ALASKA LEGISLATURE COMMITTEE FILES 1983-1984 8672

2506 SJ SB 115 - SB 121

STATE OF ALASKA 1984 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date: 11-1-83

I. REQUEST

Bill/Resolution No.: CS SB 115 (SA)
Title: Rights of Peace Officers
Sponsor: Sen. Rodey
Requestor: Senate Judiciary
Date of Request: 2-2-84

II. FISCAL DETAIL

Agency Affected: Public Safety
Program Category Affected: Justice
BRU, Program of Subprogram(s) Affected:
Alaska State Troopers

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 84	FY 85	FY 86	FY 87	FY 88	FY 89
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER (Specify Source)						
TOTAL						

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						
TOTAL						

III. SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

IV. ANALYSIS: Attach a separate page for any Analysis No fiscal impact is anticipated. (Separate page not needed.)

Prepared By: Francis C. Allan F.C.A. mcc Phone: 269-5691
Division: Alaska State Troopers Date: 11-1-83

Approved by Commissioner: R. J. Sundberg Date: 2-3-84
Department: Public Safety

Distribution:
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Copy to Sponsor
Copy to Requestor (if different from Sponsor)

9/14/83

STATE OF ALASKA
PRELIMINARY STATEMENT OF FISCAL IMPACT

Bill No: SB 115 Date on Bill: 2-9-83
Title: An Act relating to individual rights of peace officers
Sponsor: Rodey
Requestor: SENATE STATE AFFAIRS

1. Estimated fiscal impacts on:

a. Expenditures:

(Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86
Capital				
Operating				
Total	-0-	-0-	-0-	-0-

b. Revenues:

Revenue				

2. Source of funds to offset fiscal impact of bill:

Source of funds not identified by sponsor

3. Assumptions:

No fiscal impact

4. Disclaimer:
This statement has not been reviewed by the OMB in the Office of the Governor. It therefore does not represent the final estimate of fiscal impact.

Prepared By: Francis C. Allan Phone: 269-5691
Division: Alaska State Troopers Date: 2-23-83

Approved by Commissioner: [signature] Date: 3/1/83
Department: Public Safety

5. Distribution:
Original to Legislative Finance
Copy to OMB
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2/15/83

STATE OF ALASKA
FISCAL NOTE

Revision Date , 1983

I. REQUEST

Bill/Resolution No.: SB 115
Title: "Individual Rights of Peace Officers"
Sponsor: Senator Rodey
Requestor: Senate State Affairs

II. FISCAL DETAIL

Agency Affected: Public Safety
Program Category Affected: Crime & ID
BRU, Program or Subprogram(s) Affected: Alaska State Troopers

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC						
TOTAL OPERATING		-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

III. SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

IV. ANALYSIS: Attach a separate page for any Analysis No fiscal impact anticipated

Prepared By: Paul A. Conger Phone: 465-4338
Division: Administrative Services Date: 3-22-83

Approved by Commissioner: [signature] Date: 3/23/83
Department: Public Safety

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3/8/8

STATE OF ALASKA
FISCAL NOTE

Revision Date: , 1983

I. REQUEST
Bill/Resolution No.: SB 115
Title: Indiv. Rights of Peace Officers
Sponsor: Rodey, Kelly, Ray, Sturgulewski
Requestor: & Kerttula

II. FISCAL DETAIL
Agency Affected: Administration
Program Category Affected: Cen Admin Svcs
BRU, Program of Subprogram(s) Affected:
Labor Relations

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS:

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

III. SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

N/A

IV. ANALYSIS: Attach a separate page for any Analysis

Prepared By: Dean Strangham
Division: Labor Relations
Phone: 465-4404
Date: March 31, 1983

Approved by Commissioner: Lisa Rudd
Department: Administration
Date: 4/7/83

Distribution:
Original to Legislative Finance
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Copy to Sponsor
Copy to Requestor (if different from Sponsor)

3/8/83

7/0404-16-2/BDGSF1

ALASKA STATE LEGISLATURE
SENATE STATE AFFAIRS COMMITTEE
SENATOR VIC FISCHER, CHAIRMAN
POUCH V, JUNEAU 99811
(907) 465-4954

April 5, 1983
3:00pm

Butrovich Room
Capitol Bldg.

Members Present

Senator Vic Fischer, Chair
Senator Tim Kelly
Senator Arlis Sturgulewski
Senator Pat Rodey

SB 27--Toll free telephone calls

Held over pending House State Affairs Committee action on new proposal.

SB 115--Individual rights of police officers

Senator Rodey (prime sponsor) explained the provisions of the bill. He said that police officers support the bill but that police chiefs oppose it.

Chief Joe Ciraulo, Juneau Police Department (also representings other police chiefs in S.E. Alaska) spoke against the bill. He felt that having a representative of an officer present at each stage of a disciplinary hearing was unnecessary. He also opposed having to get a search warrant to search an officer's locker.

Senator Rodey said that management policies which address some of these problems can change over time. This bill offers uniform rights for all officers.

Senator Sturgulewski asked if this bill would change present policies regarding disciplinary investigations. Chief Ciraulo answered "yes".

Senator Kelly asked if this bill would apply to only local police departments. Senator Rodey responded that the bill would apply to all peace officers in the state.

Senator Fischer stated that this bill requires a written complaint pursuant to a disciplinary action and asked if that is current practice in the Juneau Police Department. Chief Ciraulo said that he thought so.

John Strutko, an Anchorage police officer, spoke in favor of the bill. He felt that it was a good management tool and that officers should not have to give up their civil rights when they put on a badge.

Senator Kelly asked if there was anything in this bill which is not already covered in the negotiated contract with the Anchorage Police Department. Mr. Strutko stated that the provisions prohibiting involuntary polygraph tests were not in the contract.

Richard Ross, Kenai Police Chief, spoke against the bill. He felt it would be a statutory interference with his municipal personnel system. He felt this system works well. He saw some merit to the polygraph provisions.

Senator Fischer asked if police officers have full fifth amendment rights under the present system. Mr. Ross answered "yes". Senator Fischer then asked if officers would lose their jobs for refusing to answer questions relating to a disciplinary investigation. Mr. Ross said "no".

Ed Martin, Kodiak Chief of Police, spoke against the bill. He said that most of the procedures in this bill are now covered in current state and federal statutory and constitutional law as well as most personnel systems.

Holli Plooq, Attorney for the Anchorage Police Officers Association, spoke for the bill. She stated that current laws limiting polygraph tests exempt police officers. She favors the use of a polygraph exam as a hiring tool but opposes its use as an investigatory tool during employment. She said that locker searches without permission were probably unconstitutional. She said that the Fairbanks Police Officers Association also supports this bill as do many officers in other departments.

Brian Porter, Anchorage Police Chief, spoke against the bill. He said that the bill is a special interest of the Anchorage Police Officers Association but is not supported by other police organizations. He felt that it was inappropriate to use a criminal law standard of proof in a personnel disciplinary matter.

Senator Rodey commented that various blue ribbon commissions have recommended approaches similar to this bill.

Rick Potter, an Anchorage police officer, spoke for the bill. He said that thirteen states have similar legislation. He opposes compulsory use of polygraphs.

Louis Bencardino, Seward Chief of Police, spoke against the bill. He said the bill would cause unneeded expenditures in overtime and other costs.

Senator Kelly commented that he is in favor of police rights but that he does not favor putting provisions into state law that are already incorporated into labor contracts.

Jean Krause, President of N.E.A. Alaska, spoke for the bill. N.E.A. believes that all employees should have full due process rights.

It was the consensus of the committee to hold the bill over.

SB 153--Punishment for obstructing a private citizen who assists a peace officer

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Senator Rodey (prime sponsor) explained the bill.

Senator Kelly moved and asked unanimous consent that the bill pass from committee with individual recommendations. There was no objection.

SB 218--Disclosure of information

Senator Kelly asked that the bill be held over.

SB 227--Alaska Council on Science and Technology

Senator Fischer said that this bill is the product of the extensive hearing the committee held on the sunset of the council and that it addressed all the concerns identified at that hearing.

Senator Rodey moved and asked unanimous consent to pass the bill from committee with individual recommendations. There was no objection.

SJR 13--Urging repeal of the Jones Act

Greg O'Cleary, Maritime Trades, testified against the resolution. He said the Jones Act is a bill of rights for American Seamen. Repeal would affect 2000 workers.

Senator Fischer stated that the Administration has problems with the timing of this measure. There are political problems with related federal issues.

Greg Olsen, FOSS Alaska Lines, said that repeal would only decrease freight rates for a short time and reduce the overall quality of service.

The resolution was held over.

Meeting adjourned at 5:00 pm.

by
David Dye
Committee Aide

ALASKA STATE LEGISLATURE
SENATE STATE AFFAIRS COMMITTEE
SENATOR VIC FISCHER, CHAIRMAN
POUCH V, JUNEAU 99811
(907) 465-4954

May 10, 1983
3:00 p.m.

Butrovich Room
Capitol Bldg.

Members Present

Senator Vic Fischer, Chair
Senator Bill Ray, Vice-Chair
Senator Pat Rodey
Senator Tim Kelly
Senator Arliss Sturgulewski

Agenda

SB 115 Rights of Peace Officers

SCR 24 Competitive bidding for travel

Drunk driving and related issues (SB 61, SB 226, HB 17)

SB 115 Rights of Peace Officers

Teleconference with Anchorage

Holli Ploog, representing the Anchorage Police Officers Association, testified in support of the committee substitute prepared by staff.

Senator Ray stated his opposition to the committee substitute. He felt that this bill is inappropriate given the nature and responsibilities of this type of occupation.

Officer Sterling, Anchorage Police Officers Association, testified for the committee substitute.

Brian Porter, Anchorage Chief of Police testified against the committee substitute. He thinks it is a special interest bill which doesn't have wide support.

Robert Henderson, Alaska Chiefs of Police Association, testified against the committee substitute.

Senator Rodey moved and asked unanimous consent to pass the bill from committee with individual recommendations. There was no objection.

SCR 24--Competitive bidding for travel

Senator Jan Faiks, prime sponsor, spoke for the bill. She said that the state travel budget is approximately $43 million, 60% of which is airfare. She sees an opportunity for substantial savings if air travel were subject to competitive bidding procedures.

Senator Ray was of the opinion that one of the unintended consequences of such a change would be to drive air carriers out of the Juneau market.

Senator Faiks stated that the federal government has successfully used competitive bidding for travel for some years now.

Anselm Staack, Deputy Commissioner of the Department of Administration, said that some savings should be achievable but that more study was needed to select among the various options. In the past the state put out requests for bids for travel and did not receive a single bid.

Senator Kelly moved and asked unanimous consent that the bill pass from committee with individual recommendations. There was no objection.

Drunk driving and related issues (SB 61, SB 226, HB 17)

This was an informal work session to consider CSSB 61 [which is identical to CSHB 6(Jud)] along with a series of amendments agreed upon by the committee. The committee was joined at the table by Gayle Horetski, Department of Law, Peggy Berck, Public Defender Agency, Russ Josephson, Legislative Legal Services, and Karla Forsythe, Alaska Court System.

Six of the proposed seven amendments were adopted by the committee (see attached). Two other changes were considered and added to the bill. Senator Rodey wanted to have "sobriety check points" included as a purpose clause to the bill as he didn't think that a letter of intent would have enough impact. Karla Forsythe of the Alaska Court System related the concerns of the court system about the impact of having the license revocation hearing under the court system. She said that one of the most important aspects of the administrative license revocation process is the swiftness in which the hearing could be done.

She said that this hearing would bog down the court system, and that the purpose of the administrative license revocation process would not be accomplished. She suggested that the hearing be done administratively under the Department of Public Safety. The committee agreed to put the administrative under the Department of Public Safety.

Some questions were raised about the impoundment provision that was in the original HB 6. Senator Rodey agreed to look into impoundment and come back to the committee with conclusions about its feasability.

The meeting adjourned at 5:12pm.

by
David Dye
Committee Aide

POSITION PAPER
SENATE BILL 115

This bill would provide, in great detail, individual rights for peace officers facing investigation which might lead to criminal action or civil liability, discipline, or "punitive action". Areas dealt with include written complaints, scheduling and conduct of interrogations, transcripts and recordings, polygraphs, personnel files and the right to representation or assistance.

We oppose this bill. Peace officers by definition are public employees, with rights to collectively bargain. Much of this bill deals with "personnel policies affecting the working conditions of employees" [AS 23.40.250(7)], which are subject to collective bargaining. In one State employee bargaining unit, extensive negotiations have occurred on the subjects addressed by the bill, and agreement has been reached on most of them (see Article 7 of the attached contract).

Prepared by:

Guy Stringham
Director
Division of Labor Relations

24 March 93
Date

Approved by:

Lisa Rudd
Commissioner
Department of Administration

4/7/93
Date

7/0323-08-4/BDGSF!

LETTER OF UNDERSTANDING #1
between
STATE OF ALASKA
and
PUBLIC SAFETY EMPLOYEES ASSOCIATION

Re: ARTICLE 7

It is understood and agreed between the parties that the provisions of Article 7 do not necessarily apply to all situations or incidents which may result in the discipline of a member of the bargaining unit. The Employer may immediately discipline any member if the Employer, after considering the circumstances of each individual case, deems it necessary that prompt disciplinary action be administered. When it becomes necessary for the Employer to initiate disciplinary actions against any member, such actions shall be administered in a fair and impartial manner, with due regard for the circumstances of the individual case.

Article 7 shall apply only to investigations or interrogations of a member conducted by the Commissioner or his authorized representatives, and which is for the purpose specified in Section 1(d). The Article shall not apply to communications between the member and his/her present chain of command (up to and including the level of Detachment Commander), unless such communications are a direct result of an administrative investigation authorized by the Commissioner.

It is further agreed that information which is obtained in the course of a criminal investigation of a member may be used in the disciplining of a member, whether or not an administrative investigation has been conducted. However, any discipline resulting from the use of such information must meet the test of just cause, and the member shall be entitled to Association representation in any meetings between the Employer and the member regarding discipline which has, or is to be, administered.

Article 7, Section 1(m), shall mean that no more than two (2) Association representatives may be present at such interviews.

This Letter of Understanding will be effective from January 1, 1983 through December 31, 1983, after which the Agreement language once again will become the sole authority of the collective bargaining application of this procedure.

Commissioner of Administration
State of Alaska
Date: 1/25/83

President
Public Safety Employees Association
Date: Jan 25 1983

Spokesperson
Public Safety Employees Association
Date: Jan 25, 1983

0124-01/PSEA1/dlr

LETTER OF UNDERSTANDING #5
BETWEEN
STATE OF ALASKA
AND
PUBLIC SAFETY EMPLOYEES ASSOCIATION
Re: ARTICLE 38

It is understood and agreed between the parties that, except as it is modified by the attached Letters of Understanding, the 1982 Agreement shall be extended and shall remain in effect from January 1, 1983 until December 31, 1983. Except for this modification of effective dates, all existing terms of Article 38 shall remain in effect during the period from January 1, 1983 until December 31, 1983.

Commissioner of Administration
State of Alaska
Date: 1/25/83

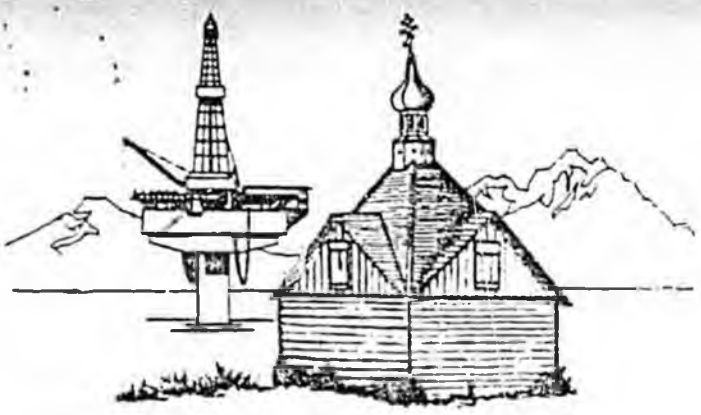
Edward J. Hart
President
Public Safety Employees Association
Date: Jan 25, 1983

Spokesperson
Public Safety Employees Association
Date: Jan 25, 1983

Attachments: Letter of Understanding #1, Re: Article 7
Letter of Understanding #2, Re: Article 15, Section 2
Letter of Understanding #3, Re: Article 15, Section 11
Letter of Understanding #4, Re: Article 20

6/0124-05/PSEA1/dlr

SB115



CITY OF KENAI

"Oil Capital of Alaska"

P. O. BOX 580 KENAI, ALASKA 99611
TELEPHONE 283 - 7535

February 22, 1983

Kenai Police Department
P. O. Box 3173
Kenai, Alaska 99611

The Honorable Vic Fischer
ALASKA STATE SENATE
Pouch V
Juneau, Alaska 99811

Dear Mr. Fischer:

This letter is submitted to request that you oppose the enactment of Senate Bill 115. This Bill should not be enacted into law for the following reasons:

1. Proposed Sec. 18.65.530: Peace officers presently have all rights of any other citizen when accused under law in a criminal action.

2. Proposed Sec. 18.65.531-33: Most of the legislation in these sections is, or should be dealth with through municipal personnel ordinances. Enactment of a special State Law that supercedes Municipal Ordinances for one class of employee, peace officers, would appear unnecessary, and even divisive to each municipalities personnel system.

3. Proposed Sec. 18.65.531(9): In the matter of Polygraph examinations the police officer is presently treated substantially different than other citizens as a matter of law. Is it not justifiable through that in this one area that the greater benefit of society is placed ahead of the individual rights of the officer? This in view of the responsibilities and authorities of a police officer, and the importance of credibility in the law enforcement function.

4. Proposed Sec. 18.65.531(11): In contrast, this section provides a "right" that is beyond that provided to any other governmental wo ker or worker in private industry. Patrol cars, desks, and other assigned "space" would no longer be the property of the agency, for purposes of compliance inspections and review on which administrative actions could be taken, but would become the protected private space of the employee.

This Bill attempts to address a problem that may exist primarily in rumor and conjecture. If in fact it is a reaction to specific incidents, it is submitted they have been isolated and should not be the subject of Statuatory over kill. On the

other hand, Statuatory enactment of some of the "rights" could be counterproductive to law enforcement in the State of Alaska. In extreme applications it could prevent effective handling of occasional police misconduct. This would eventually erode public confidence in law enforcement in our State.

Respectfully,

Richard A. Ross
Chief of Police
Kenai Police Department

RAR/ga

SENATE STATE AFFAIRS
STANDING COMMITTEE
April 19, 1983
3:00 p.m.

Members Present: Senator Vic Fischer, Chair
Senator Tim Kelly
Senator Pat Rodey
Senator Arliss Sturgulewski
Senator Bill Ray

COMMITTEE CALENDAR

SB 115 — Amended Title: An Act relating to individual rights of peace officers.

SB 57 — Amended Title: An Act Limiting the adjustment of retirement benefits; and providing for an effective date.

SB 59 — Amended Title: An Act relating to government interests in intellectual work products developed at the expense of the state.

SB 137 — Amended Title: An Act requiring public officers and employees who engage in lobbying to comply with the regulation of Lobbying Act (AS 24.45); and providing for an effective date.

HB 142 — Amended Title: An Act making a special appropriation to the Department of Commerce and Economic Development for payment as a grant Iditarod Trail Committee Inc. for expenses of conducting 1984 Iditarod Sled Dog Race; provide effect. date.

WITNESS REGISTER

Terry Cramer, Administrative Assistant
Blue Ribbon Commission on State Personnel
Pouch YG, Juneau, AK 99811
465-4442
Position Statement: Testified on SB 57 and SB 59.

Ken Humphries, Director
Division of Retirements and Benefits
Department of Administration
Pouch C, Juneau, AK 99811
Phone number not given
Position Statement: Opposed the bill.

Stan Moberly
Department of Fish and Game
P.O. Box 3-2000
Juneau, AK 99801
465-4160
Position Statement: Testified in support of SB 59.

Representative Ron Larson
Alaska House of Representatives
Pouch V, Juneau, AK 99811
465-3727
Position Statement: Testified on HB 142.

Chris Noah, Executive Director
Council on Science and Technology
Pouch CV, Juneau, AK 99811
465-3510
Position Statement: Testified on SB 59.

Lee Powelson
APEA
340 North Franklin
Juneau, AK 99801
586-2334
Position Statement: Testified on SB 59.

Greg Young
Private Citizen
9719 Trapper's Lane
Juneau, AK 99801
789-2639
Position Statement: Testified against the bill.

Dale young
Private Citizen
9720 Trapper's Lane
Juneau, AK 99801
789-0740
Position Statement: Testified on SB 59.

Sandy Stone
Senator Faiks' staff
Pouch V, Juneau, AK 99811
465-3770
Position Statement: Testified in favor of SB 137.

PREVIOUS ACTION

SB 115	Please refer to Senate State Affairs Committee minutes dated 04/05/83.
SB 57	Please refer to Senate State Affairs Committee minutes dated 02/08/83.

SB 59	There is no previous action to report on this bill in the Senate State Affairs Committee.
SB 137	Please refer to Senate Finance Committee minutes from 04/05/83. Please refer to Senate State Affairs Committee minutes dated 03/29/83.
HB 142	Please refer to House Labor and Commerce committee minutes from 03/11/83 and 04/07/83. Please refer to House Finance Committee minutes from 03/23/83. There is no previous action to report on this bill in the Senate State Affairs Committee.

ACTION NARRATIVE

TAPE# 1, 04/19/83, SIDE 1

Recording Number 000	The meeting of the Senate State Affairs Committee was called to order at 3:00 p.m. by Chair Vic Fischer with all member Senators present.
Number 001	SB 57 was brought before the committee.
Number 048	Terry Cramer, Administrative Assistant to the Blue Ribbon Commission on State Personnel, testified that generally changes in the proposed committee substitute are appropriate.
Number 103	Ken Humphries, Director of the Division of Retirements and Benefits, is opposed to the bill. He proposes a second committee substitute. He feels that current procedures for board review and waiver of overpayments is adequate. He thinks that persons who receive a waiver for an overpayment should be required to show that they did not have reasonable knowledge of the overpayment. He also thinks the retirement board should be able to review these cases.
Number 170	Senator Ray disagrees with Mr. Humphries. This bill is designed to correct shortcomings of the retirement boards. He related an example of someone who was unfairly treated by the system. He thinks it is necessary to put these changes into statute.

Number 240 — Senator Kelly thinks that people who receive overpayments have the obligation to notify the state.

Number 258 — Chair Vic Fischer asked about people who have no knowledge that they are being overpaid.

Number 300 — General discussion between Senator Ray and Mr. Humphries concerning the history of the retirement boards and solving these problems in good faith.

Number 462 — Senator Sturgulewski moves and asks unanimous consent to adopt the committee substitute submitted by Mr. Humphries. There was no objection.

Number 470 — Senator Rodey moves to pass the bill with individual recommendations. There was no objection.

Number 485 — SB 59 was brought before the committee. Terry Cramer testified in support of the bill. She gave a general explanation of the bill.

Number 578 — Senator Ray supports the bill.

Number 596 — Stan Moberly, Director of the F.R.E.D. Division of the Department of Fish and Game testified in support of SB 59.

Number 000 — BEGIN SIDE 2, TAPE 1

Number 001 — Testimony by Stan Moberly continues.

Number 201 — HB 142 was brought before the committee. Representative Ron Larson gave a summary of the bill. Senator Ray moved to take up the committee substitute. Senator Ray moved to pass the bill out of committee with individual recommendations. There were no objections.

Number 252 — Testimony on SB 59 continued. Chris Noah, Executive Director of the Council on Science and Technology, testified that the council has no problem with the bill.

Number 285 — Lee Powelson of APEA testified as to APEA's written statement.

Number 300 — Chair Vic Fischer doesn't agree with the

sweeping APEA statement.

Number 311 — Senator Ray agrees with Senator Fischer. He thinks anything developed on government time should belong to the state.

Number 375 — Greg Young, representing himself, testified against the bill. He doesn't like the waiver system in the bill.

Number 435 — Senator Ray disagrees with the previous witness.

Number 505 — Dale young, representing himself, said he supported Stan Moberly's testimony. He thinks the idea of giving an incentive to innovators is a good idea.

Number 563 — Senator Ray disagrees with the idea that state employees who develop innovations on state time should own the innovations.

Number 000 — TAPE 2, SIDE 1

Number 001 — Discussion continues on SB 59.

Number 050 — Senator Sturgulewski wants to encourage innovation.

Number 120 — Senator Rodey thinks that the problem is managerial in nature.

Number 288 — SB 137 was brought before the committee. Senator Faiks had a proposed committee substitute. Sandy Stone of Senator Faiks' staff gave a summary of the CS. There was a discussion of the committee substitute. One of the high points of the discussion was that only elected municipal officials would have to file with APOC as lobbyists. Chair Vic Fischer said that one thing that could be done would be to insert "appointed" instead of "elected".

Number 426 — Senator Ray moved to adopt the committee substitute and he moved the committee substitute out of committee with individual recommendations.

Number 448 — The committee meeting was adjourned at 4:30.

SENATE STATE AFFAIRS
STANDING COMMITTEE
Teleconference
May 10, 1983
3:00 p.m.

Members Present: Senator Vic Fischer, Chair
Senator Bill Ray
Senator Pat Rodey
Senator Tim Kelly
Senator Arliss Sturgulewski

COMMITTEE CALENDAR

SB 115 — Amended Title: An Act relating to individual rights of peace officers.

SCR 24 — Amended Title: Relating to competitive bidding for travel.

Drunk Driving and Related Issues (including SB 61, SB 226, and HB 17)

WITNESS REGISTER

Holli Ploog
Anchorage Police Officers Association
Address and phone not provided
Position Statement: Testified in support of the proposed committee substitute for SB 115.

Officer Sterling
Anchorage Police Officers Association
Address and phone not provided
Position Statement: Testified for the CS for SB 115.

Brian Porter, Police Chief
Anchorage, AK
Address and phone not provided
Position Statement: Testified against the CS for SB 115 as a special interest bill.

Robert Henderson
Alaska Police Chiefs Association
Address and phone not provided
Position Statement: Testified against the CS for SB 115.

Senator Jan Faiks
Alaska State Senate
Pouch V, Juneau, AK 99811
465-3770
Position Statement: Explained the history of SCR 24.

Anselm Staack, Deputy Commissioner
Department of Administration
Pouch C, Juneau, AK 99811
465-2200
Position Statement: Testified on SCR 24.

Gayle Horetski
Department of Law
Address and phone not provided
Position Statement: Testified on drunk driving and related issues.

Peggy Berck
Anchorage Public Defender Agency
Address and phone not provided
Position Statement: Testified on drunk driving and related issues.

Karla Forsythe
Court System
303 K St., Anchorage, AK
264-0634
Position Statement: Testified on drunk driving and related issues.

Russ Josephson
Legislative Legal Services
Address and phone not provided
!xPS!xTestified on drunk driving and related issues.

PREVIOUS ACTION

SB 115	Please refer to Senate State Affairs Committee minutes dated 04/05/83 and 04/19/83.
SCR 24	There is no previous action to report on this bill.
	The Topic "Drunk Driving and Related Issues" was heard in the Senate State Affairs Committee on 04/07/83, 04/09/83, 04/11/83, 04/12/83, 04/26/83, 04/28/83 and 05/05/83.

ACTION NARRATIVE

TAPE# 1 for 05/10/83, SIDE 1	
Recording Number 000	The 05/10/83 Anchorage Teleconference meeting of the Senate State Affairs Committee was called to order at 3:00 p.m. by Chair Vic Fischer with all member

senators present.

Number 001 — Senate Bill 115 was brought before the committee.

Number 022 — Holli Ploog of the Anchorage Police Officers Association testified that that organization supports the proposed committee substitute.

Number 126 — Senator Ray does not support the CS.

Number 133 — Officer Sterling, Anchorage Police Officers Association, testified for the CS.

Number 168 — Brian Porter, Anchorage Police Chief, testified against the CS as a special interest bill.

Number 201 — Robert Henderson, Alaska Police Chiefs Association testified against the CS.

Number 240 — End of Teleconference portion of the Senate State Affairs Committee meeting.

Number 273 — Senator Rodey moves to pass Senate Bill 115 with individual recommendations. There were no objections. SCR 24 was brought before the committee.

Number 297 — Senator Jan Faiks explained the history of SCR 24. 43 million dollars was paid for state travel. 60 percent is airfare. There is a chance for substantial savings. AS 37.05.230 now requires competitive bids, but Labor and Commerce didn't think a bill was required. Senator Faiks thinks the Administration needs encouragement.

Number 360 — Senator Ray said this would be useful for Anchorage. In Juneau it could drive one air carrier out and turn Juneau back into a 1 airline place.

Number 382 — Senator Faiks said it won't do that. It would be on a route by route basis.

Number 403 — Senator Ray thought Senator Faiks' answer was too simplistic.

Number 429 — Senator Faiks explained that no other state travels like Alaska does. The Federal government has been doing this for years successfully.

Number 439 — Senator Kelly supported the bill.

Number 444	Senator Ray was compelled to answer as there was a snide personal attack on him. Having the state buy an airplane turned out to be a bad idea.
Number 464	Senator Sturgulewski asked what would happen if all business went to one carrier.
Number 508	Senator Kelly commented on competition. There is something wrong with the market intervention approach.
Number 540	Senator Faiks stated that she's interested in saving the state dollars.
Number 550	Senator Ray said that this is penny wise and pound foolish.
Number 560	Anselm Staack, Deputy Commissioner of the Department of Administration, said that there are some savings that should be available. They have gathered much information. They already have statutory authority. Possible options are: 1. An exclusive use contract with airlines. A bid went out but there was no response. 2. Contracts with a travel agency. 3. Direct negotiations with airlines. 4. A state established travel agency.
Number 647	Mr. Staack stated that their recommendation is that they would have no objection to the resolution.
Number 670	Senator Sturgulewski asked whether they were going to try to isolate negative effects.
Number 699	Mr. Staack said that there are methods of doing this.
Number 711	Senator Ray said the Department of Administration should study who should stay home.
Number 735	Mr. Staack said that if carriers are willing to give these discounts, they should give them to us.
Number 758	Senator Ray commented that Southeast Alaska has long subsidized the travel of Anchorage.
Number 773	Senator Kelly moved the bill out with individual recommendations with no objections.

Number 793	The topic "Drunk Driving and Related Issues" was brought before the committee. Chair Fischer stated that amendments have been drafted to meet problems.
Number 803	There ensued a discussion of the future course of the Senate and House bills.
Number 842	Senator Ray leaves the meeting as this will be coming to the Judiciary Committee.
Number 855	Chair Fischer says that the committee of first referral should pass out a bill in its best shape.
Number 867	Chair Fischer says we could hold off until HB 6 and 17 have received action.
Number 877	Senator Sturgulewsik explains that this is her only chance at this and she would like to work on it.
Number 000	BEGIN TAPE 2, SIDE 1
Number 001	Witnesses join the committee at the table: Gayle Horetski, Peggy Berck, Karla Forsythe, and Russ Josephson. The committee is working from a document comparing bills.
Number 092	Gayle Horetski explains the Committee Substitute.
Number 174	Senator Sturgulewski questions the idea of administrative hearing by the issuing agency.
Number 202	Karla Forsythe referrs to the model act which has administrative appeals. She said there is a long delay in calendaring hearings and doing administrative accounts. They need new judges.
Number 290	Senator Sturgulewski agrees to take administrative part for licencing revocations.
Number 330	Ms. Horetski continues to explain the CS.
Number 382	Senator Sturgulewski asks if 15 years is too long if a person is rehabilitated.
Number 395	Senator Fischer said that he would go along with it.

Number 406	The committee reaches a consensus on 10 years.
Number 460	Senator Kelly asks about removing "reckless driving" from the bottom of Page 5. Ms. Horetski says she will get back to the committee with the information.
Number 520	Ms. Horetski continues.
Number 590	For consistency, all times should be ten years.
Number 629	Amendment to PBT number 7.
Number 803	Chair Fischer brings up a substitute amendment for a section in the CS.
Number 877	Senator Kelly asks if they've gotten away from probable cause. The answer is yes.
Number 000	BEGIN TAPE 3, SIDE 1
Number 001	Discussion on page 12 section 15.
Number 023	Discussion on section 16 regarding a penalty for breath test refusal. This is changed to 10 years.
Number 130	Discussion on section 17, conforming amendment.
Number 135	Discussion on section 18, forfiture.
Number 181	David Dye, Aid to Senator Fischer, asks who has liabilities for impounded vehicles.
Number 191	Ms. Horetski explains that the entity seeking forfiture has liability.
Number 209	Senator Rodey asks whether forfiture should be on a first offense and received no positive response.
Number 231	Discussion on amendments on forfiture, number 1, fine ceiling.
Number 275	Chair Fischer: forget this.
Number 276	Discussion on open containers.
Number 348	Discussion on treatment, amendment number 3. No objection.

Number 380	Ms. Horetski explains the amendment number 4. It is adopted.
Number 408	Discussion on amendment 5, recommended by the Department of Law.
Number 433	Discussion on amendment 6. This was dealt with before.
Number 438	Discussion on amendment 7. This was put in to take a further look at it.
Number 496	The proposed letter of intent is brought up. It is not taken up. Senator Rodey suggests putting statutory intent language in.
Number 520	Chair Fischer asks why impoundment was changed. Gayle Horetski said that a conflict between statutes made problems.
Number 566	Chair Fischer asks if Senator Rodey would work on impoundment.
Number 588	The meeting is adjourned at 5:12 p.m.

SB

121

SENATE JUDICIARY
STANDING COMMITTEE
March 18, 1983
9:30 a.m.

Members Present: Senator Joe Josephson, Vice Chairman
Senator Dick Eliason
Senator Fritz Pettyjohn

Members Absent: Senator Bob Ziegler
Senator Bill Ray

COMMITTEE CALENDAR

SB 121 Amended Title: "An Act authorizing capital punishment, classifying murder in the first degree as a capital felony, and establishing sentencing procedures for capital felonies establishing sentencing for capital felonies."

WITNESS REGISTER

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276-5121
Position Statement: Testified against SB 121.

Kenneth Anderson
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Position Statement: Testified in support of SB 121.

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Position Statement: Testified against SB 121.

Murphy Archibold
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Nancy Gordon, Attorney
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Position Statement: Supported SB 121.

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Steve Moore, Father
Archdiocese of Anchorage

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PREVIOUS ACTION

SB 121	Please refer to Senate Judiciary Committee minutes dated 02/14/83, 03/14/83.

ACTION NARRATIVE

TAPE#1 for 3/18/83, SIDE 1.

Recording Number 000	The meeting of the Senate Judiciary Committee was called to order at 9:30 a.m. on the fifth floor of the court building located at 303 K street, Anchorage, with member Senators Josephson, Eliason, and Pettyjohn present. Senators Ray and Ziegler were absent.
	The following individuals, most if not all of whom are members of or affiliated with the Moral Majority of Alaska, testified in favor of the SB 121. Tim Ewell, Executive Director of the Moral Majority of Alaska, who stated among other things, that "God doesn't change, He gives you different ways to be saved". Cecilia Young, John S. Jacobson, Burton Carney, George Steinberg, Kenneth Anderson, David Liddington, Carolyn Glover, Michael Haidt, Therese Jones, and Richard Phillips all testified in support of SB 121.
	The following individuals testified against SB 121.
	Tim Stearns, an attorney representing prisoners in the pending Cleary litigation, who focused on the lack of objective standards in SB 121 as presently drafted.
	John Katcher, a public defender, testified against SB 121.

Linda Kingkaid testified on behalf of Judy Zimicki, a private citizen.

Dr. John Garvin, a member of the United Methodist Clergy and a Social Worker, testified against SB 121.

Dana Fabe, Public Defender, who focused on the cost of implementing SB 121.

Robert Wagstaff, an attorney who focused on having to deal with the reality of death as a human being.

Brant McGee, an attorney and life-long Anchorage resident. Ron Zobel, an attorney who cited a law review article by Jack Greenberg, (91 Yale L.J. 908).

John Havelock, the Director of Legal Studies, University of Alaska/Anchorage, and former state Attorney General, whose statements included the following: This bill is basically a "dud" and no one will ever be executed under it because it is very poorly drafted and leaves open many crucial constitutional and interpretive questions.

SB 121 promised what it just can't deliver and poses an endless series of headaches;

SB 121 will have a serious, adverse impact on racial relations;

SB 121 confuses charging elements and sentencing factors;

SB 121 establishes false standards incapable of being measured, and there are a number of mitigating factors;

Constitutional issues are raised by the fact that SB 121 utilizes factors as part of its sentencing procedure that other states use as elements of the crime itself;

An analysis of first degree murder convictions in Alaska in the past ten years should be made.

Lynn Allingham, an attorney who stated that the death penalty is simply barbaric.

Lewis Gordon, an attorney, co-founder and

local leader of Amnesty International testified against SB 121.

John Angell, a professor at University of Alaska/Anchorage and the Director of Justice Center who stated that the American Psychiatric Association opposes capital punishment because it's counter productive.

Nancy Gordon, an attorney member of the Alaska ACLU testified against SB 121.

Walter Share, an attorney who specializes in criminal appeals testified against SB 121.

Murphy Archibold, an attorney who testified against SB 121.

John Suddock, an attorney appearing on behalf of the Alaska Academy of Trial Lawyers.

Father Steve Moore, on behalf of the Archdiocese of Anchorage testified against SB 121.

Robert Burke a private citizen testified against SB 121.

Sylvia Short, an attorney and the Area Coordinator for the Unitarian Council testified against SB 121.

Mark Johnson, a senior at West High School in Anchorage, who had two main objections to SB 121, its cost and the danger that a mistake will be made and an innocent person will be executed.

Roger Miller, a private citizen whose main message was that "we must codify blood revenge".

John Murtagh, an attorney in private practice specializing in criminal matters, who focused on a number of defects and ambiguities in the present bill.

John M. Richards testified against SB 121.

Karla Huntington testified against SB 121.

Doug Elliot testified against SB 121.

Phillip Weidner testified against SB 121.

The meeting broke for lunch between noon and 1:30 p.m. with adjourned at 4:26 p.m.

March 18, 1983

My name is Judy Zimicki. My address is SRA 4007-A, Anchorage, AK., 99502. I represent myself today as a citizen concerned about the degrading effect that the death penalty would have on the moral fabric of our society.

In January, 1977, a 10 year moratorium on capital punishment ended with the execution of Gary Gilmore in response to a rapidly rising crime rate and, maybe more importantly, the resultant dramatic increase in the fear of crime. The result is an institution of death at the hands of the state for certain types of homicide.

The strength of the cry for the death penalty can be directly correlated to specific events. In our state, the Meach killings last year brought close to home for all Anchorage residents the grim reality of murder. And, more recently, the seemingly calculated cold-blooded McCarthy killings bring out our animal instincts with a desire to kill, literally, a person who could commit such acts.

But the institution of the death penalty is much more than an emotional reaction. When capital punishment is legalized, the effects are profound and subtle, and still unknown.

The most common argument for the death penalty is deterrence. There seems to be no statistics to back this claim. The only study since 1945 that supports the deterrence argument was released in 1975 by an economist named Isaac Erlich. Review of his economic models immediately put his methodology under fire by both critics and proponents of capital punishment.

A look at some statistices may be helpful here. In 1033, the homicide rate in the United States was 9.7 murders per 100,000 people. During the 1930's executions averaged 150 per year. Through the post war years of 1945-60, the homicide rate fluctuated with a maximum of 6.4/100,000. In 1960, there

were 4.7 murders/100,000/ Executions at this time of relatively low homicide rates, however were down to an average of 24 per year, only 16% of the 1930's execution rate.

By 1973, the homicide rate had climbed to 9.4 and it currently rests at 9.8/100,000. Reasons offered to explain the high rate include such diverse factors as economic hard times (analogous to the 30's), the increased availability of hand-guns and the "coming-of-age" of the post-war baby boom. Looking at other countries, England, and abolitionist state, has a homicide rate of 1.1 while Japan, which practises capital punishment, has a rate of 1.0/100,000.

The moral argument against the death penalty is harder to express. In a few words, the state does not have a right to kill, no matter what heinous act someone has committed. Violations of human rights by individuals do not give the State a right to violate human rights. The United States is held up worldwide as an example of guaranteed civil liberties. The reinstitution of the death penalty in the United States is thus viewed as the first step in lessening of these rights and may promulgate executions elsewhere in the world. We watch with horror and disgust news reports of abuses of state power in other countries in the name of fighting terrorism or maintaining state stability. How, then, can we justify State murder in our own country in the name of reducing crime? And shouldn't we question the subtle negative effect state-sponsored murder might have by serving as an example of what to do when we think a wrong has been committed?

Let us look briefly at the number of criminals that would be considered for capital punishment in Alaska. In 1980, a review of felony sentences by the Alaska Judicial Council determined that 1.04% (or 5/481) sentences in urban courts were for first degree murder. During the same period, no first degree murder sentences were recorded in the 372 rural location felony sentences. Therefore, statewide, first

degree murders in 1980 accounted for 5/853 or just under one-half of one percent of felony sentences. In light of the moral questions mentioned above, is the institution of capital punishment for such a small percentage of felonies worth risking the uncertainties, biases, cost and moral degredation?

My final point today addresses the fear of crime which I mentioned earlier as one of the prime factors in the cry for the reinstitution of the death penalty. Crime is a frightening aspect of our daily lives, and the fear grows whenever we read a report of a burgulary, murder or rape situation in which the victim could have easily been ourselves or someone close to us.

As legislators and leaders in the State, you should be directing your efforts to the improvement of the criminal justice system and to the identification of and elimination of the social conditions that foster crime and unrest in our state. Capital punishment is not the answer. It is not a deterrent to crime and thus will not affect the crime rate nor ease our fears. Reinstitution of the death penalty in Alaska is only a symbolic and ineffective gesture of retribution. As such, instead of deterring crime, capital punishment would offer a false sense of security and ultimately delay any more positive measures.

Thank you for the opportunity to testify today.

TESTIMONY BEFORE THE HOUSE JUDICIARY COMMITTEE OF THE STATE OF ALASKA

KENNETH V. EMILL
EXECUTIVE DIRECTOR
MORAL MAJORITY OF ALASKA
P.O. BOX 101779
ANCHORAGE, ALASKA 99510

Thank you for the opportunity to come before you today. It is indeed a privilege to be a part of my State Government. I feel as do many others, that it is not only my privilege but my duty to let you know how I feel on legislation that affects me and the people I represent.

My qualifications are not as great as those learned jurors that have appeared before you this morning. However, I am a citizen of the State of Alaska for some years now and I have been active in the social/political areas of our State for much of that time. I have served on the Statehood Study Commission and as lobbyist in Juneau.

I support the reinstitution of the Death Penalty in the State of Alaska and I support House Bill number 121 and means to do that.

First, let me clear up some misconceptions you may have. I have read a lot of letters to the editor lately that improperly quote Biblical references and because I believe in the Bible and its principles, I would like to clear these issues up. The one that comes up the most often is the commandment that is translated in the King James Version of the Bible as "Thou shalt not kill." In 16th century England the meaning was clear but today our language does not properly do it justice. The proper translation in modern language is "Thou shalt not commit murder."

The Bible is clear in showing that God imposed the death penalty and not just for murder offenses but in lesser cases also. And He did not always dole out the punishment directly but gave the government established and in effect at the time to carry out that punishment.

God has the right to give life and the right to take it away. And God gave rules by which we must conduct ourselves. To disobey those rules is to subject oneself to the appropriate penalty. It was not based on wealth, or we who know Him would given out the same to Kings and paupers.

Our founding fathers recognized that God was the creator of the universe and the giver of all laws. Upon that principle they built this land. But we have lost a portion of people who not only refuse to recognize God's sovereignty but also that He exists at all.

I go through all this because what we are talking about today is very much a moral issue. And we must have a base for a moral consciousness or we cannot even communicate, which I fear is half our problem anyway.

Let us therefore make some suppositions. Let us assure that at all times and for all reasons, murder is unacceptable in our society. Then it follows that those who commit murder do so against the wishes of society.

If society offers no punishment for the crime, then what is to keep people from ignoring societies wishes.

I submit to you that human beings are more satisfied in their daily lives if they live within boundaries. That living within boundaries is the true test of freedom. The person who works at a job where the boss never says you're doing a good job or doing a bad job is liable to be insecure because he doesn't know what his boundaries of acceptability are. The person drives a car beyond the speed limit or in a reckless fashion does so with the clear feeling that he is overstepping the boundaries that have been established for him.

This is especially evident in the child abuse crimes that are now coming to light here in the city of Anchorage. I have known about this investigation for some time and I am glad it is finally out where it can be seen. I believe that the reason we are seeing such an increase in child abuse and the problems it creates is because of the past generation of "Spock" children who are now adults who were not disciplined properly and who were taught the philosophy "If it feels good, do it."

This problem did not exist 20 years ago like it does today. But the problem is that the parents did not establish boundaries for their children, there were no taboos, no rights and wrongs set. Hence the children, exploring, often instinctively to try to find where the real boundaries lie. They push it as far as they can.

Now don't get me wrong. I don't advocate child abuse in any form but corporal punishment, "The kind of discipline applied properly to the end of understanding" is proper and just.

And just as much as a child needs to have his boundaries, so do we as members of society need to establish and live within socially accepted boundaries.

One of those who testified this morning said that only "desperate and angry people cause crime and often under the effects of drugs and alcohol." This is blatently false. There are many people who commit crimes simply for financial gain. They don't <u>need</u> more money, they just want it. And there are a great number of people who commit crimes "under the influence of drugs or alcohol" who in fact premeditated the crime and then used that as an excuse.

The public defender who spoke this morning said this bill would legitimitize premeditated murder. I disagree. I believe that the 1972 Roe vs. Wade decision which allowed the taking of unborn "innocent" human life, is the legitimitizing of premeditated murder. I further believe that this bill merely sets standards of conduct beyond which society will take certain action and it warns the would be offender that should he/she go beyond societies standards and take a human life, that the penalty shall be death.

That is truly justice. It should be fairly and equally meted to all.

When she spoke she also alluded to some statistics about Florida in 1979, and how that despite the institution of the death penalty, homicides had risen. She failed to speak to the fact that at this same time there was an influx of hundreds of thousands of Cuban/Haitian refugees into the south Florida area and that crime in general saw a great increase because of trying to deal with this unexpected situation.

Now I say that to say this, that statistics are really meaningless unless all factors involved are considered. For instance, when we talk about the rate of homicide we must look at the other social/economic conditions at work at the same time and not just the fact of whether or not capital punishment was in effect at the time.

Now just a few words about cost. What is the cost of trying the case in proportion to one "innocent" human life - i.e. the Charles Manch case. Four people might be alive today if he had earlier been found guilty of murder in the first degree and executed.

And this is not for the sake of revenge, but for the protection of society.

Now let's talk about the court system that deals with the problem. I am amazed at how our system of justice has changed over the last 50 or 60 years. I will bet that there is not more than one lawyer in this room who has spent any time at all seriously studying the law of Blackstone.

Today, we study case law which is not law at all in "justice by precedent," and it is not justice because it cannot be equally handed down to all people. Instead, ever since supreme court justice Oliver Wendell Holmes, we have evolving law that changes not by what our elected legislators create, but by what a judge determines in his mind the law means at any given point in time in relation to any given set of circumstances.

And we see the results. We do not have justice. The attorneys who have testified here today have all told you about the fact that there is a disproportionate share of minorities in prison. That is because we do not have justice,

we have "judge law."

Now let me say a few words about the "American Image."

The nations of the world look to America to see how we are handling our crime problems. We are not doing a very good job. They see us as weak and inefficient. A strong statement on crime and punishment will strengthen our image abroad, not weaken it.

Now let me say a little bit about the jury process.
[illegible] seemed to hold some disdain for their ability to reach a reasoned determination of guilt or innocence. I submit that the jury probably has more ability in such matters than a select group of judges and lawyers. That is why the [illegible] was established and that is why it has remained. [illegible] there are some who hold an elitist point of view [illegible] they know what is best for us. The question [illegible] Did your I.Q. and common sense [illegible] that of the common man when you [illegible] the bench? [illegible] so.

And as long as [illegible] the responsibility to make life and death [illegible] supreme court review or for that matter the persons [illegible] perform the execution, they are [illegible] job. If they do not wish to accept the responsibility they do not have to hold the job.

But I think it all boils down to one thing. Either there is life after death, or there is not. If there is no life after death, then there is no sanctity in human life. However, if, as I believe, there is life after death, then God will be the final judge. He rules now in everything we say and do and He will rule then.

SB 121

TESTIMONY ON THE DEATH PENALTY

Dana Fabe, Public Defender, March 18, 1983

There are many ethical and moral reasons for not adopting the death penalty. The state is legitimizing the premeditated killing of humans. The death penalty is most often racially and economically discriminatory in its application. Innocent people can be killed by mistake. The death penalty does not act as a deterrent and in fact has a brutalizing impact on a community or society as a whole.

I oppose the death penalty for these reasons and many more. However, I would like to take my time for testifying to address the costs of implementing this bill, focusing on the costs of defending a death penalty case.

If this death penalty bill is enacted, representation of the poor in death cases must be adequate. This is due to the possibility that an innocent person might be killed by mistake. Some degree of mistake is of course a potential problem in all criminal cases. But in non-death cases, the system stands ready to correct those mistakes when they become known. An execution can never be corrected.

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

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

(1) Appeal of conviction to the Alaska Court of Appeals.

(2) Petition for Hearing to the Alaska Supreme Court.

(3) Automatic sentence review by Alaska Supreme Court.

(4) Writ of certiorari to the United States Supreme Court.

(5) Post-conviction relief proceedings in state court.

(6) Appeal of post-conviction relief proceedings in the Court of Appeals.

(7) Petition for Hearing of post-conviction relief proceedings to the Alaska Supreme Court.

(8) Writ of certiorari to the United States Supreme Court.

(9) Petition for Writ of Habeus Corpus in the Federal District Court.

(10) Appeal to the United States Court of Appeals.

(11) Rehearing in the United States Court of Appeals.

(12) Writ of certiorari to the United States Supreme Court.

(13) Commutation applications to executive branch.

(14) Emergency stays to the United States Supreme Court.

The Public Defender Agency estimates that it would cost approximately 3.5 million dollars next fiscal year to defend the estimated number of capital cases which would be assigned to this statewide agency. The figures in this fiscal note are based on the number of cases which would have qualified under the bill as capital cases which were handled by this agency during Fiscal Year 1982. This agency handled 30 first degree murder cases which would qualify as capital cases under this bill. The specific figures were arrived at as follows:

(1) Personal services. This agency is currently 11.5 attorneys short of the LEAA standards for the maximum number of cases to be handled by an attorney to ensure competent representation when no death penalty cases are involved. Death penalty cases take substantially more attorney time than other cases. For example, the Florida Legislature has adopted standards which permit an attorney to handle no more than 8 death penalty trial cases per year, or 5 death penalty appeal cases per year. For comparison, the LEAA figures are 150 non-death felonies or 25 appeals a year. Some states have applied far more stringent standards. For example, the California state appellate defender permits attorneys to handle only 2 death penalty appeals per year. Given the fact that the attorneys who handle death penalty cases will have to be given drastic caseload relief, their extra cases will be loaded onto the caseloads of attorneys whose caseloads already exceed recommended maximums. Thus, at a minimum, this agency must be brought up to the minimum number of attorneys required to handle the caseload as it exists without the death penalty. This necessitates the addition of twelve additional attorneys, plus necessary investigation and clerical support staff.

(2) Travel and Contractual Fees. (a) The New York State Defender Association has estimated that a minimum figure for expert witness fees must be $30,000 for the guilt phase and $30,000 for the penalty phase per case. Thus, the contractual and travel costs for expert witnesses has been calculated at $60,000 per case. This does not include any expert fees which might be necessary at the appellate stages.

(3) Equipment and Supplies. Other costs include expanded office space for additional personnel as well as equipment and supply money for additional personnel.

The costs described above do not take into account contingencies such as reversals and retrials after appeal or travel to Washington, D.C. to argue before the United States Supreme Court and other costs which at this time are difficult to predict. Furthermore, the cost of defending a death case is just one component of the total cost to the system of processing a capital case. The New York Defender's Association estimates the total of defense, prosecution and court costs of procesing a capital case at $1,498.100 prior to any appeals and $1,828,100 once all appeals have been processed. This figure does not include such costs as special telephone lines running from the prison to the Unted States Supreme Court or Governor's office. The cost of extra police personnel for crowd control and helicopter security are also hidden costs. Finally the cost of an actual execution can be high. The State of Georgia which executes by electrocution spent more than $250,000 solely for the anticipated but aborted, execution of Jack Howard Potts in 1980.

INSTITUTE FOR SOUTHERN STUDIES PO BOX 531 DURHAM, NC 27702 (919)688-8167

Surprising Facts About The Death Penalty

No white has ever been executed for the rape of a black in the U.S.

Nearly three quarters of all murders involve members of a family or acquaintances.

Since 1900, there has been, on the average, one case per year in the U.S. in which an entirely innocent person was convicted of murder.

Of all the people executed in the U.S. since 1930, over 54 percent were black. The population of the U.S. during this period was 9 percent black.

At the last public execution in the U.S. (a Kentucky hanging in 1938) 20,000 people turned out to watch.

Numerous studies have examined the risk presented by paroled murderers and the findings have always been the same: their rate of parole violation is by far the lowest of all classes of offenders.

In 1970, the average time spent in prison under sentence of death was 32.6 months.

The vast majority of capital crimes is committed during a moment of great emotional stress, in fear, or under the influence of drugs or alcohol. The question of deterrence seems inapplicable here.

States that have reinstated the death penalty after abolishing it have not shown a decreased rate of criminal homicide: In Deleware, for example, there was no death penalty from 1958 to 1961. After restoration, homicide increased by 3.7 persons per 100,000 population.

Though blacks constitute 54 percent of murder victims, only 13 percent of the persons currently on death row had black victims.

Since 1972, 62 percent of death row inmates were unskilled, service, or domestic workers; 60 percent were unemployed at the time of their crimes.

As of April 1980, nearly 75 percent of the national death row population is in the Deep South.

In Georgia, between 1973 and 1977, over three times as many convicted defendants who had killed white victims received a death sentence as did those who had killed

black victims.

During the same period, *geographical* discrepancies within the state were also significant: persons sentenced within Georgia's central region were four times as likely to get "death" as were those sentenced in the Atlanta area.

Never in the history of Florida has a white person been executed for a crime against a black person.

America's opinion of who should be killed has changed radically over the years. During the colonial years, King George III required the death penalty for 156 different crimes, including such offenses as stealing apples from an orchard, breaking the dam of a fishpond, cutting down trees in Putney Park – and the cultivation of tobacco plants.

Most prisoners under sentence of death are poor and so are represented by state-appointed lawyers. Most states make no provision for state-financed legal representation beyond the trial and direct appeals.

More than 650 men and women were on death row as of May, 1980, and the number is growing at the rate of over 10 a month. This is the largest death row population in U.S. history and may be the largest in the world.

Georgia has put 366 persons to death since 1930 – the highest rate for any state.

Of 455 men executed for rape in the U.S. since 1930, 405 (90 percent) were black; all but two of these executions occurred in the South.

Despite widespread publicity before and after the May 25, 1979, execution of John Spenkelink, Florida's first execution in 15 years, the state's murder rate jumped 14.4 percent during the first six months of 1980.

The state of Georgia has already spent nearly $1 million in preparation for Jack Potts' execution; meanwhile the condemned man has received only minimal medical attention for injuries sustained during his arrest six years ago, when a bullet hit his mouth, shattered his teeth and tongue and lodged 1 cm. from his spine.

In capital cases involving more than one participant, the prosecutor seldom asks for the death penalty for more than one of them. In order to obtain the powerful evidence necessary to win a death sentence, he will make a deal with all participants except one. The defendants who successfully "plea bargain" testify against the defendant chosen for the gallows and in return receive sentences of imprisonment or less. Thus, John Spenkelink died in the electric chair; his partner, Frank Brum, who cooperated with the prosecution, confessed to participation in the same murder and went free.

For a punishment to be a deterrent, it must be consistently and promptly employed: between 1930 and 1960, there was one execution for every 70 homicides, and the rate has dropped sharply since then.

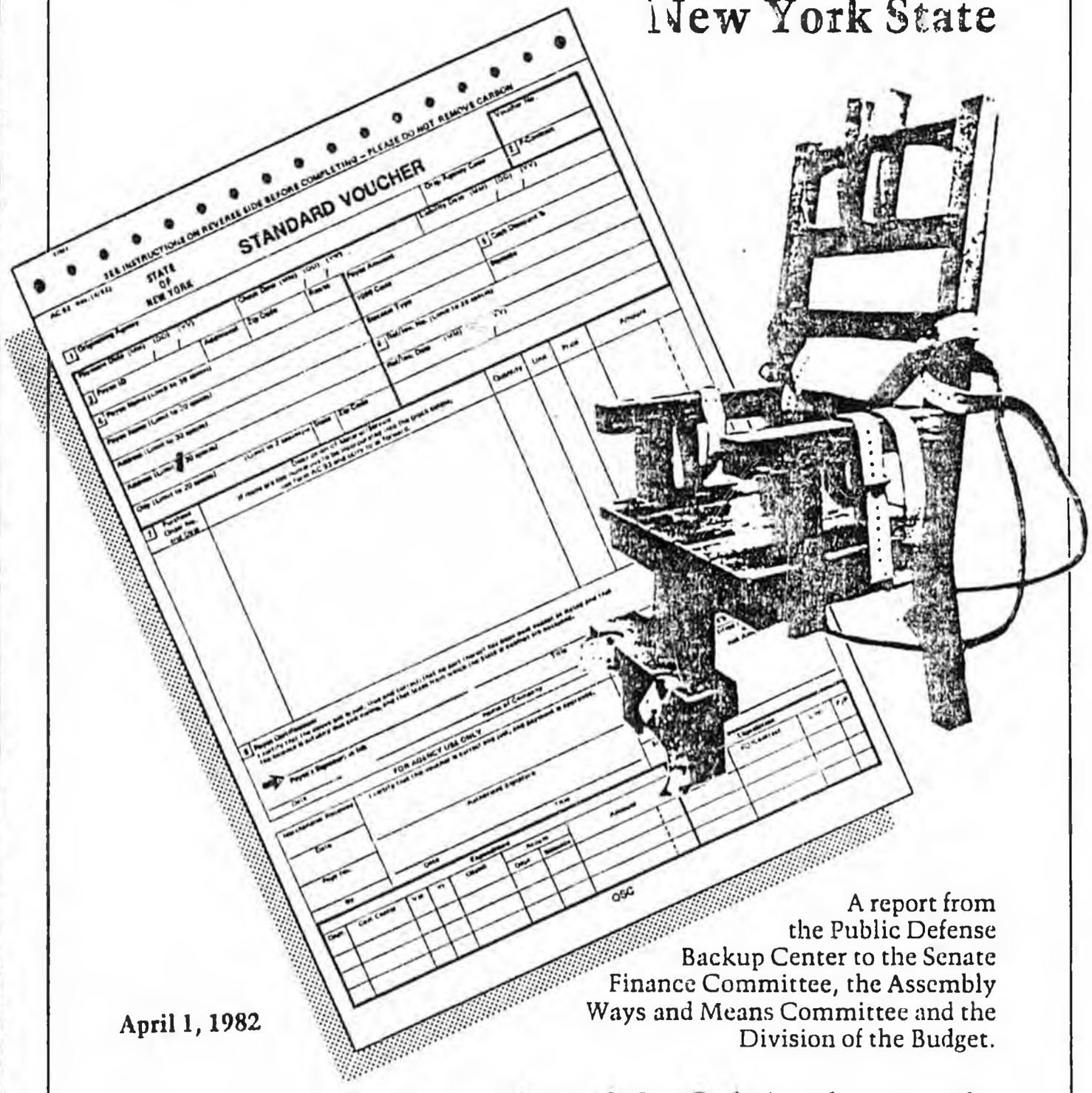
In 1978, nearly 70 percent of U.S. whites favored capital punishment while only 24 percent of blacks felt the same. Juror selection can have serious implications for the outcome of capital cases.

A Delaware policeman who had forcefully argued for restoration of capital punishment in that state on the grounds of its deterrent value killed his wife just 10 days after the penalty was restored in 1961.

Between 1928 and 1949, average homicide rates in death penalty states were between two and three times higher than in abolition states.

Of the 553 people executed in the history of the U.S. for the crime of rape, 497 or 90 percent were black even though blacks comprise only about 11 percent of the nation's population. In 1976, the Supreme Court decided it was unconstitutional for a state to execute a person for the crime of rape. The 553 people lived – and died – too early in our country's history to enjoy their full Constitutional protections.

Capital Losses: The Price of the Death Penalty for New York State



A report from
the Public Defense
Backup Center to the Senate
Finance Committee, the Assembly
Ways and Means Committee and the
Division of the Budget.

April 1, 1982

New York State Defenders Association, Inc.
150 State Street • Albany, NY 12207

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PREFACE

Under its contractual obligation with the state of New York to review, assess and analyze the public defense system, the New York State Defenders Association periodically publishes reports to the Legislature, the Governor, the Judiciary and other appropriate instrumentalities. The report which follows preliminarily examines the costs of capital litigation and the fiscal impact of the death penalty on New York State. This report is directed to those who have a legal responsibility to analyze that fiscal impact.

INTRODUCTION

In the last five years, efforts in both houses of the Legislature have pushed New York closer and closer to the passage of a death penalty. During this time, shrill voices have argued every major proposition with reference to the death penalty except one—its actual cost. The floor debates during this period of time provide little hard cost data, but, as will be seen, they make clear that the death penalty will call for the most irrational and disproportionate expenditure of energy and money in the history of criminal justice in this state.[1]

Despite this reality, one searches in vain for legislative information on the subject of actual cost. The memorandum in support of this year's death penalty bill (S.7600/A.9379), as in the past, states that there are "no fiscal implications." Yet, as late as the end of March 1982, the Senate sponsor of the bill reportedly did not know the fiscal implications of the death penalty.[2] The Senate Research Service states in its death penalty briefing paper, "Insofar as the fiscal implications of the death penalty are concerned, the costs of its imposition and the related appeals process are uncertain."[3] Likewise, though the New York State Department of Correctional Services has recognized the issue,[4] it has not projected costs under a death penalty statute.[5]

At a time when New York State is under tremendous fiscal constraint in its efforts to deliver basic human services, it is ironic that no one in government has attempted to assess and project the actual cost of a death penalty here.

Conventional wisdom suggests that it is less expensive to execute a person than to imprison a person for life. Conventional wisdom is wrong. As Mr. Justice Marshall stated in *Furman v. Georgia*, 408 U.S. 238, 357-8 (1972):

> "As for the argument that it is cheaper to execute a capital offender than to imprison him for life, even assuming that such an argument, if

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[1] The New York State Defenders Association opposes the death penalty for any crime because it is immoral, discriminatory, and inevitably capricious. The penalty provides, and will always provide, the opportunity for masking racism and prejudice. Its history marches in step with the history of genocide; its cadence is the cadence of expediency; its failure, the failure of humankind. The death penalty is obscene violence. There is no excuse for its existence, and someday it will be abolished.

We do not by this paper retreat from these positions.

In the course of this paper, we will comment on sections of the death penalty bill, and, in particular, on those sections dealing with publicly supported defense representation for the poor. Nothing we say here should be read as approval of the bill or an appraisal of its ultimate constitutionality. We are reporting cost data, and that is the purpose of this paper. It is important for state officials and the public to know the price tag which is attached to capital punishment. The costs outlined here are the bottom line. Because death has been held constitutionally to require greater procedural protections, *Gardner v. Florida*, 430 U.S. 349 (1977); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976), legally required procedures and their attendant costs will continue to escalate.

[2] *Legislative Gazette*, March 29, 1982, at 8, col. 1.

[3] SENATE RESEARCH SERVICE, ISSUES IN FOCUS, No. 82-48, DEATH PENALTY 4 (Jan. 28, 1982).

[4] In July 1978, New York's Department of Correctional Services reported, but did not evaluate the anti-death penalty position that, ". . . capital punishment is more costly from an economic viewpoint than other alternatives if all costs are counted, including court, prosecution, defense and correctional." DEPARTMENT OF CORRECTIONAL SERVICES, DIV. OF PROGRAM PLANNING, EVALUATION AND RESEARCH, OVERVIEW OF DEATH PENALTY AND REVIEW OF ARGUMENTS FOR AND AGAINST ITS USE 9 (July 1978).

[5] Significantly, states with a death penalty cannot afford the "luxury" of non-examination. The Legislature of Florida knows full well the projection of costs made by Louie L. Wainwright, Director, Florida Division of Corrections. Florida projects an expenditure (absent inflation) of more than $57 million by the year 2000 just to maintain the death row population. BUREAU OF PLANNING, RESEARCH AND STATISTICS, STATISTICAL FACTS, No. SF-80-9, FLORIDA DEP'T. OF CORRECTIONS—DEATH ROW ANALYSIS 2 (Aug. 29, 1980).

true, would support a capital sanction, it is simply incorrect. A disproportionate amount of money spent on prisons is attributable to death row. Condemned men are not productive members of the prison community, although they could be, and executions are expensive. Appeals are often automatic, and courts admittedly spend more time with death cases.

"At trial, the selection of jurors is likely to become a costly, time-consuming problem in a capital case, and defense counsel will reasonably exhaust every possible means to save his client from execution, no matter how long the trial takes.

"During the period between conviction and execution, there are an inordinate number of collateral attacks on the conviction and attempts to obtain executive clemency, all of which exhaust the time, money, and effort of the state. There are also continual assertions that the condemned prisoner has gone insane. Because there is a formally established policy of not executing insane persons, great sums of money may be spent on detecting and curing mental illness in order to perform the execution. Since no one wants the responsibility for the execution, the condemned man is likely to be passed back and forth from doctors to custodial officials to courts like a ping-pong ball. The entire process is very costly.

"*When all is said and done, there can be no doubt that it costs more to execute a man than to keep him in prison for life.*" (Footnotes omitted.) (Emphasis supplied.)

The authority of Mr. Justice Marshall's assertions,[6] as well as other recent work,[7] indicate in general terms, but without contradiction, that a criminal justice system with the death penalty is inordinately more expensive than a criminal justice system without the death penalty.

Seventeen years ago, the State of New York Temporary Commission on Revision of the Penal Law and Criminal Code, in its report recommending the abolition of the death penalty in New York State, said:

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

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[6] T. THOMAS, THIS LIFE WE TAKE 20 (3d ed. 1965); B. ESHELMAN AND F. RILEY, DEATH ROW CHAPLAIN 226 (1962); Caldwell, *Why Is the Death Penalty Retained*, 284 ANNALS 45, 48 (Nov. 1952); McGee, *Capital Punishment as Seen by a Correctional Administrator*, 28 FED. PROBATION, No. 2, at 11, 13-14 (June 1964); Sellin, *Capital Punishment*, 25 FED. PROBATION, No. 3, at 3 (Sept. 1961); Slovenko, *And the Penalty Is (Sometimes) Death*, 24 ANTIOCH REVIEW 351, 363 (1964); Bailey, *Rehabilitation on Death Row*, in BEDAU, THE DEATH PENALTY IN AMERICA 556 (1967 rev. ed.); T. ARNOLD, THE SYMBOLS OF GOVERNMENT 10-13 (1935). See also: *Stein v. New York*, 346 U.S. 156, 196, 73 S.Ct. 1077, 1098, 97 L.Ed. 1522 (1953) (Jackson, J.); cf. *Reid v. Covert*, 354 U.S. 1, 77, 77 S.Ct. 1222, 1261-1262, 1 L.Ed.2d 1148 (1957) (Harlan, J., concurring in result); *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed 2d 776 (1968); *Carnativo v. California*, 357 U.S. 549, 78 S.Ct. 1263, 2 L.Ed.2d 1531 (1958).

[7] Nakel, *The Cost of the Death Penalty*, 14 CRIM. L. BULL., No. 1, at 69 (Jan. 1978). See also the newly revised BEDAU, THE DEATH PENALTY IN AMERICA (3rd ed. 1982).

obstruction, confusion and waste."[8]

The Commission saw early on the direction of capital litigation in the United States and, accepting the inevitable consequences of the then developing moratorium on executions,[9] rejected the death penalty as an inappropriate adjunct to the administration of criminal justice. Since 1955, while we have lived with and without a death penalty in New York State, and in recent years while we have vigorously debated its reemergence, there has been no systematic effort to identify and compute costs. This paper is a preliminary examination of those costs.

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[8] STATE OF NEW YORK TEMPORARY COMMISSION ON REVISION OF THE PENAL LAW AND CRIMINAL CODE, FOURTH INTERIM REPORT: SPECIAL REPORT ON CAPITAL PUNISHMENT, LEG. DOC. NO. 25, at 97 (1965).

[9] From 1967 until 1977, executions in the United States were suspended by litigation in the federal courts seeking the resolution of constitutional challenges to the death penalty. The United States Supreme Court, in a plurality opinion, declared in *Furman v. Georgia*, 408 U.S. 238 (1972), that discretionary death penalty statutes then in effect constituted cruel and unusual punishment because death was imposed infrequently and in the absence of clear standards. The rare, unpredictable, discretionary use of the sanction of death was deemed to violate the Eighth and 14th Amendments to the United States Constitution. State legislatures responded to *Furman* by enacting either mandatory death statutes or "guided discretion statutes" which utilized bifurcated trial procedures to determine guilt and then punishment. In 1976, the Supreme Court ruled in *Woodson v. North Carolina*, 428 U.S. 280, 310 (1976), that the mandatory death penalty for first degree murder was unconstitutional because it treated all convicted persons not as "... uniquely individual human beings but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." On the same day, in *Gregg v. Georgia*, 428 U.S. 153 (1976), the Court upheld "guided discretion" statutes which required objective standards to guide, regularize, and make rationally reviewable the process of imposing death. Since *Gregg*, more than a dozen substantial procedural issues have been decided on behalf of defendants by the United States Supreme Court. Capital litigation routinely raises those and other constitutional questions at every stage of review.

PART I:
THE NATURE OF DEFENSE SERVICES UNDER THE PROPOSED DEATH PENALTY BILL

One of the great concerns of the New York State Defenders Association concerning the implementation of the death penalty in New York is whether or not the representation of the poor in death cases will be adequate. The current delivery mechanism for public defense services is clearly inadequate to a death penalty. The County Law leaves to each county responsibility for the development of its own system of defense services. The result is that a crazy quilt of county defender systems exists in the state. The services are insulated, autonomous and unregulated. Resources differ from county to county. It follows that the adequacy of defense representation differs from county to county as well.[10]

The problems of the system have not gone unnoticed in the legislative debate concerning the death penalty in New York Some representative comments from the Assembly and Senate floor debates follow:

> "The fact is, ladies and gentlemen, we will look at the defense capability. Throughout New York State today there are 20 counties that have . . . no . . . investigators to help in any case, much less a capital case . . . Nine counties have one investigator available, four of them have two and four have three. *Forty-one of our counties—over two-thirds, do not have the investigative capability that the defense attorney needs to defend his client.*" (Emphasis supplied.)[11]

> "We are talking in many instances of assigned counsels who are paid very little money by any contemporary standard. *We are talking about a system where the defense really doesn't have the ability to investigate* . . . ***that's the question you are asking yourself, and that's the question each of us has to ask ourselves before we vote on this bill. . . ." (Emphasis supplied.)[12]

> "Forty-six counties have asked the New York State Public (sic) Defenders Association for help in doing appeals, the appeal work for the felony criminal matters. *What kind of justice is that, where 46 counties say, after the trial, 'We don't have the expertise and the ability to deal with the appeal process.'* That is the fair trial we are talking about, with an irrevocable penalty." (Emphasis supplied.)[13]

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[10] Article 18-B of the County Law requires each county to adopt a systematic plan for furnishing counsel to indigent defendants. The counties may choose: 1)representation by a public defender; 2)representation by contract with a legal aid society; 3) representation by counsel furnished pursuant to an assigned counsel plan of a bar association; or 4) a combination of these. In the greater part of the state, public defense is a part-time job. Training is not a mandatory part of the statutory scheme. Assigned counsel plans are shrinking as a result of the very low fees paid to public defense attorneys. Nationally, New York ranks 45th with the lowest reimbursement rate at the trial and appellate level. There are 76 distinct defender systems in this state. The common thread that binds them together is underfunding at the county level, a lack of standards for their operation, and the unpopularity of the clients they serve.

[11] RECORD OF PROCEEDINGS, ASSEMBLY, STATE OF NEW YORK (Tuesday, February 17, 1981) (statement of Assemblyman Hevesi), at 875.

[12] RECORD OF PROCEEDINGS, ASSEMBLY, STATE OF NEW YORK (Tuesday, February 17, 1981) (statement of Assemblyman Miller), at 1020.

[13] RECORD OF PROCEEDINGS, ASSEMBLY, STATE OF NEW YORK (Tuesday, February 17, 1981) (statement of Assemblyman Hevesi), at 875-876.

"Who is going to get the death penalty? The poor defendant, the defendant with the poor lawyer more likely. I'll tell you one thing, if there is one certainty—if there is one certainty in what you're about to do—it is that, if you pass the bill and it goes into effect, I am certain that no millionaire will ever burn, that no rich person will ever have the sentence carried out, and that's a fact, and I think we all acknowledge that that's a fact. *The victim of this, the person upon whom this penalty will be carried out, will be the poor unfortunate, the person with the lawyer of less skill or experience than others.*" [Emphasis supplied.][14]

"When you look at the kinds of people who have been convicted and sentenced to death, they invariably are people from the low income bracket and *there are those of us who believe . . . that if you're poor, you do not necessarily get the kind of legal representation that you would if you had the money to afford the right kind of attorney.* I know you will say that that's not the case, and that there is equitable provision under the law and that there is a fair share, and everyone else will get their day in court, but I think the real world proves that poor people generally carry the brunt when they are charged with murder, particularly if there is a difference in ethnicity." [Emphasis supplied.][15]

All of these comments reflect upon a defense system that is basically inadequate. Three critical aspects are identified. First, there is no set of experiential standards to be met for the representation of defendants in felony cases in this state. Second, there is county-based disparity in the financing of the public defense system such that certain counties are without the resources to provide adequate representation. Third, there are exceedingly low fees for attorneys, experts, investigators, and other necessary auxiliary services.

The Volker/Graber bill [S.7600/A.9379] responds directly to these issues by: a) removing the burden from counties and making the cost of defense services a state charge; b) attempting to create experiential standards for the representation of defendants in capital cases; and c) creating a standard whereby attorneys, experts, investigators and others will be paid the customary fee for similar privately retained representation or services. In pertinent part, the bill states:

§722-g. Assignment of counsel and related services in criminal actions in which the death sentence may be imposed. 1. *Notwithstanding any other provision of law to the contrary,* in every criminal action in which a defendant is charged with an offense defined in section 125.27 of the penal law, *a defendant who is or becomes financially unable to obtain adequate representation or investigative, expert or other reasonably necessary services at any time either* (a) *prior to judgment,* or (b) *after the entry of a judgment imposing a sentence of death but before the execution of that judgment; shall be entitled to the appointment of one or more attorneys and the furnishing of such other services* in accordance with the remaining provisions of this section.

2. If the appointment is made prior to judgment, at least one attorney so appointed must have been admitted to practice in the courts of this

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[14] RECORD OF PROCEEDINGS, SENATE, STATE OF NEW YORK (Monday, January 14, 1980) (statement of Senator Connor), at 145.

[15] RECORD OF PROCEEDINGS, SENATE, STATE OF NEW YORK (Monday, March 23, 1981) (statement of Senator Bogues), at 1279-1280.

state for not less than five years, and must have had not less than three years' experience in the actual trial of felony cases in this state.

3. If the appointment is made after judgment, at least one attorney so appointed must have been admitted to practice in the courts of this state for not less than five years, and must have had not less than three years' experience in the handling of appeals in felony cases.

4. Upon a finding in an ex parte proceeding that investigative, expert or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or sentence, the court shall authorize the defendant's attorneys to obtain such services on behalf of the defendant and shall order the payment of fees and expenses therefore pursuant to the provisions of subdivision five hereof. Upon a finding that timely procurement of such services could not practicably await prior authorization, the court may authorize the provision of and payment for such services nunc pro tunc. The court shall determine reasonable compensation for the services and direct payment to the person who rendered them or to the person entitled to reimbursement.

5. *Notwithstanding the rates and maximum limits generally applicable* to criminal cases and any other provision of law to the contrary, *the court shall fix the compensation to be paid to attorneys* appointed pursuant to this section *and the fees and expenses to be paid for investigative, expert, and other reasonably necessary services* authorized pursuant to subdivision four of this section *at such rates or amounts* as the court determines to be appropriate *in order to provide such defendant with representation by counsel and other services as nearly equivalent as possible to those available to defendants who are financially able to obtain such representation and other services for their defense and appeal.*

6. Any compensation, fee or expense to be paid pursuant to this section *shall be a state charge* payable on vouchers approved by the court which fixed the same, after audit by and on the warrant of the comptroller. (Emphasis supplied.)

The bill is an effort to overcome a defective statutory scheme. It is designed to assure equality of service for the poor. Under its terms, the state must appoint and pay for counsel for those unable to afford a lawyer both prior to judgment and at any time up until the actual imposition of the sentence of death.

Investigative, expert and other auxiliary defense services, as well as counsel fees, will be paid on the basis of customary rates for the services in amounts which will provide the defendant with representation and other services " . . . as nearly equivalent as possible to those available to defendants who are financially able to obtain such representation and other services for their defense and appeal."

The meaning of this language and the full scope and extent of what the Volker/Graber bill means is made crystal clear by a review of statements made by the bill's sponsors in debate on the floor of the Legislature. Referring to §722-g[5], Assemblyman Graber stated in 1978:

" . . . [A]nd I surmise today, as this debate progresses, we are going to hear, and hear loud and clear, from those who will say this bill is an attack at minorities, that they cannot get a fair trial, they cannot obtain good counsel, and to those of you who are going to make comment on that particular issue, please read page 9, line 10, section 5 of the bill—

and I would like it read into the record: 'Notwithstanding the rates and maximum limits generally applicable to criminal cases and any other provisions of law to the contrary, the court shall fix the compensation to be paid to attorneys appointed pursuant to this section, and the fees and expenses to be paid for investigative, expert and other reasonably necessary services authorized pursuant to Subdivision 4 hereof, at such rates or amounts as the court determines to be appropriate in order to provide such defendant with representation by counsel and other services as nearly equivalent as possible to those available to defendants who are financially able to obtain such representation and other services for their defense and appeal.'

"I think that says a lot, for it is in that section we are *guaranteeing to those minorities, those indigent people who in the past have not been able to afford good expert counsel; we here, in the State, are going to pay the bill to make sure that they do get the counsel that they need.*" (Emphasis supplied.)[16]

Again in 1980, in moving A.8431, Assemblyman Graber stated:

"I am sure later today we will hear that indigent people are unable to get adequate defense counsel because they cannot afford same. ***[Referring again to proposed §722-g(5)] I think that's brand new as far as this state is concerned, that we provide for adequate defense counsel at state cost *to make it absolutely certain that anyone charged with a capital offense . . . would, in fact, have adequate defense.*" (Emphasis supplied.)[17]

Last year, on February 17, 1981, referring again to the same section, Assemblyman Graber stated:

"It provides for the appointment of attorneys with experience of three years, if the defendant is unable to employ such an attorney. I am sure later today we will hear that indigent people are often unable to afford adequate defense counsel, because they cannot afford it. *** [722-g(5)] is a first for New York, I believe. *I don't know of any other state that incorporated that into the text of their law.*" (Emphasis supplied.)[18]

Thus, a reading of the Assembly debates makes clear that the intent of the sponsors has been to pass a death penalty bill in New York distinctly different and more extensive than any other such bill in America.

Those who are familiar with New York's defense system may find it anomalous that while New York continues to rank 45th in its assigned counsel fee structure for non-capital cases, its Legislature has declared that it shall pay whatever is necessary in death penalty cases. Any doubt regarding this legislative intent, however, is laid to rest by a review of the remarks of the bill's co-sponsors. In 1980, Assemblyman George Friedman stated:

" . . . [N]ever before, never before in the history of any country operating under a system like we operate in the United States of America,

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[16] RECORD OF PROCEEDINGS, ASSEMBLY, STATE OF NEW YORK (Monday, March 20, 1978) (statement of Assemblyman Graber), at 2040-2041.

[17] RECORD OF PROCEEDINGS, ASSEMBLY, STATE OF NEW YORK (Monday, January 14, 1980) (statement of Assemblyman Graber), at 60.

[18] RECORD OF PROCEEDINGS, ASSEMBLY, STATE OF NEW YORK (Tuesday, February 17, 1981) (statement of Assemblyman Graber), at 854.

have rights of accused individuals been protected as they are in this bill. This bill doesn't say you have a right to counsel; it doesn't say just that the State will give you counsel, *it says that the State will pay the going rate for counsel competent to represent you. That is that under this bill you have the right to get somebody like Percy Foreman to represent you and the State is going to foot the bill. Under no other system do you have that right. . . .*" (Emphasis supplied.)[19]

Last year in responding to Assemblyman Hevesi's remarks concerning the inadequacy of counsel and investigative services (*supra* n.11), Assemblyman Friedman stated:

"The bill does not say that investigative services will be provided only where investigators exist or work in the county where the trial is held. No, not at all.

"This bill says that investigative services will be supplied, period, whether it is Onondaga County or Bronx County. If you need investigators for the defense of this accused person, you will get them no matter what county he is in. . . .

"***Any fair-minded person would have to say, yes, it is possible an innocent person might be convicted. But I ask you to consider the other side of it. *This happens to be the most humane and fairest capital punishment bill ever passed in any house of any legislature in any state, and probably any country in the world.*

"*This bill provides . . . for the best lawyers to represent the poor Blacks that you were talking about.* You are right, Blacks in the past, and *minority people in the past, have suffered under capital punishment bills because they have not been able to get the best kind of legal representation. But under this bill, they could, because the bill requires that the State pay the equivalent rate for lawyers in that field. . . .*

***[If] I were accused of a capital crime, I could not hire a lawyer like the fellow now representing Jean Harris down in Westchester County, because he charges some $100 to $150 an hour, and if he was going to put in 100 or 200 hours for my defense, I could not afford it or pay for it. I would have to get one of my friends from Bronx County.

"But a poor person . . . under this bill . . . could go hire Joel Arnou now defending Mrs. Harris; F. Lee Bailey, if he feels like coming in; Mr. Edelstein from Brooklyn, you name it. Under this bill the poor person is going to have that lawyer representing him. It is not just the lawyer, it is the investigative services.

"You know the guys that were found, after their convictions, to have actually been innocent, were found to be innocent because somehow they managed, over the years, to get investigators working for them to dig into the facts and find out what actually happened, and uncover the real truth of the cases. This bill says you are going to have those investigative services at the very beginning. *Whatever is necessary, whatever is needed, if an army is necessary, you can hire them under this bill,* and you can prepare a defense if a defense is necessary." (Emphasis supplied.)[20]

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[19] RECORD OF PROCEEDINGS, ASSEMBLY, STATE OF NEW YORK (Monday, January 14, 1980) (statement of Assemblyman Friedman), at 99-100.

[20] RECORD OF PROCEEDINGS, ASSEMBLY, STATE OF NEW YORK (Tuesday, February 17, 1981) (statement of Assemblyman Friedman), at 881-890.

In 1980, Assemblyman Clark Wemple, another Assembly co-sponsor, stated:

> "This bill is as carefully constructed a piece of legislation that has ever come before this house. There is not a single provision in our Penal Law, our Code of Criminal Procedure, absolutely nothing that comes within shouting distance of this particular bill in terms of its attention to the rights of the accused. ***Any defendant under this bill can have *unlimited funds* to hire the top attorney in his community, in his state, in the Nation, to defend him. ***You can get not just competent counsel under this bill, *you can get the best counsel*. That is the point of distinction." (Emphasis supplied.)[21]

And again last year, during the debate on this bill, Assemblyman Wemple stated:

> ". . . [T]*his bill goes far beyond anything we have ever had in this State or in the country in terms of providing those constitutional rights and extra-constitutional rights* that you don't generally find." (Emphasis supplied.)[22]

Assemblyman Morahan, speaking in 1981 on the floor of the Legislature, stated:

> ". . . [A]nd they have provided adequate money for defense, and I am not talking about the average public defender brand of defense, but *defense equal to those who would have money.*" (Emphasis supplied.)[23]

It is apparent that the supporters of the Volker/Graber death penalty bill recognize the inadequacies of the current system for providing public defense services. It is also absolutely clear that the legislative intent of §722-g[5] is to respond to those inadequacies by supplying "unlimited funds" to the defense in capital cases. In what follows, the price of that response and other costs of capital litigation are detailed.

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[21] RECORD OF PROCEEDINGS, ASSEMBLY, STATE OF NEW YORK (Monday, January 14, 1980) (statement of Assemblyman Wemple), at 86-87.

[22] RECORD OF PROCEEDINGS, ASSEMBLY, STATE OF NEW YORK (Tuesday, February 17, 1981) (statement of Assemblyman Wemple), at 908.

[23] RECORD OF PROCEEDINGS, ASSEMBLY, STATE OF NEW YORK (Tuesday, February 17, 1981) (statement of Assemblyman Morahan), at 997.

PART II:
THE COST OF CAPITAL LITIGATION
(TEN LEVELS AND BEYOND)

It is now clear that a permanent and indispensible feature of capital litigation involves the review of constitutional, statutory and discretionary questions at a minimum of ten state and federal judicial levels. These include, but are not limited to:

1. the guilt and penalty phases of trial;
2. review by the highest state court of a sentence of death and the underlying conviction;
3. writ of *certiorari* to the United States Supreme Court;
4. post conviction proceedings including evidentiary hearings to vacate judgment or set aside sentence or both;
5. review by the highest state court of adverse determinations in such post-conviction proceedings;
6. writ of *certiorari* to the United States Supreme Court;
7. petition for writ of *habeas corpus* to the United States District Court;
8. appeal of a negative determination of a writ of *habeas corpus* to the Federal Court of Appeals for the circuit encompassing the district wherein the writ was brought;
9. a petition for rehearing *en banc* from a negative determination of the Court of Appeals;
10. a writ of *certiorari* to the United States Supreme Court to review a negative determination of either the Court of Appeals or a rehearing *en banc*.

After final judicial review, commutation applications directed to the executive branch are conducted. Stays at each level or stage of litigation are routine. A litigation process lasting eight to ten years is the norm.[24]

These levels of judicial review are the mandatory daily fare of capital litigation even in states where death penalty statutes, unlike the Volker/Graber bill, fail to provide representation beyond the highest state court.

There is a nationwide network of lawyers, legal workers and organizations routinely seeing to it that lawyers are supplied in the post-conviction stages of capital cases everywhere in the country.[25]

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[24] While nostalgic longing for simpler times may be appealing, it will not change the course or the length of capital litigation in the United States. The most recent death case before the Supreme Court, *Eddings v. Oklahoma*, _U.S._, 102 S.Ct. 869 (1982), vacated a sentence of death and remanded for resentencing. The decision handed down January 19, 1982, concerned a shooting which occurred April 4, 1977. If *Eddings* is resentenced to death, the appeal process will begin again. This time-consuming judicial resolution of complex legal questions is something to be proud of. It is one of the indicia which distinguishes the United States of America from a host of "overnight republics" which dot the globe. Furthermore, litigation delay is by no means unique in or limited to death cases. *United States v. IBM*, 618 F2d 923 (2d Cir. 1980) was an antitrust suit brought by the Justice Department in 1969. The suit alleged that IBM had, *inter alia*, monopolized the electronic digital computer market. Discovery lasted from approximately 1969 to 1975. In that year the government's direct case commenced. It lasted for almost three years. From 1972 to 1980, IBM appealed at least five orders from the District Court, two of which were appealed to the Supreme Court. The IBM defense began in 1978. In January of 1982 the lawsuit was discontinued. As of 1979, 90,000 pages of testimony had been transcribed, several hundred witnesses had been deposed and 70 trial witnesses had been called.

[25] This network, partially the outgrowth of the death penalty moratorium strategy, is now in permanent place throughout the country. Thus, even in states which do not provide for representation beyond the highest state court, litigation still takes place and generates all the costs of responding to petitions for writs of *certiorari*, *habeas corpus* and other forms of state and federal post-conviction relief. More importantly, the

By an examination of these ten levels of judicial review, it is possible to actually chart the costs of capital litigation (see Table 1).

TABLE 1[26]

A Model Charting System for Projecting Capital Litigation Cost

STATE I

TRIAL						1.
PENALTY PHASE	Defense	Prosecution	Court	Correction	Other	TOTAL
State Charge						
County Charge						
GUILT PHASE	Defense	Prosecution	Court	Correction	Other	TOTAL
State Charge						
County Charge						

APPEAL						2.
COURT OF APPEALS	Defense	Prosecution	Court	Correction	Other	TOTAL
State Charge						
County Charge						

WRIT OF CERTIORARI						3.
U.S. SUPREME COURT	Defense	Prosecution	Court	Correction	Other	TOTAL
State Charge						
County Charge						

extent to which capital litigants are entitled to counsel in seeking state and federal post-conviction review (in states failing to provide it) is, itself, a question raised in capital litigation. It is clear that, from an ethical point of view, a lawyer cannot just "drop a capital case." Furthermore, canon 2 of the CODE OF PROFESSIONAL RESPONSIBILITY (DR2-110[A][2]) can be read to require the lawyer in a capital case to pursue the matter in federal court independent of the state's statutory scheme. See also *In Re Anderson*, 69 Cal. 2d 613 (1968). A strong argument that counsel should be required constitutionally to pursue the case into federal court is developing. Sevilla, *Do Court Appointed Counsel In Capital Cases Have A Duty To Pursue The Case In Federal Court?*, 1 DEATH PENALTY REPORTER, No. 9, at 1 (May 1981). It is reasonable to assume that eventually in capital cases a right to counsel for *all* levels of review, similar to the New York State statute, will be constitutionally mandated. The cost of the death penalty in those states that have failed to provide counsel will, at that time, be geometrically increased since such a ruling will no doubt be given retroactive effect.

[26] This chart depicts three channels of review in which capital litigation takes place: "State I," "State II" and "Federal." The stages are numbered in the theoretical order in which a "model" case would proceed. In reality, remands, evidentiary hearings, stays, and certain concurrent proceedings would both alter and add to the numbering system. The boxes represent in graphic form a means to allocate state and county costs across the ten levels of judicial review for defense, prosecution, courts, corrections, and other miscellaneous categories. In our model, "State I" is the first channel of litigation and includes the state trial court proceeding,

STATE II

POST-CONVICTION PROCEEDING						4.
	Defense	Prosecution	Court	Correction	Other	TOTAL
State Charge						
County Charge						

APPEAL						5.
COURT OF APPEALS	Defense	Prosecution	Court	Corrections	Other	TOTAL
State Charge						
County Charge						

WRIT OF CERTIORARI						6.
U.S. SUPREME COURT	Defense	Prosecution	Court	Correction	Other	TOTAL
State Charge						
County Charge						

FEDERAL

PETITION FOR WRIT OF HABEAS CORPUS						7.
DISTRICT COURT	Defense	Prosecution	Court	Correction	Other	TOTAL
State Charge						
County Charge						

APPEAL						8.
U.S. COURT OF APPEALS	Defense	Prosecution	Court	Correction	Other	TOTAL
State Charge						
County Charge						

REHEARING						9.
U.S. COURT OF APPEALS	Defense	Prosecution	Court	Correction	Other	TOTAL
State Charge						
County Charge						

WRIT OF CERTIORARI						10.
U.S. SUPREME COURT	Defense	Prosecution	Court	Correction	Other	TOTAL
State Charge						
County Charge						

EXECUTIVE

COMMUTATION APPLICATION						11.
	Defense	Prosecution	Court	Correction	Other	TOTAL
State Charge						
County Charge						

In what follows, we discuss "State I"—the first three stages of capital litigation. We will trace a death penalty case through trial, appeal, and United States Supreme Court review. To the extent possible, we allocate and chart the costs for defense,[27] prosecution,[28] corrections,[29] courts,[30] and other miscellaneous categories.

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direct appeal to the Court of Appeals, and federal relief in the form of *certiorari* to the United States Supreme Court. In the event that relief is denied in this channel, litigation in "State II" (the state's post-conviction remedy channel) commences. Post-conviction proceedings at the trial level, direct review by the Court of Appeals, and again a writ of *certiorari* to the Supreme Court are envisioned. The "Federal" channel includes *habeas corpus* relief in the U.S. District Court, review of adverse decisions by the U.S. Court of Appeals, discretionary relief by rehearing *en banc* in the U.S. Court of Appeals, and again a writ of *certiorari* for Supreme Court review. The eleventh level of this review process includes executive clemency. It should be noted that the statutory apparatus for clemency in the state of New York does not appear to be procedurally sufficient for death cases. See N.Y. CORRECT. LAW ARTICLE 11 (McKinney 1968).

[27] In addition to other authority cited throughout this paper, in February and March of 1982, the New York State Defenders Association conducted a telephone survey of public defender offices, private attorneys, expert witnesses, investigators, correctional personnel, and others in order to determine costs involved in litigating death penalty cases.

[28] Throughout the remainder of this paper, we apply a uniform formula to estimate capital prosecution costs. This formula is based on existing average statewide disparity rates between prosecution and defense. For the purposes of the estimates, we use the baseline defense costs and apply three prosecution to defense ratios. The first, a 2 to 1 ratio, is applied to counsel costs in the guilt and penalty phases. The second, a 3 to 1 ratio, is applied to expert witness and investigation costs in the guilt and penalty phases. The third, a 1 to 1 ratio, is applied to the cost of appeals to the New York Court of Appeals and the United States Supreme Court. These ratios are a reflection of actual experience based on defense/prosecution cost data. As applied, they will consistently yield what we believe are uniformly conservative dollar amounts. Actual prosecution/defense disparity is much greater than 2 to 1 or 3 to 1. In some jurisdictions, disparity runs as high as 8 or 10 to 1. The reader can thus take the prosecution costs reported hereinafter as the minimum cost of capital prosecution, resting precariously upon the assurance that these costs will be no less than what is reported, and will probably be much more. While we hesitate to say how much more, if recent experience is the bellwether, counties will assuredly go bankrupt as they pay for the cost of prosecution in capital cases. Under the capital litigation scheme envisioned for New York by the Volker/Graber bill, prosecution costs will remain a county charge.

[29] We do not yet know the correctional costs generated by the death penalty at the local level. There will be higher security costs attached to capital incarceration in the areas of housing, monitoring, maintenance, transportation, and feeding. Most local jails will be hard pressed to achieve adequate capital case security. We do not, herein, estimate local correctional costs generated by the death penalty. In the state system (post-verdict), capital incarceration takes a tremendous and distinctly identifiable toll. We discuss certain costs associated with state level incarceration infra at PART III.

[30] The difficulty of retrieving useful data for the purpose of projecting court costs in New York State has previously been recognized. NATIONAL CENTER FOR STATE COURTS, NEW YORK STATE BUDGET REVIEW MANUAL: A REPORT OF THE SENATE SELECT TASK FORCE ON COURT REORGANIZATION (1978). For this reason, in this report we rely on survey data from other states.

THE GUILT AND PENALTY PHASES

A. Death Is Different

The United States Supreme Court has recognized that death penalty cases require greater due process procedural safeguards than do non-capital cases. In *Gardner v. Florida*, 430 U.S. 349, 357 (1977), the Court stated:

> "... [F]ive Members of the Court have now expressly recognized that death is a different kind of punishment from any other which may be imposed in this country. [Citations omitted.] From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."

The Legislature's intent to have the state pay the defense bill no doubt arises from court decisions like *Gardner* which establish that death cases require greater procedural protection.[31]

In recognizing this constitutional principle, the Legislature has declared its commitment to this new brand of equal protection. It has stated that where the state seeks the irrevocable sanction of death, inability to pay for the best counsel and auxiliary services will not be a bar to receiving them. Under the Legislature's view of due process, in such cases, the state will pay for representation, no matter what it costs.

In the ordinary criminal case in which the appointment of counsel is made for a person unable to afford counsel, the court will appoint counsel. The legislative debates indicate, however, that, although it is not a requirement of our present statutory scheme and has not yet been recognized as an element of the Sixth Amendment,[32] an indigent defendant facing the death penalty in New York State will have the opportunity to choose the lawyer to be appointed. Additionally, although the mechanism for this process of appointment has not been made clear by the Legislature, the Legislature has explicitly pointed out that this will not just be competent counsel but will be the best counsel money can buy:

> "... [W]hat we are saying is that whatever the fees are that F. Lee Bailey and the best attorneys, the best criminal attorneys get, are the kind of fees that the State is going to provide for the defense of accused persons who may come under the restrictions of this bill."[33]

While the use of the name F. Lee Bailey may be somewhat symbolic, there is no

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[31] See *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Furman v. Georgia*, 408 U.S. 238 (1972). Mr. Justice Harlan, concurring in *Reid v. Covert*, 354 U.S. 1, 77 (1957), stated: "I do not concede that whatever process is 'due' an offender faced with a fine or a prison sentence necessarily satisfies the requirements of the Constitution in a capital case." *Gardner* makes clear that a majority of the Court accepted this position.

[32] The U.S. Court of Appeals for the Ninth Circuit has held that a defendant's Sixth Amendment right to counsel is violated when a trial court judge fails to accord appropriate weight to an existing attorney/client relationship in determining whether to grant a continuance founded on the temporary unavailability of the defendant's particular attorney. *Slappy v. Morris*, 649 F.2d 718 (9th Cir. 1981). On March 29, 1982, the United States Supreme Court agreed to review the case. *Morris v. Slappy*, 81-1095. See also *N.Y.L.J.*, March 30, 1982, at 1, col. 4. Thus the question of whether or not a defendant has a federal constitutional right under certain circumstances to "counsel of choice" may soon be resolved.

[33] RECORD OF PROCEEDINGS, ASSEMBLY, STATE OF NEW YORK (Monday, March 20, 1978) (statement of Assemblyman Friedman), at 2079-2080.

question that his fee structure is real. If New York is prepared to pay for the "best" counsel with taxpayers money, it can begin with his law offices in Boston. Bailey's office reported that in serious felony (non-capital) cases, it requires an initial retainer of $50,000. This does not include expenses or per diem trial costs.[14]

Norris Gelman, a Pennsylvania attorney with much trial experience in death penalty cases, stated that an appropriate retainer in a capital case runs anywhere from $25,000 to $50,000 depending on the fact pattern.

Ken Rose, an attorney with Team Defense in Atlanta, an organization that specializes in defending death penalty cases, reported that private attorneys in the Atlanta area require initial retainers ranging from $15,000 to $40,000. The Southern Poverty Law Center similarly found that private attorneys in Alabama require retainers of not less than $25,000.

Fees thereafter will be based on hourly and daily (trial) rates. Fees ranging from $100 to $200 per hour will not be uncommon. The bill provides for the appointment of "one or more attorneys" and it is reasonable to assume that the appointment of two or more attorneys will be the rule, not the exception.[15]

The natural result of the death penalty statute will be that jury trials will be conducted in all capital murder cases. The jury trials will be longer and more expensive than in non-capital cases. Long before the jury is empaneled, however, there will be very high pretrial costs. These include motion practice, investigations, and the use of expert witnesses. A discussion of these follows.

B. Motion Practice

Pretrial motions play an important role in *most* criminal cases. However, a death penalty trial is strikingly different than other felony trials because of the length of each procedural stage and its overall importance to the ultimate objective—preventing the imposition of the sanction of death. Extensive pretrial motions play, therefore, a crucial role in *every* death penalty case.

Motions request specific legal relief or action; they help to educate the trial court and appellate courts as to the standards of extra special due process that have to be applied to each procedural question in a death case. Motions create a record and set a course of strategy upon which the entire litigation effort in a capital case is patterned.

The usual number of pretrial motions in non-capital cases vary between five and seven. In death penalty cases, every motion will be critical, requiring substantially more time to prepare. Experienced attorneys state that the typical capital case requires the filing of between 10 and 25 trial motions.[16] Many pretrial motions will relate solely to the unique aspects of the defendant's underlying criminal case. Others will be specifically a function of there being a death penalty statute in existence.

Thoroughly researched constitutional attacks on the death statute, motions directed at insulating the jury from outside influences, and in-depth motions for discovery and the right to inspect and test evidence will be routine. Ordinary motions in criminal

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[14] Significantly, F. Lee Bailey reportedly spent $350,000 for his own defense against charges of conspiracy to defraud investors arising from his involvement with Glenn Turner. (*Time*, Feb. 16, 1976, at 50.) Nor is he alone. John Ehrlichman is reported to have spent $400,000 on his defense. (*Time*, Jan. 13, 1975, at 14.)

[15] Unlike the proposed Volker/Graber bill, the California death statute is silent on the number of lawyers to be appointed in capital cases. Nevertheless, the California Supreme Court has held that a court should presumptively appoint a second attorney if such an attorney "... may lend important assistance in preparing for trial or presenting the case." *Keenan v. The Superior Court of the City and County of San Francisco*, 30 Cal. 3d_____ (Feb. 8, 1982).

[16] *Motions for Capital Cases*, Southern Poverty Law Center, 1981, p.2.

cases take on a different meaning in death cases. Thus, motions to suppress physical evidence or suggestive identification procedures, motions to dismiss the indictment, or motions to contravert search warrants, the routine matter of any criminal case, are longer, more complicated and more heavily litigated in death cases.

In capital cases, motions for the appointment of expert witnesses, the employment of investigators, the utilization of private psychiatrists for trial and sentencing and special motions to increase the court's consciousness of the requirements of "super due process" are not only routine but required as an element of the effective assistance of counsel.

In virtually every death penalty case, the defense will file motions for change of venue, individual *voir dire*, sequestration of jurors during *voir dire*, and sequestration of a petit jury. The motions are essential to offset prejudicial pretrial publicity and to ensure the defendant an impartial jury.[37] There are reported cases of individual examination of potential jurors that have lasted two to four weeks. The cost of sequestering the jury in a trial that, on the average, lasts from four to six weeks in a capital case, is also substantial.[38]

Professor Robert Buckhout, a professor of psychology at Brooklyn College, Brooklyn, New York, has testified in over 80 death penalty cases. His expertise involves the sufficiency of eyewitness identifications as well as conducting juristic psychological surveys. Juristic psychological surveys involve consulting with the attorneys and preparation of sample questionnaires to assist in targeting special jurors during *voir dire*. At times, he has even assisted attorneys in the actual conduct of *voir dire*. Professor Buckhout's fee for the surveys is $500 per day for in-courtroom testimony with a consulting fee of $100 per hour. In 1977, Professor Buckhout submitted a $25,000 bill in a death penalty trial for a juristic psychological survey.

C. Investigators

Once an attorney appears in a death penalty case, and ordinarily before many of the aforementioned pretrial motions are brought, there arises the need for auxiliary defense services. Foremost among these is the need for an investigator.

Investigators' fees, in our survey, range from $500 to $1500 per day. Hourly rates for experienced investigators were reported to range between $75 and $200. The Office of the State Public Defender in California has found the cost for investigators at trial in some death penalty cases to have been in excess of $40,000. Similar amounts were reported by private attorneys. The National College for Criminal Defense in Houston found that the bare minimum needed for investigation is $10,000, and this figure only represents the investigation required for the trial phase. This figure, by New York standards, is concededly low.[39]

The Sixth Amendment right to the effective assistance of counsel in both federal and state courts requires thorough investigations in all criminal cases. Apparently, this has not gone unnoticed by the Legislature. The legislative debate on what would be paid for investigators included a comment by Assemblyman Friedman about defendants who, years after conviction, were able to secure their freedom with "late" investigative

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[37] *Motions for Capital Cases*, Southern Poverty Law Center, 1981, pp. 43-44, 78-83.

[38] This cost is not detailed nor estimated herein. It will, however, be a substantial charge.

[39] In *People v. Gaydon*, 43 A.D.2d 842 (1974), a non-capital murder case involving a shooting in a social club, the American Service Bureau, the private investigation firm on the case, found and interviewed more than 35 witnesses. The work in that non-capital matter included the investigation of each complaining witness and the retrieval of statements. The cost of this alone exceeded $25,000.

help. Referring to this issue he stated, *supra*, at n. 20, "This bill says you are going to have those investigative services at the very beginning."

"Up front" investigative services have been shown to be essential. In the recent case of Johnny Ross, imprisoned in Louisiana at 15 and sentenced at 16 to die for a rape he didn't commit, investigative services set him free. These investigative services should have been available pretrial, but were not supplied until the Southern Poverty Law Center brought a *habeas corpus* petition (in the "Federal" or third litigation channel).

The Southern Poverty Law Center received a letter from Johnny Ross in 1975 pleading his innocence. Ross was 16 at the time—the youngest person on death row in America—and the Center took his case. Ross's 1975 trial had lasted less than one day despite the fact that it was a capital case in which his life was at stake.

Among numerous other things, the Southern Poverty Law Center hired Gary Eldredge, a private investigator from New Orleans, to complete the investigation in the Johnny Ross case:

> "Eldredge read the trial transcript and began tracking down alibi witnesses, interviewing investigating officers and pursuing other leads. In reading the transcript, he noticed that the prosecutor had introduced, through the testimony of a criminalist, the rapist's blood type, as determined from a semen sample taken from the rape scene, but the prosecutor had never tied this piece of evidence to Ross.
>
> "For the sake of thoroughness, Eldredge decided to check it out and contacted Ross to see if he knew his blood type. The rapist's was the 'B' group. Ross didn't know his, but told Eldredge he had donated blood a number of times since he'd been imprisoned. So Eldredge contacted the blood bank that served the prison.
>
> "Each of the numerous times Ross had donated, his blood had been typed, and each time it had come up 'O +.' But these were the results of testing by technicians, not physicians, so after informing [the Southern Poverty Law Center] of his findings, Eldredge arranged for a prominent university doctor to test Ross, and his tests produced exactly the same results. ***[The Southern Poverty Law Center] took the evidence to the district attorney's office. Soon thereafter, Ross was released. He is now living with his sister in Denver."[40]

The price of the Gary Eldredge investigation in the Johnny Ross case was $3500. It took place, however, years later than it should have, in conjunction with a federal *habeas corpus* petition. The waste of taxpayer dollars that ensued from unnecessary litigation is nothing compared to the abuse of Johnny Ross's liberty—a deprivation of freedom arising directly from poverty.

A typical criminal case investigation, obviously heightened in a death case, involves searching for and interviewing every potential favorable and adverse witness. It includes crime scene investigations, photographs, the search for and retention of experts, and the review of testimony presented at pretrial hearings and other evidentiary proceedings. The investigator retrieves evidence, follows leads, and develops factual theories. Frequently, the investigator is deeply involved in surveys to test for prejudice within a community and among potential jury veniremen. In a system which requires the marshalling of facts before they are applied to law, the investigator is a crucial and vital part of the defense team.

Nor should it be forgotten that the sentencing phase of the bifurcated trial process is

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[40] *Poverty Law Report*, Vol. 10, No. 1, Jan./Feb. 1982, at 3.

a co-equal part of capital litigation at the trial level. Thus, the marshalling of facts on the issue of guilt is but 50 percent of the work that a good private investigator will be doing in a capital case.

D. Experts and Auxiliary Services

Experts, such as forensic scientists, juristic psychologists, psychiatrists, crime scene reconstructionists, criminalists, polygraph experts and others contacted in our survey, reported fees ranging from $500 to $1,000 a day for their services. These people are critically necessary to the defense team. While any particular case may require a different configuration of the experts required, all cases will require the extensive use of numerous experts. The fees reported below are exclusive of the expenses required for travel.

Judith Bunker, a technical specialist to the medical examiner in Atlanta, and one of the top crime scene reconstructionists and blood stain analysts in the country, has advised NYSDA that the going rate for such services ranges from $700 to $1,000 per day.

In many capital cases, difficult issues, such as the insanity defense, are often raised. Psychological Evaluations, Inc., in Atlanta, has performed psychiatric and psychological evaluations in death penalty cases throughout the country. Although the individual fees vary, Dr. Anthony Stone, a psychologist, reports the average fee is approximately $700 a day exclusive of expenses.

Our office interviewed Mr. Robbie Robertson of W.A. Robertson and Associates from Atlanta, Georgia. Mr. Robertson is an expert in the administration and analysis of polygraph examinations. He has participated in approximately 25 capital murder cases in which his testimony and analysis were used at pretrial proceedings, and trial and sentencing phases of the bifurcated capital process. His present fee is $200 per day for courtroom testimony. In addition, he charges $150 for the administration of the polygraph examination with the average bill approximating $500 plus expenses.

As stated earlier, Professor Robert Buckhout has appeared in his capacity as an expert witness regarding eyewitness identifications. His courtroom fee is $500 per day. His consulting fee, once again, $100 per hour.

Dr. George Jurow of New York, New York, has been involved in approximately 25 death penalty cases. His expertise centers on *Witherspoon* issues.[41] His research concludes that the exclusion of jurors opposed to the death penalty at trial results in biased juries. His services include consulting with the attorney and sometimes testimony at the pretrial stage. Frequently, he is a witness in support of defense motions to empanel a separate jury for the sentencing phase. His fee is $100 per hour for consulting as well as testimony.

Dr. David Rothstein, of the Michael Reese Medical Center, Chicago, Illinois, is a psychiatrist. Dr. Rothstein has testified in several capital cases in both the trial and penalty phases. His fee is $125 per hour for in-court testimony and $110 per hour for analysis. This fee is exclusive of expenses.

Dr. Seymour Halleck, of the School of Psychiatry at the University of North Carolina at Chapel Hill, has testified in both the trial and penalty phases of capital trials. With a standard fee of $150 per hour, he approximated his average bill to be $2500 for both phases.

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[41] *Witherspoon v. Illinois*, 391 U.S. 510, 522 (1968), held that a death sentence may not be "... carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction."

A typical death case will use these experts or others just like them. A hypothetical case can easily be designed. Let us assume a case in which three days of crime scene reconstruction, a juristic psychological survey and a polygraph examination are required. Let us further assume a *Witherspoon* jury challenge that takes three days of work and four hours of testimony and the use of one psychiatrist who has conducted a five hour exam and testifies for two hours. This relatively modest use of experts will run up a bill for the state of more than $30,000 in just the guilt phase of a capital case. These costs are real. They will be paid by the state. They will be present in every capital trial.

E. Sentencing in the Penalty Phase

Any aspect of the defendant's character or record and any other circumstance offered in mitigation of punishment must be considered by the jury in the penalty phase of a capital trial. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). *Lockett* followed on the heels of *Woodson v. North Carolina*, 428 U.S. 280 (1976). In *Woodson*, the Supreme Court, in defining the requirements of capital sentencing procedures, stated that courts must consider the:

> "character and record of the individual offender and the circumstances of the particular offense *as a constitutionally indispensible part of the process of inflicting the penalty of death.*" (Emphasis supplied.) *Id.*, at 304.

In *Gardner v. Florida*, 430 U.S. 349, 358 (1977), the Court held that:

> "[I]t is now clear that *the sentencing process*, as well as the trial itself, *must satisfy the requirements of the Due Process Clause* ***[T]*he sentencing is a critical stage of the criminal proceeding at which [the defendant] is entitled to the effective assistance of counsel.* ***The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence. . . ." (Citations omitted.) (Emphasis supplied.)

At this critical stage of the proceeding, the defense may use many of the socio-psychiatric witnesses employed during the trial phase. However, this stage additionally requires the investigation of the defendant's family, friends, neighbors, school personnel, and social workers.

The investigation at the sentencing phase requires a complete retrospective analysis of every positive aspect of the defendant's life from the day of birth to the date of sentence. The witnesses called to this proceeding, vital to establishing evidence in mitigation of sentence, must be made available to testify, requiring, in many cases, the reimbursement of travel expenses and accommodations. Military, school, work, and other records must be designated, located and retrieved.

The Volker/Graber bill will permit the court, upon a showing of prejudice, to discharge the trial jury and empanel a new sentencing jury.[42] Hence, defense counsel will undoubtedly make the same motion as was made at trial for individual *voir dire* at the sentencing phase and for sequestration of the sentencing jury. Here again, a lengthy process of individual *voir dire* is, in many cases, the only possible remedy to empanel a fair and impartial jury on the question of sanction. The main reason courts have granted individual *voir dire* is that it is uniquely suited to capital cases.

Death cases ordinarily are accompanied by tremendous publicity and notoriety. Infection of the jury panel by this kind of publicity, and its resultant effect on jury fact-finding, creates reversible error. Therefore, it is in the interest of the court system to

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[42] Proposed Crim. Proc. Law §400.27(2), S.7600/A.9379 §8 (1982).

permit individual *voir dire* and sequestration of jurors during *voir dire*. Such *voir dire* enables the defense to delve into the area of prejudice without fear that the answers of one juror will taint the entire panel. Such taint preserves an issue for later litigation.

Three of the mitigating factors described in the proposed death bill for New York require the sentencing jury to consider whether ". . . [t]he murder was committed while the defendant was mentally or emotionally disturbed or under the influence of alcohol or any drug . . . ,"[43] whether ". . . [t]he defendant was under unusual and substantial duress or under the domination of another person . . . ,"[44] and whether ". . . [t]he defendant's mental capacity . . . or his ability to conform his conduct to the requirements of law was significantly impaired. . . ."[45] These circumstances clearly contemplate a situation where the defense will be called upon to present extensive testimony of psychologists and psychiatrists. The previously discussed costs of such services will *again* be incurred by the state. They will probably be higher in the penalty phase of the capital trial since the importance of such testimony is magnified by the omnipresence of death.

Furthermore, since 1978, it has been constitutionally explicit that:

> ". . . [T]he Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[46]

The requirements which permit relevant evidence in mitigation also result in the defense calling witnesses to establish the cruelty of the death penalty. Former death row inmates, theologians and witnesses to prior executions are the type of non-traditional expert witnesses that now, under rules laid down by the Supreme Court, testify in the penalty phase of capital litigation. The expense of these experts at the sentencing proceeding will be considerable. Little, if any, of this evidence can be legally excluded from the sentencing phase of a capital trial in the United States.

Mr. Lloyd McClendon, Deputy Administrator, Ohio Penal Industries, Columbus, Ohio, is an ex-death row inmate, having spent two years on death row. He has been certified as an expert witness in approximately six death penalty trials throughout the country. His testimony is used at the sentencing stage to rebut the deterrent effect of the death penalty and to support mitigating factors such as the defendant's positive potential. Mr. McClendon's fee is presently $500 a day for in-court testimony. In a recent case in the state of Florida, he submitted a bill to the public defender's office for approximately $2000.

The array of expert witnesses, including social psychiatrists, criminologists, and counselors, whose testimony will bear on the inadequacy of the death penalty as a sanction, requires preparation for a full blown evidentiary, adversarial proceeding. Experts to testify on the death penalty as it is applied in a particular state, professors to testify on the philosophical question of capital punishment, social scientists to resolve jury doubts, and many others are called as witnesses in the penalty phase. Testimony on the inefficacy of the death penalty as a deterrent, on attitudes toward the

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[43] Proposed CRIM. PROC. LAW §400.27 (8)(f), S.7600/A.9379 §8 (1982).

[44] Proposed CRIM. PROC. LAW §400.27(8)(c), S.7600/A.9379 §8 (1982).

[45] Proposed CRIM. PROC. LAW §400.27(8)(b), S.7600/A.9379 §8 (1982).

[46] *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

death penalty, on racial prejudice, and on every imaginable issue that can prevent the execution of a human being is permissible and systematically used in the sentencing phase of a capital case.[47]

THE COST OF THE GUILT AND PENALTY PHASES

The first stage of "State I" has been seen to be expensive. We recap costs here.

Defense: Charges for the defense will conservatively total $352,700. One hundred seventy six thousand, three hundred fifty dollars ($176,350) is allocated for each phase (guilt and penalty)[48] as follows:

Attorneys	$106,350
Investigators	40,000
Experts	30,000
	$176,350

Prosecution: Our estimate of prosecution costs at the trial level for the guilt and penalty phase of the average capital case in New York is $845,400.[49]

Court: As previously stated,[50] court data is difficult to retrieve for the purpose of capital litigation cost modeling. We do, however, have a guidepost and, in the absence of hard data, we use it. John Ackerman, dean of the National College for Criminal Defense, reports that a local Texas judge, counting only court-time, employees time and jury sequestration, estimated the county cost of a recent death penalty case at over $300,000. This amount did not include appeal, and the defendant in that case did not receive a sentence of death. In fact, the case is now on appeal.

Correctional Cost: As previously stated,[51] we do not estimate or allocate local jail capital incarceration costs.

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[47] It should be noted that the only experiential competence statutorially required under the Volker/Graber bill is in the *trial* of felony cases (three years). However, the two stages of the bifurcated capital process require experiential competence in both the guilt phase (trial) and the penalty phase (sentencing). The art of sentencing advocacy is a new and developing area. Experience in New York felony court representation, absent more, is not sufficient experience for the sentencing phase of a capital case. Additionally, in New York, experiential competence in similar sentencing proceedings would be virtually impossible to acquire. Although Article 400 of the Criminal Procedure Law presently provides for presentence conferences, summary hearings, and other specified hearing procedures, these proceedings do not approach the complexity or importance of penalty phase proceedings in death cases. Furthermore, the CPL proceedings can only be held before a judge [CPL §§400.10; 400.15(7)(a); 400.16(2); 400.20(a); 400.21(7)(a); 400.30; 400.40(5)] while penalty phase proceedings are held before juries. Although the Volker/Graber bill clearly permits hiring special counsel to assist in penalty phase procedures, including post-trial, presentence motion practice, presentence investigations, hearing preparation and the sentencing hearing itself, we do not independently calculate these fees.

[48] This assumes a concededly low model four week trial of 120 trial hours, exclusive of motions. It assumes two trial lawyers, one investigator, and the expert costs detailed *supra* at D. One hundred twenty five [125] hours of motion work are allocated to the guilt phase, and 344 hours of lawyer time to investigation and preparation [research, witness preparation, client interviews].

[49] See n. 28, *supra*.

[50] See n. 30, *supra*.

[51] See n. 29, *supra*.

We can now allocate and chart some of the costs arising in the first stage of capital litigation—the guilt and penalty phases. (See Table 2 below.)

TABLE 2
COST OF THE GUILT AND PENALTY PHASES

TRIAL						
PENALTY PHASE	Defense	Prosecution	Court	Correction	Other	TOTAL
State Charge	$176,350	—0—	$150,000	—0—	?	$326,350
County Charge	—0—	$422,700	—0—	?	?	$422,700
GUILT PHASE	Defense	Prosecution	Court	Correction	Other	TOTAL
State Charge	$176,350	—0—	$150,000	—0—	?	$326,350
County Charge	—0—	$422,700	—0—	?	?	$422,700

STATE $652,700
COUNTY $845,400
TOTAL $1,498,100

Under the Volker/Graber bill, it will cost New York State and its counties more than $1.4 million to bring a capital case to the point of a death sentence. However, the drain of taxpayers' money will have just begun. The costs associated with the ensuing nine levels of appellate review are substantial.[52] The first two stages of the appellate process within "State I" are detailed below.

DIRECT APPEAL TO THE COURT OF APPEALS

The Volker/Graber bill authorizes a direct appeal to the Court of Appeals from judgment of conviction and sentence of death. The Court of Appeals will review the law and the facts. It will examine the presence of passion, prejudice, or arbitrariness in the sentence. It will review statewide sentencing patterns and determine whether the sentence of death is disproportionate or excessive. The appellate process will increase the total cost of the death penalty procedure by: 1) being more expensive than non-capital appeals; and 2) regenerating the costs of the trial process when cases are remanded for trial. The latter result is not infrequent in death penalty appeals.

The California Office of the State Public Defender reports that nine out of the first 11 death judgment appeals under California's death penalty statute resulted in either

[52] It bears repeating that the proposed bill does not limit the reimbursement of appellate defense counsel to the state appellate forum. Indeed, it requires the appointment of appellate counsel for the federal as well as the state level. The costs associated with "State II" and the "Federal" litigation channel (see Table 1, *supra*) (post-conviction proceedings, appeals, writs of *certiorari*, federal *habeas corpus* petition, federal appeals, rehearings, and writs of *certiorari*) are not detailed in this paper. Furthermore, the Attorney General will represent the state as respondent at each application for a writ of *habeas corpus* and other federal relief. The weighty state costs associated with this representation at three federal stages of litigation are also not detailed herein.

reversals or retrials. That office also reports the cost of a death penalty appeal on the state level to be in excess of $30,000 per case.

The proposed New York bill would require appellate counsel to perfect two appeals at once, i.e., the sentence review[53] and the direct appeal. The expense of this procedure will also be felt by the state and county as they attempt to defend the conviction. The constitutionality of a death penalty statute is almost always attacked on appeal. In New York, this will require the Attorney General's office to appear and defend the constitutionality of this statute.[54]

In our survey on appellate death penalty costs, F. Lee Bailey's office reported a minimum cost of $25,000 to take a non-capital felony appeal. Again, this figure is exclusive of expenses.

The Southern Poverty Law Center reported the cost of an appeal to range from $20,000 to $30,000. Under the New York statute, the costs will be higher.

In order to accurately quantify time involved in a capital case, we examined jurisdictions which have objectified the appellate process by the development of workload standards. In California and Michigan, the state defender offices have quantified non-capital appellate work into work units. By calculating the number of hours to prepare one brief from 300 pages of transcript, the Michigan Appellate Defender Office has developed an "an appellate unit"—a work unit equal to 55 hours of attorney time. Under this formula, a minor non-capital case directly appealed to the highest state court would require 3.7 work units or approximately 203½ hours. This includes an application to appeal, an appellate brief, oral argument, and motion for rehearing. It does not cover reply briefs, client visits, or expenses. The standards for California are substantially similar.

Significantly, the Appellate Section of the National Legal Aid and Defender Association[55] has developed capital case appellate standards and has also done so on the basis of work units. Under these standards, which can permissibly be met under the express provisions of the Volker/Graber bill, 30 work units are the standard work load for one appellate attorney for one year. A direct appeal of a death case to the New York Court of Appeals would constitute 14 work units under these standards.

This figure, which may be somewhat low considering the extensive research and innovation that will be required in the first onslaught of constitutional challenges to the Volker/Graber bill, translates into about five months work or between 800 and 900 billable hours. At the rates charged by the "best" counsel, *supra*, at n. 33, this will translate into defense costs of $80,000.

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[53] The costs associated with the constitutionally required disproportionality review have not been assessed. The death penalty statute will require the arresting police officer, the prosecuting attorney, the defendant's attorney, and the trial judge to file reports with the Court of Appeals in every case where a defendant is indicted for first degree murder. These reports will have to be filed with the Court of Appeals within 30 days of a disposition by a superior court. They will also have to be separately analyzed in conjunction with each death penalty sentence appeal. The contents of the reports will be designed by rule of the Court of Appeals. They are obviously, therefore, not detailed in the bill. It is, however, clear that, independent of other increased capital case judicial costs, the judicial system will need significant additional resources just to carry out disproportionality review.

[54] N.Y. EXEC. LAW, §71 (McKinney 1972).

[55] The workload standards reported here were presented at the National Appellate Defender Conference conducted by the National Legal Aid and Defender Association, April 10-12, 1981, in Indianapolis, Indiana. The capital case workload standards of 30 work units define a capital brief as 10 units, and a petition for *certiorari* as four.

A direct appeal of a capital case to the New York State Court of Appeals will, therefore, cost New York taxpayers no less than $160,000[56] exclusive of correctional and court costs, as indicated in Table 3 below.

TABLE 3
COST OF DIRECT APPEAL TO THE NEW YORK STATE COURT OF APPEALS

APPEAL						
COURT OF APPEALS	Defense	Prosecution	Court	Correction	Other	TOTAL
State Charge	$80,000	—0—	?	?	?	$80,000
County Charge	—0—	$80,000	—0—	—0—	?	$80,000

STATE $80,000
COUNTY $80,000
TOTAL $160,000

SUPREME COURT REVIEW

Final judgments of the Court of Appeals rendered in death penalty cases are next reviewable by the United States Supreme Court by writ of *certiorari*. Bringing such petitions is routine capital practice. Preparation of the petition and the brief on the merits involve complete review of, and familiarity with, the entire trial transcript and all state court proceedings. The transcripts to be reviewed frequently contain thousands and thousands of pages.

Edward Nowak, Public Defender of Monroe County and an able appellate lawyer who successfully argued the landmark case of *Dunaway v. New York*, 99 S.Ct. 2248 (1979), before the Supreme Court, estimates that the amount of time to adequately prepare a non-capital case for Supreme Court review averages between 150 and 200 hours. Seventy to 100 of these hours cover the preparation of the petition for *certiorari*. Once the petition is granted, however, fine points have to be honed and final briefs have to be prepared. Six lawyer weeks is not an unusual amount of time in non-capital cases.

In capital cases, far more is involved. The record is longer, the issues more complex, the stakes higher. More importantly, the constitutional principles involved have frequently only recently been enunciated and are subject to precise case by case refinement. During this process of review, while the cost of defense services will be a state charge, the cost of prosecutorial time will be a county charge.

The Supreme Court does not look at a *certiorari* petition to do justice to an individual litigant. Despite its reputation, the Supreme Court does not sit as a "court of last resort." Rather, in exercising its *certiorari* jurisdiction, the court seeks to either refine existing propositions of law, explore potential areas for applying settled principles of law, or to resolve constitutional conflicts among the state or federal circuits. In death cases, these principles heighten the existing pressure to find novel issues for Supreme Court reversal.

In the most recent case before the Court, *Eddings v. Oklahoma*, ____U.S.____, 102 S. Ct. 869 (1982), the question presented was whether or not the infliction of the death penalty on a minor who was 16 at the time of the crime constituted cruel and unusual

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[56] Prosecution costs are calculated at a ratio of 1 to 1 with defense. See n. 28, *supra*.

punishment under the Eighth and 14th Amendments to the Constitution of the United States. A second question was whether or not the Supreme Court should address the plain error committed by the trial court when it refused to consider relevant mitigating evidence. The petition for *certiorari* was 26 pages long. The state's opposition brief, 20 pages long. The brief on the merits, filed for the petitioner, was 68 pages long. It argued three points of law, cited 81 cases, and discussed 95 domestic statutes. It reviewed the statutes of 11 countries. Seventy-seven other authorities were cited in the brief. Five appendices containing in-depth social research were filed.

The *Eddings* case is not an unusual effort on behalf of a capital defendant. It involved hundreds and hundreds of attorney hours to research, prepare and present the case.[57]

Applying the Michigan work unit formula, a non-capital petition for *certiorari*, brief and argument before the United States Supreme Court requires four units or 220 hours of attorney work. The California formula, applied to Supreme Court review in a non-capital case, would require three appellate work units and approximately 200 hours of attorney time for research, preparation, brief writing, and oral argument. Applying the NLADA Appellate Section standards, a petition for *certiorari* in a capital case would require approximately 256 hours of preparation. Supreme Court review itself, including legal research, preparation, *certiorari* petition, briefs, and oral argument would be equal to or surpass 46 percent of an attorney's work year. This is billable at approximately 883 hours.

Under the provisions of the Volker/Graber bill, which provides fees at the rates charged by the "best attorneys," *supra*, at n. 33, this will translate into defense costs of $85,000.

Supreme Court review of a New York capital case will, therefore, cost New York taxpayers no less than $170,000[58] exclusive of correctional costs as indicated in Table 4 below.

TABLE 4
COST OF SUPREME COURT REVIEW

WRIT OF CERTIORARI						
U.S. SUPREME COURT	Defense	Prosecution	Court	Correction	Other	TOTAL
State Charge	$85,000	—0—	?	?	?	$85,000
County Charge	—0—	$85,000	—0—	?	?	$85,000

STATE $85,000
COUNTY $85,000
TOTAL $170,000

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[57] Significantly, the Supreme Court decided the narrower of the two questions in *Eddings*. The constitutionality of imposing the death penalty on a 16-year-old thus remains an open question. The case is now in Oklahoma awaiting a resentencing procedure. NYSDA has been informed that a motion has been made seeking the appointment of a new sentencing judge. This will, of necessity, have to be decided before the case can proceed.

[58] Prosecution costs are calculated at a rate of 1 to 1 with defense. See n. 28, *supra*.

PART III:
A NOTE ON THE COST OF THE "CORRECTIONAL" PROCESS

The fiscal wastefulness of a criminal justice system with a death penalty is epitomized by the cost of incarceration. Since 1976, when the death penalty was held not to be unconstitutional *per se* by the Supreme Court, four people have been executed in the United States.[59] The vast majority of capital defendants do not get executed; rather, ultimately, after enormous agony and squandering of the public treasury, they are sentenced to life imprisonment. It will be the same in New York State. New Yorkers will not only pay for the cost of trial, appeal, and nine levels of review, but also for the incarceration of the inmate during the process and most probably for the rest of his life. It would, in the eyes of some, be better at the outset to offer life imprisonment as the only sanction for first degree murder.

The annual cost of maintaining an inmate in a New York State prison was calculated at $15,050 in 1978.[60] Assuming that the average age of persons convicted of first degree murder is 30,[61] and that they will live until age 70, the cost of life imprisonment for 40 years would be $602,000. At a cost of $1.4 million, a death penalty trial alone will exceed the cost of life imprisonment.

For the defendant facing capital punishment, the cost of special death row security must be added to the annual charges above. Thus, according to representatives of the Florida Clearinghouse on Criminal Justice, during the eight to ten years involved in post-conviction appellate review, an additional $15,000 per year for each inmate will probably be required. This security cost reflects the need to deal with the death row inmate individually, to maintain an individual cell, and to separate the inmate from the general population. This issue is certainly not new to correctional administrators.[62]

Richard McGee, then Administrator of the California Youth and Adult Corrections Agency, stated 18 years ago:

> "There is also the argument of cost. Why support some murderer for the rest of his life when we could execute him and save all that money, the argument goes.
>
> "Like so many arguments favoring the death penalty, this does not

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[59] Note that of the four, three—Gary Gilmore (1977); Jesse Bishop (1979); and Steven Judy (1981)—all desired execution. Only John Spenkelink did not wish to die. He is thus the only person to be executed against his will since 1967. Since 1976, eight persons on death row have, however, committed suicide.

[60] D. McDONALD, THE PRICE OF PUNISHMENT: PUBLIC SPENDING FOR CORRECTIONS IN NEW YORK 13 (1980).

[61] Florida reports the average age at admission to its death row is 30.8 years. BUREAU OF PLANNING, RESEARCH AND STATISTICS, FLORIDA DEP'T. OF CORRECTIONS—DEATH ROW ANALYSIS 1, STATISTICAL FACTS (Aug. 29, 1980).

[62] Thorsten Sellin, writing in 1961, said: "It has . . . been claimed that [the death penalty] is an economical way of disposing of criminals who, otherwise, would have to be supported at public expense—perhaps for the rest of their lives. Those who employ this cynical argument may be ignorant of the sometimes mountainous costs of the administration of justice in capital cases and they certainly have no knowledge of the realities of prison administration. It is no doubt true that some prisoners, including some lifers, do not make adequate returns to the state—measured in dollars and cents—for some of them are mentally or physically incapable of doing so. But most lifers work in prison. They perform domestic services, they work in prison shops, they do clerical work. If they were paid a wage commensurate with their services, they would be able to pay the costs of their maintenance, but since they are paid little or nothing, it is easy to forget that they are a source of financial profit to the institution in one way or another. Any prison warden will testify to the fact that it is from the group of lifers that he draws a considerable number of trusted inmate employees." *Capital Punishment*, 25 FED. PROBATION, No. 3, at 3 (Sept. 1961).

hold up under factual analysis. The actual costs of execution, the cost of operating the super-maximum security condemned unit, the years spent by some inmates in condemned status, and a pro-rata share of top level prison official's time spent in administering the unit add up to a cost substantially greater than the cost to retain them in prison the rest of their lives.

"Furthermore, perhaps half of those condemned could make highly useful prisoners. It is a common experience that many long-term prisoners settle down to responsible jobs in the prison community which could conservatively be valued at a minimum of half the salary of an employee in industrial, maintenance, clerical and other roles. This would more than pay for both their own keep and that of the other half.

"*Thus, our studies indicate that just on the basis of prison costs alone, it would actually be cheaper to do away with the death penalty.* When the other costs of death penalty cases are added—the longer trials, the sanity proceedings, the automatic and other appeals, the time of the Governor and his staff—then there seems no question but that economy is on the side of abolition."[63] (Emphasis supplied.)

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[63] McGee, *Capital Punishment as Seen By a Correctional Administrator*, 28 FED. PROBATION, No. 2, at 13-14 (June 1964).

CONCLUSION

Throughout this paper we have suggested the existence of certain indirect costs or made reference to specific costs we do not calculate.[64] These include court costs, jury sequestration, security costs for local correctional facilities, the cost of hiring special penalty phase counsel, and millions of dollars that will be associated with state and federal post-conviction review.

It should by now be clear that government has failed to look at the actual costs of defending and prosecuting capital cases. It has failed to examine the impact of the death penalty on the state's correctional system. It has no idea what the price tag for capital litigation by the Attorney General's office will be.

While prosecution costs in capital cases will probably bankrupt some counties, local governments, already caught in a quagmire over a jail crisis, have yet to examine the impact of capital case security requirements on local correctional facilities.

All these issues must be confronted without appeal to bloodlust. Bloodlust in the name of the public good is a political lie.

And the public? The public is concerned with security on the streets, in homes, at school, in offices. The public is, at best, overlooked by a government's death-bent myopia and, at worst, disregarded.

Crime and justice need to wear a common yoke. The death penalty permanently disengages them one from the other. There can be no murder in the name of justice.

Capital cases do not need to exist. The expenditures outlined in this paper are not necessary. Millions of dollars directly attributable to a death penalty and capital litigation can be instantly saved and redirected by not reinstituting capital punishment in New York State. This is not a choice ordinarily posed to voters or those others who live petrified and diminished by the fear of crime.

Political rhetoric, however, should not be permitted to obscure the true pain of the families of homicide victims. They need closure. For capital defendants, delay and legal review mean life. For the families of homicide victims, delay and legal review mean pain. For both, the process is agonizing.

While many have voiced concern over victims or perpetrators, few seem to know the true agony of either—the agony that comes from the notoriety of five or six appeals, from two or three reviews by the Supreme Court, from being dragged, alone, through the cruel and unusual punishment of waiting.

For the victim's family, it is the seemingly endless grief, memories of the morgue, recounting the report of death, refeeling aloneness.

The death penalty perpetuates victim pain. It also eats at the inwards of the accused. Death row:

> ". . . is set up with one thing in mind: to hold a person until execution. None of the programs of education or rehabilitation available to others in even the strictest of prisons are available to death row inmates. The prison is required only to house, feed and then kill the inmate. This makes life on death row far more depressing and meaningless than life normally is in prison. . . . [D]eath row, . . . a ghastly zoo organized and wholly devoted to carrying out the most sordid act imaginable ***is just barely living. It is instinctive existence where the days are stitched together by a thin thread of hope that either the laws under which the penalty was decreed will be ruled unconstitutional or one's conviction will be reversed for some reason. The effects of years of isolation and deprivation, the lack of human contact, touch, and

[64] See nn. 25, 26, 29, 30, 38, 47, 52, 53, 54, *supra*, and text accompanying them.

> sexuality builds unrelievable pressures. The constant possibility of execution added to those pressures makes for a grinding, withering life that is all but intolerable—a 'slow coming dark.' "[65]

The debate on the death penalty has become sordid and loud. It has diminished us all. We have come very far down the road from morality. Too far. The distance is shamefully represented by the theme of this paper—cost. Capital litigation and the costs of the death penalty, however, will not go away until the death penalty is abolished.

As can be seen from Table 5 below, some of the costs of the first three stages of capital litigation will total no less than $1,828,100.

TABLE 5
COST OF STATE I
(Trial, Appeal, Supreme Court)

	Defense	Prosecution	Court	Correction	Other	TOTAL
State Charge	$517,700	—0—	$300,000	?	?	$817,700
County Charge	—0—	$1,010,400	—0—	?	?	$1,010,400

STATE $817,700
COUNTY $1,010,400
TOTAL $1,828,100

By the time the first 40 New York death cases have been tried to verdict, over $59 million will have been expended. By the time the first 21 New York death cases have reached the United States Supreme Court, New York State and its counties will have expended as much as the Governor, in his February crime message, deemed appropriate for the entire statewide Major Offense Prosecution Program. An amount exceeding the Legislature's fiscal year 1982-83 local criminal justice assistance budget will rapidly be spent to pay for the death penalty in New York.

A recent analysis of the criminal justice system[66] indicates that the cost of the system has increased by 120 percent every five years since the early 1900's, while the rate of inflation has only increased by 40 percent every five years. A capital case, therefore, that necessarily taps resources from all facets of the criminal justice system, can be estimated to increase in cost at a similar rate. If 20 percent of the murder cases in New York (251 convictions in 1980)[67] are prosecuted through three stages of litigation as capital offenses at an average cost of $1.5 million, then in current dollars the death penalty will generate costs of approximately $75,000,000. If we assume that the cost will grow in proportion to the cost of the criminal justice system as indicated by the study, then in the year 2000 A.D., the death penalty will cost $1,075,000,000 annually. Perhaps that is what the Temporary Commission on Revision of the Penal Law meant

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[65] D. MAGEE, SLOW COMING DARK: INTERVIEWS ON DEATH ROW 5, 6 (1980).

[66] Sepler, *The Next Twenty-Five Years Facing the Criminal Justice System: Using Standard Celeration Charting for Systems Analyses*, 6 AM. J. CRIM. LAW 47 (1979).

[67] *Annual Report '80—Crime and Justice*, NEW YORK STATE DIVISION OF CRIMINAL JUSTICE SERVICES, at 224.

in 1965 when, regarding the death penalty, it found "nothing but obstruction, confusion and waste."[68]

We have not detailed the costs of an actual execution. They singularly generate inordinate, almost uncontrollable, expense. The state of Georgia, which executes by electrocution, spent more than $250,000 solely for the anticipated, but aborted, execution of Jack Howard Potts in 1980.[69]

Special telephone lines running from the prison to the United States Supreme Court and to the Governor's office are necessary. The cost of extra police personnel for crowd control, helicopter security and the shutdown of federal air space over the prison are but a few items of the irrational cost that will be generated in the rare handful of cases that ever reach the execution stage.

It is our hope that a rational discussion of the costs of the death penalty will lead New York State to a rational conclusion. ■

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[68] See n. 6, *supra*.

[69] *Atlanta Journal*, Feb. 11, 1982, at 1, col. 1.

STATE OF ALASKA
FISCAL NOTE

Revision Date 3/29 , 1983

I. REQUEST

Bill/Resolution No.: SB 121
Title: "An Act authorizing capital punishment
Sponsor: Sen. Pettyjohn
Requestor:

II. FISCAL DETAIL

Agency Affected: Public Defender Agency
Program Category Affected:
BRU, Program of Subprogram(s) Affected:

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
OPERATING		1239.4	1313.8	1392.6	1476.1	1564.7
100 PERSONAL SERVICES		300.0	318.0	337.1	357.3	378.7
200 TRAVEL		1935.5	2051.6	2174.7	2305.2	2443.5
300 CONTRACTUAL		26.0	27.6	29.3	31.1	33.0
400 COMMODITIES		45.5	5.0	5.0	5.0	5.0
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC						
TOTAL OPERATING	-0-	3546.4	3716.0	3938.7	4174.7	4424.9
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND		3546.4	3716.0	3938.7	4174.7	4424.9
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS:

FULL-TIME		23.0	23.0	23.0	23.0	23.0
PART-TIME						
TEMPORARY						

III. SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

IV. ANALYSIS: Attach a separate page for any Analysis

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Division: Dana Fabe, Public Defender Date: 3-29-83
Approved by Commissioner: Date:
Department:

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3/9/83

If this death penalty bill is enacted, representation of the poor in death cases must be adequate. This is due to the possibility that an innocent person might be killed by mistake. Some degree of mistake is of course a potential problem in all criminal cases. But in non-death cases, the system stands ready to correct those mistakes where they become known. An execution can never be corrected.

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

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

(1) Appeal of conviction to the Alaska Court of Appeals.

(2) Petition for Hearing to the Alaska Supreme Court.

(3) Automatic sentence review by Alaska Supreme Court.

(4) Writ of certiorari to the United States Supreme Court.

(5) Post-conviction relief proceedings in state court.

(6) Appeal of post-conviction relief proceedings in the Court of Appeals.

(7) Petition for Hearing of post-conviction relief proceedings to the Alaska Supreme Court.

(8) Writ of certiorari to the United States Supreme Court.

(9) Petition for Writ of Habeus Corpus in the Federal District Court.

(10) Appeal to the United States Court of Appeals.

(11) Rehearing in the United States Court of Appeals.

(12) Writ of certiorari to the United States Supreme Court.

(13) Commutation applications to executive branch.

(14) Emergency stays to the United States Supreme Court.

In Fiscal Year 1982 this agency handled 30 first degree murder cases which would qualify as capital cases under this bill. The figures in this fiscal note are based on that figure. The specific figures were arrived at as follows:

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Fiscal Note Assumptions
(cont. p. 3)

(1) Personal services. This agency is currently 11.5 attorneys short of the LEAA standards for the maximum number of cases to be handled by an attorney to ensure competent representation when no death penalty cases are involved. Death penalty cases take substantially more attorney time than other cases. For example, the Florida Legislature has adopted standards which permit an attorney to handle no more than 8 death penalty trial cases per year, or 5 death penalty appeal cases per year. For comparison, the LEAA figures are 150 non-death felonies or 25 appeals a year. Some states have applied far more stringent standards. For example, the California state appellate defender permits attorneys to handle only 2 death penalty appeals per year. Given the fact that the attorneys who handle death penalty cases will have to be given drastic caseload relief, their extra cases will be loaded onto the caseloads of attorneys whose caseloads already exceed recommended maximums. Thus, at a minimum, this agency must be brought up to the minimum number of attorneys required to handle the caseload as it exists without the death penalty. This necessitates the addition of twelve additional attorneys, plus necessary investigation and clerical support staff.

(2) Travel and Contractual Fees. (a) The New York State Defender Association has estimated that a minimum figure for expert witness fees must be $30,000 for the guilt phase and $30,000 for the penalty phase per case. Thus, the contractual and travel costs for expert witnesses has been calculated at $60,000 per case. This does not include any expert fees which might be necessary at the appellate stages.

(b) Since no public defender office exists in the Kodiak/Bristol Bay/Aleutian area, we must be prepared to expand our contract with private attorneys to handle death cases at the trial and penalty phases. Appeals will be handled by the Public Defender office in Anchorage since being on site near the trial court is not necessary for appellate work. The New York State Defender Association estimates that to contract with private counsel as well as provide expert witness and investigation contractual fees costs approximately $350,000 per case during the guilt and penalty phases only. Based on statistics which show one "capital" case handled in these areas during Fiscal Year 1982, $350,000 in contractual fees has been added for this area.

(3) Equipment and Supplies. Other costs include expanded office space for additional personnel as well as equipment and supply money for additional personnel.

The above costs do not take into account contingencies such as reversals and retrials after appeal, travel to Washington, D.C. to argue before the United States Supreme Court and other costs which at this time are difficult to predict. However, the cost of defending a capital case is tremendous given the unique nature of the death penalty, and without adequate representation a conviction will not withstand appellate challenge.