ALASKA LEGISLATURE COMMITTEE FILES, 1989-1990

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

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

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

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

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

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

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

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

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

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

(2) the evidence supports the finding of an aggravating factor under AS 12.55.179 and whether the court has properly considered mitigating factors under AS 12.55.180;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(3) the defendant should be sentenced to death.

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

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

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

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

(c) The court may not impose the death sentence

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

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

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

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

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

(2) mitigating factors considered by the court.

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

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

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

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

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

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

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

(6) the defendant knowingly directed the conduct

constituting the offense at an active or former law enforcement officer, prosecuting attorney, fireman, judicial officer, or correctional officer during or because of the exercise of official duties;

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

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

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

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

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

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

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

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

CHAPTER 58. IMPOSITION OF DEATH PENALTY.

ARTICLE 1. EXECUTION.

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

Sec. 12.58.020. EXECUTION BY LETHAL INJECTION. After consulting

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

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

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

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

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

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

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

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

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

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

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

ARTICLE 2. STAY OF EXECUTION.

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

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

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

(c) If the sentencing court finds that the defendant is competent, the court shall immediately certify the finding to the supreme court and the commissioner. The supreme court shall issue and deliver

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

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

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

ARTICLE 3. GENERAL PROVISIONS.

Sec. 12.58.900. DEFINITIONS. In this chapter,

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

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

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

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

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

(2) post-conviction relief;

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

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

(4) extradition;

(5) habeas corpus;

(6) probation and parole; and

(7) bail.

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

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

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

Q U E S T I O N

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

Yes [ ] No [ ]

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

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

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

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

6-0343H
Chenoweth
2/7/89

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

IN THE SENATE BY THE JUDICIARY COMMITTEE

CS FOR SENATE BILL NO. 17 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - FIRST SESSION

A BILL

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

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

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

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

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

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

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

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

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

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

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

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

(d) An attempt is

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

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

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

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

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

C felony;

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

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

(c) Solicitation is a

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) the evidence supports the finding of an aggravating factor under AS 12.55.179 and whether the court has properly considered mitigating factors under AS 12.55.180;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(3) the defendant should be sentenced to death.

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

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

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

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

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

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

factors; or

(2) does not recommend a sentence of death.

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

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

(2) mitigating factors considered by the court.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CHAPTER 58. IMPOSITION OF DEATH PENALTY.

ARTICLE 1. EXECUTION.

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

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

injection and a drug or combination of drugs to be used for an execution by lethal injection.

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

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

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

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

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

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

(b) Persons other than the necessary staff designated by the commissioner and others permitted under AS 12.58.040 - 12.58.050 may

not be permitted to attend an execution, nor may any person under the age of 19 attend.

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

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

ARTICLE 2. STAY OF EXECUTION.

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

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

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

(c) If the sentencing court finds that the defendant is competent, the court shall immediately certify the finding to the supreme court and the commissioner. The supreme court shall issue and deliver another warrant to the commissioner under AS 12.55.117, together with

a copy of the certified finding. Unless the sentencing court's finding is appealed in accordance with applicable court rule, the warrant shall specify a date of execution that is not less than 30 days nor more than 60 days after the date of the warrant.

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

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

ARTICLE 3. GENERAL PROVISIONS.

Sec. 12.58.900. DEFINITIONS. In this chapter,

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

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

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

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

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

(2) post-conviction relief;

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

AS 47.10;

(4) extradition;

(5) habeas corpus;

(6) probation and parole; and

(7) bail.

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

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

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

Q U E S T I O N

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

Yes [ ] No [ ]

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

* Sec. 16. APPLICABILITY TO APPELLATE RULES. AS 12.55.117(c), added by

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

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

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

Alaska State Legislature

SENATE

Committee on Finance

Official Business

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

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

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

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

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

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

Chapter 41. Offenses Against the Person.

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

Article 1. Homicide.

Section
100. Murder in the first degree
110. Murder in the second degree
115. Defenses to murder

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

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

(A) causes the death of any person; or

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

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

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

Effect of amendments. — The 1988 amendment, in subsection (a), divided the formerly undivided introductory language into an introductory paragraph and present paragraph (1), redesignated former paragraphs (1) and (2) as present paragraphs (1)(A) and (1)(B), added "or" at the end of paragraph (1)(B), and added paragraph (2).

NOTES TO DECISIONS

Instructions.

Where the jury was given a proper lesser-included offense instruction on murder in the second degree, but nevertheless convicted defendant of murder in the first degree, given the jury's rejection of second-degree murder as a lesser-included offense, it is evident that defendant suffered no prejudice, even assuming a manslaughter instruction he challenged was inadequate. Ridgely v. State, Ct. App. No. 727 (File Nos. A-30, A-44, A-56), 739 P.2d 1299 (1987).

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

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

Maximum sentence for first-degree murder upheld. — See Riley v. State, Ct. App. Op. No. 630 (File No. A-1258), ___ P.2d ___ (1986).

Sentence upheld. — See Travelstead v. State, Sup. Ct. Op. No. 407 (File No. A-114), 689 P.2d 491 (1984); Lewis v. State, Ct. App. Op. No. 673 (File No. A-793), 731 P.2d 68 (1987); Jackson v. State, Ct. App. Op. No. 781 (File No. A-2026), ___ P.2d ___ (1988).

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

Sentence of consecutive 99-year terms for two murders is not clearly mistaken where the defendant presents a risk of continued criminal conduct which would seriously threaten the public safety. Krufoff v. State, Ct. App. Op. No. 187 (File No. A-1831), ___ P.2d ___ (1985).

Sentence for attempted first degree murder upheld. — See Stancel v. State, Ct. App. Op. No. 454 (File No. A-781), 697 P.2d 1050 (1985).

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

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

Conviction reversed where trial court's finding of voluntary Miranda waiver was in error. See Hamped v. State, Ct. App. Op. No. 517 (File No. 7798), 706 P.2d 1173 (1985).

Conviction reversed because of admission of improperly seized evidence. See Lowry v. State, Ct. App. Op. No. 528 (File No. A-249), 707 P.2d 280 (1985).

Cited in Lerchenstein v. State, Ct. App. Op. No. 453 (File No. 7729), 697 P.2d 312 (1985); Hart v. State, Ct. App. Op. No. 482 (File No. A-295), 702 P.2d 651 (1985); Ridgely v. State, Ct. App. Op. No. 503 (File No. A-30, A-43, A-56), 705 P.2d 924 (1985); Peckham v. State, Ct. App. Op. No. 639 (File No. 7029), ___ P.2d ___ (1986); Hastings v. State, Ct. App. Op. No. 706 (File No. A-602), ___ P.2d ___ (1987); Clifton v. State, Sup. Ct. Op. No. 3280 (File No. S-1945), ___ P.2d ___ (1988); Peel v. State, Ct. App. Op. No. 793 (File No. A-2293), 752 P.2d 472 (1988); Cole v. State, Ct. App. Op. No. 805 (File No. A-1505), ___ P.2d ___ (1988); Cuevas v. State, Ct. App. Op. No. 813 (File No. A-2033), ___ P.2d ___ (1988).

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

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

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

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

STATE OF ALASKA

DEPARTMENT OF LAW

CRIMINAL DIVISION

STEVE COWPER, GOVERNOR

REPLY TO

X CRIMINAL DIVISION CENTRAL OFFICE
P.O. BOX KC
JUNEAU, ALASKA 99811-0310
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☐ OFFICE OF SPECIAL PROSECUTIONS AND APPEALS
1031 WEST 4TH AVENUE, SUITE 318
ANCHORAGE, ALASKA 99501-5993
PHONE: (907) 279-7424

February 14, 1989

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

Dear Senator Szymanski:

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

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

The touchstone of interpretation of a law is to ascertain the intent of its drafters. Kenai Peninsula Borough v. State of Alaska, 612 F.2d 1210 (9th Cir. 1980), aff'd, 451 U.S. 51). Similarly, in interpreting a constitutional provision tory and the insight it provides into the intent of the drafters is important. See, e.g., North Slope Borough v. Sohio Petroleum Corp., 585 P.2d 534 (Alaska 1978). The language utilized in Artile I, Section 12 was specifically discussed at the Alaska Constitutional Convention.

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

[1]Ind. Const., art. I, §18.

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

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

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

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

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

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

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

[6]Id. (emphasis added).

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

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

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

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

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

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

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

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

Very truly yours,

GRACE BERG SCHAIBLE
ATTORNEY GENERAL

By: _____
Laurie H. Otto
Assistant Attorney General

Attachment: Appendix A
cc: Bob Evans

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

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

NORDALE: I second the motion.

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

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

RECESS

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

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

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

R. RIVERS: I submit one.

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

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

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

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

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

KNIGHT: I second the motion.

PRESIDENT EGAN: Please read the amendment again.

(The Chief Clerk read the amendment again.)

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

PRESIDENT EGAN: Mr. McLaughlin.

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

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

PRESIDENT EGAN: Mr. Doogan.

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

PRESIDENT EGAN: Mrs. Hermann.

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

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

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

TAYLOR: I am preparing one, Mr. President.

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

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

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

TAYLOR: I move the adoption of the amendment.

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

DAVIS: May we have it read again slowly?

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

(The Chief Clerk read the amendment again.)

TAYLOR: You left out the word "penalties".

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

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3800

M E M O R A N D U M February 7, 1989

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

TO: Senator Jan Faiks, Chair
Senate Judiciary Committee

FROM: Jack Chenoweth
Legislative Counsel

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

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

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

JC:gc
WKG6/102

Enclosure

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3800

M E M O R A N D U M February 7, 1989

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

TO: Senator Jan Faiks, Chair
Senate Judiciary Committee

FROM: Jack Chenoweth
Legislative Counsel

Article I, section 12 of the Alaska Constitution provides:

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

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

It is my opinion that it would not.

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

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

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

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

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

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

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

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

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

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

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

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

When first offered, the proposed language in question read:

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

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

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

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

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

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

DELEGATE RALPH RIVERS: I submit one.

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

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

. . .

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

PRESIDENT EGAN: Mr. McLaughlin.

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

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

PRESIDENT EGAN: Mr. Doogan.

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

PRESIDENT EGAN: Mrs. Hermann.

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

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

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

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

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

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

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

---

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

2/ Specifically, the Indiana Supreme Court said:

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

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

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

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

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

JC:gc
WKG6/101

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Dr. Ernest van den Haag
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New York, N. Y. 10024

RECEIVED
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JAN FAIKS
SENATE OFFICE

February 5, 1989

Dear Senator Faiks:

I was delighted to testify. Let me take the opportunity to point out that on p.6 of the proposed law line 27 the "not" before "outweighed" should be eliminated. On p.4, lines 22-23 are constitutionally unnecessary and likely to give rise to much litigation. Moreover I don't see wherein the guilt of defendant X is diminished because defendant Y got away with less punishment.

Sincerely,

Ernest van den Haag

LDF

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AND EDUCATIONAL FUND, INC.

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FEB 9 1989

February 3, 1989

Ms. Leeann Lucas
Alaska State Legislature
Senate Advisory Council
P.O. Box V
Juneau, AK 99811

Dear Ms. Lucas:

Thank you for your recent inquiry about capital punishment systems in the United States.

Enclosed you will find a citation list to state death penalty statutes, as well as some information on the cost of administering capital punishment in several states. To my knowledge, every state that has to-date investigated the matter has found imprisonment for life to be at least one-half as expensive as execution, given the constitutional safeguards mandated by the U.S. Supreme Court.

We would be more than happy to provide you with additional information about the retentionist states' experience with capital punishment. I have taken the liberty of enclosing a recent article from The National Law Journal which I believe accurately summarizes the many practical difficulties -- unforeseen by most legislators ten years ago -- these states have encountered in administering the penalty.

Sincerely,

Tanya E. Coke

Tanya E. Coke
Director of Research
Capital Punishment Project

Enclosures

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STATES RETAINING CAPITAL PUNISHMENT

Citation List to Statutes

Alabama:	Ala. Code § 13A-5-40 (1982)
Arizona:	Ariz. Rev. Stat. Ann. § 13-703 (1983)
Arkansas:	Ark. Stat. Ann. § 41-1301 (1985)
California:	Cal. Penal Code § 190 (Supp. 1987)
Colorado:	Colo. Rev. Stat. § 16-11-101 (1986)
Connecticut:	Conn. Gen. Stat. Ann. § 53a-46a (West 1985)
Delaware:	Del. Code Ann. tit. 11, § 4209 (1979)
Florida:	Fla. Stat. Ann. § 921.141 (West 1985)
Georgia:	Ga. Code Ann. § 26-3102 (1979)
Idaho:	Id. Code § 18-4004 (1982)
Illinois:	Ill. Ann. Stat. Ch. 38 § 9-1 (Smith-Hurd. Supp. 1987)
Indiana:	Ind. Code Ann. § 35-50-2-9 (Burns Supp. 1987)
Kentucky:	Ky. Rev. Stat. Ann. § 532.030 (Baldwin 1981)
Louisiana:	La. Code Crim. Proc. Ann. art. 905 (West Supp. 1987)
Maryland:	Md. Ann. Code art. 27, § 413 (Supp. 1987)
Mississippi:	Miss. Code Ann. § 99-19-101 (Supp. 1987)
Missouri:	Mo. Ann. Stat. § 565.001 (Vernon Supp. 1987)
Montana:	Mont. Code Ann. § 4-5-102 (1987)
Nebraska:	Neb. Rev. Stat. § 28-105 (1985)
Nevada:	Nev. Rev. Stat. § 175. 552 (1986)
New Hampshire:	N.H. Rev. Stat. Ann. § 630:5 (1986)
New Jersey:	N.J. Stat. Ann. § 2C:11-3(c)(West Supp. 1987)
New Mexico:	Life Imprisonment. N.M. Stat. Ann. § 31-18-14 (1978)
N. Carolina:	N.C. Gen. Stat. § 14-17 (1981)
Ohio:	Ohio Rev. Code Ann. § 2929.02 (Baldwin 1982)
Oklahoma:	Okla. Stat. § 701.10 (1987)
Oregon:	Or. Rev. Stat. § 163.105(1) (1987)
Pennsylvania:	Pa. Cons. Stat. Ann. § 9711(a)(1)(Purdon 1982)
S. Carolina:	S.C. Code Ann. § 16-3-20(A)(1986 Cum. Supp.)

S. Dakota:	S.D. Codified Laws Ann. § 22-6-1(1)(1982)
Tennessee:	Tenn. Code Ann. § 39-2-203 (1985)
Texas:	Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon 1986)
Utah:	Utah Code Ann. § 76-3-206 (Supp. 1987)
Virginia:	Va. Code § 19.2-264-1 (1986)
Washington:	Wash. Rev. Code Ann. § 9A.32.040 (1982)
Wyoming:	Wyo. Stat. § 6-2-102 (1983)

CORRECTION

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AND EDUCATIONAL FUND, INC.

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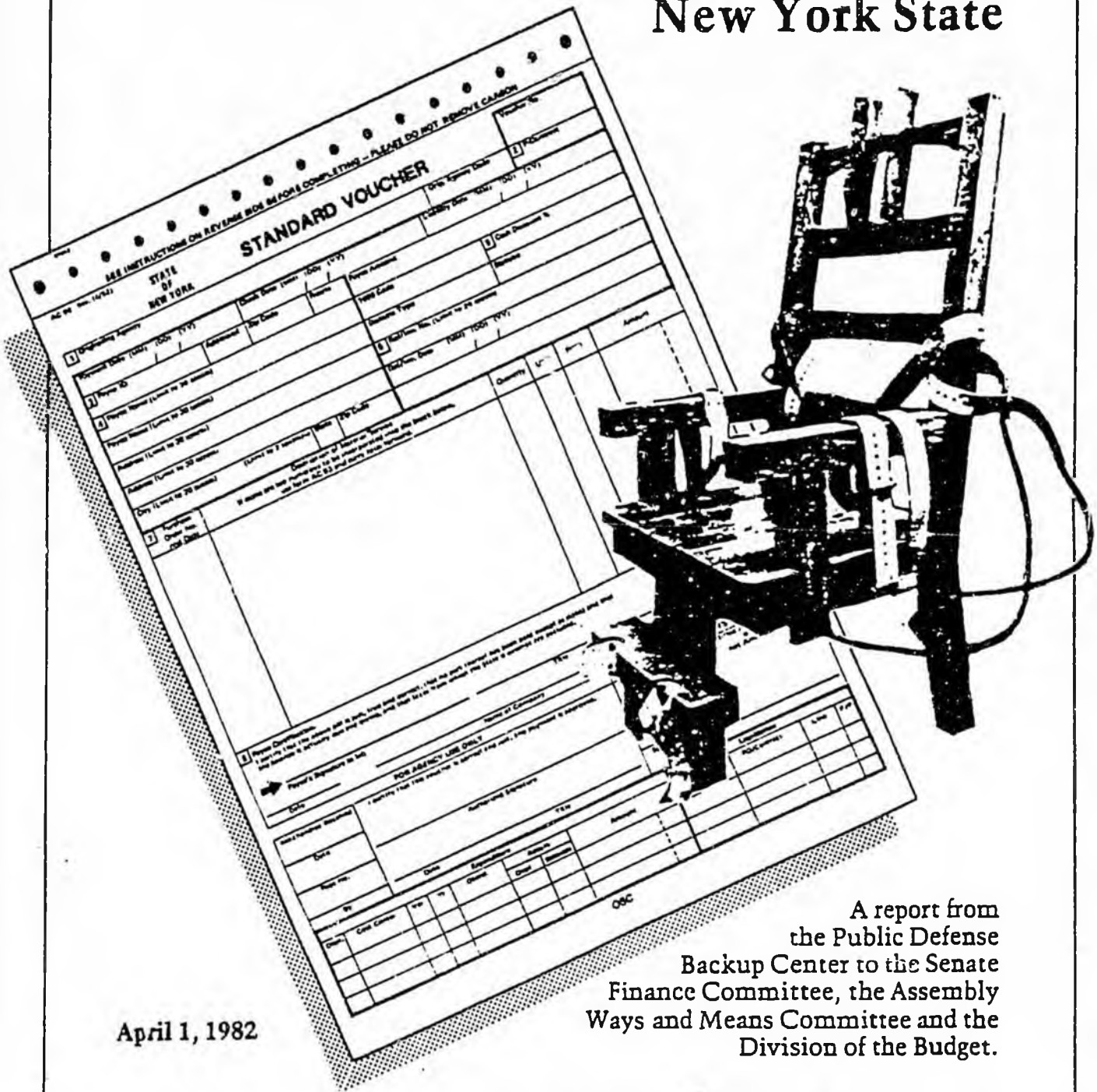
Capital Losses: The Price of the Death Penalty for New York State



April 1, 1982

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.

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

TABLE OF CONTENTS

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); *Cantauvo 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) (statemen. 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 ☐

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 channell 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 o...nder faced with a fine or a prison sentence necessarily satisfies the requirements of the Constitution in a capital case." *Gardner* makes clear that a majority of the Court accepted this position.

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

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

question that his fee structure is real. If New York is prepared to pay for the "best" counsel with taxpayers money, it can begin with his law offices in Boston. Bailey's office reported that in serious felony (non-capital) cases, it requires an initial retainer of $50,000. This does not include expenses or per diem trial costs.[34]

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

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

Fees thereafter will be based on hourly and daily (trial) rates. Fees ranging from $100 to $200 per hour will not be uncommon. The bill provides for the appointment of "one or more attorneys" and it is reasonable to assume that the appointment of two or more attorneys will be the rule, not the exception.[35]

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

B. Motion Practice

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

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

The usual number of pretrial motions in non-capital cases vary between five and seven. In death penalty cases, every motion will be critical, requiring substantially more time to prepare. Experienced attorneys state that the typical capital case requires the filing of between 10 and 25 trial motions.[36] Many pretrial motions will relate solely to the unique aspects of the defendant's underlying criminal case. Others will be specifically a function of there being a death penalty statute in existence.

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

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

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

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

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

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

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

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

C. *Investigators*

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

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

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

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

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

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

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

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

> "Eldredge read the trial transcript and began tracking down alibi witnesses, interviewing investigating officers and pursuing other leads. In reading the transcript, he noticed that the prosecutor had introduced, through the testimony of a criminalist, the rapist's blood type, as determined from a semen sample taken from the rape scene, but the prosecutor had never tied this piece of evidence to Ross.
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> "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.
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> "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. IV, 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

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[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

[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

[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 innards of the accused. Death row:

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

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

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

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

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

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

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

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

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

A recent analysis of the criminal justice 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. 8, *supra*.

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