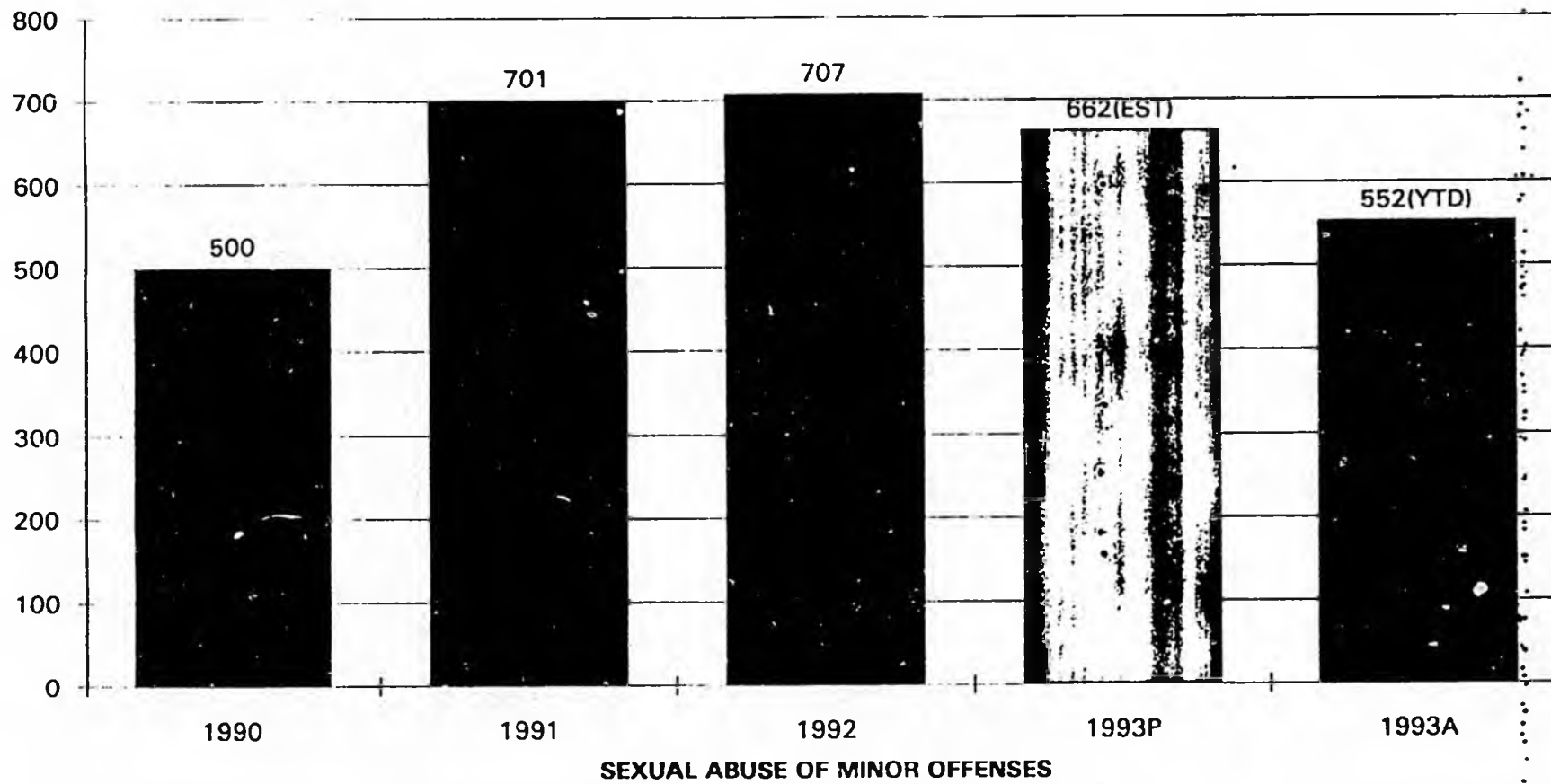
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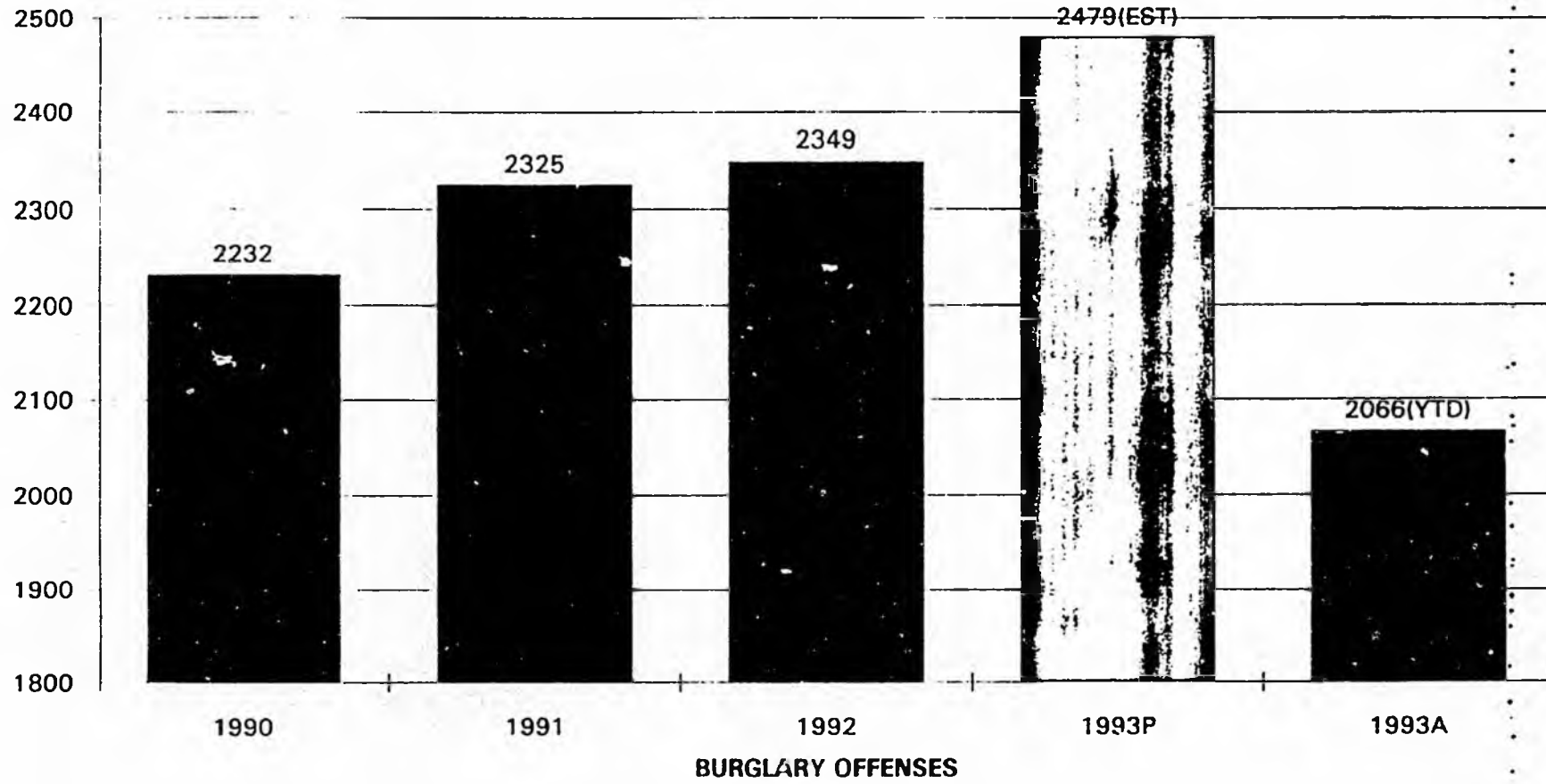
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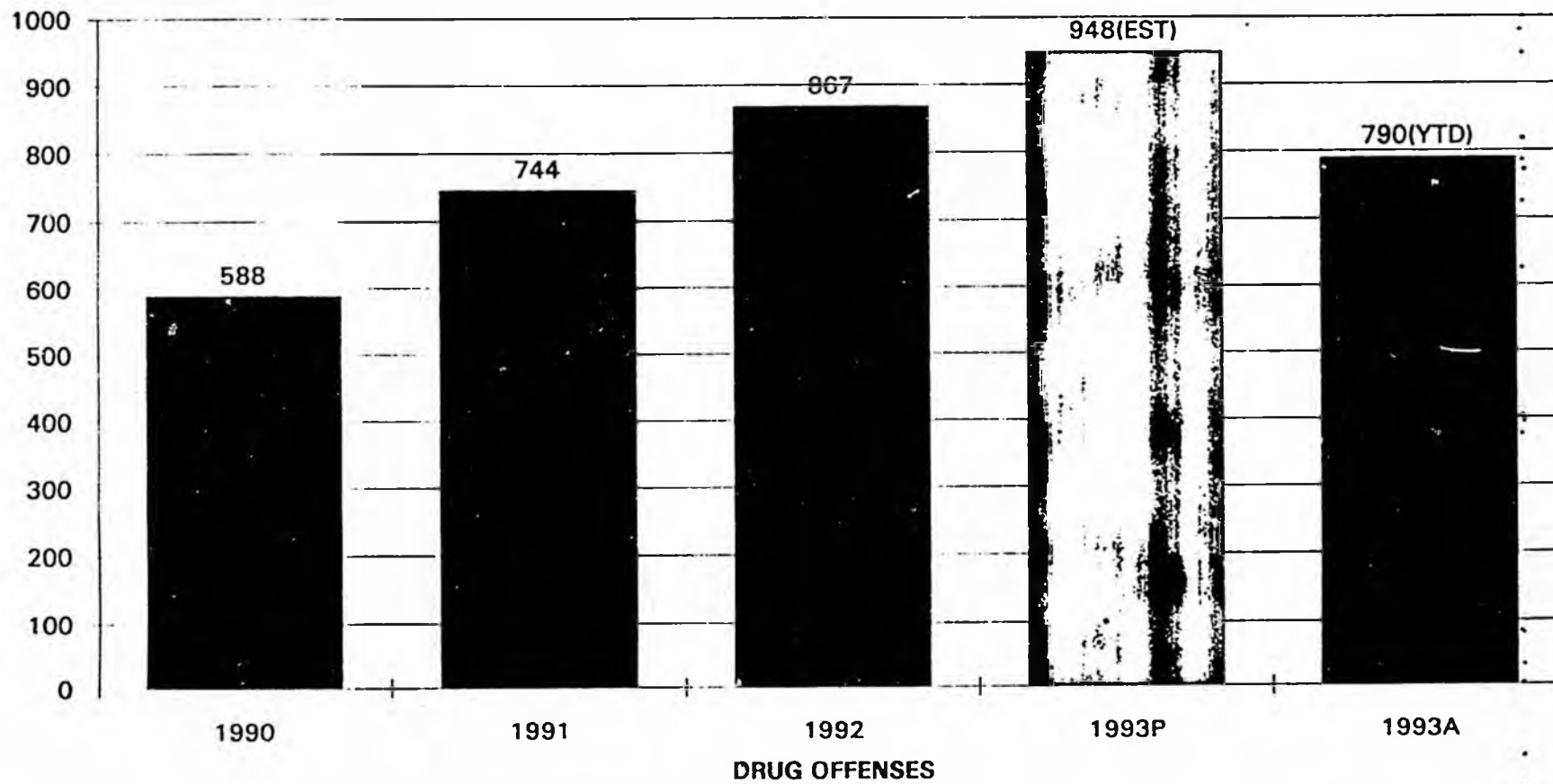
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# ALASKA STATE TROOPERS



### ALASKA STATE TROOPERS

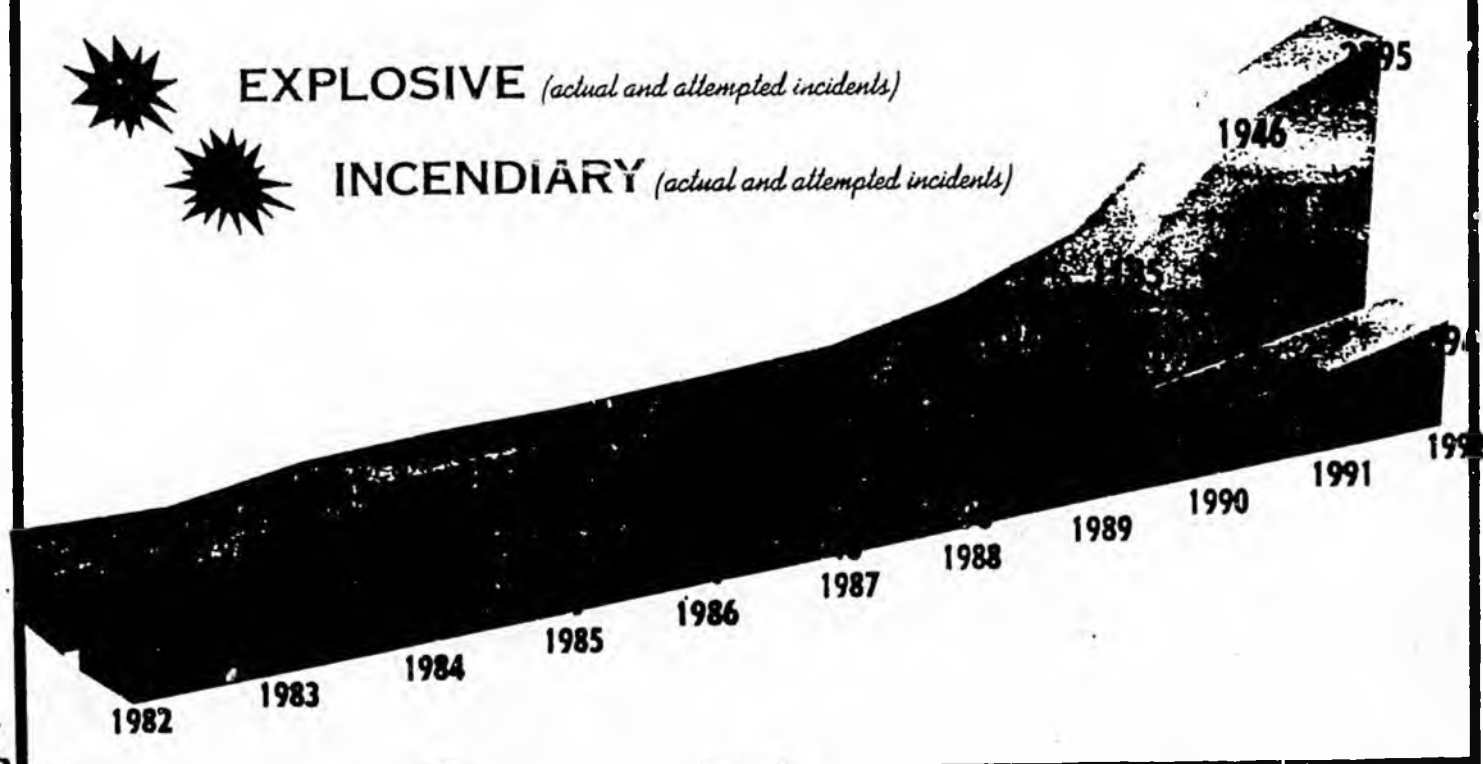


# 1992

# BOMBING INCIDENTS

# 1992

		1982	1983	1984	1985	1986	1987	1988	1989	1990	1991	1992
BY YEAR	TOTAL	795	687	803	847	858	848	977	1208	1582	2499	2989
	EXPLOSIVE	485	442	518	575	580	600	593	641	931	1551	1911
	INCENDIARY	194	127	127	102	129	104	156	203	267	423	582
Attempts	EXPLOSIVE	77	77	118	113	101	102	161	243	254	395	384
	INCENDIARY	39	41	40	57	48	42	40	91	130	130	112
\$ Millions	PROPERTY DAMAGE	7.20	6.34	5.61	6.35	3.40	4.20	2.26	5.00	9.60	6.44	12.50
	PERSONS INJURED	99	100	112	144	185	107	145	202	222	230	349
	DEATHS	16	12	6	28	14	21	20	11	27	29	26



# 1992 INJURIES AND DEATHS



STATE	INJURIES	DEATHS	STATE	INJURIES	DEATHS	STATE	INJURIES	DEATHS
AL	1	-	KY	2	-	OH	6	3
AK	-	1	LA	-	1	OK	5	-
AZ	7	-	ME	2	-	OR	4	2
AR	2	-	MD	2	2	PA	46	-
CA	56	3	MA	3	-	PR	-	-
CO	4	-	MI	28	1	RI	3	-
CT	3	-	MN	6	-	SC	2	-
DE	-	-	MS	1	-	SD	-	-
DC	2	2	MO	8	-	TN	1	3
FL	12	1	MT	4	-	TX	9	1
GA	4	-	NE	-	-	UT	3	2
HI	-	-	NV	1	1	VT	3	-
ID	-	-	NH	-	-	VA	1	-
IL	39	1	NJ	17	1	WA	5	-
IN	4	-	NM	3	1	WV	-	-
IA	3	-	NY	33	-	WI	3	-
KS	4	-	NC	7	-	WY	-	-
			ND	-	-	<b>TOTAL</b>	<b>349</b>	<b>26</b>

thirty-five

## FORUM / LETTERS

## Mail-bomb survivor backs capital punishment for Alaska

By MICHELLE KERR

Many readers may recognize my name. I survived the mail-bombing in Chugiak in September of 1991. My husband, Dave, was killed instantly and I was critically injured.

I am a lifelong Alaskan and, like most people, I felt immune to violent crime. It is something you see happening in L.A. and Miami, not Anchorage and Chugiak. My safe, secure world blew up on Sept. 17, 1991. I now realize that violent crime can happen to anyone. We envision violent crime taking place in dark alleys and involving drug dealers. For me, "the wrong place at the wrong time" was my kitchen on a Tuesday afternoon.

I attended the public hearing of the House and Senate Judiciary Committees on Nov. 16. I felt compelled to share my thoughts regarding House Bill 162 re-establishing the death penalty in Alaska. I also feel I must respond to Kathy Kainer's arguments against the bill published in a Daily News Compass.

Our case involves federal charges and is being handled in the federal court system. Under different circumstance, it could have easily fallen into state jurisdiction. Since the bombing, I have met many families of Alaska victims whose murderers could not face the death penalty. All Alaskans deserve to see the system work when our loved ones are brutally murdered.

Ms. Kainer argues that the



death penalty is not a deterrent. I believe it is. The opposition says crime rates continue to rise, even in states enforcing the death penalty. Their argument is based on the lack of "studies" showing decreased crime rates in those states. No study can accurately predict how much further the crime rate may have skyrocketed had the death penalty not been in force. Even murderers have a basic survival instinct which could deter them from committing a heinous crime.

Capital punishment will deter repeat offenders. The average time served nationally for a life sentence is only 7½ years. Often, once released, the criminal murders again. The life sentence is not a deterrent. Incarcerated criminals have nothing to lose. They may conspire to kill from the inside or even escape to kill again. Had they been executed, this would be impossible.

Even criminals realize that imprisonment alone may not stop further crime. For example, Craig Gustafson (who assisted in building the bomb) requested and received witness protection. He fears that his brother Doug and R.D. Cheely will retaliate from prison. He wants protection from people like himself who will kill at the request of inmates. These crimi-

nals have proved that prison is not always enough. We need capital punishment to stop them.

Opponents of the bill say it would unjustly punish poor, minority and mentally retarded members of society. This is not true. The district attorney does not simply decide who is sentenced to death. The bill specifically states the defendant must first be convicted of murder in the first degree and a jury determines the sentence. The jury can impose capital punishment only if they unanimously agree that one or more of the aggravating factors exist, the aggravating factors must outweigh the mitigating factors, and that the defendant be sentenced to death.

Aggravating factors that must exist are as follows: 1) defendant's conduct involved torture; 2) defendant's conduct caused the death of two or more persons; 3) defendant's conduct risked injury to three or more persons; 4) defendant has prior felony conviction involving violence or murder; 5) defendant directed offense at the president of the United States or the governor; 6) the crime was directed at a law enforcement officer, prosecuting attorney, firefighter, judge or corrections officer; 7) defendant had an agreement to either pay or be paid for the offense; 8) defendant was on release for another felony assault charge or conviction; or 9) defendant was a member of an organized group of five or more persons and the offense was committed to further the criminal objectives of the group.

Obviously, this would not apply

*For me, "the wrong place at the wrong time" was my kitchen on a Tuesday afternoon.*

to the typical alcohol-related crime of passion in Alaska. In fact, the mitigating factors that must be considered include: 1) defendant was under duress, coercion, threatened or felt compulsion that significantly affected his conduct; 2) youthful defendant was influenced by a person more mature; 3) defendant was seriously provoked by the victim; and 4) defendant assisted authorities in the apprehension of other involved criminals. All of these factors are in place to protect criminals from unjust punishment. Therefore, capital punishment will not discriminate based on race, education or financial status.

In her article, Ms. Kainer states that defendants on death row are there because they cannot afford high-powered attorneys. I argue that they are there because they have committed a violent crime. I have seen that there are plenty of high-powered attorneys willing to defend violent murderers. Doug, Craig and Peggy Gustafson and R.D. Cheely had two each at taxpayers' expense.

Ms. Kainer also quoted a classic argument, "In other words, we are going to teach that it is wrong to kill by killing the killers." The obvious point omitted is the difference between a society legally determining punishment for a specific crime versus a violent murder.

The goal is not "to teach," it is to punish. Our current system attempts to "rehabilitate" murderers rather than protect society. It is time to say enough is enough. People must suffer the consequences of their own actions. If the law states that the penalty may be death, so be it.

The weakest argument opposing capital punishment is cost. How can a price tag be put on the safety and protection of our citizens? If capital punishment deters one person from taking a life, it's worth the expense. How can a person who values human life argue otherwise? The major expense of capital punishment is not "the hangman" but rather the defense and ridiculously lengthy appeal process afforded to the convicted murderers.

If you agree that the death penalty should be re-established in Alaska, don't sit back and wait. You need to contact your legislator and voice your opinion. Even if 99 percent of Alaska residents favor the death penalty, our legislators will ultimately decide. Make sure they represent you. Don't wait until you are a victim. Please help me to stop violent crime in memory of all victims, including David Kerr.

Michelle Kerr lives in Anchorage.

A Report by the  
Death Penalty Information Center  
October 1992

# **MILLIONS MISSPENT**

What Politicians Don't Say  
About the High Costs  
of the Death Penalty

# **MILLIONS MISSPENT:**

## **What Politicians Don't Say About the High Costs of the Death Penalty**

---

*"Whether you're for it or against  
it, I think the fact is that Oregon  
simply can't afford it."*

*—James Ellis,  
Chief Criminal Judge Oregon*

---

A Report by  
The Death Penalty Information Center  
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## Executive Summary

Across the country, police are being laid off, prisoners are being released early, the courts are clogged, and crime continues to rise. The economic recession has caused cutbacks in the backbone of the criminal justice system. In Florida, the budget crisis resulted in the early release of 3,000 prisoners. In Texas, prisoners are serving only 20% of their time and rearrests are common. Georgia is laying off 900 correctional personnel and New Jersey has had to dismiss 500 police officers. Yet these same states, and many others like them, are pouring millions of dollars into the death penalty with no resultant reduction in crime.

The exorbitant costs of capital punishment are actually making America less safe because badly needed financial and legal resources are being diverted from effective crime fighting strategies. Before the Los Angeles riots, for example, California had little money for innovations like community policing, but was managing to spend an extra \$90 million per year on capital punishment. Texas, with over 300 people on death row, is spending an estimated \$2.3 million per case, but its murder rate remains one of the highest in the country.

The death penalty is escaping the decisive cost-benefit analysis to which every other program is being put in times of austerity. Rather than being posed as a single, but costly, alternative in a spectrum of approaches to crime, the death penalty operates at the extremes of political rhetoric. Candidates use the death penalty as a facile solution to crime which allows them to distinguish themselves by

the toughness of their position rather than its effectiveness.

The death penalty is much more expensive than its closest alternative—life imprisonment with no parole. Capital trials are longer and more expensive at every step than other murder trials. Pre-trial motions, expert witness investigations, jury selection, and the necessity for two trials—one on guilt and one on sentencing—make capital cases extremely costly, even before the appeals process begins. Guilty pleas are almost unheard of when the punishment is death. In addition, many of these trials result in a life sentence rather than the death penalty, so the state pays the cost of life imprisonment on top of the expensive trial.

The high price of the death penalty is often most keenly felt in those counties responsible for both the prosecution and defense of capital defendants. A single trial can mean near bankruptcy, tax increases, and the laying off of vital personnel. Trials costing a small county \$100,000 from unbudgeted funds are common and some officials have even gone to jail in resisting payment.

Nevertheless, politicians from prosecutors to presidents choose symbol over substance in their support of the death penalty. Campaign rhetoric becomes legislative policy with no analysis of whether the expense will produce any good for the people. The death penalty, in short, has been given a free ride. The expansion of the death penalty in America is on a collision course with a shrinking budget for crime prevention. It is time for politicians and the public to give this costly punishment a hard look.

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## Introduction

Over two-thirds of the states and the federal government have installed an exorbitantly expensive system of capital punishment which has been a failure by any measure of effectiveness. Literally hundreds of millions of dollars have already been spent on a response to crime which is calculated to be carried out on a few people each year and which has done nothing to stem the rise in violent crime.

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For years, candidates have been using the death penalty to portray themselves as tough on crime. But when politicians offer voters the death penalty as a solution to violence, the people actually become worse off in their fight against crime. The public is left with fewer resources and little discussion about proven crime prevention programs which could benefit their entire community. In today's depressed economy, the criminal justice system is breaking down for lack of funds while states pour more money into the black hole of capital punishment expense.

Local governments often bear the brunt of capital punishment costs and are particularly burdened. A single death penalty trial can exhaust a county's resources. Politicians singing the praises of the death penalty rarely address the question of whether a government's resources might be more effectively put to use in other methods of fighting crime. A million dollars spent pursuing the execution of one defendant

could provide far more effective long-term crime reduction: many additional police officers; speedier trials; or drug rehabilitation programs. Instead, in today's political atmosphere, politicians worry about appearing soft on crime, even if soft means espousing proven methods of crime reduction. Thus, there is little debate about whether the death penalty accomplishes any good at all.

Meanwhile, the death penalty is reaching a critical stage in America. No longer isolated in the South, the death penalty has become a national phenomenon. There are more people on death row than at any time in the nation's history. The list of states actually carrying out executions has grown to 20, with 4 new states added this year. The number of executions in 1992 is likely to be the largest in 30 years and the costs of pursuing the death penalty continue to mount. At the same time, the United States has parted company from the other democratic countries of the world which have largely abandoned capital punishment.

In the 1990 elections, politicians were particularly blatant in their promotion of the death penalty. It was advanced at all levels of the political process as an answer to crime and was used by liberals and conservatives alike. This year, the death

penalty rhetoric, while not as blatant, continues the charade: vital crime fighting programs are being cut while the high-priced death penalty goes unchecked.

Like the emperor's cowering subjects who praised his invisible robes, many politicians extol the death penalty as if it were a solution to the problem of crime. It is a cynical manipulation of the public's legitimate fear of the growing tide of violence: a symbol without substance, a "solution" for politicians who know that no credible evidence exists linking the death penalty to a reduction of murder.

This report will focus first on the role the death penalty plays in the economic crisis facing states and local governments. As budgets everywhere are being tightened, the death penalty looms as an exorbitant and superfluous "luxury item." Some counties have been pushed to the brink of bankruptcy and have had to enact repeated tax increases to fund these extremely expensive cases. As money is spent on the death penalty, it is thereby less available for the very programs which are the backbone of the effort to reduce crime in this country.

Secondly, the report will illustrate how politicians have manipulated the death penalty issue and avoided debate on the real causes of crime. Their approach has been typically marked by a simplistic rhetoric of revenge which ignores the ineffectiveness and costs of capital punishment. This superficial treatment comes

precisely at a time when the economic crisis in criminal justice and crime prevention demands that the death penalty be given a harder look.

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## The Financial Costs of the Death Penalty

Death penalty cases are much more expensive than other criminal cases and cost more than imprisonment for life with no possibility of parole. In California, capital trials are six times more costly than other murder trials.<sup>1</sup> A study in Kansas indicated that a capital trial costs \$116,700 more than an ordinary murder trial.<sup>2</sup> Complex pre-trial motions, lengthy jury selections, and expenses for expert witnesses are all likely to add to the costs in death penalty cases. The irreversibility of the death sentence requires courts to follow heightened due process in the preparation and course of the trial. The separate sentencing phase of the trial can take even longer than the guilt or innocence phase of the trial. And defendants are much more likely to insist on a trial when they are facing a possible death sentence. After conviction, there are constitutionally mandated appeals which involve both prosecution and defense costs.

Most of these costs occur in every case for which capital punishment is sought, regardless of the outcome. Thus, the true cost of the death penalty includes all the added expenses of the "unsuccessful" trials in which the death penalty is sought but not achieved. Moreover, if a defendant is convicted but not given the death sentence, the

state will still incur the costs of life imprisonment, in addition to the increased trial expenses.

For the states which employ the death penalty, this luxury comes at a high price. In Texas, a death penalty case costs taxpayers an average of \$2.3 million, about three times the cost of imprisoning someone in a single cell at the highest security level for 40 years.<sup>3</sup> In Florida, each execution is costing the state \$3.2 million.<sup>4</sup> In financially strapped California, one report estimated that the state could save \$90 million each year by abolishing capital punishment.<sup>5</sup> The New York Department of Correctional Services estimated that implementing the death penalty would cost the state about \$118 million annually.<sup>6</sup>

## The Recession and the Death Penalty

The effects of the present financial crisis on the criminal justice system vary widely, but the common thread has been cutbacks in critical areas. In a report released in August of this year, the American Bar Association found that "*the justice system in many parts of the United States is on the verge of collapse due to inadequate funding and unbalanced funding.*" The report went on to state that "the very notion of justice in the United States is threatened by a lack of adequate resources to operate the very system which has protected our rights for more than two centuries."<sup>7</sup>

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-American Bar Association

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—Scott Harshbarger,  
Attorney General of  
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New Jersey, for example, laid off more than 500 police officers in 1991.<sup>8</sup> At the same time, it was implementing a death penalty which would cost an estimated \$16 million per year,<sup>9</sup> more than enough to hire the same number of officers at a salary of \$30,000 per year.

In Florida, a mid-year budget cut of \$45 million for the Department of Corrections forced the early release of 3,000 inmates.<sup>10</sup> Yet, by 1988 Florida had spent \$57.2 million to accomplish the execution of 18 people.<sup>11</sup> It costs six times more to execute a person in Florida than to incarcerate a prisoner for life with no parole.<sup>12</sup> In contrast, Professors Richard Moran and Joseph Ellis estimated that the money it would take to implement the death penalty in New York for just five years would be enough to fund 250 additional police officers and build prisons for 6,000 inmates.<sup>13</sup>

Ten other states also reported early release of prisoners because of overcrowding and underfunding.<sup>14</sup> In Texas, the early release of prisoners has meant that inmates are serving only 20 percent of their sentences and re-arrests are common.<sup>15</sup> On the other hand, Texas spent an estimated \$183.2 million in just six years on the death penalty.<sup>16</sup>

Illinois built new prisons but does not have the funds to open them.<sup>17</sup> It does, however, have the fourth largest death row in the country. Georgia's Department of Corrections lost over 900 positions<sup>18</sup> in the past year while

local counties have had to raise taxes to pay for death penalty trials.

Police officers on the beat, imprisonment of offenders, and a functioning criminal justice and correctional system form the heart of the nation's response to crime. Yet, in state after state, these programs are suffering drastic cuts while the death penalty absorbs time, money and political attention.

### **The Cost to Local Governments**

An increasingly significant consequence of the death penalty in the United States is the crushing financial burden it places on local governments. The current economic recession has made it clear that there is no unlimited source of government largesse. Counties, which bear the brunt of the costs of death penalty trials, are also the primary deliverers of local health and human services in the public sector.<sup>19</sup> Hard choices have to be made among the demands of providing essential services, creative crime reduction programs such as community policing, and the vigorous pursuit of a few death penalty cases.

As Scott Harshbarger, Attorney General of Massachusetts, put it: “Virtually every major program designed to address the underlying causes of violence and to support the poor, vulnerable, powerless victims of crime is being cut even further to the bone. . . . In this context, the

proposition that the death penalty is a needed addition to our arsenal of weapons lacks credibility and is, as a sheer matter of equity, morally irresponsible. If this is really the best we can do, then our public value system is bankrupt and we have truly lost our way."<sup>20</sup>

While state and national politicians promote the death penalty, the county government is typically responsible for the costs of prosecution and the costs of the criminal trial. In some cases, the county is also responsible for the costs of defending the indigent. Georgia, Alabama and Arkansas, for example, provide little or no funding for indigent defense from the state treasury.<sup>21</sup> In Lincoln County, Georgia, citizens have had to face repeated tax increases just to fund one capital case.

Even where the state provides some of the money for the counties to pursue the death penalty, the burden on the county can be crushing. California, for example, was spending \$10 million a year reimbursing counties for expert witnesses, investigators and other death-penalty defense costs, plus \$2 million more to help pay for the overall cost of murder trials in smaller counties. (Now, even that reimbursement is being cut.) But many financially strapped smaller counties still could not afford to prosecute the complicated death-penalty cases. Some small counties have only one prosecutor with little or no

experience in death-penalty cases, no investigators, and only a single Superior Court judge.<sup>22</sup>

In Sierra County, California authorities had to cut police salaries in 1988 to pick up the tab of pursuing death penalty prosecutions. The County's District Attorney, James Reichle, complained, "If we didn't have to pay \$500,000 a pop for Sacramento's murders, I'd have an investigator and the sheriff would have a couple of extra deputies and we could do some lasting good for Sierra County law enforcement. The sewage system at the courthouse is failing, a bridge collapsed, there's no county library, no county park, and we have volunteer fire and volunteer search and rescue." The county's auditor, Don Hemphill, said that if death penalty expenses kept piling up, the county would soon be broke.<sup>23</sup> Just recently, Mr. Hemphill indicated that another death penalty case would likely require the county to lay off 10 percent of its police and sheriff force.<sup>24</sup>

In Imperial County, California, the county supervisors refused to pay the bill for the defense of a man facing the death penalty because the case would bankrupt the county. The county budget officer spent three days in jail for refusing to pay the bill. A judge reviewing the case took away the county's right to seek the death penalty, thus costing the county the partial reimbursement which the state provided for capital cases. The County took the challenge all the way to the California Supreme Court and

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—Norman Kinne,  
Dallas County  
District Attorney

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ended up costing the County half a million dollars.<sup>25</sup> In the criminal trial, the defendant was acquitted.

A similar incident occurred recently in Lincoln County, Georgia. The county commissioners also refused to pay the defense costs when the attorney won a new trial for a death row inmate Johnny Lee Jones. As in California, the commissioners were sent to jail. Walker Norman, chair of the County Commission explained: "We're a rural county of 7,500 people with a small tax base. We had to raise taxes once already for this case when it was originally tried, and now we are going to have to raise taxes again. It's not fair."<sup>26</sup> The first trial alone cost the county \$125,000.<sup>27</sup> The second trial was completed in September and the defendant received a life sentence.

In Meriwether County, Georgia, a county of 21,000 residents and a \$4 million annual budget, the prosecutor sought the death penalty three times for Eddie Lee Spraggins, a mentally retarded man. The case cost the county \$84,000, not including the defense attorney's bill for appealing, and the third conviction was again overturned by the Georgia Supreme Court.<sup>28</sup> Spraggins was finally granted a plea and received a life sentence.

In Mississippi, Kemper and Lauderdale Counties recently conducted a border survey battle to avoid responsibility for a capital murder trial. Faced with a case that could cost the county

\$100,000, Kemper County wanted to show that the scene of the murder was outside their border and conducted two surveys of the site. County Supervisor Mike Luke explained, "As much as we were talking about the taxpayers of Kemper County having to pay out, we believed we needed to be sure." Luke said that the decision to seek the death penalty was not his—he only had to come up with the money. Lauderdale County, where the trial was originally scheduled, has now sent a bill to Kemper County for expenses incurred while holding the defendant in jail for 19 months. Kemper County is considering how much it will have to raise taxes just to pay the initial costs of the prosecution.<sup>29</sup>

In Yazoo City, Mississippi, the town is worried that it, too, might get stuck with an expensive death penalty case. "A capital murder trial is the worst financial nightmare any government body could envision," said the editor of the local paper.<sup>30</sup>

With more death row inmates and more executions than any other state, Texas is also experiencing the high costs of executions. Norman Kinne, Dallas County District Attorney, expressed his frustration at the expense:

"[E]ven though I'm a firm believer in the death penalty, I also understand what the cost is. If you can be satisfied with putting a person in the penitentiary for the rest of his

life . . . I think maybe we have to be satisfied with that as opposed to spending \$1 million to try and get them executed. . . . I think we could use (the money) better for additional penitentiary space, rehabilitation efforts, drug rehabilitation, education, (and) especially devote a lot of attention to juveniles."<sup>31</sup>

Vincent Perini of the Texas Bar Association, calls the death penalty a "luxury": "There's some things that a modern American city and state have got to have. You have to have police and fire and public safety protection. You have to have a criminal justice system. You do not have to have a death penalty. The death penalty in criminal justice is kind of a luxury item. It's an add-on; it's an optional item when you buy your criminal justice vehicle."<sup>32</sup>

Chief Criminal Judge, James Ellis, came to a similar conclusion in Oregon: "Whether you're for it or against it, I think the fact is that Oregon simply can't afford it."<sup>33</sup> James Exum, Chief Justice of the North Carolina Supreme Court, agrees: "I think those of us involved in prosecuting these (death penalty) cases have this uneasy notion that . . . these cases are very time-consuming and very troublesome and take a lot of resources that might be better spent on other kinds of crimes. . . ."

Efforts are under way in both Congress and the Supreme Court to reduce the avenues of appeal available to death row inmates. But most of the costs

associated with the death penalty occur at the trial level.<sup>34</sup>

Whatever effect cutting back on the writ of habeas corpus may have on the time from trial to execution, it is not clear that the changes will make the death penalty any less expensive, and they may result in the execution of innocent people. With the number of people on death row growing each year, the overall costs of the death penalty are likely to increase.

Some state appeals courts are overwhelmed with death penalty cases. The California Supreme Court, for example, spends more than half its time reviewing death cases.<sup>35</sup> The Florida Supreme Court also spends about half its time on death penalty cases.<sup>36</sup> Many governors spend a significant percentage of their time reviewing clemency petitions and more will face this task as executions spread. As John Dixon, Chief Justice (Retired) of the Louisiana Supreme Court, said: "The people have a constitutional right to the death penalty and we'll do our best to make it work rationally. But you can see what it's doing. Capital punishment is destroying the system."<sup>37</sup>

### **Alternatives for Reducing Crime**

New York does not have the death penalty. In the early 1980s, the N.Y. State Defenders Association conducted a study to estimate how much the death penalty would cost if it were to be implemented in New York. The estimates were that each case

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would cost the state \$1.8 million, just for the trial and the first stages of appeal.<sup>38</sup> The majority of those costs would be borne by the local governments. New Yorkers have consistently re-elected a governor whom they know will veto any death penalty legislation which comes across his desk. Now it appears that New York may be reaping the benefit of that choice.

Significantly, no city in New York State, without the death penalty, is among the nation's top twenty-five cities in homicide rates according to statistics recently released by the FBI.<sup>39</sup> In particular, New York City bucked the national trend and experienced a decline in every major category of crime last year.<sup>40</sup> In the first four months of 1992, crime is again down across the board in New York, compared to the same period two years ago, with murders decreasing by over 11 percent.<sup>41</sup>

While direct causes for a decrease in crime are difficult to pinpoint, many experts have attributed New York's success to an increasingly popular concept known as community policing. Two years ago, New York had 750 foot officers on the street. Today that number is 3,000.<sup>42</sup> Community policing is a strategy for utilizing police officers not just as people who react to crime, but also as people who solve problems by becoming an integral part of the neighborhoods they serve.

Such programs do not come cheaply, but they do seem to be effective. In Prince George's County, Maryland, police Capt. Terry Evans said their community policing program is "the only thing I've seen in 23 years of law enforcement that's had an impact, actually turned it around."<sup>43</sup> Fully implemented, Prince George's community policing program will cost the county \$10 million per year.

The programs apparently work best where governments can afford to add officers, rather than taking from existing numbers, leaving other work unattended. This is borne out in cities like Boston where murders dropped 23 percent in 1991, partly because of a program that put more police officers on the beat.<sup>44</sup> The need for more police officers is supported by a survey of Chiefs of Police from around the country, 70 percent of whom said they could no longer provide the type of crime prevention activities they did ten years ago because of too few police officers.<sup>45</sup>

Boston, like New York, is in a state without the death penalty, though Governor William Weld (R-Mass.) has been attempting to re-instate it. That proposal has met with opposition from the state's district attorneys. Judd Carhart, past president of the district attorneys' association said a majority of the state's district attorneys oppose capital

punishment partially on the grounds that it is a waste of money better spent on other areas of law enforcement and incarceration.<sup>46</sup> Attorney General Scott Harshbarger agreed: "We need major criminal justice and court reform now to address the crisis in our criminal justice system. The death penalty, however, has no place in this reform effort. It is a simplistic, arbitrary, misguided, ineffective and costly response, cloaked in the guise of a remedy to the brutalizing violence that angers and frustrates us all."<sup>47</sup>

Compared to community policing and other successful programs, the death penalty, for all its cost, appears to have no effect on crime. A New York Times editorial noted recently that the number of executions in this country "constituted less than .001 percent of all murderers . . . and were only .000004 percent of all violent criminals. Even if U.S. executions were multiplied by a factor of 10 they would still constitute an infinitesimal element of criminal justice." The public seems to agree: only 13 percent of those who support capital punishment believe it deters crime.<sup>48</sup>

New York and Massachusetts can be contrasted with Texas which is the nation's leader in the use of the death penalty. Texas has the largest

death row and has executed almost twice as many people as the next leading state. Houston alone accounts for 10% of all people executed in the United States since 1976.<sup>49</sup> Yet, the murder rates in three of Texas' major cities rank among the nation's top 25 cities. In all three, Houston, Dallas and Fort Worth, the number of murders increased significantly last year.<sup>50</sup>

Wherever the death penalty is in place, it siphons off resources which could be going to the front line in the war against crime: to police, to correctional systems, and to neighborhood programs which have proven effective. Instead, these essential services are repeatedly cut while the death penalty continues to expand. Politicians could address this crisis, but, for the most part, they either endorse executions or remain silent.

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—New York Times  
editorial, 1992

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## Political Manipulation of the Death Penalty

What drives this high spending on such an ineffective program? The answer lies partly in the promotion by politicians who hope to benefit by advocating the death penalty. Even though it fails to meet the cost-benefit test applied to other government programs, many politicians use capital punishment to distinguish themselves from their opponents. Politicians have generally not posed the death penalty as one alternative among a limited number of crime fighting initiatives which the people must ultimately pay for. Rather, the death penalty is used to play on the public's fear of crime and to create an atmosphere in which the extreme view wins. The rhetoric then becomes policy and the people pay.

### The Death Penalty in National Politics

Flush with his party's convincing victory in the 1988 Presidential elections, Republican National Chairman Lee Atwater urged his fellow Republicans to capitalize on the issue of crime because "almost every Democrat out there running is opposed to the death penalty."<sup>51</sup> Apparently, the Democrats were listening as well since politicians of all stripes rushed to proclaim their support of capital punishment.

From Florida to California, the political races in 1990 were marked by excessive attempts by

politicians to appear tougher on crime by their willingness to execute people. Ironically, those who were most demonstrative about the death penalty were defeated, though seldom by opponents of capital punishment.

In this election year, the national political debate on the death penalty is more conspicuous for its silence. The utility of the death penalty as a defining issue was lost when most of the Democratic Presidential candidates supported the death penalty. George Bush, Bill Clinton and Ross Perot are all in favor of the death penalty, though none has made it a major campaign issue.

### George Bush: From Willie Horton to the Crime Bill

In the previous campaign, George Bush was able to link a furlough for convicted murderer Willie Horton with Michael Dukakis' position against the death penalty, thus portraying Dukakis as soft on crime. This time, President Bush has sought to convey a tough image by his support for a greatly expanded federal death penalty. When recent unemployment figures indicated that the economy was going to be a negative for the Bush campaign, his advisers called for a greater emphasis on crime to bolster the President's popularity.<sup>52</sup>

In 1990, President Bush sought to identify the Republican Party as tough on crime. He introduced a crime bill whose