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death penalty. The various subsections prescribe a process and define the factors that the court must apply in its review. In an effort to encourage consolidated disposition of all pertinent legal questions relating to the trial, the court is authorized to consider on review any other point of appeal that the defendant would want to raise. If the court upholds the judgment, it shall prepare and issue a death warrant and deliver the warrant to the commissioner of corrections.

AS 12.55.125(a), amended by bill section 8, prescribes the sentence of imprisonment for first degree murder. Since another provision of this bill makes first degree murder a capital felony, the technical amendment is made in this section. The substantive change adds the death penalty as the alternative sentence that may issue upon conviction.

In bill section 9 is set out the sentencing procedures applicable to convictions for capital felonies. The bill section adds four new interrelated provisions:

Proposed AS 12.55.177 provides that, upon conviction of first degree murder, a separate sentencing procedure should be undertaken before the trial jury or, if conviction has been had by a judge without jury, before a specially impaneled jury. The section relates generally the manner in which the sentencing proceedings are to be conducted, including applicable limitations, and indicates how the sentencing jury is to reach a recommended sentence.

Proposed AS 12.55.178 addresses the trial court's review and disposition of a death sentence recommended by a jury. The section includes limitations on the court's imposition of a death sentence. The key provision is subsection (b): a court may not affirm a recommended death sentence unless it determines that the jury has based its decision on a finding of at least one aggravating factor that is not outweighed by one or more mitigating factors (see AS 12.55.179 and 12.55.180 and the references in next paragraph). When a jury has recommended imposition of a death sentence and the court acts on the recommendation, the section directs the court to enter written findings of the applicable factors. A death sentence is, of course, subject to automatic review under AS 12.55.117, discussed earlier.

Imposition of a death penalty must involve the jury's

consideration of the facts against various factors. Proposed AS 12.55.179 sets out the "aggravating factors" that the jury may consider; proposed AS 12.55.180 prescribes the "mitigating factors" that the jury must consider. */

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*/ Let me expand this discussion in this extended footnote.

Prior to 1972, the United States Supreme Court almost invariably upheld capital punishment statutes. Then, in Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346 (1972), the court struck down the Georgia death penalty statute. The court said that the Eighth Amendment to the United States Constitution, which prohibits the imposition of "cruel and unusual punishment," is violated where the jury has unguided discretion to impose the death penalty.

In response to the Furman decision Georgia and virtually every other state with the death penalty rewrote its capital punishment statutes to comply with that decision. In 1976, the United States Supreme Court upheld the capital punishment statutes of Georgia, Florida, and Texas. Gregg v. Georgia, 428 U.S. 153, 49 L.Ed.2d 859 (1976) Proffitt v. Florida, 428 U.S. 242, 49 L.Ed.2d 913 (1976); Jurek v. Texas, 428 U.S. 262, 49 L.Ed.2d 929 (1976). In each case, the court found the guidelines for imposition of the death penalty constitutionally sufficient. The details of the statutes differ. In general, however, they require the court or jury to find one of several enumerated aggravating circumstances before the penalty can be imposed. Moreover, the aggravating circumstances must not be outweighed by mitigating circumstances. This measure, which is based on the Georgia and Florida statutes, operates in this manner and is therefore probably valid.

The United States Supreme Court has offered other guidelines with regard to the imposition of the death penalty, all of which seem to be satisfied in this legislation. For example, the death penalty may be imposed only when it is proportional to the crime for which the defendant is convicted. In the case of deliberate murder, the punishment is clearly proportionate. Gregg v. Georgia, supra. But in the case of the rape of an adult woman not resulting in the victim's death, the death penalty may not be imposed. Coker v. Georgia, 53 L.Ed.2d 982 (1977). This bill applies only to murder in the first degree.

Bill section 10 adds a new chapter to AS 12 that prescribes how the imposed death sentence is to be carried out.

Generally, if after its automatic review, the supreme court sustains the imposition of the death penalty, the court shall issue a death warrant and deliver it to the commissioner of corrections. By AS 12.58.010, the commissioner is to give the defendant the choice of the means of execution--lethal injection or firing squad--or, if the defendant fails or refuses to choose, make the choice for the defendant. The commissioner is then to specify the time, place, and manner of execution.

AS 12.58.020 gives additional specifics applicable in the event of execution by firing squad; AS 12.58.030 gives additional specifics relating to death by lethal injection. In either event, the commissioner and a licensed physician designated by the commissioner must witness the execution. AS 12.58.040.

Additional witnesses, here styled "invitees" are permitted, not to exceed nine in number; their selection by the commissioner of corrections is provided for in AS 12.58.050.

A statute providing a mandatory death penalty for conviction of certain crimes is unconstitutional. Wadson v. North Carolina, 428 U.S. 280, 49 L.Ed.2d 944 (1976). Under this bill, the death penalty is never mandatory and may be imposed only after it is considered by a jury. The Court has also held that the refusal of the trial court to consider certain relevant mitigating factors is an unconstitutional application of the death penalty. Eddings v. Oklahoma, 455 U.S. 104, 71 L.Ed.2d 1 (1982). Again, in its proposed AS 12.55.180, this bill requires the trial court to consider all mitigating factors.

There are, of course, numerous grounds upon which any death penalty statute might be challenged. It is impossible to say whether any of them will ultimately succeed in light of the evolution of the doctrine of the United States Supreme Court on the death penalty. Under current decisions as I understand them, however, the bill appears to satisfy the requirements of the federal constitution.

Press coverage of an execution is authorized. AS 12.58.060 specifies how press coverage is to be allowed and sets limitations on the use of photographic and recording equipment during the execution. Subsection (c) imposes a penalty for violation of the conditions under which the press may cover an execution.

Proposed AS 12.58.070 sets additional limitations and conditions on attendance of witnesses and the press at an execution.

When the execution is completed, the commissioner of corrections is to affirm certain details of it by return of a death warrant. AS 12.58.080.

AS 12.58.200 - 12.58.220 generally address instances in which an execution may be stayed or postponed. Two instances are identified: incompetency of the defendant and pregnancy of a female defendant. If either circumstance exists, the commissioner is to notify the sentencing court, the prosecuting attorney, and defendant's counsel in writing, and execution of sentence on the death warrant is stayed (AS 12.58.200). It is the responsibility of the sentencing court to conduct proceedings to affirm the commissioner's determination of competency or pregnancy and, if it does, to stay the effect of execution. When the disability ceases to exist, the trial court is to so certify to the supreme court, and the latter is to issue another death warrant. In the "stay" provision, AS 12.58.210(c) and 12.58.220(b), there are provisions that would allow for appeal of the sentencing court's findings that the defendant was not incompetent or pregnant.

Bill section 10 concludes with a section adding pertinent definitions.

AS 22.07.020(a) defines the jurisdiction of Alaska's intermediate appellate court, the Court of Appeal. Normally, appeals in criminal matters are directed to that court. In this bill, I have authorized automatic review by the supreme court. The amendment made in bill section 11 recognizes that exception to the Court of Appeal's jurisdiction.

Similarly, AS 22.07.020(b) directs that sentence appeals be first filed and considered by the Court of Appeal. The amendment made by bill section 12 recognizes the exception to the Court of Appeal's jurisdiction in sentence appeals involving imposition of the death penalty.

Though the substantive provisions of this Act are given an effective date of August 15, 1991, by bill section 17, you directed inclusion of a provision that calls for an advisory vote by the state's voters at the next statewide election (presumptively the state primary election of August, 1990) to determine whether there is public support for the proposed imposition of the death penalty. Bill section 13 authorizes the advisory vote and specifies the advisory question to be submitted.

As my December 15, 1988, memo transmitting the bill draft noted, there are several criminal court rules pertaining to sentencing and sentence appeals that currently guide the trial courts. The provisions of this bill operate independently of sentencing and sentences appeal practices and existing court rules. In my judgment, court rule change provisions are necessary. I have included two--one related to the applicability of the substantive changes to the Criminal Rules, in bill section 14, and one related to the applicability of the substantive changes to the Appellate Rules, in bill section 15. Note that I have referred to them in the bill title, as required by article IV, sec. 15, Alaska constitution, and Rule 39(e), Uniform Rules of the Alaska Legislature.

Finally, bill sections 16 and 17 provide effective dates. The advisory vote provision is given an immediate effective date; the remainder of the bill is to take effect August 15, 1991.

If this memo or the accompanying bill draft prompts questions, please contact me.

JC:lmb
L6/146

SB 17 FILE 2

Re Capital Punishment
– real good?

See p. 162 for
results of two studies

the economics of **Public Issues**

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the economics of Crime and Punishment

Is there a relationship between punishment and the number and types of crimes committed? If so, what are the available alternatives to punishing guilty offenders? Should we impose large fines instead of incarceration? Should we have public whippings? Should capital punishment be allowed? To establish a system of crime deterrence, we would need to assess carefully the value of different supposed deterrents.

One thing we can be sure of. Uniformly heavy punishments for all crimes will lead to a larger number of major crimes being committed. Let's look at the reasoning. All decisions are made on the margin. If an act of theft will be punished by hanging and an act of murder will be punished by the same fate, there is no marginal deterrence to murder. If a theft of $5 is met with a punishment of 10 years in jail

and a theft of $50,000 incurs the same sentence, why not steal $50,000? Why not go for broke? There is no marginal deterrence to prevent one from doing so.

A serious question is how our system of justice can establish penalties that are appropriate from a social point of view. To establish the correct (marginal) deterrents, we must observe empirically how criminals respond to changes in punishments. This leads us to the question of how people decide whether to commit a "crime." A theory needs to be established as to what determines the supply of criminal offenses.

Adam Smith once said:

> The affluence of the rich excites the indignation of the poor, who are often both driven by want, and prompted by envy, to invade his possessions. It is only under the shelter of the civil magistrate that the owner of that valuable property, which is acquired by the labour of many years, or perhaps by many successive generations, can sleep a single night in security. He is at all times surrounded by unknown enemies, whom, though he never provokes, he can never appease, and from whose injustice he can be protected only by the powerful arm of the civil magistrate continually held up to chastise it. The acquisition of valuable and extensive property, therefore, necessarily requires the establishment of civil government. Where there is no property, or at least none that exceeds the value of two or three days' labour, civil government is not so necessary.[1]

Smith pointed out that in any society where one person has substantially more property than another, robberies will be committed. We can surmise that the individuals who engage in robberies are seeking income. We can also surmise that, before acting, a professional criminal might be expected to look at the anticipated returns and anticipated costs of criminal activity. These could then be compared with the net returns from legitimate activities. In other words, those en-

[1]Adam Smith, *The Wealth of Nations*, 1776.

gaging in crimes do so on the basis of a cost/benefit analysis in which the benefits outweigh the costs. The benefits of the crime of robbery are clear. The cost would include, but not be limited to, apprehension by the police, conviction, and jail. (The criminal's calculations are analogous to those made by a professional athlete when weighing the cost of possible serious injury against the benefits to be gained from participating in the sport.)

If we view the supply of offenses in this manner, we can come up with methods by which society can lower the net expected rate of return for committing any illegal activity. That is, we can figure out how to reduce crime most effectively. We have talked about one particular aspect—the size of penalties. We also briefly mentioned another—the probability of detection for each offense. When either of these costs of crime goes up, the supply of offenses goes down; that is, less crime is committed.

Can this theory be applied to a decision, pro or con, on capital punishment? Sociologists, psychologists, and others have numerous theories correlating the number of murders committed to various psychological, sociological, and demographic variables. In general, they have stressed social and psychological factors as determinants of violent crime and have therefore felt that capital punishment would have no deterrent effect. Economists, on the other hand, have stressed a cost-benefit equation, which implies that capital punishment would deter violent crime.

We start with a commodity called the act of murder. If the act of murder is like any other commodity, the quantity "demanded" (by perpetrators, of course, not victims) will be negatively related to the relative price. But what is the price of murder? Ignoring all the sociological, psychological, or psychic costs of murder, we have to consider the probability of being caught and, after capture, the possible jail sentence or capital punishment that may be called for. But here again, we have to look at the probability of a particular jail sentence and the probability of going to the gas chamber, or the guillotine, or the four winds. Thus, it would do little good to observe the difference in murder rates between states that have capital punishment and states that do not. Instead, we must assess the probability of a convicted murderer actually being executed in those states that do have capital punishment and compare this probability with what happens in states that do not. In some states that allow capital punishment, for example, the probability of a convicted murderer being executed is zero. We find, for example, that a charge of first-degree murder is often changed to a charge of second-degree murder if the penalty for murder is execution. In states that do not allow the death penalty, however, first-degree murder sentences are given more frequently. Recently, it has been argued that "death-qualifying" juries—that is, juries consisting only of persons who do not oppose the death penalty—are more likely to convict individuals of crimes for which the penalty is capital punishment.[2] Because these variables exist among states allowing capital punishment, it is necessary to look at the actual number of executions within a state, and not the laws, in order to establish whether capital punishment is actually a deterrent to murder.

Now, immediately critics of such cost/benefit analysis point to the "fact" that the murderer, either in a moment of unreasoned passion or when confronted with an unanticipated situation (for example, during an armed robbery), does not take into account the expected probability of going to the gas chamber. That is to say, murderers are not acting rationally when they murder. Is this a valid criticism of the economic model of the demand for murder? It is not. If the model predicts poorly, then either the assumptions or the model must be changed. Indeed, if one contends that the expected "price" of committing a murder has no effect on the quantity of murders, one is implicitly negating the law

[2]See, for example, the discussion of *Lockhart v. McCree* in "Death Penalty: A Barrier Falls," *Newsweek*, May 19, 1986.

of demand or stating that the price elasticity of the demand for murder is zero. One is also confusing the average murderer with the marginal murderer. All potential murderers do not have to be aware of or react to the change in the expected "price" of committing a murder for the theory to be useful. If a sufficient number of marginal murderers act as if they were responding to the higher expected "price" of murdering, then the demand curve for murders by perpetrators will be downward sloping.

A few economists have actually worked through economic models of the demand for murder and other crimes. One of the first statistical studies of significance is that by Isaac Erlich, published in 1975.[3] One of the variables he included was the objective conditional risk of being executed if caught and convicted of murder. Two elasticities given in one study were -0.06 and -0.065. While these elasticities are relatively small, they are not zero. The implication of these elasticities, given the number of murders and executions in the period covered by the study (1935–1969), was striking. The implied tradeoff between murders and executions was between 7 and 8. "Put differently, an additional execution per year over the period in question may have resulted, on average, in 7 or 8 fewer murders."[4]

The deterrent effect of capital punishment on the crime of murder was more recently also analyzed by Stephen Layson, an economist at the University of North Carolina at Greensboro. His findings are even more suggestive. Layson concluded that every execution of a convicted murderer deters, on average, 18 other murders that would have occurred without it. He also studied the relationship between arrests and convictions of murderers and the murder rate. His conclusions were that a 1-percent increase in the arrest rate for murder would lead to 250 fewer murders per year being committed and that a 1-percent increase in murder convictions would deter about 105 murders.[5]

[3]Isaac Erlich, "The Deterrent Effect of Capital Punishment: A Question of Life and Death," *The American Economic Review*, Vol. 65, no. 3 (June 1975).
[4]Ibid., p. 414.

As might be expected, these findings are highly controversial and have led to a debate that still goes on. Critics have stressed, for example, the tenuous statistical basis of Erlich's findings.[6] While the argument over capital punishment continues, the evidence that crime rates in general appear to vary inversely with estimates of penalties, probabilities of conviction, and legal opportunities has received substantial support.[7] Currently, the arrest rate for murderers is 75 percent; only 38 percent of all murders result in a conviction, and 1 percent of murders result in an execution. It is perhaps not too hard to understand why 75 percent of Americans now favor the death penalty.

One final note. In the case of capital punishment, the execution must be thought to fall on the guilty parties, rather than randomly applied. History tells us that under the emperors in China, executions were frequent. However, the emperors were not always so diligent about executing the right person. This system of "punishment" does little good for society in terms of combating crime, not to mention the loss suffered by the innocent victim and his or her family due to perverted justice.

SUMMARY

One can analyze criminal acts as economic activities. The potential criminal makes an economic decision in which he

[5]Stephen K. Layson, "Homicide and Sentence: A Reexamination of the United States Time-series Evidence," *Southern Economic Journal*, vol. 52 (July 1985), pp. 68–89. For an evaluation of Layson's conclusions, see Ernest Van Den Haag, "Death and Deterrence," *National Review*, (March 14, 1986), p. 16.
[6]Peter Parsell and John R. Taylor, "The Deterrent Effect of Capital Punishment: Another View," *The American Economic Review*, vol. 67, no. 3 (June 1977), pp. 445–451.
[7]Gary Becker and William Landes, editors, *Essays in the Economics of Crime and Punishment* (Columbia University Press: New York, 1974).

or she does a cost/benefit analysis of criminal activities versus legal consequences. A key set of variables in such an analysis involves the costs of criminal activity, which include the costs of getting caught, being sentenced. and suffering punishment. In most major cities, the probabilities of being caught, sentenced, going to trial, and serving time are very low. Hence, when they are multiplied together and the product is multiplied times the potential punishment, the expected cost is extremely small. The potential criminal's cost/benefit analysis therefore often implicitly shows that crime does indeed pay. In order to reduce criminal activities, including murder, an economist would argue that the price paid by the criminal must be increased.

DISCUSSION QUESTIONS

1. The analysis just presented makes the assumption that criminals act rationally. Does the fact that they do not necessarily do so negate our analysis?
2. In many cases, murder is committed among people who know each other. Does this mean that raising the price the murderer has to pay will not affect the quantity of murder demanded by perpetrators?

complice in sale of cocaine, it was incumbent on the state to prove, first, that defendant was aware of another individual's plan to resell the cocaine; and, second, that in supplying the individual with cocaine, defendant acted with the intent to promote the other individual's plan. The state was not required to show defendant's awareness of and intent to promote the specific sale that actually occurred. Shindle v. State, Ct. App. Op. No. 674 (File No. A-1960), 731 P.2d 567 (1987).

Applied in Boxell v. State, Ct. App. Op. No. 658 (File No. A-1175), 728 P.2d 1220 (1986); Kinegak v. State, Ct. App. Op. No. 767 (File No. A-1576), P.2d (1987).

Quoted in Cole v. State, Ct. App. Op. No. 805 (File No. A-1505), P.2d (1988).

Cited in Dailey v. State, Ct. App. Op. No. 324 (File No. 4190), 674 P.2d 857 (1984).

Sec. 11.16.120. Exemptions to legal accountability for conduct of another.

NOTES TO DECISIONS

Conviction of accessory when principal is undercover agent. — Conviction of a professional hunting guide for hunting violations as an accessory when the principal was an undercover agent for the government was affirmed; the Alaska court of appeals stated that the defense of entrapment under AS 11.81.450 provides an adequate remedy for any government overreaching. Vaden v. Alaska, Ct. App. Op. No. 744 (File No. A-1581), 717 P.2d 781 (1987).

Quoted in Kot v. State, Sup. Ct. Op. No. 2774 (File No. 5570), 678 P.2d 386 (1984).

Chapter 31. Attempt and Solicitation.

Section
100. Attempt

Sec. 11.31.100. Attempt. (a) A person is guilty of an attempt to commit a crime if, with intent to commit a crime, the person engages in conduct which constitutes a substantial step toward the commission of that crime.

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

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

(d) An attempt is

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

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

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

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

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

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

(e) If the crime attempted is an unclassified crime described in a state law which is not part of this title and no provision for punishment of an attempt to commit the crime is specified, the punishment for the attempt is imprisonment for a term of not more than half the maximum period prescribed as punishment for the unclassified crime, or a fine of not more than half the amount of the maximum fine prescribed as punishment for the unclassified crime, or both. If the crime attempted is punishable by an indeterminate or life term, the attempt is a class A felony. (§ 2 ch 166 SLA 1978; am § 1 ch 102 SLA 1980; am § 10 ch 45 SLA 1982; am § 1 ch 59 SLA 1988)

Effect of amendments. — The 1988 amendment, in subsection (d), inserted present paragraph (1), redesignated former paragraphs (1)-(5) as present paragraphs (2)-(6), and added "other than murder in the first degree" at the end of paragraph (2).

NOTES TO DECISIONS

Applicability of this section. — Since under Alaska law, delivery of cocaine is expressly defined to include an attempted delivery, the more specific statute controls and this section, the general attempt statute, is therefore not applicable to delivery of cocaine. Stuart v. State, Ct. App. Op. No. 464 (File No. A-2761), 698 P.2d 1218 (1985).

Failure to include "substantial step" language in indictment 'or attempted murder was a defect only as to form, where the indictment included a concise description of defendant's actions that constituted the offense, including the proper language regarding his state of mind. Cier o v. State, Ct. App. Op. No. 813 (File No. A-2033), P.2d (1988).

Attempted kidnapping was class A felony under this section before 1982 amendment. — Under the law as it existed before the 1982 amendment to this section became effective, attempted kidnapping was unquestionably a class A felony. Galbraith v. State, Ct. App. Op. No. 437 (File No. A-197), 693 P.2d 880 (1985).

Attempted first-degree sexual assault. — At the very least, a defendant must have formed a specific intent to engage in sexual penetration in order to be convicted of attempted first-degree sexual assault. Baden v. State, Ct. App. Op. No. 285 (File No. 6832), 667 P.2d 1275 (1983).

Offense of attempted second-degree murder was an impossibility. Hunt v. State, Ct. App. Op. No. 348 (File No. 7141), 678 P.2d 415 (1984).

Applicability of partial affirmative defenses. — A person charged with attempted kidnapping is not entitled to assert a partial defense when the intended victim of the crime is voluntarily released unharmed; under the plain language of AS 11.41.300(b), the partial affirmative defense applies only in a prosecution for kidnapping. Laraby v. State, Ct. App. Op. No. 555 (File No. A-530), 710 P.2d 427 (1985).

Evidence was sufficient to support conviction. — See McCarlo v. State, Ct. App. Op. No. 335 (File No. 7112), 677 P.2d 1268 (1984).

Conviction reversed because of insufficient evidence. — See Brower v. State, Ct. App. Op. No. 656 (File No. A-716), P.2d (1986).

Conviction and sentence upheld. — See Andrejko v. State, Ct. App. Op. No. 444 (File No. A-205), 695 P.2d 246 (1985).

Convictions reversed because of er-

roneous jury instruction. — Convictions for attempted sexual assault in the first degree and kidnapping were reversed because of an erroneous jury instruction on sexual assault in the first degree concerning consent. The correct standard is whether the defendant recklessly disregarded the victim's lack of consent. Lassiter v. State, Ct. App. Op. No. 387 (File No. 7736), 684 P.2d 139 (1984).

Sentence upheld. — Travelstead v. State, Sup. Ct. Op. No. 407 (File No. A-1110, 689 P.2d 491 (1984); Schnicker v. State, Ct. App. Op. No. 732 (File No. A-1995), 739 P.2d 1310 (1987).

Sentence for attempted first degree murder upheld. — See Stancl v. State, Ct. App. Op. No. 451 (File No. A-780, 697 P.2d 1050 (1985).

Conviction of attempted first-degree sexual assault affirmed. — Conviction of attempted sexual assault on the first degree under AS 11.41.410 as it read before the 1983 amendment and this section was affirmed. Sexual charges based on non-consensual genital intercourse do not require proof of a specific sexual intent; and plain error was not established though the prosecutor's expressions which might have been construed as a personal opinion of the guilt of the defendant or an argument relating to a defendant's need for treatment were improper and unattested. Pate v. State, Ct. App. Op. No. 551 (File No. A-247), 712 P.2d 385 (1985).

Sentence under former AS 11.41.410(b) and this section held excessive. — See Holhouse v. State, Ct. App. Op. No. 602 (File No. 7665), 687 P.2d 1106 (1984).

Applied in Patterson v. State, Ct. App. Op. No. 681 (File No. A-978), P.2d (1987).

Cited in Bell v. State, Ct. App. Op. No. 288 (File No. 5821), 668 P.2d 829 (1983); Brower v. State, Ct. App. Op. No. 381 (File No. 7816), 683 P.2d 280 (1984); Hart v. State, Ct. App. Op. No. 482 (File No. A-295), 702 P.2d 651 (1985); Chief v. State, Ct. App. Op. No. 618 (File No. A-954), 718 P.2d 475 (1986); Hastings v. State, Ct. App. Op. No. 706 (File No. A-992), P.2d (1987); James v. State, Ct. App. Op. No. 733 (File No. A-1154), 739 P.2d 1311 (1987); Stevens v. State, Ct. App. Op. No. 773 (File No. A-1327), P.2d (1988); James v. State, Ct. App. Op. No. 814 (File No. A-2318), P.2d (1988).

Sec. 11.31.110. Solicitation.

NOTES TO DECISIONS

Cited in Monroe v. State, Ct. App. Op. No. 798 (File No. A-1992), 752 P.2d 1017 (1988).

Sec. 11.31.150. Substantive crimes involving attempt or solicitation.

NOTES TO DECISIONS

Cited in Stuart v. State, Ct. A., p. Op. No. 464 (File No. A-276), 698 P.2d 1218 (1985).

Even though there is no question that the crime of attempt requires a specific intent, it seems equally beyond dispute that a charge of attempt to commit a specific crime clearly advises the defendant of the offense with which he is charged. State v. Thomas, Sup. Ct. Op. No. 1077 (File No. 2234), 525 P.2d 1092 (1974).

Indictment charging attempted rape and citing only the rape statute held sufficient. — See State v. Thomas, Sup. Ct. Op. No. 1077 (File No. 2234), 525 P.2d 1092 (1974).

Defendant may be found guilty though attempt not expressly charged. — Jury could find defendant guilty of the attempt to commit the crime of possessing narcotic drugs despite the fact that the attempt was not expressly charged. Simpson v. United States, 13 Alaska 635, 195 F.2d 721 (9th Cir. 1952).

Substantial evidence of attempt. — In a prosecution for possession of narcotic drugs, although there was no substantial evidence that defendant committed the crime charged in the information, there was substantial evidence that she attempted to commit the crime charged. Simpson v. United States, 13 Alaska 635, 195 F.2d 721 (9th Cir. 1952).

Same offense for sentencing purposes. — Assault with intent to rob and attempted robbery constituted the "same offense" for sentencing purposes. Brookins v. State, Sup. Ct. Op. No. 1936 (File No. 3972), 600 P.2d 12 (1979).

Sentence upheld. — See Bowie v. State, Sup. Ct. Op. No. 769 (File No. 1122), 491 P.2d 800 (1972); Spearman v. State, Sup. Ct. Op. No. 1210 (File No. 2520), 543 P.2d 202 (1975); Braham v. State, Sup. Ct. Op. No. 1522 (File No. 2558), 571 P.2d 631 (1977), cert. denied, 436 U.S. 910, 98 S. Ct. 2246, 56 L. Ed. 2d 410 (1978); Johnson v. State, Sup. Ct. Op. No. 1656 (File No. 3424), 580 P.2d 700 (1978); Ferguson v. State, Sup. Ct. Op. No. 1791 (File No. 3800), 590 P.2d 43 (1979); Morris v. State, Sup. Ct. Op. No. 1830 (File No. 4132), 592 P.2d 1244 (1979); Ranil v. State, Sup. Ct. Op. No. 2217 (File No. 4944), 619 P.2d 722 (1980).

Sentence held excessive. — See Hansen v. State, Ct. App. Op. No. 218 (File No. 6965), 657 P.2d 862 (1983).

Applied in Nicholson v. State, Ct. App. Op. No. 193 (File No. 6192), 656 P.2d 1209 (1982).

Stated in State v. Silas, Sup. Ct. Op. No. 1851 (File No. 4237), 595 P.2d 651 (1979); Coleman v. State, Sup. Ct. Op. No. 2190 (File No. 4416), 621 P.2d 869 (1980); Ranil v. State, Sup. Ct. Op. No. 2217 (File No. 4944), 619 P.2d 722 (1980); Clark v. State, Ct. App. Op. No. 96 (File No. 5658), 645 P.2d 1236 (1982); Tazruk v. State, Ct. App. Op. No. 195 (File No. 6954), 655 P.2d 788 (1982).

Cited in Handley v. State, Sup. Ct. Op. No. 2155 (File Nos. 3946, 4035), 615 P.2d 627 (1980); Walker v. State, Ct. App. Op. No. 231 (File No. 6304), 662 P.2d 948 (1983).

Sec. 11.31.110. Solicitation. (a) A person commits the crime of solicitation if, with intent to cause another to engage in conduct constituting a crime, the person solicits the other to engage in that conduct.

(b) In a prosecution under this section,

(1) it is not a defense

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

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

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

(c) Solicitation is a

(1) class A felony if the crime solicited is an unclassified 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.

(d) If the crime solicited is an unclassified crime described in a state law which is not part of this title and no provision for punishment of a solicitation to commit the crime is specified, the punishment for the solicitation is imprisonment for a term of not more than half the maximum period prescribed as punishment for the unclassified crime, or a fine of not more than half the maximum fine prescribed as punishment for the unclassified crime, or both. If the crime solicited is punishable by an indeterminate or life term, the solicitation is a class A felony. (§ 2 ch 166 SLA 1978; am § 2 ch 102 SLA 1980; am § 11 ch 45 SLA 1982)

Cross references. — For legislative purpose of ch. 45, SLA 1982, see § 1, ch. 45, SLA 1982, in the Temporary and Special Acts; for legal accountability based on the conduct of another and complicity, see AS 11.16.110.

Effect of amendments. — The 1980 amendment added subsection (d).

The 1982 amendment, substituted "an unclassified felony" for "murder in any degree or kidnapping" in subsection (c).

Legislative history reports. — For a report on Chapter 102, SLA 1980 (HCS CSSB 511), see 1980 Senate Journal Supplement No. 44, May 20, 1980, or 1980 House Journal Supplement No. 79, May 28, 1980.

NOTES TO DECISIONS

Former law construed. — See McConkey v. State, Sup. Ct. Op. No. 855 (File No. 1464), 504 P.2d 823 (1972); Cassell v. State, Ct. App. Op. No. 91 (File No. 5136), 645 P.2d 219 (1982), decided under former AS 11.10.070.

One contracting with another to kill a third person was guilty of attempted first-degree murder, not solicitation. — See Braham v. State, Sup. Ct. Op. No. 1522 (File No. 2558), 571 P.2d 631 (1977), cert. denied, 436 U.S. 910, 98 S. Ct. 2246, 56 L. Ed. 2d 410 (1978), decided under former AS 11.10.070 and 11.15.010.

Cited in Beaver v. State, Ct. App. Op. No. 73 (File No. 6223), 641 P.2d 1264 (1982); P.S. v. State, Ct. App. Op. No. 191 (File No. 6870), 655 P.2d 1329 (1982).

Sec. 11.31.140. Multiple convictions barred. (a) It is not a defense to a prosecution under AS 11.31.100 or AS 11.31.110 that the crime that is the object of the attempt or solicitation was actually committed pursuant to the attempt or solicitation.

(b) A person may not be convicted of more than one crime defined by AS 11.31.100 or AS 11.31.110 for conduct designed to commit or culminate in commission of the same crime.

(c) A person may not be convicted on the basis of the same course of conduct of both (1) a crime defined by AS 11.31.100 or AS 11.31.110; and (2) the crime that is the object of the attempt or solicitation.

Revisor's notes. — Subsection (e) was enacted as (f). Renumbered in 1982 when the original (e) was renumbered as AS 12.47.055.

Effect of amendments. — The 1984 amendment substituted "Corrections" for "Health and Social Services" in the first and last sentences in subsection (b) and "corrections" for "health and social services" in the introductory language of subsection (e).

Sec. 12.47.055. Treatment for other defendants not limited. Nothing in AS 12.47.050 limits the discretion of the court to recommend, or of the Department of Corrections to provide, psychiatrically indicated treatment for a defendant who is not adjudged guilty but mentally ill. (§ 22 ch 143 SLA 1982, am E.O. No. 55, § 5 (1984))

Revisor's notes. — Enacted as AS 12.47.050(e). Renumbered in 1982.

Effect of amendments. — The 1984 amendment substituted "Corrections" for "Health and Social Services."

Sec. 12.47.060. Post conviction determination of mental illness. (a) In a prosecution for a crime when the affirmative defense of insanity is not raised and when evidence of mental disease or defect of the defendant is not admitted at trial under AS 12.47.020, and the defendant is convicted of a crime, the defendant, the prosecuting attorney, or the court on its own motion may raise the issue of whether the defendant is guilty but mentally ill. A hearing must be held on this issue at or before the sentencing hearing. At the hearing the court shall determine whether the defendant has been shown to be guilty but mentally ill by a preponderance of the evidence presented at the hearing and any evidence relevant to the issue that was presented at trial.

(b) If the court finds that a defendant is guilty but mentally ill, it shall sentence the defendant as provided by law and shall enter the finding of guilty but mentally ill as part of the judgment.

(c) A defendant determined to be guilty but mentally ill under this section is subject to the provisions of AS 12.47.050.

(d) In this section, "guilty but mentally ill" has the meaning given in AS 12.47.030. (§ 22 ch 143 SLA 1982)

Sec. 12.47.070. Psychiatric examination. (a) If a defendant has filed a notice of intention to rely on the affirmative defense of insanity under AS 12.47.010 or has filed notice under AS 12.47.020(a), or there is reason to doubt the defendant's fitness to proceed, or there is reason to believe that a mental disease or defect of the defendant will otherwise become an issue in the case, the court shall appoint at least two qualified psychiatrists or two forensic psychologists certified by the American Board of Forensic Psychology to examine and report upon the mental condition of the defendant. If the court appoints psychiatrists, the psychiatrists may select psychologists to provide assistance. If the defendant has filed notice under AS 12.47.090(a), the report shall consider whether the defendant can still be committed under AS

12.47.090(c). The court may order the defendant to be committed to a secure facility for the purpose of the examination for not more than 60 days or such longer period as the court determines to be necessary for the purpose and may direct that a qualified psychiatrist retained by the defendant be permitted to witness and participate in the examination.

(b) In an examination under (a) of this section, any method may be employed which is accepted by the medical profession for the examination of those alleged to be suffering from mental disease or defect.

(c) The report of an examination under (a) of this section shall include the following:

(1) a description of the nature of the examination;

(2) a diagnosis of the mental condition of the defendant;

(3) if the defendant suffers from a mental disease or defect, an opinion as to the defendant's capacity to understand the proceedings against the defendant and to assist in the defendant's defense;

(4) if a notice of intention to rely on the affirmative defense of insanity under AS 12.47.010(b) has been filed, an opinion as to the extent, if any, to which the capacity of the defendant to appreciate the nature and quality of the defendant's conduct was impaired at the time of the crime charged; and

(5) if notice has been filed under AS 12.47.020(a), an opinion as to the capacity of the defendant to have a culpable mental state which is an element of the crime charged.

(d) If the examination under (a) of this section cannot be conducted by reason of the unwillingness of the defendant to participate in it, the report shall so state and shall include, if possible, an opinion as to whether the unwillingness of the defendant was the result of mental disease or defect.

(e) The report of the examination under (a) of this section shall be filed with the clerk of the court, who shall cause copies to be delivered to the prosecuting attorney and to counsel for the defendant. (§ 22 ch 143 SLA 1982)

NOTES TO DECISIONS

Editor's notes. — The cases annotated under Notes to Decisions were decided under former AS 12.45.087.

The conviction of a person who is incompetent to stand trial violates due process of law. Schade v. State, Sup. Ct. Op. No. 912 (File No. 1620), 512 P.2d 907 (1973).

One of the primary reasons for requiring that a defendant be competent before standing trial is to safeguard the accuracy of the guilt finding process. Schade v. State, Sup. Ct. Op. No. 912 (File No. 1620), 512 P.2d 907 (1973).

The defendant must have some minimum ability to provide his counsel with information necessary or relevant to his defense. He must also be able to understand the nature of the proceedings sufficiently to participate in certain decisions about the conduct of the defense. Schade v. State, Sup. Ct. Op. No. 912 (File No. 1620), 512 P.2d 907 (1973).

Some strategic choices must be the product of meaningful communication between the defendant and his counsel. Schade v. State, Sup. Ct. Op. No. 912 (File No. 1620), 512 P.2d 907 (1973).

But this does not mean that a defendant must possess any high degree of legal sophistication or intellectual prowess. Schade v. State, Sup. Ct. Op. No. 912 (File No. 1620), 512 P.2d 907 (1973).

Numerous persons are subjected to criminal prosecution, and properly so, even though they are of relatively low intelligence or are suffering from some significant emotional or physical impairment. Schade v. State, Sup. Ct. Op. No. 912 (File No. 1620), 512 P.2d 907 (1973).

Not every emotional flaw renders one incompetent to stand trial. Schade v. State, Sup. Ct. Op. No. 912 (File No. 1620), 512 P.2d 907 (1973).

The presence of some degree of mental illness is not an invariable barrier to prosecution. There may be an impaired functioning of some aspects of the defendant's personality and yet he may still be minimally able to aid in his defense and to understand the nature of the proceedings against him. Schade v. State, Sup. Ct. Op. No. 912 (File No. 1620), 512 P.2d 907 (1973).

Standard for determining competency is relative. — See Schade v. State, Sup. Ct. Op. No. 912 (File No. 1620), 512 P.2d 907 (1973).

Where the psychiatric examination of the defendant yields professional findings that he is competent to stand trial, the question of whether to hold any further or evidentiary hearings is addressed to the sound discretion of the trial court. Schade v. State, Sup. Ct. Op. No. 912 (File No. 1620), 512 P.2d 907 (1973).

Physical examination did not violate predecessor section. A physical examination between a clinical psychologist and defendant shortly after defendant was arrested and taken into custody, because the police feared defendant was suicidal, was properly authorized under AS 33.30.130(a), which specifies the duty of the commissioner of public safety to provide for persons pending arraignment or commitment, and did not violate subsection (a) of former AS 12.45.087, and the evidence resulting from it was therefore legally obtained. Loveless v. State, Sup. Ct. Op. No. 1819 (File No. 3320), 592 P.2d 1206 (1979).

Duty to order examination. — Once motion for competency evaluation was made under former AS 12.45.100 that was neither frivolous nor lacking in good faith and that set forth reasonable cause to believe accused might be incompetent, trial court had mandatory duty to order examination. Leonard v. State, Ct. App. Op. No. 223 (File No. 6261), 658 P.2d 798 (1983).

Where trial judge erroneously denied defendant's motion for competency evaluation under former AS 12.45.100, proper remedy was new trial preceded by competency determination. Leonard v. State, Ct. App. Op. No. 223 (File No. 6261), 658 P.2d 798 (1983).

Sec. 12.47.080. Procedure upon verdict of not guilty. (a) If a defendant is found not guilty under AS 12.47.040(a)(2), the prosecuting attorney shall, within 24 hours, file a petition under AS 47.30.700 for a screening investigation to determine the need for treatment if the prosecuting attorney has good cause to believe that the defendant is suffering from a mental illness and as a result is gravely disabled or likely to cause serious harm to self or others.

(b) In this section, "mental illness" has the meaning given in AS 47.30.915(12). (§ 22 ch 143 SLA 1982)

Sec. 12.47.090. Procedure after raising defense of insanity. (a) At the time the defendant files notice to raise the affirmative defense of insanity under AS 12.47.010 or files notice under AS 12.47.020(a), the defendant shall also file notice as to whether, if found not guilty by reason of insanity under AS 12.47.010 or 12.47.020(b), the defendant will assert that the defendant is not presently suffering from any mental illness that causes the defendant to be dangerous to the public peace or safety.

Sec. 47.10.060. Waiver of jurisdiction. (a) If the court finds at a hearing on a petition that there is probable cause for believing that a minor is delinquent and finds that the minor is not amenable to treatment under this chapter, it shall order the case closed. After a case is closed under this subsection, the minor may be prosecuted as an adult.

(b) *[Repealed, § 8 ch 110 SLA 1967.]*

(c) *[Repealed, § 8 ch 110 SLA 1967.]*

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

(e) A person who has been tried as an adult under this section, or the Department of Health and Social Services on the person's behalf, may petition the superior court to seal the records of all criminal proceedings, except traffic offenses, initiated against the person, and all punishments assessed against the person, while the person was a minor. A petition under this subsection may not be filed until five years after the completion of the sentence imposed for the offense for which the person was tried as an adult. If the superior court finds that the punishment assessed against the person has had its intended rehabilitative effect, the superior court shall order the record of proceedings and the record of punishments sealed. Sealing the records restores civil rights removed because of a conviction. A person may not use these sealed records for any purpose except that the court may order their use for good cause shown or may order their use by an officer of the court in making a presentencing report for the court. (§ 9 art I ch 145 SLA 1957; am § 1 ch 118 SLA 1962; am §§ 3, 8 ch 110 SLA 1967; am § 6 ch 104 SLA 1971; am § 13 ch 63 SLA 1977)

Cross references. — For hearings before the juvenile court, see AS 47.10.070. See also, Children's Rule 3, Alaska Rules of Court.

NOTES TO DECISIONS

Non-criminal treatment of child offenders is to be rule. — The statutory framework for dealing with child offenders contemplates that non-criminal treatment is to be the rule and adult criminal disposition the exception. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

Section provides means to determine amenability to treatment available for child offenders. — The waiver procedure set out in this section and in Rule of Children's Procedure 3 provides the means by which the children's court judge determines, prior to adjudicating the delinquency petition, that an accused child is not a suitable subject for the treatment available for child offenders. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

The court's authority to impose a penal sentence on a juvenile is limited under the strict procedures of subsections (a) and (d) and Children's Rule 3. B.A.M. v. State, Sup. Ct. Op. No. 1104 (File No. 2144), 528 P.2d 437 (1974).

A minor may move to waive children's court jurisdiction pursuant to subsection (a). M.O.W. v. State, Ct. App. Op. No. 95 (File No. 4846), 645 P.2d 1229 (1982).

A minor under the age of 18 cannot "elect" to be tried as an adult. M.O.W. v. State, Ct. App. Op. No. 95 (File No. 4846), 645 P.2d 1229 (1982).

Where no waiver hearing has been conducted, the court has no authority to sentence a delinquent child as an adult. B.A.M. v. State, Sup. Ct. Op. No. 1104 (File No. 2144), 528 P.2d 437 (1974).

Before treating a juvenile as an adult, the court must first conduct a waiver hearing. B.A.M. v. State, Sup. Ct. Op. No. 1104 (File No. 2144), 528 P.2d 437 (1974).

Option available to prosecution absent waiver. — A proceeding in children's court, which is limited to the dispositions set forth in AS 47.10.080(b), is the only option available to the prosecution absent waiver under subsection (a) of this section, and the standards established in subsection (a) are sufficiently clear to prevent arbitrary enforcement. M.O.W. v. State, Ct. App. Op. No. 95 (File No. 4846), 645 P.2d 1229 (1982).

But hearing is not criminal in nature. — A waiver hearing is not criminal in nature and is dispositional, rather than adjudicatory. N.P.A. v. State, Sup. Ct. Op. No. 2005 (File No. 4618), 604 P.2d 599 (1979).

And right to attend may be waived. — Although a minor had a constitutional right to attend her waiver hearing, she waived that right when she voluntarily failed to appear at the hearing by refusing to waive extradition from another state. N.P.A. v. State, Sup. Ct. Op. No. 2005 (File No. 4618), 604 P.2d 599 (1979).

Findings necessary to justify waiver. — To justify waiver, the children's court judge must find, on sufficient evidence, that probable cause is established at the hearing for believing that the child committed the act with which he was charged in the petition and which if committed by an adult would constitute a crime and the child is not amenable to the treatment provided under this article. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

As a prerequisite to criminal prosecution, the children's court must find not only that the child is properly accused but also that he would not be receptive to the rehabilitative programs available to the court. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

The inability to predicate a plan for a defendant during the short time remaining before his 19th birthday coupled with the obvious need of treatment as disclosed by the record may be sufficient to justify a waiver to adult jurisdiction. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

The court may close out the case as a juvenile matter only upon finding cause to believe that the minor is delinquent and that the minor is not amenable to treatment. B.A.M. v. State, Sup. Ct. Op. No. 1104 (File No. 2144), 528 P.2d 437 (1974).

A court must find that there is probable cause to believe that the minor is delinquent and that the minor is not amenable to treatment before jurisdiction may be waived. In re J.H.B., Sup. Ct. Op. No. 1676 (File No. 2917), 578 P.2d 146 (1978).

Subsection (d) is clear on its face that age 20 is the proper age for determining whether a minor is amenable to treatment. In re F.S., Sup. Ct. Op. No. 1756 (File No. 4015), 586 P.2d 607 (1978).

The 1977 amendments of this section and 47.10.080 show that it is the legislature's intent that age 20 is the age to be used in determining the amenability issue. In re F.S., Sup. Ct. Op. No. 1756 (File No. 4015), 586 P.2d 607 (1978).

Binding advance consent to treatment. — In order to give effect to the legislature's intent that a court may consider treatment until age 20 in determining waiver of juvenile jurisdiction, it is necessary that the judge be able to evaluate at the time of the waiver hearing whether the juvenile will in fact be available for treatment. It is not possible for the judge to know this unless the child can give binding consent at the time of the hearing. State v. F.L.A., Sup. Ct. Op. No. 2041 (File No. 4333), 608 P.2d 12 (1980).

The portion of the opinion in In re F.S., Sup. Ct. Op. No. 1756 (File No. 4015), 586 P.2d 607 (1978) that held that a minor in a waiver hearing could not give a binding advance consent to treatment beyond age 19 was mistaken. State v. F.L.A., Sup. Ct. Op. No. 2041 (File No. 4333), 608 P.2d 12 (1980).

Waiver decision without testimony of psychologist or psychiatrist. — A waiver of juvenile jurisdiction decision can be made without the testimony of a psychologist or psychintrist, since such testimony is germane to at most two of the four factors set out in subsection (d) of this section, and not all four of those facts need be determined adversely to the youth to warrant waiver of juvenile jurisdiction. In re J.R., Sup. Ct. Op. No. 2165 (File No. 5194), 616 P.2d 865 (1980).

There is no conflict between subsection (d) and AS 47.10.080(b)(1). In re F.S., Sup. Ct. Op. No. 1756 (File No. 4015), 586 P.2d 607 (1978).

The inconsistency between subsection (d) of this section and 47.10.080(b)(1) that existed prior to the 1977 amendments to these sections has been eliminated in that subsection (d) now provides that the determinative age is 20 and AS 47.10.080(b)(1) provides that the maximum limitation of confinement of minors is to the age of 20. In re F.S., Sup. Ct. Op. No. 1756 (File No. 4015), 586 P.2d 607 (1978).

Factors to be considered in judging seriousness of alleged offense. — In judging the seriousness of the alleged offense, the children's court judge may consider not only the type of crime charged but also the circumstances surrounding its commission, the factors leading to delinquency, history of delinquency, and facilities available for rehabilitation. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

The amenability decision rests in the sound discretion of the children's court judge. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972); In re F.S., Sup. Ct. Op. No. 1756 (File No. 4015), 586 P.2d 607 (1978).

But the latitude afforded him is not unbounded. The proper exercise of that discretion must be predicated not only upon procedural regularity sufficient to satisfy the basic requirements of due process but also on a full inquiry into the amenability issue. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

The trial court must make an evidentiary record and make written findings of fact, as required by Children's Rule 3(h), as to each of these four factors enunciated in subsection (d). In re F.S., Sup. Ct. Op. No. 1756 (File No. 4015), 586 P.2d 607 (1978).

These findings must be supported by substantial evidence. In re F.S., Sup. Ct. Op. No. 1756 (File No. 4015), 586 P.2d 607 (1978).

Substantial evidence must be presented before jurisdiction may be waived. D.H. v. State, Sup. Ct. Op. No. 1396 (File No. 2837), 561 P.2d 294 (1977).

Based on these findings, the trial court, within its sound discretion, must make a decision as to the minor's amenability to treatment. In re F.S., Sup. Ct. Op. No. 1756 (File No. 4015), 586 P.2d 607 (1978).

Factors to be considered in determining amenability. — Subsection (d) of this section suggests four factors which may be considered by the court when inquiring into the amenability issue: (1) the seriousness of the offense; (2) the delinquency of the minor; (3) the probable cause of the delinquent behavior; and (4) the facilities available for the treating of the minor. J.W.H. v. State, Sup. Ct. Op. No. 1708 (File No. 3812), 583 P.2d 227 (1978).

All four factors listed in subsection (d) need not be resolved against the child to justify waiver. Nor is there value in requiring the children's court to make an arithmetic calculation as to the weight to be given each factor. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

But there must be a thorough examination of the child, his background and alternative strategies of rehabilitation short of adult criminal treatment. Lacking such an examination, the children's court has no evidentiary basis for the decision. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972); D.H. v. State, Sup. Ct. Op. No. 1396 (File No. 2837), 561 P.2d 294 (1977).

Though the standards for determining amenability to treatment through the children's court lack explicit definition, it is clear from the statute that the court in most cases must go beyond the circumstances surrounding the alleged delinquent acts and the age of the child. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

Even though the children's court may have independent knowledge concerning children's treatment programs and facilities, it is necessary to make the existence and evaluation of such programs a part of the waiver proceedings to enable proper review by the supreme court. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

At a waiver hearing there must be a thorough examination of (1) the probable cause for believing that the child committed the act with which he was charged and (2) the amenability of the child to juvenile treatment. R.J.C. v. State, Sup. Ct. Op. No. 1022 (File No. 2038), 520 P.2d 806 (1974).

In the absence of such an examination there is no evidentiary basis for a waiver decision. R.J.C. v. State, Sup. Ct. Op. No. 1022 (File No. 2038), 520 P.2d 806 (1974); J.W.H. v. State, Sup. Ct. Op. No. 1708 (File No. 3812), 583 P.2d 227 (1978).

The record must disclose the existence and evaluation of the available children's treatment programs in all future cases in order to establish the validity of the hearing. R.J.C. v. State, Sup. Ct. Op. No. 1022 (File No. 2038), 520 P.2d 806 (1974).

The constitutional prerequisites for a valid waiver of juvenile court treatment are reflected in Rule of Children's Procedure 3 which guarantees the child a hearing before the children's court judge after adequate notice thereof, counsel at the hearing who has had access to records and reports relevant to issues before the court, and a statement of reasons accompanying the waiver order. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

Compliance with Rule of Children's Procedure 3(h) is essential to insure that the waiver hearing is not a "mere ritual" and to provide a meaningful basis for review. R.J.C. v. State, Sup. Ct. Op. No. 1022 (File No. 2038), 520 P.2d 806 (1974).

The waiver hearing is a critically important stage in criminal proceedings against a child. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

At stake at a child's waiver hearing is the statutory promise of special rehabilitative treatment in lieu of the harsher sanction of criminal conviction. Because the consequences of waiver are great, the hearing must measure up to the essentials of due process and fair treatment. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

The investigation at a waiver hearing cannot be a mere ritual. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

There must be a hearing which measures up to the essential of due process and fair treatment. R.J.C. v. State, Sup. Ct. Op. No. 1022 (File No. 2038), 520 P.2d 806 (1974); J.W.H. v. State, Sup. Ct. Op. No. 1708 (File No. 3812), 583 P.2d 227 (1978).

The right of confrontation applies to children's proceedings in which the child is charged with misconduct for which he may be incarcerated. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

Waiver without hearing is denial of due process. — To waive children's court jurisdiction without a hearing or opportunity for adversary presentation is a denial of fair process. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

As is waiver without substantial evidence of unamenability to treatment. — To waive children's court jurisdiction without substantial evidence having been presented that the child is unamenable to juvenile rehabilitation programs is denial of fair process. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

The proper standard of proof as to the amenability of a minor to treatment is the "preponderance of the evidence" standard. In re F.S., Sup. Ct. Op. No. 1756 (File No. 4015), 586 P.2d 607 (1978).

Probable cause determination cannot be based on hearsay testimony. — The probable cause determination of a court at a waiver hearing concerning juveniles cannot be based upon hearsay testimony. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 501 P.2d 837 (1972).

Exclusion of testimony held proper. — Although proffered testimony was relevant to the amenability issue, the superior court did not abuse its discretion in excluding it because its prejudicial impact outweighed its probative value. In re F.S., Sup. Ct. Op. No. 1756 (File No. 4015), 586 P.2d 607 (1978).

Insufficient evidence. — Where the court had little information concerning the probable cause of the minor's delinquent behavior, it was aware only of the nature of the offenses, of the fact that the minor was apparently not in need of funds, and of his statement that he regarded the commission of the crimes as a game, this information was insufficient to satisfy the requirements of this subsection. D.H. v. State, Sup. Ct. Op. No. 1396 (File No. 2837), 561 P.2d 294 (1977).

Waiver hearing did not comply with the standards set forth in this section and Rule of Children's Procedure 3. R.J.C. v. State, Sup. Ct. Op. No. 1022 (File No. 2038), 520 P.2d 806 (1974).

Trial court's conclusion that minor was amenable to treatment was abuse of discretion. — See In re F.S., Sup. Ct. Op. No. 1756 (File No. 4015), 586 P.2d 607 (1978).

Pros... ...or joyriding. — One under 18... ...are could be charged, prosecutes... ...ceed in the district court, as an... ...misdemeanor violation of A... ...riding" statute, former AS 28... ...fore there had been an orde... ...superior court waiving the ju... ...enile jurisdiction. State v. G... ...Op. No. 1786 (File No. 2978),... (1979).

Applied in St... ...Ct. App. Op. No. 125 (File No. 5879), 650 P.2d 422 (1982).

Quoted in Henson v. State, Sup. Ct. Op. No. 1300 (File No. 3020), 576 P.2d 1352 (1978).

Cited in E. L. L. v. State, Sup. Ct. Op. No. 1540 (File No. 3374), 572 P.2d 787 (1977); State v. P. H., Ct. App. Op. No. 375 (File No. 7768), P.2d (1984); Brower v. State, Ct. App. Op. No. 381 (File No. 7816), P.2d (1984).

Sec. 47.10 ...arings. The court may conduct the hearing in an informal ma... ...ne courtroom or in chambers. A hearing may be held before ...ng adult advisory panel in accordance with AS 47.10.075 ... ...t shall give notice of the hearing to the department and it may ... representative to the hearing. The court shall also transmit a copy of the petition to the department. The representative of the department may also be heard at the hearing. The public shall be excluded from the hearing, but the court, in its discretion, may permit individuals to attend a hearing, if their attendance is compatible with the best interests of the minor. Nothing in this section may be applied in such a way as to deny a child's rights to a public trial and to a trial by jury. (§ 10 ch 1 art I ch 145 SLA 1957; am § 1 ch 49 SLA 1966; am § 53 ch 71 SLA 1972)

Cross references. — For waiver hearings, see AS 47.10.060.

Editor's notes. — John Doe v. State, Sup. Ct. Op. No. 707 (File No. 1240), 487 P.2d 47 (1971) and RLR v. State, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971), cited below, were decided prior to the 1972 amendment to this section.

NOTES TO DECISIONS

Constitutionality. — See In re Gault, 387 U.S. 1, 87 Sup. Ct. 1428, 18 L. Ed. 2d 527 (1967), discussing due process requirements in juvenile delinquency proceedings.

Constitutional requirements apply to children. RLR v. State, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971).

Hence, states must afford juveniles due process of law in delinquency proceedings that might result in the child's incarceration, and accordingly juveniles must be afforded the right to be represented by counsel, must be given proper and timely notice, must be given the right of confrontation and cross-examination of witnesses, and afforded the privilege against self-incrimination. John Doe v. State, Sup. Ct. Op. No. 707 (File No. 1240), 487 P.2d 47 (1971).

While the U.S. Supreme Court has not held that children must be afforded due process rights in the pre-adjudication stages of the juvenile process, the Alaska supreme court believes that due process safeguards are necessary not only at the adjudicative hearing, but at any stage which may result in deprivation of the child's liberty. John Doe v. State, Sup. Ct. Op. No. 707 (File No. 1240), 487 P.2d 47 (1971).

The extension to children of fundamental constitutional rights does not mean a total substitution of the adult criminal model for the present children's court system. John Doe v. State, Sup. Ct. Op. No. 707 (File No. 1240), 487 P.2d 47 (1971).

The problems of pre-adjudication treatment of juveniles are unique to the juvenile process; hence, what is held with regard to the procedural requirements at the adjudicatory stage has no necessary applicability to other steps of the juvenile process. John Doe v. State, Sup. Ct. Op. No. 707 (File No. 1240), 487 P.2d 47 (1971).

Due process standards must be observed at a detention inquiry since it may result in the deprivation of the child's liberty. Due process requires at the very least that detention orders be based on competent, sworn testimony, that the child have the right to be represented by counsel at the detention inquiry, and that the detention order state with particularity the facts supporting it. John Doe v. State, Sup. Ct. Op. No. 707 (File No. 1240), 487 P.2d 47 (1971).

Incarceration, when applied to children, is a taking of liberty under the 14th amendment, regardless of benevolent-sounding labels. RLR v. State, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971).

The due process clause of the 14th amendment applies when a child is charged with misconduct for which he may be incarcerated in an institution, regardless of the labels of the adjudication and institution, so the child is entitled to notice of charges, counsel, confrontation and cross-examination, and the privilege against self-incrimination. RLR v. State, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971).

The right to grand jury indictment is not so fundamental that due process is offended by alternate methods for instituting children's proceedings where the child is charged with having violated a criminal statute. John Doe v. State, Sup. Ct. Op. No. 707 (File No. 1240), 487 P.2d 47 (1971).

Children who are charged with acts which would be chargeable only by grand jury indictment, if committed by an adult, need not be indicted by a grand jury. John Doe v. State, Sup. Ct. Op. No. 707 (File No. 1240), 487 P.2d 47 (1971).

Children are constitutionally entitled to jury trial in the adjudicative stage of a delinquency proceeding. However, due to the uniqueness of some facets of the procedures governing children's court proceedings and the potential damage which may accrue to the child by a public trial, the child should first consult with his counsel and his parents or guardian when appropriate, and then affirmatively assert the right to a trial by jury before it is finally granted. RLR v. State, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971). But see McKeiver v. Pennsylvania, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971), in which it was held that trial by jury in the juvenile court's adjudicative stage is not a constitutional requirement.

Whenever a child in a delinquency proceeding is charged with acts which would be a crime, subject to incarceration if committed by an adult, Alaska Const., art. I, § 11, guarantees him the right to jury trial. To the extent In re White, Sup. Ct. Op. No. 507 (File No. 1013), 445 P.2d 813 (1968) (subsequently overruled, in re G.K., Sup. Ct. Op. No. 796 (File Nos. 1627, 1654, 1674), 497 P.2d 914 (1972)) is inconsistent with this opinion, it is overruled. RLR v. State, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971).

The purposes of the right to jury trial, such as protection against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge, apply as much in children's cases as in adults' cases. RLR v. State, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971).

If the child waives jury trial, the state may not require it, but jury trial shall be provided only on demand. RLR v. State, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971).

The Hammonds test of waiver (Hammonds v. State, Sup. Ct. Op. No. 483 (File No. 828), 442 P.2d 39 (1968)), applies to infants as well as adults. The consequences of application will differ for infants, because some decisions can be "knowingly and intelligently" made only by persons of fuller knowledge and maturity. An infant not advised by an attorney could make few knowledgeable and intelligent decisions about whether to waive rights in judicial proceedings. On the other hand, in areas where an adult ordinarily delegates to his attorney decision-making authority, as in deciding whether to object to introduction of evidence, the competence of the attorney rather than of the client generally determines whether waivers satisfy the Hammonds criteria. RLR v. State, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971).

The right to counsel extends to children charged with delinquency. RLR v. State, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971).

A juvenile must be afforded the right to be represented by counsel at the delinquency proceeding, and a denial of that right violates due process. John Doe v. State, Sup. Ct. Op. No. 707 (File No. 1240), 487 P.2d 47 (1971).

Right to reasonable time to prepare for trial. — It is unquestionable that the right to the assistance of counsel of necessity includes the concomitant right to have a reasonable time in which to prepare for trial. John Doe v. State, Sup. Ct. Op. No. 707 (File No. 1240), 487 P.2d 47 (1971).

While an adult defendant in a criminal case must be brought to trial within a reasonable time, due process requires that he may not be brought to trial too soon. He must be given a reasonable time to consult with his counsel and to prepare his defense. John Doe v. State, Sup. Ct. Op. No. 707 (File No. 1240), 487 P.2d 47 (1971).

This section provides for the exclusion of the public from children's hearings. RLR v. State, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971).

But such provision involves only persons whose presence is not desired by child. — The area of discretion in the rule, where the court may refuse to open the hearing, involves persons whose presence is not desired by the child. RLR v. State, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971).

It is an abuse of discretion for the court to refuse admittance to individuals whose presence is favored by the child, except in special circumstances such as the unavailability of a courtroom sufficiently large to hold all the individuals whose presence is sought. RLR v. State, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971).

If the child or his guardian ad litem wants the press, friends, or others to be free to attend, then the hearing must be open to them. RLR v. State, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971).

As children are guaranteed the right to a public trial by the Alaska Constitution, RLR v. State, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971).

Due process requires that children have the right to a public trial by jury where they are charged with acts which would be a crime if committed by an adult. John Doe v. State, Sup. Ct. Op. No. 707 (File No. 1240), 487 P.2d 47 (1971).

The fundamental constitutional right of public trial by jury must be afforded children in delinquency adjudication proceedings, in spite of the possible interference with the benevolent motives of the children's court system which have, in the past, justified denial of those rights. John Doe v. State, Sup. Ct. Op. No. 707 (File No. 1240), 487 P.2d 47 (1971).

The reasons for the constitutional guarantees of public trial apply as much to juvenile delinquency proceedings as to adult criminal proceedings. RLR v. State, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971).

Delinquency must be proved beyond a reasonable doubt under the due process clause of the 14th amendment. RLR v. State, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971).

Cited in In re [illegible], Sup. Ct. Op. No. 1127 (File No. 2191), 533 P.2d 13 (1975); M.O.W. v. State, Ct. App. Op. No. 95 (File No. 4846), 645 P.2d 1229 (1982).

Collateral references. — Power of juvenile court to require testimony by children, 151 ALR 1229.

Applicability of rules of evidence in juvenile delinquency proceedings, 43 ALR2d 1128.

Degree of proof in juvenile delinquency proceedings, 43 ALR2d 1138.

Sec. 47.10.075. Young adult advisory panels. (a) Unless the minor objects, the court may select a young adult advisory panel to hear the case and advise the court of a recommended judgment and order. The court may consider any of the panel recommendations in making its judgment and order in the case.

(b) The principal of each high school shall submit annually to the court a list of the students enrolled in grades 10, 11 and 12. The court shall determine the method of selecting the members of each panel.

(c) A student shall be excused from attending school while serving as a panel member. A student may not serve more than once each year on a panel.

without also finding him guilty of assault, a lesser-included offense instruction on assault was required. Marker v. State, Op. No. 432, 692 P2d 977 (Alaska App. 1984).

A lesser-included offense instruction is not necessarily inappropriate even if there is a reasonable theory under which the jury could find defendant guilty of the crime charged without also finding him guilty of the lesser offense. Marker v. State, Op. No. 432, 692 P2d 977 (Alaska App. 1984).

This rule does not preclude a mistrial in a case in which the jurors cannot agree on a greater offense but can agree on a lesser offense. Desnek v. State, Op. No. 455, 697 P2d 1059 (Alaska App. 1985).

Juries need not unanimously agree upon a particular statutory theory of the crime charged if there is sufficient evidence in the record to support either theory. State v. James, Op. No. 2925, 698 P2d 1161 (Alaska 1985).

Under this rule, a jury may not convict a defendant of offenses which are related to the crime charged but which are not necessarily included therein. State v. Minano, Op. No. 3006, 710 P2d 1013 (Alaska 1985).

An indictment charging a greater offense necessarily also charges all lesser-included offenses as well as attempts; consequently, where a trial court finds that there was insufficient evidence to permit an indictment charging the greater offense, but sufficient evidence to charge the lesser offense including an attempt, the indictment should not be dismissed, but the charges should be reduced to charge the lesser offense. State v. Ison, Op. No. 754, 744 P2d 416 (Alaska App. 1987).

PART VII. JUDGMENT

Rule 32. Sentence and Judgment.

(a) Sentence. Sentence shall be imposed without unreasonable delay. Pending sentence the court may commit the defendant or continue or alter bail as provided in Rule 41 (a), Alaska Rules of Criminal Procedure. Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment. If the defendant is being sentenced following a plea of guilty or nolo contendere the court shall question the defendant to ascertain that he understood the meaning of his plea, and that it was freely and voluntarily entered.

(b) Judgment — Execution.

(1) *Execution.* The judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. At the time of imposition of sentence, the judge or magistrate shall make a statement on the record explaining his reasons for imposition of the sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge or magistrate. The clerk shall forthwith deliver to a peace officer a copy of the judgment for execution. The peace officer shall note on the copy of the judgment the date of its delivery to him. When the judgment has been executed, the peace officer shall promptly return the copy to the clerk with his proceedings endorsed thereon.

(2) *Conviction of a Corporation.* If a corporation is convicted of any criminal offense the court may give judgment thereon and shall cause such judgment to be enforced in the same manner as a judgment in a civil action, or as otherwise provided by law.

(c) Procedure for Determining Mitigating and Aggravating Factors and Effect of Prior Convictions.

(1) At the time guilt is established by verdict or plea, counsel shall inform the court and the defendant of any prior convictions which bring into effect the presumptive sentencing provisions of AS 12.55.125; any dispute over the fact of prior convictions shall be set for hearing pursuant to paragraph (2) (ii), and the court shall order a presentence investigation by the Division of Corrections.

(2) At the time guilt is established, the court shall set:

(i) the time for the submission by counsel of affidavits setting forth aggravating and mitigating factors pursuant to AS 12.55.155 and extraordinary circumstances pursuant to AS 12.55.165, which time shall be not less than five working days after the finding of guilt;

(ii) a hearing not less than five working days from the time set for submission of the affidavits required by paragraph (2) (i) above, if there is any dispute between the parties concerning the requirement of presumptive sentencing, aggravating and mitigating factors and extraordinary circumstances which may exist.

(3) At the presentence hearing provided for by paragraph (2) (ii) the court shall enter an order establishing if presumptive sentencing applies, setting forth the aggravating and mitigating factors. A copy of this order shall be given to the Division of Corrections. If presumptive sentencing applies and there are no aggravating or mitigating factors, only a short form of the presentence report is required.

(4) At the time guilt is established the court shall establish the date for sentencing and provide that the presentence report be made available to the attorneys ten calendar days before sentencing in order that any factual errors in the report may be resolved among the attorneys and the Division of Corrections or at a hearing before the judge to whom the case is assigned for sentencing unless good cause is shown for the hearing to be before another judge.

(d) Presentence Investigation.

(1) *When Made.* The probation service shall make presentence investigation and report before the court imposes sentence or grants probation. The report shall not be submitted to the court or its contents disclosed to any one except counsel unless the defendant has tendered a plea of guilty or nolo contendere or has been found guilty. The court may

...ilize the report in determining if a bargained sentence recommendation will be followed pursuant to Rule 11. In the event the attorneys for the parties request the preparation of a presentence report to aid ... in plea bargaining the court may order such report to be made prior to the time stated in this rule.

(2) *Report.* The report of the presentence investigation shall contain any prior criminal conviction including a finding of delinquency of the defendant and such information about his characteristics, his financial condition, and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court. No record of arrest or other police contacts shall be included in the report. The report shall be made available to the state's attorney and to the defendant's attorney in all cases and to the defendant unless the court enters on the record findings of reasons why the report would prove detrimental to the rehabilitation of the defendant or safety of the public. Unless otherwise ordered, further disclosure of the report shall be limited to the reviewing court on appeal and to the agencies having charge of the defendant's rehabilitation.

(e) **Sentencing Referrals to Three-Judge Panel.**

(1) If the trial court finds that extraordinary circumstances exist under AS 12.55.165, the case shall be transferred forthwith to a three-judge sentencing panel of the superior court. All pertinent files, records and transcripts shall be transmitted to the sentencing panel by the clerk of the court within 30 days of the date of the order transferring the case.

(2) Three judges of the superior court shall be appointed by the chief justice to be the regular members of the sentencing panel. Two other judges of the superior court shall be appointed by the chief justice as first and second alternate members of the sentencing panel. At least one of the three regular members and one of the two alternate members of the sentencing panel shall reside outside of Anchorage. The term of appointment of the regular and alternate members of the sentencing panel shall be two years, except that the first three regular members appointed shall serve staggered terms of one, two, and three years. The chief justice may appoint additional alternate members of the sentencing panel to serve on a case-by-case basis in the event of the disability or disqualification of more than two judges.

(3) The chief justice shall appoint one of the three regular members to be administrative head of the sentencing panel and his or her office shall serve as the administrative repository for all papers and documents pertaining to cases submitted to the sentencing panel.

(4) Both the prosecuting attorney and the defendant may exercise in a timely fashion a challenge for cause, or a peremptory challenge if not previously exercised, to one judge on the sentencing panel in accordance with AS 22.20.022 and Rule 25 (d) (1), Alaska Rules of Criminal Procedure. In the event that a judge on the sentencing panel is the same judge who made the finding under subsection (1) of this rule, that judge shall be automatically disqualified.

(5) The sentencing panel shall either sentence the defendant or remand the case to the court within 60 days from the date that the case was transmitted to the sentencing panel. The sentencing panel shall provide a written statement of its findings and conclusions in support of any order remanding a case to the trial court.

(6) If the sentencing panel elects to take testimony or sentence the defendant under AS 12.55.175 (b) or (c), both the prosecution and the defendant shall have the right to be present in court during the proceedings. The defendant shall have the right to address the sentencing panel personally before sentence is imposed. The proceedings shall be held in a location best suited to the convenience of the parties and the court as determined by the sentencing panel.

(7) If the three-judge sentencing panel imposes sentence on the defendant, any further sentencing proceedings, including proceedings relating to sentence modification, shall occur before the same three-judge panel, who shall be considered the sentencing court. If at the time further proceedings are requested any of the three judges is no longer available, one or more alternate members shall sit in the same fashion as provided for in AS 12.55.175 (a).

(8) The right to bail of a convicted defendant is neither conferred nor enlarged by this rule.

(f) **Transcript of Sentencing Proceeding.** A transcript of any sentencing proceeding at which the defendant is committed to serve in excess of 6 months on one or more charges shall be prepared and furnished to the state attorney, defendant, and the Alaska Parole Board.

(Adopted by SCO 4 October 4, 1959; amended by SCO 157 effective February 15, 1973; by Amendment No. 5 to SCO 157 effective July 1, 1974; by SCO 330 effective January 1, [illegible]; by SCO 418 effective August 1, 1980; by SCO [illegible] effective October 21, 1980; by SCO 437 effective October 21, 1980; by SCO 550 effective February 1, 1983; by SCO 554 effective April 4, 1983; and by SCO 603 effective September 14, 1984)

Cross References

(a) CROSS REFERENCES: AS 12.55.010

sentencing judge may consider instances of past anti-social ... substantiated by supporting information, even though ... was not charged or convicted. Nukapigak v. State, Op. ... 562 P2d 697 (Alaska 1977).

...estion: "Do you have anything you want to say before I ... sentence?" was minimal compliance with allocution ...ement of this rule, where defendant w... ...ntenced four days ... Supreme Court imposed more strin... ...ttrass standard. ...ell v. State, Op. No. 1482, 568 P2d 11... 1978).

...al court's failure to afford defendant the opportunity to make ...nent on his own behalf at sentencing hearing was not ...ss error. Mohn v. State, Op. No. 1719, 584 P2d 40 (Alaska ...).

...der Rule 32(a) the obligation is on the court to afford the ...dant the opportunity to speak and not on the defendant to ...est such an opportunity, hence defendant's failure to assert ... his right of allocution did not constitute waiver. Mohn v. State, Op. No. 1719, 584 P2d 40 (Alaska 1978).

Defendant's contention that consideration of his juvenile ...ord by the court imposing sentence violated his right to privacy ...rejected. Penn v. State, Op. No. 1774, 588 P2d 288 (Alaska ...).

Despite the fact that defendant spoke at some length under ...examination by his counsel at the sentencing hearing, the ...'s failure to inform him of his right of allocution required ...encing. Law v. State, Op. No. 2301, 624 P2d 284 (Alaska ...).

In order to establish a claim of racial bias in sentencing defend... must show that the sentence was probably higher than that ... would have been imposed upon a defendant of a different ... with a like criminal history who committed a similar offense. ...leman v. State, Op. No. 2190, 621 P2d 869 (Alaska 1980).

Trial court, in conducting a hearing pursuant to this rule to ...mine whether mitigating and aggravating factors have been ...blished, may consider evidence previously introduced at the ... Wolf v. State, Op. No. 99, 647 P2d 609 (Alaska App. 1982).

Where defendant was given a chance to exercise his right of ...cation just prior to sentencing and did not exercise that right on ...ground that he needed more time to prepare, failure of the trial ...rt to give the defendant more time was not error. Hastings v. State, Op. No. 706, 736 P2d 1157.

Rule 32.1. Appeal From Conviction of Sentence—Notification of Right to Appeal.

A person convicted of a crime after trial shall be advised by the judge or magistrate:

(a) That he has the right to appeal from the judgment of conviction within 30 days (or 15 days in appeals from the district court made under Rule 217, Alaska Rules of Appellate Procedure) from the date shown in the clerk's certificate of distribution on the judgment appealed from by filing a notice of appeal with the clerk of court.

(b) That in accordance with Appellate Rule 215, the defendant may appeal the sentence on the ground that it is excessive, that upon such appeal the court may reduce or increase the sentence, and that by appealing the sentence, the defendant waives the right to plead that by a revision of the sentence resulting from the appeal he has twice been placed in jeopardy for the same offense.

(c) That if he wants counsel and is unable to pay for the services of an attorney, the court will appoint an attorney to represent him on the appeal.

(Added by SCO 157 effective February 15, 1973; amended by SCO 218 effective January 15, 1976; by SCO 536 effective October 1, 1982; and by SCO 643 effective September 15, 1985)

Annotations

Cases

Sentence of five years' imprisonment for burglary, two of which were suspended, was not clearly mistaken, even though the defendant was 19 years old and it was his first felony offense. Zurfluh v. State, Op. No. 2238, 620 P2d 690 (Alas... 1980).

Where defendant was convicted of assault with a dangerous weapon for striking another person in the face with a beer bottle, sentencing court was not clearly mistaken in imposing a five-year sentence. Wire v. State, Op. No. 2, 621 P2d 18 (Alaska 1980).

Thirty-year sentence for third rape conviction and ten-year sentence for assault with a dangerous weapon, the sentences to run consecutively, were not excessive. Coleman v. State, Op. No. 2190, 621 P2d 869 (Alaska 1980).

Four month jail term for selling marijuana on school premises was appropriate notwithstanding sentencing guideline which suggested not more than thirty days for the quantity of marijuana involved. Anderson v. State, Op. No. 2763, 621 P2d 1345 (Alaska 1981).

Sentence of ten years with five suspended for sale of cocaine was excessive for a youthful first offender. Kelly v. State, Op. No. 2268, 622 P2d 432 (Alaska 1981).

A total sentence of 55 years was not excessive for second degree murder and two counts of shooting with intent to kill where defendant had a lengthy criminal record and a propensity for violent crime. Nielsen v. State, Op. No. 2279, 623 P2d 304 (Alaska 1981).

Sentence of 35 years for murder was not excessive even though defendant had no prior criminal record. Bryant v. State, Op. No. 2280, 623 P2d 310 (Alaska 1981).

Fifteen-year sentence was not inappropriate for shooting with intent to wound. Kagak v. State, Op. No. 2311, 624 P2d 818 (Alaska 1981).

Ten-year sentence for manslaughter was not excessive for defendant, an alcoholic, 67 years of age, with extensive criminal record and one prior homicide conviction. Phillips v. State, Op. No. 2229, 625 P2d 816 (Alaska 1981).

Rule 32.3. Judgment and Orders—Effective Dates and Commencement of Time for Appeal, Review and Reconsideration.

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

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

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

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

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

(c) **Date of Notice.**

(1) *Oral Orders.*

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

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

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

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

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

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

(Added by SCO 554 effective April 4, 1983)

Cross References

CROSS REFERENCE: App. R. 204

Rule 33. New Trial.

The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury, the court may vacate the judgment if entered, take additional testimony and enter a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other ground shall be made within 5 days after verdict or finding of guilt, or within such further time as the court may fix during the 5-day period.

(Adopted by SCO 4 October 4, 1959: amended by SCO 554 effective April 4, 1983)

Annotations

Cases

Where a case has been appealed, a trial court can entertain a motion for new trial based on newly discovered evidence without first applying for and obtaining a remand of the case from the supreme court to the trial court for the stated purpose of granting a new trial. State v. Salinas, Op. No. 39, 562 P2d 298, 5 [illegible] (Alaska 1961).

A motion for new trial based on the grounds of newly discovered evidence must meet the following requirements: (1) It must appear from the motion that the evidence relied on is, in fact, newly discovered, i.e., discovered after the trial. (2) The motion must allege facts from which the court may infer diligence on the part of the movant; (3) the evidence relied on must not be merely cumulative or impeaching; (4) must be material to the issues involved; and (5) must be such as, on a new trial, would probably produce an acquittal. Rank v. State, Op. No. 144, [illegible] (Alaska 1963).

Where newly discovered evidence was not such as would probably produce an acquittal on a new trial, and motion failed to show the requirement that there be a showing of diligence in attempting to locate a witness before or at the time of trial, the court properly exercised his discretion in denying a motion for new trial based on newly discovered evidence. Rank v. State, [illegible] 382 P2d 760 (Alaska 1963).

Where in a criminal case erroneous and prejudicial admission of hearsay evidence had resulted in reversal and retrial for appellant, it was reversible error for the trial court at the retrial to deny a motion for a new trial which was supported by affidavits of jurors showing that prejudicial evidence received in the first trial was actually before the jury at the retrial by virtue of the jury's knowledge of the contents of a local newspaper article published the last day of the retrial quoting the statement erroneously received in the first trial. Watson v. State, Op. No. 335, 413 P2d [illegible] (Alaska 1966).

As one of the exceptions to the general rule prohibiting jurors to impeach their verdicts, the verdict must not be allowed to stand where a party was deprived of a fair trial and since affidavits showed that they were exposed to a newspaper article containing information previously held so prejudicial as to require a new trial, established that the appellant was deprived of such a fair trial that the court erred in denying motion for new trial. Watson v. State, Op. No. 335, 413 P2d 22 (Alaska 1966).

judgment debtor is a final order terminating the proceeding and is appealable. Mallonee v. Grow, Op. No. 841, 502 P2d 432 (Alaska 1972).

In the interest of judicial economy, and because of the important issues involved, procedural rules were relaxed so that the merits of an appeal from a temporary restraining order issued by the superior court, which determined that a strike by public school teachers was illegal and which ordered the teachers to return to work, could be decided on the merits as though a declaratory judgment had been entered. Anchorage Educ. Assoc. v. Anchorage Sch. Dist., Op. No. 2537, 648 P2d 993 (Alaska 1982).

III. Criminal Appeal by State

The limitation on the right of the state to appeal does not prevent the state from using the petition for review proceeding to question the jurisdiction of the superior court. State of Alaska v. Salinas, Op. No. 39, 362 P2d 298 (Alaska 1961).

The prohibition of appeals by the state except to test the indictment does not prevent the state from petitioning for review of the trial court ruling that the accused was a minor and without the jurisdiction of the superior court, such ruling affecting a "substantial right" of the state to try the accused and preventing a final judgment. State of Alaska v. Linn, Op. No. 47, 363 P2d 361 (Alaska 1961).

The state may appeal "to test the sufficiency of the indictment" thereby raising any question as to the adequacy and adaptation of the indictment to its purpose. The inquiry is not limited to whether the indictment met the formal statutory requirements for a valid indictment. State of Alaska v. Shelton, Op. No. 56, 368 P2d 817 (Alaska 1962).

State had a right to appeal trial court's order arresting judgment where motion in arrest of judgment challenged only the sufficiency of the indictment. State v. Adkerson, Op. No. 294, 403 P2d 673 (Alaska 1965).

If the trial court dismissed a count of the indictment upon a motion for acquittal, but based its action unequivocally on the sole ground that the indictment was defective, the state had a right to appeal for the purpose of testing the sufficiency of the indictment. State v. Selman, Op. No. 302, 406 P2d 181 (Alaska 1965).

The issue whether an information substituted in place of a complaint in a magistrate court was adequate to prosecute an offense within the criminal jurisdiction of that court tested the sufficiency of the information, and appeal by the state from dismissal of the case was not barred. State v. Smith, Op. No. 356, 417 P2d 252 (Alaska 1966).

The supreme court on a criminal appeal taken by the state from a judgment of the superior court setting aside a conviction in the district court has authority to pass upon the sufficiency of information used as substitute for a complaint in the district court. State v. Pete, Op. No. 372, 420 P2d 338 (Alaska 1966).

In an appeal brought by the state from a judgment of the superior court setting aside a conviction in the district court on grounds of insufficiency of information, the supreme court reversed the superior court's order and also in order to avoid piecemeal appeals further considered other points made in the appellee's brief in defense of the judgment below and appearing in the record, albeit not passed upon below. State v. Pete, Op. No. 372, 420 P2d 338 (Alaska 1966).

Death of the appellant while criminal appeal was pending abated the criminal action ab initio. Hartwell v. State, Op. No. 391, 423 P2d 282 (Alaska 1967).

The limitation placed by AS 22.05.010 upon the state's right to appeal in a criminal case applies only to instances where the Supreme Court's jurisdiction is sought by appeal. Other forms of review authorized under the statute are not subject to the limitation. State v. Browder, Op. No. 699, 486 P2d 925 (Alaska 1971).

Neither the limitation placed by AS 22.05.010 upon the state's right to appeal in a criminal case nor the prohibition of Constitutional Article 1, § 15, against double jeopardy requires an erroneous nonfinal order or decision, favorable to the accused, to stand uncorrected. The state can invoke the discretionary review jurisdiction of the Supreme Court in criminal cases where the matter sought to be reviewed involves a nonfinal order or decision of the superior court. State v. Browder, Op. No. 699, 486 P2d 925 (Alaska 1971).

The state has the right to appeal a sentence only if it contends that the sentence imposed was too lenient. Where the state, which has unsuccessfully sought consecutive sentences, fails to challenge the defendant's sentence on two counts of negligent homicide on the ground that it was too lenient, there is no jurisdiction for the state's appeal under the sentence review statute. State v. Gibson, Op. No. 1215, 543 P2d 406 (Alaska 1975).

Double jeopardy prevents the retrial of any person acquitted by a trial court. Only where a guilty verdict rendered in the trial court has been reversed on appeal in the superior court, when that court is acting as an intermediate appellate court, can the state appeal a not guilty verdict to the supreme court. State v. Gibson, Op. No. 1215, 543 P2d 406 (Alaska 1975).

The state may appeal any adverse final judgment of a trial court in a criminal action dismissing an indictment for any reason unless retrial would be barred by the double jeopardy clauses of the state or federal constitutions. State v. Michel, Op. No. 48, 634 P2d 3[illegible] (Alaska App. 1981).

Rule 203. Supervision and Control of Proceedings.

The supervision and control of the proceedings on appeal is in the appellate court from the time the notice of appeal is filed with the clerk of the trial courts, except as otherwise provided in these rules. The appellate court may at any time entertain a motion to dismiss the appeal, or for directions to the trial court, or to modify or vacate any order made by the trial court in relation to the prosecution of the appeal, including any order fixing or denying bail.

(SCO 439 effective November 15, 1980; amended by SCO 572 effective February 1, 1984)

Rule 204. Appeal: Time—Notice—Bonds.

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

(1) *Appeals.* The notice of appeal shall be filed within 30 days from the date shown in the clerk's certificate of distribution on the judgment appealed from.

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

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

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

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

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

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

(7) Granting or denying a motion for reconsideration under Civil Rule 77 (m).

(ii) *Motions That Terminate Time for Filing Appeal in Criminal Cases.* In a criminal case, if a motion for a new trial or in arrest of judgment or a timely motion for reconsideration has been filed in the superior court, or if a motion for modification, correction, or suspension of sentence under Criminal Rule 35 has been made within the allowed period following the date shown in the clerk's certificate of distribution on the judgment, an appeal from a judgment may be filed within 30 days after the date of notice of the order deciding the motion. Notice of entry is defined in Criminal Rule 32.3(c).

(iii) *Effect of Taxing of Costs and Prejudgment Interest.*

(A) The running of the time for filing an appeal is not terminated by proceedings related to the taxing of costs pursuant to Civil Rule 79 or while awaiting calculation of prejudgment interest. However, the Statement of Points on Appeal filed pursuant to Appellate Rule 210 (e) may be amended by an appellant or cross-appellant to include the subjects of costs and attorney's fees or prejudgment interest and these subjects will thereafter be considered part of the appeal if contained in the brief of appellant or cross-appellant. If an appeal or cross-appeal is pending, costs and attorney's fees or the amount of prejudgment interest shall be considered a final judgment subject to separate appeal limited to the subject of costs, attorney's fees or prejudgment interest.

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

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

(b) **Notice of Appeal.** A party may appeal from a judgment by filing a notice of appeal with the court from which the appeal is being taken. The notice of appeal must specify the parties taking the appeal and their current addresses, designate the judgment or part thereof appealed from, and name the court to which the appeal is taken. The notice of appeal shall be accompanied by proof of service on all other parties to the action in the trial court. As provided elsewhere in these rules, at the time it is served and filed the notice of appeal shall be accompanied by a statement of points on appeal (Rule 210 (e)) and designation of record on appeal (Rule 210 (a) (1)) and, if required, by the filing fee (Rule 204 (h)) and a bond for costs on appeal (Rule 204 (c) (1)). If a motion for an extension of time to file the statement of points on appeal or designation of record on appeal has been filed with the appellate court, the appellant shall serve and file with the notice of appeal a written statement to that effect. A motion to waive bond on appeal pursuant to Rule 104 (c), or to appeal at public expense pursuant to Rule 209, may be filed along with the notice of appeal. Otherwise, the clerk of the trial courts shall refuse to accept for filing any notice of appeal not conforming to this paragraph.

(c) **Bond on Appeal.**

(1) Unless a party is exempted by law, a bond for costs on appeal shall be filed with the notice of appeal in a civil case. The bond shall be in the sum of seven hundred fifty dollars ($750.00), unless the superior court fixes a different amount or unless a supersedeas bond is filed, in which event no separate bond on appeal is required. The bond on appeal shall have sufficient surety and shall be conditioned to secure the payment of costs if the appeal is dismissed or the judgment affirmed, or such costs as the supreme court may award if the judgment is modified. If a bond on appeal in the sum of seven hundred fifty dollars ($750.00) is given, no approval thereof is necessary. After a bond on appeal is filed, an appellee may by motion raise objection to the form or amount of the bond or to the sufficiency of the surety which shall be determined by the superior court. In lieu of filing such cost bond, the appellant may deposit in the office of the clerk of the court from which the appeal is taken a sum of money reasonably sufficient to cover such costs, the amount thereof to be fixed by the superior court.

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

(d) **Supersedeas Bond.** Whenever in a civil case an appellant entitled thereto desires a stay on appeal, he may present to the superior court for its approval a supersedeas bond which shall have such surety or sureties as the court requires. The bond shall be conditioned for the satisfaction of the judgment in

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

(e) **Failure to File or Insufficiency of Bond.** (Rescinded by Supreme Court Order 576 effective February 1, 1984)

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

(g) **Joint or Consolidated Appeals.** If two or more persons are entitled to appeal from a judgment or order of a court and their interests are such as to make joinder practical, they may file a joint notice of appeal, or may join in appeal after filing separate timely notices of appeal, and they may thereafter proceed on appeal as a single appellant. Appeals may be consolidated by order of the appellate court upon its own motion or upon motion of a party.

(h) **Filing Fee.** When a notice of appeal is filed, the appellant shall pay to the clerk of the court from which the appeal is taken a filing fee prescribed in Rule 9, Rules Governing the Administration of All Courts.

(i) **Notice to Appellate Court.** Immediately upon the filing of the notice of appeal, the Clerk of the trial courts shall send to the clerk of the appellate courts: a copy of the notice of appeal, statement of points on appeal, designation of record on appeal, and proof of service of these documents, indicating the date on which they were filed; evidence that the filing fee has been paid and a bond for costs on appeal posted, if required, or a statement that the appeal is at public expense; a statement identifying all parties to the appeal and the attorneys who represented them in the trial court; and a copy of the judgment being appealed.

(SCO 439 effective November 15, 1980; amended by SCO 461 effective June 1, 1981; by SCO 510 effective August 30, 1982; by SCO 513 effective October 1, 1982; by SCO 554 effective April 4, 1983; by SCO 573 effective February 1, 1984; by SCO 574 effective February 1, 1984; by SCO 575 effective February 1, 1984; by SCO 726 effective December 15, 1986; SCO 794 effective March 15, 1987; by SCO 830 effective August 1, 1987; and by SCO 847 effective January 1, 1988)

Annotations

Cases

I. In General
II. Entry of Judgment
III. Timeliness of Appeal
  A. In General
  B. Tolling of Time for Appeal

I. In General

An appeal does not in itself operate to prevent execution of judgment below, and in order to prevent such an enforcement appellant must either file a supersedeas bond approved by the court or obtain a stay of enforcement from the supreme court. Liberty National Insurance Company v. Hunter, Op. No. 281, 398 P2d 997 (Alaska 1965).

Where appellee did not take a cross-appeal nor allege an issue of attorney's fees not previously raised by [illegible] statement of points on appeal, he could not attack the award in this regard for first time by appellee's brief. Alaska Brick Company v. McCoy, Op. No. 287, 400 P2d 454 (Alaska 1965).

An attorney in a workmen's compensation proceeding is within the scope of this rule and has the right of appeal from award of attorney's fees by either the Board or the superior court. Rose v. Alaskan Village, Inc., Op. No. 333, 412 P2d [illegible] (Alaska 1966).

This rule governs procedure for obtaining a stay of a compensation award once an appeal has been taken from the superior court. Johns v. State of Alaska, Dept. of Highways, Op. No. 424, 431 P2d 148 (Alaska 1967).

In determining whether to approve a supersedeas bond under this rule, the superior court should apply the same criteria applicable in determining "irreparable damage" under the statutory provisions of AS 23.30.125(c). Johns v. State of Alaska, Dept. of Highways, Op. No. 424, 431 P2d 148 (Alaska 1967).

It is not necessary to hold an evidentiary hearing on [illegible] alleged deprivation of the right to appeal where petitioner alleges she requested her trial defense counsel to file an appeal from her conviction, but fails to indicate time, location, manner or circumstances under which she had requested her counsel to file an appeal. Pore v. State, Op. No. 437, 452 P2d 433 (Alaska 1969).

...court has the primary responsibility to determine ... should be allowed to appeal at public expense. ...nson, Op. No. 1229, 544 P2d 1028 (Alaska 1976).

...written statement of reasons for denying a motion ... expense, a judge should take care to state with ... detail preliminary and basic facts upon which ... judge makes such findings will the supreme ... have a clear understanding of the basis for the ...Johnson v. Johnson, Op. No. 1229, 544 P2d 1028

Rule 210. Record on Appeal.

Designation of Contents of Record on Appeal.

...the time the notice of appeal is filed, the ... shall also serve upon the appellee and file ... court a designation of the portions of ... including transcripts, exhibits and any ... from the court file, to be contained in the ... appeal. The designation must describe the ... with reasonable specificity. Within 10 days ... service and filing of such a designation, any ... to the appeal may serve and file a desig... additional portions of the record to be ...

...appellant designates nothing other than ... required by subsection (f)(1) of this rule, ... appellee thereafter designates additional ... the parties shall proceed under subsection ... this rule as if the appellee were the appellant.

...In the absence of an agreement between the ... or an order of the court to the contrary, the ... shall pay all costs for preparation of the ... record and transcript, including the cost of ... of those portions designated by the ... This rule does not govern the payment for ... prepared for the use of the parties or counsel.

Transcript.

...If there is to be included in the record on ... any evidence or proceedings that were ste...graphically reported or electronically recorded, ... appellant shall incorporate in his designation a ...scription in the best practical manner of the par...lar parts of the evidence or proceedings to be ...luded. At the time of filing the request for the ...paration of the transcript, the appellant shall ...ate the type of proceedings and the number of days ... trial involved.

...The appellant shall ascertain from the clerk of ... trial court whether the trial court transcript ...partment has the capability to prepare the tran...script in a timely manner. If it does not, the appellant ...shall contract with an authorized transcribing firm ... prepare the transcripts, at a price agreed to ...between them, within a time which will enable the ...clerk of the trial court to comply with subsection (g) ...of this rule. The agreement between the appellant ...and the authorized transcribing firm shall comply with Rule 36 of the Rules Governing the Administration of All Courts. An authorized transcribing firm shall promptly notify the clerk of the trial court when it has been engaged to prepare a transcript for appeal. Promptly upon receipt of such notice, the clerk of the trial courts shall comply with Rule 36 (b) of the Rules Governing the Administration of All Courts. At the time of filing the original of the transcript with the clerk of the trial courts, the authorized transcribing firm shall also submit a statement of the costs of the transcript, identifying the attorney or party who made payment. If additional payment is made at a later time, the transcribing firm shall promptly notify the clerk of the trial courts. The clerk of the trial courts shall transmit this information to the clerk of the appellate courts.

(3) If the appellant's designation includes only part of the recorded or reported evidence or proceedings, the appellee, in his designation referred to in subdivision (a) of this rule, shall in like manner designate such additional parts thereof as he desires to have added. If it is impractical to describe with precision those portions which the parties desire to have included in the record on appeal, amended or supplemental designations may be filed at the time a transcript has been prepared.

(4) The request for the preparation of a transcript shall be:

[a] In writing;

[b] Served on the other parties to the appeal;

[c] Accompanied by proof of service; and

[d] Filed in duplicate with the clerk of the trial courts. The duplicate copy shall be forwarded immediately by the clerk of the trial courts to the clerk of the appellate courts.

(5) If a copy of the transcript or of the necessary portions thereof is already on file, the appellant shall not be required to file any additional copies.

(6) Transcripts will be prepared in a form prescribed by the administrative director by administrative bulletin.

(c) **Stipulation as to Record.** Instead of serving designations as above provided, the parties by written stipulation filed with the clerk of the trial courts may designate the parts of the record, proceedings, and evidence to be included in the record on appeal.

(d) **Record to be Abbreviated.** All matters essential to the decision of the questions presented by the appeal must be included in the record on appeal, and all matters not essential to the decision of such questions shall be omitted; and the appellate court will consider nothing but those parts of the record so designated. For any infraction of this rule, the appellate court may withhold or impose costs as the circumstances of the case and discouragement of like conduct in the future may require, and such costs

may be imposed upon offending attorneys or parties. In addition, if any material part of the record, proceedings and evidence is not included in the record on appeal, the appeal may be dismissed, or such other order made as the circumstances may appear to the court to require.

(e) **Statement of Points.** At the time of filing his notice of appeal, the appellant shall serve and file with this designation a concise statement of the points on which he intends to rely on the appeal. The appellate court will consider nothing but the points so stated. On motion in the appellate court, and for cause, the statement of points may be supplemented subsequent to the filing of the designation of record.

(f) **Record to be Prepared by Clerk — Necessary Parts.**

(1) The clerk of the trial courts shall prepare the record on appeal which shall consist of original papers, exhibits and transcript as designated by the parties, and which shall always include, whether or not designated, the following: the material pleadings, without unnecessary duplication; the verdict or the findings of fact and conclusions of law; in an action tried without a jury, the referee's or master's report, if any; the opinion, if any; the judgment or part thereof appealed from; the notice of appeal with date of filing; the designations or stipulations of the parties as to matter to be included in the record; and the statement by the appellant of the points on which he intends to rely.

(2) In a criminal case, if among the points on appeal is an allegation that the sentence is excessive or too lenient, the record on appeal shall also include, whether or not designated the material required by Rule 215(g)(1).

(3) If the original of any item to be included in the record on appeal cannot be located or is otherwise unavailable, the clerk may substitute a copy, and shall accompany the record with an affidavit of the clerk or a deputy clerk stating the reasons why the original is not available.

(4) The record on appeal shall be assembled by the clerk in one or more separate parts or volumes, as the clerk may deem convenient, and with each page numbered at the bottom consecutively, in order that convenient and easy reference, by page and volume numbers, may be had to any particular paper or exhibit in the record.

(5) The clerk shall prepare, sign and attach to the record on appeal a certificate containing the following: a table of contents which shall list each document and exhibit contained in the record on appeal with corresponding volume and page numbers where each such document may be found, and a brief description of each exhibit indicating if the exhibit is a "physical exhibit" which will not be transmitted pursuant to subsection (1) of this rule; the date upon which the preparation of the record was completed; and the dates upon and manner in which notice of such completion of the record was given by the clerk and the names of the parties or their attorneys to whom such notice was given.

(6) Promptly upon the completion of the record on appeal, the clerk shall give notice thereof to all parties to the judgment and to the clerk of the appellate courts, by sending them a copy of the certificate referred to in paragraph (5).

(7) Paragraphs (3), (4), (5), (6), (8) and (9) of this subsection apply to all records on appeal, including supplemental records prepared pursuant to subsection (h) or some other provision of these rules, and including records prepared pursuant to Rule 215 (g), 216 (f), 217(c), or 218(e).

(8) The clerk of the trial courts shall comply with paragraph (6) of this subsection even though, pursuant to paragraph (g) (1), the clerk of the appellate courts may request that a particular record be transmitted to his office immediately upon its completion.

(9) Papers filed under seal in the trial court, recordings or transcripts of closed hearings held in the trial court, and exhibits submitted or introduced at closed hearings in the trial court, must be included in the record on appeal if designated by a party or required by these rules to be included. Such papers must be maintained under seal while they constitute part of a record on appeal, and access to them shall be governed by Rule 512.5(c).

(g) **Time for Completion of Record.**

(1) The preparation of the record on appeal shall be completed within 40 days from the date of filing the notice of appeal. After completion, the record shall be retained in the clerk's office for a length of time sufficient to permit the preparation of briefs in accordance with Rule 212. The original record and such copies as may be required, shall be transmitted to the appellate court in a manner and at a time designated by the clerk of that court.

(2) Should an authorized transcribing firm be unable to complete the transcripts in sufficient time to enable the clerk of the trial courts to comply with this subsection, either the transcribing firm, or the appellant shall move the appellate court for an extension of time for completion of the record on appeal. The motion shall comply with Rule 503, shall also be served on the clerk of the trial court, and shall be considered a routine motion within the meaning of Rule 503 (e).

(3) Ultimate responsibility for compliance with the time periods of this subsection shall be with the appellant. Sanctions for noncompliance may be imposed as provided in Rule 511.5.

...Power of the Court to Correct, Modify or Supplement Record. It is not necessary for the record on ... approved by the trial court or a judge ... as provided in subdivision (k) of this ... Rule 211, but if any difference arises ... record truly discloses what occurred in ... court, the difference shall be submitted to ... by that court and the record made to ... that court's decision. If anything material ... party is omitted from the record on ... or accident by court personnel, or is ... them, the parties by stipulation, or the ... either before or after the record is transmitted to the appellate court, or the appellate court, ... suggestion or of its own initiative, may ... the omission or misstatement shall be ... and if necessary that a supplemental ... certified and transmitted by the clerk ... courts. All other questions as to the contents of the record shall be presented to the ... court. On motion in the appellate court, ... the record may be modified or supplemented to correct omissions by counsel.

...ord for Preliminary Hearings in the Appellate Court. (Rescinded by Supreme Court ... effective February 1, 1984)

...veral Appeals. When more than one appeal ... the appellate court from the same judgment ... one record on appeal shall be prepared ... all the matter designated or agreed upon ... parties, without duplication. The preparation ... record shall be completed within 40 days after ... of the last notice of appeal.

...Appeals When No Stenographic Report or Electronic Recording was Made. In the event no ... graphic report or electronic recording of the ... or proceedings at a hearing or trial was ... the appellant may prepare a statement of the ... of proceedings from the best available ... including his recollection, for use instead of a ... graphic or electronically recorded transcript. ... statement shall be served on the appellee, who ... serve objections or proposed amendments, and ... be submitted to the court from which the ... is being taken for settlement and approval. As ... and approved, the statement shall be ... by the clerk of that court in the record on ... appeal.

(l) Exhibits. If physical exhibits are designated for the record on appeal, the clerk of the trial courts shall list them in the table of contents, together with a brief description of each, but shall not transmit them to the appellate court unless requested to do so by the clerk of the appellate courts. If a party wishes to have particular physical exhibits transmitted, he may file a motion with the appellate court. As used in this subsection, "physical exhibits" includes exhibits other than documents or photographs, and also includes documents or photographs of unusually large size or unusual bulk or weight.

(m) Transfer of Record on Appeal. If it is impractical for Alaska counsel for a party to prepare his brief because he resides in a city or town other than the one where the record on appeal is situated, the clerk of the appellate courts may direct the transfer of the record for the accommodation of counsel in the preparation of briefs.

(SCO 439 effective November 15, 1980; amended by SCO 461 effective June 1, 1981; by SCO 510 effective August 30, 1982; by SCO 554 effective April 4, 1983; by SCO 577 effective February 1, 1984; by SCO 578 effective February 1, 1984; by SCO 631 effective September 15, 1985; by SCO 736 effective December 15, 1986; by SCO 768 effective March 15, 1987; by SCO 795 effective March 15, 1987; and by SCO 883 effective July 15, 1988)

Annotations

Cases

I. In General
II. Contents of Record on Appeal
  A. In General
  B. Statement of Points

I. In General

Matters that were not made issues in the trial court, by either the pleadings or the pre-trial order or that were not tried before the court, will not be considered on appeal. Lumbermens Mutual Cas. Co. v. Continental Cas. Co., Op. No. 160, 387 P2d 104 (Alaska 1963).

Where in his reply brief the appellee raised the issue of allowance of attorney's fees, but did not cross-appeal and did not by cross-statement of points alert appellant to such an issue so that additional portions of the record could have been designated if appropriate, the issue of attorney's fees allowed by trial court was not considered on appeal. Alaska Brick Company v. McCoy, Op. No. 287, 400 P2d 454 (Alaska 1965).

An argument not made at trial or listed in appellant's statement of points on appeal will not be considered. Moran v. Holman, Op. No. 834, 501 P2d 769 (Alaska 1972).

The failure to raise a point at trial court level or include it in statements of points to be raised on appeal generally will foreclosure the appeal of an alleged error, unless it reaches the level of plain error. Burford v. State, Op. No. 954, 515 P2d 382 (Alaska 1973).

Letter from Workers' Compensation Board notifying claimant's counsel that the record on appeal was complete was sufficient notice under this rule even though no "certificate" that the record was complete was sent. Cowitz v. Alaska Workers' Compensation Board, Op. No. 3078, 721 P2d 635 (Alaska 1986).

In light of the fact that superior court order holding appellant's appeal from an administrative agency decision in abeyance was never vacated, that the agency did not furnish the superior court clerk with a copy of its decision on reconsideration, that the agency did not prepare and certify the record on appeal, and that the clerk of the superior court never notified the agency of the date by which it was to complete the record on appeal, appellant's counsel reasonably could have been in doubt as to how to proceed with the administrative appeal, thus superior court erred in dismissing the appeal for lack of prosecution. King v. State Dept. of Natural Resources, Op. No. 3226, 742 P2d 253 (Alaska 1987).

II. Contents of Record on Appeal

...peal, along with the brief, clearly inform cross-appellee ... error. State v. Abbott, Op. No. 804, 498 P2d 712 ...

... that instructions were "lacking and misleading" ... court erred in giving requested instructions are too ... consideration on appeal. Transamerica Title Insurance ... Ramsey, Op. No. 869, 507 P2d 492 (Alaska 1973).

Rule 213. Oral Argument.

... party may serve and file a written ... for oral argument not later than 10 days after ... on which appellant's reply brief is due pursuant to Rule 212(a)(1), or pursuant to any extension of time granted under Rule 502 or 503. If oral argument is timely requested, it will automatically be scheduled. When a request is made by one party, the right to oral argument extends to all parties. Oral argument shall be scheduled and held as provided in Rule 505.

(b) **Opening and Conclusion.** The original appellant shall be entitled to open and conclude the argument of the case. Men there is a cross-appeal, the appeal and cross-appeal shall be argued together. In such cases the order of oral argument shall be determined by the court at the request of either party or upon its own motion.

(SCO 439 effective November 15, 1980)

Rule 214. Disposition of Appeals.

(a) The court may determine that an appeal shall be disposed of by summary order and without formal written opinion. To assist the court in making this determination, the parties may request in writing that an appeal be so decided. The request shall be signed by all parties and may be filed any time after the filing of the notice of appeal.

(b) In a criminal case, a summary order under this rule shall contain, at a minimum, a statement of the issues considered by the appellate court. This statement of issues may be made by reference to a trial court opinion. For purposes of this rule, "criminal case" includes all collateral criminal proceedings listed in AS 22.07.020(a).

(c) Nothing in this rule limits the right of the parties to oral argument pursuant to Rule 213.

(d) Summary decisions under this rule are without precedential effect and may not be cited in the courts of this state.

(SCO 439 effective November 15, 1980)

Rule 215. Sentence Appeal.

(a) **Notification of Right to Appeal Sentence.** At the time of imposition of any sentence of imprisonment of 45 days or more, the judge shall inform the defendant as follows:

(1) That the sentence may be appealed on the ground that it is excessive;

(2) That upon such appeal the appellate court may reduce or increase the sentence, and that by appealing the sentence under this rule, the defendant waives the right to plead that by a revision of the sentence resulting from the appeal he has been twice placed in jeopardy for the same offense;

(3) That if the defendant wants counsel and is unable to pay for the services of an attorney, the court will appoint an attorney to represent him on the appeal.

(b) **Notice of Appeal.** Written notice of appeal from a sentence by the prosecution, or by a defendant appealing solely on the ground that the sentence is excessive, shall be filed with the clerk of the court which imposed the sentence not later than 30 days after the date shown in the clerk's certificate of distribution on the written judgment, except as provided for by Appellate Rule 204(a)(4). The notice of appeal need only state that the sentence which is being appealed is too lenient or excessive. Whether or not the defendant is represented by counsel, a notice of appeal filed by a defendant shall state the mailing address of the defendant. No fee shall be collected for filing a notice of sentence appeal. When filed, the notice of appeal shall be accompanied by proof of service on opposing counsel.

(c) **Termination of Appeal.** Any appeal of a sentence initiated by the defendant may be terminated by his filing within 30 days from the filing of the notice of appeal a notice of intent to terminate the appeal. Such a termination shall prevent any increase in the sentence or sentences imposed.

(d) **Indigent's Right to Counsel on Sentence Appeal.** An indigent defendant is entitled to the assistance of counsel in prosecuting an appeal on the ground that the sentence is excessive. Where an appeal is taken by the prosecution pursuant to AS 12.55.120(b) on the ground that the sentence is too lenient, and the defendant has not appealed, the appellate court in its discretion may appoint counsel for an indigent defendant.

(e) **Forwarding Notice of Appeal.** Immediately upon filing of a notice of sentence appeal, the clerk shall forward a copy of the notice to the clerk of the appellate court. The copy of the notice sent to the appellate court shall be accompanied by a copy of the judgment as required by Rule 204 (i).

(f) **Sentencing Report.** The trial court shall prepare a sentencing report as part of the record, which shall include the following:

(1) A verbatim record of the sentencing hearing, including statements made by witnesses, the prosecuting attorney, the defense attorney, and the defendant;

(2) The reasons for selecting the particular sentence imposed;

(3) Specific findings on all material issues of fact and on all factual questions required as prerequisite to the selection of the sentence imposed;

(4) A precise statement of the terms of the sentence imposed and the purpose the sentence is intended to serve.

(g) Record on Appeal.

(1) *Preparation and Contents.* Within 15 days after the filing of a notice of sentence appeal, the clerk shall prepare sufficient copies of the record on appeal, which shall consist of the following:

[a] A transcript of the entire sentencing proceeding, which shall include the complete sentencing report required by subdivision (f) of this rule;

[b] All reports and documents which were available to the sentencing court as an aid in imposing sentence;

[c] Notices of factors in aggravation or mitigation, if any, filed under AS 12.55.155 (f).

The clerk shall number the pages of the record consecutively in the same manner as required by Rule 210 (f) (4). The 15-day period may be extended as provided in Rule 210 (g).

(2) *Distribution.* Immediately upon preparation of the record on appeal, the clerk shall send the original to the clerk of the appellate courts, and copies to the defendant, his counsel, and the attorney for the prosecution.

(h) Memoranda on Appeal.

(1) *By Appellant.* Within 15 days after service of copies of the record on appeal provided for in (g) of this rule, the appellant shall file with the appellate court the original and three copies of a typewritten memorandum in support of the appeal.

(2) *By Appellee.* Within 15 days after service of a copy of appellant's memorandum, the appellee may file with the appellate court the original and three copies of a typewritten memorandum in opposition to the appeal.

(3) *Reply Memorandum.* No reply memorandum shall be filed unless ordered by the court.

(4) *Form and Contents of Memoranda.* The memoranda filed by either the appellant or the appellee need not comply with the requirements of Appellate Rule 212 unless ordered by the appellate court.

(5) *Service of Memoranda.* When filed, the original memoranda shall be accompanied by proof of service on opposing counsel.

(i) Disposition of Appeals by Reviewing Court. Sentence appeals will be disposed of by the appellate court on the record. Oral argument, if timely requested no later than ten days after the date on which the appellee's sentence memorandum is due, is limited to fifteen minutes per side, unless otherwise ordered by the court of appeals. The order of argument is as provided in Rule 213(b). In cases where sentence appeals are consolidated with appeals on the merits, a timely request for argument on the merits in accordance with Rule 213(a) or Rule 217(h) is deemed to include a request for argument on the sentence appeal.

(j) Bail Pending Appeal. A sentence appealed on the sole ground that the sentence is excessive does not confer or enlarge the right to bail pending appeal.

(k) Consolidation of Sentence Appeals with Regular Appeals. An appeal of a sentence on the ground that the sentence is excessive or too lenient shall be consolidated with an appeal by the same party based upon other grounds. Upon consolidation, the procedure for perfecting an appeal on other grounds shall govern.

(SCO 439 effective November 15, 1980; amended by SCO 515 effective October 1, 1982; by SCO 554 effective April 4, 1983; by SCO 575 effective February 1, 1984; by SCO 781 effective March 15, 1987; by SCO 827 effective August 1, 1987; by SCO 829 effective August 1, 1987; and by SCO 862 effective July 15, 1988)

Annotations

Cases

A sentence will be modified on appeal only if those circumstances where the reviewing court is convinced that the sentencing court was clearly mistaken in imposing a particular sentence. McClain v. State, Op. No. 1016, 519 P2d 811 (Alaska 1974).

Where a case is on appeal, the denial of guilt should not be considered as a factor weighing against probation. Bradley v. State, Op. No. 1145, 535 P2d 1031 (Alaska 1975).

The standard of review on a sentence appeal is to determine whether the trial clearly mistaken. State v. Trunnel, Op. No. [illegible] 549 P2d 550 (Alaska 1976).

A sentence is imposed at the time it is first announced [illegible] on the record by the court. State v. Trunnel, Op. No. 1260, 549 P2d 55[illegible] (Alaska 1976).

When a sentence is reduced under Criminal Rule [illegible] amounts to the imposition of a new sentence which the state may appeal. State v. Trunnel, Op. No. 1260, 549 P2d 550 (Alaska 197[illegible]

Probationer may seek relief by sentence appeal following probation revocation and imposition of sentence of imprisonment. Gilligan v. State, Op. No. 1378, 560 P2d 17 (Alaska 197[illegible]

Mere assertion that defendant told his attorney that he wanted to attack sentence as excessive does not demonstrate that failure to file appeal within 30 days was due to excusable neglect, or that the limit should be relaxed to avoid injustice, where motion for modification of sentence was made two years after sentence was imposed. Taylor v. State, Op. No. 1436, 564 P2d 1219 (Alaska 197[illegible]

Denial of a motion to reduce sentence is not the imposition of a sentence for the purpose of paragraph (b) of this rule. Davis v. State, Op. No. 1453, 566 P2d 640 (Alaska 1977).

Rule permitting defendant sentenced to 45 days or more to appeal the sentence did not conflict with statute conferring

THE MIAMI HERALD
7/10/88/1A, 12A

Capital punishment in paralysis

Huge caseload bloats lethargic, costly system in Florida, U.S.

By DAVE VON DREHLE
Herald Staff Writer

On a whim during a burglary, Charles Proffitt murdered Joel Medgebow on July 10, 1973. He plunged a bread knife into his sleeping victim's chest, "just to see what it felt like."

Three years later, using *Proffitt vs. Florida* as its test case, the U.S. Supreme Court upheld Florida's death penalty. Proffitt could be dead in six months, Attorney General Robert Shevin predicted.

Today, 15 years after the murder, Charles Proffitt is alive and well, sewing uniforms for inmates at Florida State Prison. The Florida Supreme Court reduced his sentence to life last year.

The state of Florida spent at least half a million dollars over a decade and a half trying to execute Charles Proffitt. It failed.

THE DEATH PENALTY

A FAILURE OF EXECUTION
First of a series

For Florida, and the 36 other states that impose the death penalty, *Proffitt vs. Florida* is still a test case. And the death penalty fails the test. The death penalty is costly, slow and inefficient.

Apart from any arguments about the morality of capital punishment, there is something terribly wrong with the system.

● Costly: The death penalty costs much more than life imprisonment without parole. It has cost Florida at least $57 million since 1973, according to conservative calculations based on independent studies.

● Slow: 36 inmates on Florida's Death Row have been there more than 10 years. Florida's senior Death Row resident, Howard Douglas, is in his 15th year — and his execution is nowhere in sight.

● Inefficient: Half of all death sentences are overturned on appeal, usually after years of expensive litigation. For every execution in America, courts sentence 13 more people to die.

The statistics speak for themselves: Death Row is going to get bigger, the wait for execution is sure to get longer, and the cost is bound to get higher. Experts are coming to the grim conclusion that little or nothing can be done to make the system work. It is a failure of execution.

Nowhere is this fact more clear than in Florida, a fervently pro-execution state that has always been among the first to arrive at death penalty milestones.

Here — where 296 convicted killers make up the largest Death Row in the nation — judges, prosecutors and politicians are quietly lowering their sights, giving up on swift and sure justice, and learning to live with a bloated system that splutters and wheezes.

"I don't know if we're ever going to catch up," says Carolyn Snurkowski, Florida's chief appellate prosecutor. The best the system can hope for, she says, is to "keep plodding along."

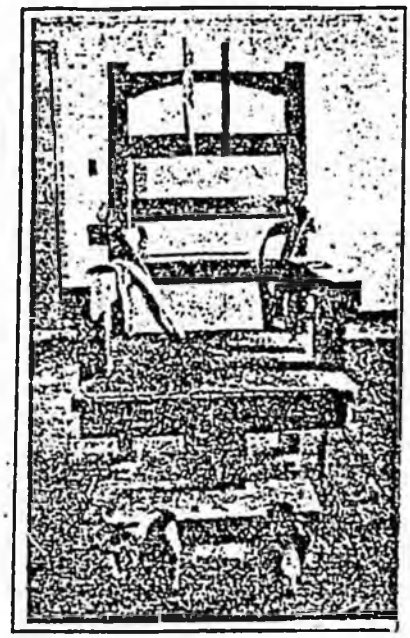
For capital punishment advocates, this is a bitter pill. Just two years ago, former Florida Attorney General Jim Smith pumped up his campaign for governor by promising two executions a month or more. "This delay couldn't go on forever," he said.

Today, the numbers refute such predictions. Even though the public solidly supports the death penalty, Florida has executed but two men in the past two years. Nationwide, the number is just 39.

In the same two years, Florida courts sent 89 people to Death Row. Nationwide: some 600.

"We're not going to clear out Death Row any more than we're going to pay off the national debt," says former Florida Bar Association President James Rinaman of Jacksonville. Rinaman, a death penalty advocate, has labored for more than three years to speed up the system.

A WHOPPING BILL



- Spent by Florida taxpayers on the death penalty since 1973: at least $57,215,210.
- Executions: 18.
- Cost per execution: at least $3,178,623.
- Cost of life in prison (40 years): $515,964.
- The appeal process: at least $36.1 million, just for government-paid lawyers.

Failure clearly visible

The failure of the death penalty is visible from one end of the nation to the other.

● More than 2,100 people live on America's Death Rows. At the current execution rate, it would take 82 years to kill them all. And the Death Row population is likely to double by the turn of the century.

● In Dade County, the public defender is under court order not to take on any more death penalty cases — the caseload is too great. Private attorneys must be appointed — and paid for — by the courts. "The system doesn't have the resources to handle the workload," says Public Defender Bennett Brummer.

● The number of capital cases on appeal in the federal courts will more than triple in the next two years, according to a study prepared for the federal judiciary. Lawyers to handle these appeals will cost the nation's taxpayers $30 million a year, the study concluded.

California, for example, has 234 prisoners on Death Row — the third-largest population in the country. Its last execution was in 1967. Yet the taxpayer-funded budget for defense attorneys there is more than $2 million a year.

● Even Bob Graham, the former Florida governor who signed more death warrants than anyone in the state's history, pronounces the death penalty system a "quagmire."

"And if the definition of justice is a system that administers equal and predictable results, then capital punishment in the United States today falls short," Graham says.

It was not supposed to be this way. Not after millions of dollars and years of effort spent trying to make the death penalty work.

The heyday

The heyday of the death penalty in America came in the 1930s. Hanging judges and biased juries too often used the penalty as little more than a legal lynching.

Proffitt

Bundy

> 'If the definition of justice is a system that administers equal and predictable results, then capital punishment in the United States today falls short.'
>
> Sen. Bob Graham

Gradually, the numbers subsided: there were fewer executions in the '40s and fewer still in the '50s. Legal assaults on the fairness of the death penalty system stopped executions altogether in Florida in 1964. In 1965, a commission to revise New York's penal code found that "whatever aspect of the death penalty one examines, one finds nothing but obstruction, confusion and waste."

Two years later, executions ceased across the country.

In 1972, a narrow and fractured majority of the U.S. Supreme Court concluded the death penalty, as it existed in America, was unconstitutional.

Justice William Brennan wrote that capital punishment depends on "a system in which the punishment of death is invariably and swiftly imposed. Our system, of course, satisfies neither condition. A rational person contemplating a murder is confronted, not with the certainty of a speedy death, but with the slightest possibility that he will be executed in the distant future."

Although Brennan and Justice Thurgood Marshall said the death penalty would always be unconstitutional, the seven other justices encouraged the states to draft new laws that would meet the constitutional test.

'A back-breaker'

Florida obliged within six months. Texas, Georgia, Louisiana and others were close behind. Courts and legislatures in 37 states have tinkered ceaselessly ever since, trying to make the death penalty fair, rational and swift.

But instead of fair, rational and swift, all this tinkering is making the law ever more complicated. And complicated means slow. It means expensive.

"There is no question that it's a back-breaker," says Sandy Weinberg, a former federal prosecutor. Recently, Weinberg helped win freedom for Death Row inmates William Riley Jent and Earnest Lee Miller. "It takes eight years or more of litigation to execute someone, and the process just can't go faster."

"The Supreme Court has said 'death is different,' " says Bob Spangenberg, a Boston-based consultant who has studied legal costs and the death penalty for 24 state and federal agencies. "The court has said everyone must follow extensive procedures to guarantee the process is fair. And that takes a lot of time. In *every* case."

As judges anguish over each case, more and more pile up behind. The backlog is infinite. With 300 new cases every year, the U.S. could execute one person every day, and it would take more than 30 years to empty all the Death Row cells.

No one familiar with the system believes that is possible. Daily executions are unprecedented in American history. The executioner's busiest year was 1935, when there were 199 executions.

That record rate, given the current pace of death sentencing, wouldn't make a dent in America's Death Row. At that rate, Death Row would keep on growing.

Last year there were 25 executions in America, the most in a quarter century. Yet the system is barely plodding along, falling further and further behind.

Even that great motivator of balky government — community outrage and pressure — cannot speed the system. No murderer is more loathed and notorious than Theodore Robert Bundy. In 1978, Bundy slipped into a Tallahassee sorority house and bludgeoned two sleeping women to death, then killed a 12-year-old girl in Lake City.

He was sentenced to die three times in 1979. Nine years later, Bundy is alive and well on Death Row.

For five of those years, his case sat before the Florida Supreme Court. Like all capital cases in Florida, Bundy's sentence went to the state high court for a mandatory review. Court justices insist they weren't dragging their heels. The backlog was just too big.

Florida high court justices plow through 70 mandatory reviews each year, consuming at least a third of their time. On top of that, the justices are hit with 30 to 40 last-minute appeals.

"Let me put it this way: Capital cases are a very small part of the caseload of the Court, but we must spend a very, very, very substantial amount of time on them," says Justice Gerald Kogan. "The workload is far out of proportion with the actual number of cases."

Chief Justice Parker Lee McDonald: "If I could figure out a way to make this better or easier or quicker, I would. But I can't."

Executing Ted Bundy

Bundy's federal appeals couldn't even *start* until the state Supreme Court made its ruling. Once the federal appeals were filed, they immediately bogged down in another backlog.

Last week, the 11th Circuit Court of Appeals in Atlanta turned down a Bundy petition. The court took almost two years to decide. Some think the end is in sight for Ted Bundy. They've been wrong before.

There's nothing unusual about Bundy's case. Indeed, there are 55 death cases in Florida alone that have been in the system longer than Bundy's.

And it's getting worse. A year ago, only 275 of the 2,100 death penalty cases in America — 13 percent — had reached the federal level of appeals. Almost all of them were from Southern states. They consumed about a third of the judges' time in the 11th Circuit Court of Appeals and the Fifth Circuit in New Orleans.

From those 275 cases, the federal caseload will increase to 1,000 by 1990, according to Spangenberg, the Boston analyst. He talks of "a tidal wave" of death penalty cases about to swamp courts that have little or no experience with such appeals.

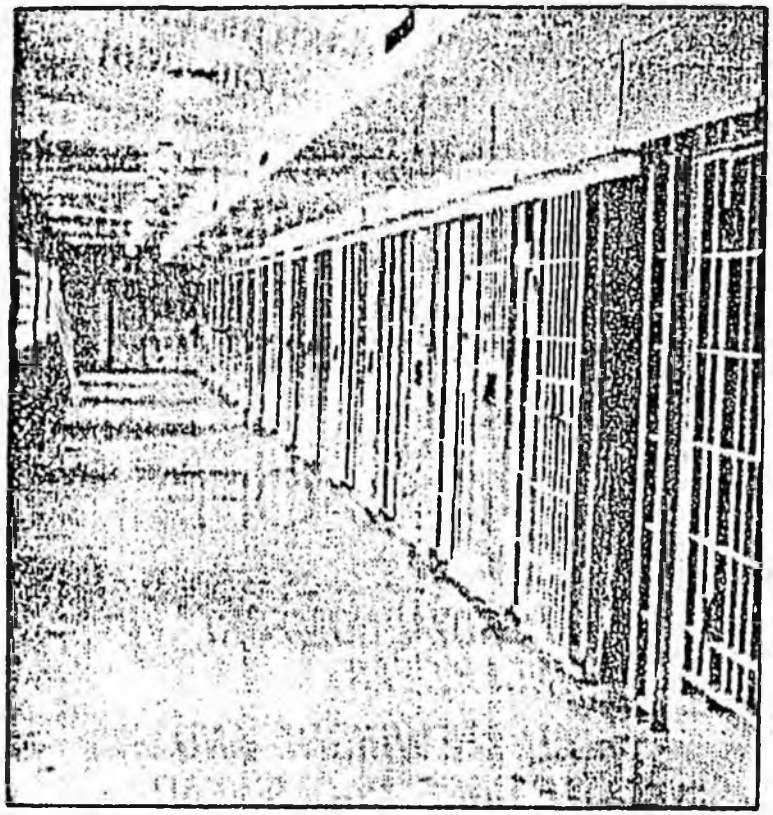
Specifically, the federal courts in California have but a single death penalty case on their dockets. Soon, the caseload will be 80. After the wave hits California, it will hit Ohio. Then Illinois, Pennsylvania, Arizona.

"What was once a Southern problem is soon going to become a national problem," Spangenberg says.

Across the nation, federal judges are looking toward Florida to size up the future. They see a 300-person Death Row. They see a five-year court backlog. They see Charles Proffitt sewing uniforms and Ted Bundy reading legal briefs.

"The judges are beginning to realize what is happening," says Spangenberg. "And they're asking: 'What the hell are we going to do?' "

FLORIDA'S DEATH ROW INMATES



At Starke, more inmates — 296 — await the executioner than in any state. Eighteen have been electrocuted.

14 YEARS ON DEATH ROW: Howard Douglas, Gary Alvord, James McCray, Vernon Cooper.

13 YEARS: Ronald Jackson, Jacob Dougan, Alvin Ford, Levis Aldrich, Charles Messer, Douglas Meeks, William Elledge, Thomas Knight, Lenson Hargrave.

12 YEARS: Carl Jackson, Sampson Armstrong, Charles Foster, Raymond Stone, Eligaah Jacobs, Wardell Riley, Jessie Tafero, Mark Mikenas, William Zeigler, Joseph Spaziano.

11 YEARS: Henry Sireci Jr., Harold Lucas, James Hitchcock.

10 YEARS: James Rose, Amos King, Carl Songer, Ernest Downs, Bennie Demps, Robert Buford, Freddie Hall, Mack Ruffin, Morgan Floyd, James Morgan.

9 YEARS: John Ferguson, Walter Steinhorst, William Thompson, Jimmy Smith, Stephen Booker, Nollie Martin, William Christopher, Raleigh Porter, William White, Marvin Johnson, Aubrey Adams Jr., Leslie Jones, David Delap, McArthur Breedlove, Robert Heiney, Kenneth Griffin, Gary Trawick, Roy Stewart, Terry Sims, Theodore Bundy.

8 YEARS: Gregory Engle, Rufus Stevens, Johnny Copeland, Bryan Jennings.

7 YEARS: Frank Smith, Paul Scott, Larry Johnson, Theodore Bassett, Bobby Lusk, Gregory Mills, Bernard Bolander, Robert Combs, Robert Waterhouse, William Middleton, Terrell Johnson, Robert Teffeteller, Kenneth Quince, James Agan, Dan Poutly, Ernest Fitzpatrick, Sonny Dals Jr., Larry Mand, Oscar Mason, Jeffery Daugherty, Linroy Bolloson, Ian Lightbourn, John Michael, John O'Callaghan, Chester Maxwell, Jim Chandler.

6 YEARS: Manuel Valle, Ed Thomas, Theodore Harris, Robert Preston, Leo Jones, Freddie Williams, Edward Kennedy, Norman Parker Jr., James Card Sr., Phillip Atkins, Ted Herring, William Squires, Daniel Johnson, Robert Patton, Thomas Rope, Roy Harich, Jerry White, Robert Craig, Omar Blanco, Charlie Burr, Ronnie Jones, Davidson James, Milford Byrd, Daniel Doyle, Frank Griffin, Mario Lara, David Gorham, Larry Brown, Robert Henderson, John Rush, Douglas Jackson.

5 YEARS: Alphonso Cave, John Mills, J.B. Parker, Garry Hollman, Tommy Groover, Kenneth Hardwick, Allen Davis, George Lemon, Kayle Sales, Ernest Roman, F.L. Medina, Lloyd Guest, Robert Parker, Clarence Hill, Marion Francis, Milo Rose, William Rutzy, Raymond Koon, Clarence Jackson.

4 YEARS: Harold Hooper, Joel Wright, Ronald Woods, Enrique Garcia, Raymond Dolinsky, Gerald Stano, Fred Way, Andrew Jackson, Harry Phillips, Robert Reese, Richard Cooper, Jason Malloy, Michael Lambrix, Ernesto Suarez, William Kelley, Anthony DeViolotti, Robert Glock, Carl Duluth, David Johnston, Jason Deaton, Donald Lloyd, James Hull, John Marek, Jeffrey Muehleman, Thomas Provenzano, Eduardo Lopez.

3 YEARS: Charles Knight, James Floyd, James Hamblen, Joan Melendez, Gregory Kokal, Oscar Torres-Arboledo, Jerry Rogers, Abron Scott, Nathaniel Jackson, David Gore, Joseph Ramirez, Herbert Spivey, Burley Gilliam, Billy Nibert, Robert Long, Joe Nixon, James Floyd.

2 YEARS: Richard Rhodes, Layne Tompkins, Guy Cochran, Jessie Livingston, William Turner, Roy Swafford, David Cook, Judias Buendano, Martin Grossman, Rickey Roberts, Angel Diaz, Johnny Perry, Jerry Correll, Duane Owen, Gary Tillman, Morris Brown, John Hardwick Jr., Frank Smith, Anthony Bryan, Johnny Williamson, Daniel Remeta, Reinaldo Amoros, Donald Kritzman, Johnny Robinson, Harold Harvey Jr., Hector Fuente, Juan Banda, Jesus Scull.

LESS THAN 2 YEARS: Etheria Jackson, John Merritt, Paul Hildwin, Kenneth Stewart, Robert Roundtree, Walter Brown, Cleo Leroy, Allon Moore, Walter Kyser, Charles Pridgen, Willie Mitchell Jr., John Edwards, Arthur Rutherford, Rudolph Hollon, James Harmon, Leonard Spencer, Grover Reed, Kaysie Dudley, Darryl Barwick, Mark Davis, Timothy Hudson, James Brown, Paul Brown, George Murris, Wilburn Lamb, Carla Caillier, Charlie Thompson, Alberto Farinas, George Hill, Carlos Bello, John Henry, Michael Rivera, Darrell Hallman, Arthur Schafer, Melvin Troller, Jorge Zerquera, James Mack, Samuel Rivera, James Dailey, Manuel Colina, Andrew Williams, William Reaves, Jerry Stokes, Mac Wright, Roger Cherry, James Bryant, William Rhodes, Dee Casteel, Michael Irvine, Michael Bruno Sr., Alphonso Green, Eddie Alvin, Dominick Occhicone, Todd Mendyk, Dennis Sochor, Antonio Carter, Krishna Maharaj, Michael Keen, Doy Christian, John Freeman, Frederick Nowitzke, Clinton Jackson, Peter Ventura, Bradley Scott, Edward Castro, David Pentecost, George South, David Young, Richard Anderson, Raymond Thompson, George Porter Jr., Johnnie Boule Jr., Walter Czubak, Burnell Hegwood, Thewell Hamilton, Jerry Haliburton, Paul Johnson, Randall Jones, Robert Blakley, Edward Ragsdale, Donny Craig, Daniel Burns Jr., James Campbell, Manuel Pardo Jr., Leonard Smalley Jr., James Duckett.

EXECUTED IN 14 YEARS: John Spenkelink, Robert Sullivan, Anthony Antone, Arthur Goode, James Adams, Carl Shriner, David Washington, Earnest Dobbert, James Henry, Timothy Palmes, James Raulerson, Johnny Witt, Marvin Francois, Daniel Thomas, David Funchess, Ronald Straight, Beauford White, Willie Darden.

SOURCE: Florida Department of Corrections

THE MIAMI HERALD
7/10/88/12A

Bottom line: Life in prison one-sixth as expensive

By DAVE VON DREHLE
Herald Staff Writer

At first glance, executions appear cheap.

Funeral suit from Jim Tatum's Fashion Showroom in Jacksonville — "We Fit Them All, Big and Tall" — costs $150. Florida's budget for the last meal: $20. Executioner's fee: $150. Undertaker: $525, box included.

But the true cost of an execution is closer to $3.2 million.

To execute a prisoner, the state of Florida spends six times as much money as it would to keep him in prison until he dies of natural causes.

How come? Why does the death penalty cost so much more than life-without-parole?

Government agencies and independent analysts in eight states have scrutinized the ledgers. Said Michael Gradess, who calculated the cost of a proposed death penalty in New York: "People in states that have the death penalty kept telling me, 'I hope you're ready to go bankrupt.' "

Although the numbers vary, all the studies agree that death penalty cases cost more than life-in-prison cases at every level — from pretrial investigation to last-gasp appeals.

To begin with, death penalty cases almost always require a trial. They usually generate a lot of publicity, making prosecutors reluctant to plea bargain. And only a suicidal defendant pleads guilty when facing death.

And death penalty trials take longer. Attorneys have unusual freedom to question potential jurors one by one — a very time-consuming process. Fighting for their clients' lives, defense attorneys file twice as many pretrial motions as in the average nondeath murder trial, a California study found.

Once the defendant is found guilty, the law requires a second trial to decide if the prisoner should live or die.

To show why they should live, defendants often call as witnesses psychiatrists, family members, former teachers, even accomplices in past crimes. The witnesses have to be located, which can take months of expensive investigation.

To show why the defendant should die, the state tries to persuade the jury that he is hopelessly evil, a permanent danger to society. For this, prosecutors rely heavily on high-priced psychiatrists.

The total additional cost for trial and sentencing over a no-execution murder trial: at least $36,000, a Maryland study showed. A similar study in Kansas figured the additional costs at $116,700.

After sentencing, every death verdict must be reviewed by the state Supreme Court. The U.S. Supreme Court requires it. And every defendant is entitled to a state-paid lawyer.

Bob Spangenberg, a consultant for the American Bar Association, surveyed more than 150 capital cases across the country. For defense alone, these mandatory reviews cost an average of $34,740 each, Spangenberg computed.

That's just the beginning. After the mandatory review there are at least six levels of appeals. Spangenberg calculated these costs. Average cost for government-salaried defense lawyers: $137,410.

This is a bargain compared to costs racked up by prestigious volunteer lawyers handling death penalty appeals. Wilmer, Cutler and Pickering, a big-name Washington firm, figures it has already laid out $1.2 million in attorney time and $173,000 in hard cash arguing federal appeals for serial killer Ted Bundy.

There are two sides, of course, to every appeal. The prosecution needs lawyers, too. Repeated studies show that prosecutors match defense attorneys dollar-for-dollar.

In Florida, state-paid prosecutors and defense attorneys received about $3 million last year — to fuel a system that executed only one man, Willie Darden.

James Rinaman, former president of the Florida Bar Association, has studied the process at length, hoping to speed it up. He believes more lawyers are needed. To keep up with the demands of Florida's enormous death-penalty system, Rinaman estimates, taxpayers should be shelling out $12 million a year for lawyers alone.

"It boggles the mind," he says.

Analyst Spangenberg estimates the cost of appellate lawyers will soon top $30 million a year nationwide.

In the past, states kept costs down by relying on volunteer defense lawyers. Now there are too many cases and too few lawyers.

Says Clearwater's Pat Doherty, one of Florida's busiest volunteer capital attorneys: "It isn't good publicity. If you're going to do volunteer work, you're better off representing the Poor Clares."

Then comes the expense of prison. Death Rows cost more to run than ordinary maximum security cell blocks, according to studies in Kansas and Alaska. Florida prison officials say specific calculations are impossible.

Florida officials calculate one cost, however. When the governor signs a death warrant and an inmate's execution is scheduled, the doomed man is moved to a cell near-

er the electric chair. For 30 days, guards keep a round-the-clock watch to make sure the inmate doesn't kill himself.

The cost in overtime for guards each time a warrant is signed is $13,800.

There have been 199 warrants signed in Florida since 1973. Sometimes the state saves money because the guards can watch several doomed men at once.

Merely feeding and housing a Death Row prisoner long enough to execute him costs, on average, $108,000.

Total it up.

Florida taxpayers have paid more than $57 million for the death penalty since 1973. This number is based on the most conservative figures available. The real cost could easily be twice that or more.

Divide the $57 million by 18 executions. The bottom line: at least $3.2 million per execution. And the cost is growing.

Bob Spangenberg, the bar association consultant: "The costs are going to add and add and add and add. It's going to add up until something gives."

Michael Gradess, who studied the issue for the state of New York: "You're going to see a death penalty that costs a billion dollars nationwide."

THE MIAMI HERALD
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Fairness was fatal blow to fast executions

By DAVE VON DREHLE
Herald Staff Writer

Howard Douglas is the Methuselah of Death Row. The jury thought he should live, and the judge thought he should die. Fifteen years later, courts are still trying to sort it out

Douglas may well become the first man in Florida history to live for 20 years in the shadow of the electric chair.

But almost certainly, he won't be the last.

Why does the death penalty take so long? Why is it that 97 percent of the death sentences imposed by America's courts have yet to be carried out — even though the public strongly supports capital punishment and spends millions trying to speed the process?

Lawyers blame the governors. Governors blame the courts. Courts blame the lawyers. But still nothing happens. There is a population explosion on America's Death Row, and no one has a realistic solution.

Legal experts — both for and against capital punishment — are coming to an identical conclusion: The death penalty itself is to blame. It is too complicated to work efficiently.

When the death penalty almost died 16 years ago, advocates rushed to resuscitate it. What they ended up with, many experts now believe, is a monster of litigation — unpredictable, irrational, causing chaos wherever it goes. And impossible to control.

Here's why it is failing:

● When the U.S. Supreme Court decided in 1972 that capital punishment was unconstitutionally arbitrary, state legislatures moved swiftly to restore the death penalty. To eliminate the problem of unfairness, lawmakers established complex standards for determining who should live and who should die.

● The Supreme Court wanted to make sure the new laws worked — that they really were fair. So it initiated an unprecedented level of state and federal court scrutiny.

● Courts eventually discovered that the complicated new laws worked only about half the time. Half of all death sentences, they determined, were mishandled — and ultimately illegal. So the intense level of case-by-case scrutiny persisted.

● As more and more judges looked at more and more cases, they came up with more and more interpretations of the law. With each new interpretation, inmates found more avenues of appeal.

● Judges and juries nevertheless have embraced the new death penalty as never before. The system is now hopelessly behind. For every 30 death sentences, America has executed one person.

A solution, if it comes, would require a virtual revolution in the criminal justice system — a bloodbath of proportions never seen in the nation's history. An execution a day, every day, for decades.

"That's just not going to happen. It's never going to happen," says Carolyn Snurkowski, chief appellate prosecutor for the Florida attorney general.

"We have to figure out a way to dig ourselves out of this mess, or we need to get rid of the death penalty," says Ed Austin, state attorney for Jacksonville, the pro-death penalty dean of Florida prosecutors.

The death penalty used to work *fast* — especially in the South. The jury delivered a verdict, the judge imposed sentence and the warden readied the gallows or the electric chair. Convicted rapist Robert Hinds was executed in Florida seven days after his trial in 1937.

But with speed came outrageous excesses. Small-town judges and juries had the awesome power to decide for themselves who would live and who would die. Not surprisingly, blacks fared poorly in this lottery. Though they comprised less than 20 percent of the population, blacks made up more than half the people executed in America before 1967.

THE LONG ROAD TO EXECUTION

These are the steps every capital case must pass through before execution:

THE DEATH PENALTY

A FAILURE OF EXECUTION
Second of a series

- ▶ **TRIAL** — Defendant guilty or not guilty?
- ▶ **SENTENCING** — Should defendant live or die?
- ▶ **DIRECT APPEAL** — State Supreme Court reviews decision.
- ▶ **U.S. SUPREME COURT** — Process fair thus far?
- ▶ **COLLATERAL APPEAL** — State courts examine trial procedures.
- ▶ **HABEAS CORPUS** — Federal courts look for constitutional violations.
- ▶ **U.S. SUPREME COURT** — Final review.

At any point, the case can be sent back to a lower level. And the process begins again.

Eventually, the abuses soured the public on the death penalty. Executions ground to a halt in 1967, and the Supreme Court agreed to take a long look at the issue. After an anguished debate, the justices ruled in 1972 that all existing capital punishment laws were fundamentally unfair and thus unconstitutional.

Dependent on whim

Justice William Douglas summed up: "No standards govern the selection of the penalty. People live or die, dependent on the whim of one man or 12."

This landmark decision in Furman vs. Georgia was a narrow one — the vote was 5-4. The chief justice at the time, Warren Burger, wrote the dissenting opinion, joined by current Chief Justice William Rehnquist.

Burger complained that the majority decision left the death penalty in "an uncertain limbo" and suggested that state legislatures "bring their laws into compliance . . . by providing standards for judges and juries to follow."

Burger was doubtful, though, that anyone could actually define adequate standards. Defining in advance which cases should get the death penalty, he warned, has "been uniformly unsuccessful." Each passing year shows how right he was.

State legislatures nevertheless took up the challenge to make the death penalty fair. Two approaches emerged: "mandatory" and "guided discretion."

Some states — notably North Carolina and Louisiana — tried to eliminate caprice by making the death penalty mandatory for first-degree murder. Other states — notably Florida, Georgia and Texas — adopted a process called "guided discretion."

"Guided discretion" meant that a judge and jury must weigh every capital defendant on a balance of aggravating and mitigating circumstances.

If the defendant had a prior record, if he murdered in the course of another felony, if his crime was "heinous, atrocious or cruel" — these would count as aggravating circumstances, making him or her more likely to receive the death penalty.

But if the defendant was very young, the product of a savage family or under the influence of a vicious accomplice — these would count as mitigating circumstances, tipping the balance away from death.

When the balancing was done, if the aggravating circumstances outweighed the mitigating, the death penalty would be imposed. Then the state supreme court would be required to review the decision to make sure it met the standards of the law.

The U.S. Supreme Court pondered both approaches and, on July 2, 1976, made its decision. Mandatory death sentences were ruled unconstitutional. But guided discretion passed muster, in a case called Gregg vs. Georgia.

The death penalty was saved.

Planted seeds of failure?

More and more experts are coming to believe that the court inadvertently planted the seeds of failure in its Gregg opinion. By declaring that "death is different" and demanding that *every* death sentence measure up to a complex and vague set of standards, the high court may have doomed the system to tedium and expense.

In a speech last year to the Maryland legislature, the state's chief judge, Robert Murphy, explained the problem. The very heart of the Gregg decision, he said, gives death penalty defendants "protections well beyond those required for noncapital felons." Those safeguards are "extremely difficult and complicated . . . protracted and expensive."

People may wonder, the judge said, "whether the time is close at hand when most of the legal problems will have been ironed out so that death penalty appeals will be treated as routinely as other criminal appeals. I doubt seriously that that day, if it ever comes, is close at hand."

Declares Richard Burr, director of the anti-death penalty Legal Defense Fund of the NAACP: "The Supreme Court has infused through all the lower courts an attitude that says, 'If you're going to have a death penalty, you're going to have to proceed in *each individual case* with as careful a review as is humanly possible.' "

This review takes place at three levels.

First, on "direct appeal," the state courts review each death sentence to be certain that the *facts* of the case justified the ultimate penalty.

Second, on "post-conviction" appeal, the same state courts again review each case, this time to be sure that the *procedures* used to convict the inmate were legal.

Third, on "habeas corpus" appeal, the federal courts determine if any aspect of the case violated the U.S. Constitution.

In theory, most of these reviews were available to doomed inmates even before the new death penalty laws were written. But in fact, in the old days, inmates were routinely executed without a glance from appellate judges.

The Furman and Gregg decisions changed all that. State supreme courts are now required to get involved. And scrutiny by the federal courts has become routine.

This puts a huge strain on the system.

An example: Every time a case hits the the federal level, a U.S. district judge is appointed to hear the appeal. At the same time, three judges of the Circuit Court of Appeals are appointed to review the decision of the first judge. And a U.S. Supreme Court justice is appointed to look over the decisions of the two lower courts.

With each step through the system, clerks must notify every judge. As the hour of doom nears, the process gets frantic.

U.S. District Judge Eugene Spellman remembers deciding one last-minute appeal at midnight. Spellman dialed the U.S. Supreme Court to notify the clerk. Could the clerk notify Justice Lewis Powell?

"He's right here," came the reply. "Why don't you tell him yourself?"

How often must a Supreme Court justice sit in his chambers, poised by the telephone, at midnight? Consider this: There are more than 2,100 cases in America's execution pipeline. The conclusion is inescapable: *Something has to give.*

Death penalty advocates have long hoped that courts will be forced to streamline the process. They have interpreted nearly every important death penalty decision as a sign that courts were abandoning tedious case-by-case review. Again and again, pro-death penalty politicians have predicted that the logjam was broken.

That was the prediction in 1979, when Florida electrocuted John Spenkelink. Officials confidently forecast six more executions in the coming year. But they were wrong — four years passed before the next execution.

Around the nation, death penalty advocates greeted favorable U.S. Supreme Court decisions in 1984 and 1986 as paving the way for quicker executions. Yet the execution rate nationwide hasn't accelerated. Quite the opposite: There were 2.08 executions per month in 1987; 1.17 per month so far in 1988.

In fact, there is little reason to believe that the judges will ever back off. Under the Gregg decision, they feel it is their duty to review every case. And, disturbingly, the judges keep finding major mistakes.

About half of all death sentences have been overturned on appeal since the "guided discretion" concept became law. Federal courts knock out about a quarter of the cases — even after the state's double-barreled review.

"There is a widespread sense that all this is just a matter of delays, that eventually everyone on Death Row is going to be executed. Well, that's just not the case," says Burr, of the NAACP. "How can you cut short someone's appeals when he stands a 50-50 chance of a major error?"

Yet case-by-case review has a disastrous effect on the legal system, prosecutors and defense attorneys agree. Laws are supposed to be predictable, solid as a rock. The failure of death penalty law, lawyers argue, is that it shifts and changes with each new lawyer arguing a new case to a new judge.

Instead of rock-solid, death penalty law is quicksand.

"The essence of the law is its predictability. The law is supposed to be coherent, consistent," says Pat Doherty, a Clearwater attorney who defends Death Row inmates. "Under the death penalty, all this is meaningless. The death penalty is a cancer on the law."

Exhibit A: Charles Proffitt, who murdered a sleeping man with a bread knife in Tampa in 1973.

In 1975, the Florida Supreme Court ruled that the facts of the case justified the death penalty. But over the years, as Proffitt's appeals crawled through the courts, the law subtly shifted.

In 1987, after a federal court ordered a new weighing of the aggravating circumstances, the state Supreme Court — the very court that had turned Proffitt down years before — spoke again.

This time, the court had a new sense of what made a murder especially "heinous, atrocious or cruel." Proffitt — who had not planned his crime, tortured his victim or compounded his crime by attacking his victim's wife — no longer met the test. The court reduced his sentence to life.

So a man who deserved the death penalty in 1975 didn't deserve it 12 years later.

'The law keeps changing'

"We're in a quandary of trying to hit a moving target," says Art Wiedinger, assistant general counsel to former Gov. Bob Graham. "The law keeps changing. The courts may make a ruling today that suddenly means something we did five years ago was wrong."

The changing law affected only one person in Proffitt's case. Often, though, shifts affect scores of condemned men. A U.S. Supreme Court decision last month will mean new appeals for 15 of the 19 inmates on Maryland's Death Row.

Arthur England, former chief justice of the Florida Supreme Court, lost hope of making death penalty law consistent.

"I thought the Supreme Court of Florida would be able to set standards that made sense that we could enforce," he says. "Because the legal system must be predictable. My experience on the court was that it's impossible to set standards and adhere to them. Predictability is not available in this area and it won't be."

One last hope of death penalty advocates: Ronald Reagan's conservative judges will swing the tide toward swifter executions. But even this hope is growing dim.

Seven of the nine U.S. Supreme Court justices support capital punishment. Four are Reagan nominees. Yet they continue to hear capital cases at a rate unimaginable before Furman and Gregg. Already this year, the high court has ruled on nine separate cases — without drastically changing anything.

Even Chief Justice Rehnquist, the most determined pro-death penalty voice on the court, concedes that capital punishment requires "especially careful review of the fairness of the trial, the accuracy of the fact-finding process and the fairness of the sentencing."

"No appeal is a 'mere technicality,'" says Florida Supreme Court Justice Gerald Kogan. "Technicalities are the law. So people can say, 'That's a technicality,' but we have to answer: 'Yeah, but that's what the law is.'"

More and more, it appears that the problem is the law itself

Says Parker Lee McDonald, chief justice of Florida's high court: "The old cases never really go away, and the new ones just keep coming. The way the system is cranked in now, I think we're probably running pretty near maximum speed."

Maximum speed. In the 12 years since the "guided discretion" concept resuscitated the death penalty, America has executed 88 inmates against their will. Twelve more men quit their appeals and went to the death chamber willingly. Total: 100 executions.

Death Row, by comparison, grows at the rate of 300 death sentences a year.

Ed Austin, the pro-death penalty Jacksonville prosecutor, is just about ready to pull the plug.

"If you can't carry out the sentence within a reasonable amount of time, you should abolish the death penalty," Austin says. "The Supreme Court should fix it or get rid of it. If the court doesn't want to come to terms with this, then somebody should step in and say, 'It's a joke. It doesn't work. It's a shell game.'"

PROTECTING THE INNOCENT

The ultimate malfunction of justice is the execution of an innocent person. Fourteen times since 1973, justice in America has come close. Judges sentenced innocent men to die. Only the laborious appeals process saved them. One case took 13 years to correct.

▶ **JOSEPH GREEN BROWN, 23,** Florida: *Sentenced 1974. Freed 1987.*

A petty crook with a conscience, Brown confessed to a burglary he committed with an accomplice. The accomplice got even by accusing Brown of murder. Eventually, experts declared that Brown's gun wasn't the murder weapon. After more than a decade, the accomplice admitted he lied.

▶ **EARL CHARLES, 21,** Georgia: *Sentenced 1975. Freed 1978.*

After conviction, new evidence surfaced establishing his alibi. A federal judge ordered the state to compensate Charles in 1983 because a police officer violated his civil rights.

▶ **NEIL FERBER, 35,** Pennsylvania: *Sentenced 1982. Freed 1986.*

Prosecutors became convinced the star witness against Ferber lied. An eyewitness to the murder came forward to say Ferber was not the killer. When a new trial was ordered, charges were dropped.

▶ **GARY L. BEEMAN, 25,** Ohio: *Sentenced 1976. Freed 1979.*

An escaped prisoner, Clare Liuzzo, was the star witness against Beeman. When an appeals court ordered a new trial, five witnesses testified that Liuzzo bragged about committing the murder himself. Beeman was acquitted.

▶ **LARRY HICKS, 19,** Indiana: *Sentenced 1978. Freed 1980.*

Judge ordered a new trial because Hicks, who had a 'low-to-normal' IQ, had been too confused to assist his lawyer. At the new trial, Hicks' alibi was proved.

▶ **JOHNNY ROSS, 16,** Louisiana: *Sentenced 1975. Freed 1981.*

Convicted of rape. The youthful Ross confessed after police beat him. His trial lasted less than a day. Eventually, defense lawyers established that Ross' blood type did not match the sperm found in the victim.

GLADISH

GREER

KEINE

SMITH

▶ **THOMAS V. GLADISH, 23; RICHARD WAYNE GREER, 31; RONALD B. KEINE, 27; and CLARENCE SMITH JR. 30,** New Mexico: *Sentenced 1974. Freed 1976.*

Convicted of murder, kidnapping, sodomy and rape. Detroit News reporters traced the murder weapon and getaway car to a drifter in South Carolina. The drifter confessed.

JENT

MILLER

▶ **WILLIAM RILEY JENT, 28, and EARNEST LEE MILLER, 23,** Florida: *Sentenced 1980. Freed 1988.*

A federal judge found police withheld key evidence to back up the Jent-Miller alibi. Police overlooked the victim's boyfriend, whose next girlfriend was also beaten to death and burned. When a new trial was ordered, prosecutors offered to free Jent and Miller immediately if they would plead guilty to a lesser charge. While asserting their innocence, the half-brothers accepted the deal.

▶ **DELBERT TIBBS, 35,** Florida: *Sentenced 1974. Freed 1976.*

Victim's girlfriend, who was raped by the killer, gave a description of the attacker — which didn't match Tibbs. But she testified against him anyway. Tibbs, a hitchhiking divinity student, had a motel registration to support his alibi. Florida Supreme Court set him free. Prosecutor admitted the trial wasn't fair.

▶ **JONATHAN CHARLES TREADAWAY JR., 21,** Arizona: *Sentenced 1975. Freed 1978.*

Convicted of sodomy and murder of a 6-year-old boy. At retrial, five pathologists testified that the victim probably wasn't murdered or sodomized — that he probably died of pneumonia.

SOURCES: Herald research and Hugo Adam Bedau's and Michael Radelet's *Miscarriages of Justice* in the Stanford Law Review. These 14 cases are the most clear-cut. In scores of cases, significant doubts remain.

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'Judicial override' bogs system down

By DAVE VON DREHLE
Herald Staff Writer

A convicted killer stands before the judge. The jury recommends life in prison. But the judge imposes the death penalty.

This has occurred on 113 occasions in Florida since 1973. In more than 20 percent of the state's 544 death cases, judges sentenced to death defendants whom juries thought should live.

It is called "judicial override." For judges, it can be good publicity. For the legal system, it can be trouble.

In seven out of 10 "judicial overrides," higher courts reverse the trial judge — after long and costly appeals. Every time this happens, Florida taxpayers unwittingly shell out at least $69,480, according to conservative cost estimates — or $5 million thus far.

Says Bennett Brummer, Dade Public Defender: "Juries are supposed to be representative of the community. If a jury recommends that the defendant's life should be spared, then I feel the judge should be bound by that."

Jacksonville Circuit Judge Hudson Olliff is one of only two Florida judges whose override death sentences have actually ended in executions. Child-killer Earnest Dobbert was electrocuted on Olliff's orders on Sept. 7, 1984.

"Only a defense attorney would criticize the override," says Olliff.

Florida lawmakers created the judicial override late in 1972, as they rushed to write a new death penalty law after the U.S. Supreme Court declared the nation's existing capital punishment laws unconstitutional.

Existing death penalty laws gave juries too much power to decide who should live and who should die, the Supreme Court ruled. So in drafting the new law, Florida's legislators gave judges the power to disregard the jury's recommendations.

Now critics argue that the judges have too much power.

"If the people don't want an override, then let the Legislature change it."
Ellen Morphonios,
DADE CIRCUIT JUDGE

Other than Florida, only Alabama and Indiana permit judicial override. Only Florida judges use it extensively — so extensively that the Florida Supreme Court has been forced to set tough standards for policing the use of overrides.

Without these time-consuming standards, "the death penalty would be untenable in Florida," according to Supreme Court Justice Gerald Kogan.

It works the other way — but rarely. Angry citizens picketed Dade Circuit Judge Steven Robinson after he gave a life sentence to Jesse Ramirez in the "Duct Tape Murder" of Mario Portela.

No judge believes in the override more than Dade Circuit Judge Ellen Morphonios, known as "Maximum Morphonios" for her harsh sentences. *60 Minutes* and *NBC Nightly News* have filmed her in action.

"If I feel that's the thing that ought to be done, then I'll do it," she says.

Morphonios overrode the jury and sentenced Anibal Jaramillo to death in a 1981 drug-murder case. The justices of Florida's Supreme Court found her reasoning so unpersuasive they not only reversed the sentence, they turned Jaramillo loose.

In fact, all of Morphonios's nine death sentences have been reversed on appeal. The celebrity judge is unperturbed.

"You know there's a good chance the case is not going to fly, but you've got to live with yourself. If the people don't want an override, then let the Legislature change it."

A lot of people like that idea. Given the high cost and low success rate of judicial overrides, experts are increasingly calling for the elimination of this quirk in Florida's death penalty law.

"Face it," says Larry Spalding, Florida's chief Death Row defense lawyer. "If you can't convince the majority of a jury to impose the death penalty, then it's not a death penalty case."

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Political pressure thwarts clemency

By DAVE VON DREHLE
Herald Staff Writer

Meet Vernon Cooper, the man on Death Row no one wants to execute.

Cooper may have murdered a policeman in 1974. Then again, maybe not. Cooper says his accomplice did it. The policeman and the accomplice are both dead. Since there were no other witnesses, no one knows for sure.

THE DEATH PENALTY
A FAILURE OF EXECUTION
Third of a series

In the heyday of the death penalty, Florida's governor probably would have granted executive clemency and reduced death to life in prison. For years, governors used this technique to dispose of marginal cases.

But today, in Florida, executive clemency is just one more aspect of the death penalty that doesn't work right.

Clemency exists only in theory, like UFOs and Bigfoot.

Since 1982, Govs. Bob Graham and Bob Martinez have reviewed 158 clemency requests — and granted zero.

The reason, some experts contend, is politics. No politician ever won an election by dispensing mercy to murderers.

"Theoretically, clemency could be used to clear away all the marginal cases and speed up executions," says Bob Spangenberg, a Boston attorney who has studied criminal law and the death penalty for 24 state and federal agencies.

"In reality, though, it's political."

Paradoxically, political pressure *in favor* of the death penalty is one reason the death penalty doesn't work.

In Florida, this happens three ways:

- By shunning the clemency process, governors have ignored an opportunity to cut court overload and streamline capital punishment.
- By signing a lot of death warrants, governors look tough on crime. But warrants signed willy-nilly merely increase the cost of capital punishment — by at least a third.
- By overriding jury recommendations for life in prison, judges look tough, too. Yet an astonishing number of these cases — seven out of 10 — are reversed after lengthy and expensive litigation.

Across the nation, the death penalty is taking on more and more political significance. Yet in the statistical world of murder, it counts for very little.

The 2,100 inmates on America's Death Rows account for less than two percent of the murders committed in the past 15 years.

Inmates actually executed — 100 — account for less than one-tenth of one percent of the nation's homicides.

The issue flourishes

Still, the death penalty issue flourishes in campaigns for state legislatures, governors' mansions, court benches, the halls of Congress — even the White House.

Strategists for Vice President George Bush already are attacking Democrat Michael Dukakis for opposing the death penalty.

"This is going to be part of the national debate," says Gov. Martinez, a prominent Bush man.

Candidates of every stripe affirm their belief in the death penalty almost as a code, symbolic of their hard line against crime.

People used to call Bob Graham a wimp. Not anymore. His strong support for the death penalty helped transform him into a U.S. senator and a finalist for the Democrats' vice president nomination.

Graham's pro-death penalty record, some say, makes him a perfect running mate for the vulnerable Dukakis.

The death penalty bandwagon is crowded. Witness the most recent race for governor of Florida.

"I voted for the death penalty," boasted candidate Barry Kutun, Miami Beach senator.

"I've always, always supported it," declared candidate Harry Johnston, former Florida Senate president.

"I'll pull the switch personally," said candidate Joan Wolin, Lake County lawyer.

"If I am elected, Florida's electric bill will go up," promised candidate Tom Gallagher, Coconut Grove representative.

Candidate Bob Martinez, mayor of Tampa, won.

"Bob Graham politicized the death penalty and he set the standard for Bob Martinez," says Larry Spalding, a Graham appointee who directs an office of defense attorneys on behalf of Florida's doomed inmates.

Political motives?

Graham calmly denies that his death penalty agenda has been political. He consulted his "inner gyroscope," he says, and found his actions above reproach. Critics nevertheless see political motives behind the strange death of executive clemency in Florida.

Between 1925 and 1965, Florida's governors granted clemency in 57 of 268 capital cases — 21.3 percent.

In his first three years in office, Graham approached that pace. He granted clemency in six of 38 cases — 15.8 percent.

But Graham discovered that granting clemency risks political backlash. After he spared the life of Leanie Leo Alford in 1979, Republicans denounced the governor. Alford's father, the Republicans noted, was a preacher active in Democratic politics.

After he spared the life of Darrell Hoy in 1980, parents of one of Hoy's victims deluged Graham with angry petitions.

In January 1982 — the year Graham ran for a second term — clemency vanished, never to be seen again. Although everyone on Death Row gets a clemency hearing, everyone on Death Row stays there.

Graham and Martinez explain: The system got better. The courts now weed out marginal cases before they get to the clemency board.

"After the first few years I was in office, the courts laid out sufficient standards, so cases that came through the process didn't leave much basis for clemency," says Graham.

Says Martinez: "Cases go through so many judges, they get sorted out pretty well."

In fact, though, marginal cases never stopped popping up. So, in place of clemency, Graham's staff quietly developed a way to sidetrack executions without making headlines.

Shift in tactics

The governor simply neglected to sign death warrants in cases that left him uncertain. No defendant can be executed without a warrant. Graham employed this tactic 20 times.

These cases, says Art Wiedinger, Graham's former assistant general counsel, "go into a sort of limbo."

Thus, Vernon Cooper, sentenced to death 14 years ago for the shooting of a Pensacola sheriff's deputy, remains on Death Row — though no one is trying to execute him. Jacob John Dougan, 13 years on Death Row, is in limbo. Eligaah Jacobs, 12 years on Death Row, is in limbo.

Limbo is politically safe. But at the same time, it does nothing to relieve the burdens of the system.

Martinez says he doesn't expect to grant clemency

> 'Bob Graham politicized the death penalty and he set the standard for Bob Martinez.'
>
> **Larry Spalding,**
> CHIEF OF APPELLATE DEFENSE LAWYERS

any more than Graham did. He can't imagine circumstances that would convince him to reduce even one sentence.

"I guess I'll know it if I hear it," he says.

Today's clemency hearings are a Catch-22: The obvious way to win clemency is to be innocent. But every session begins with an admonition not to argue innocence.

"It is presumed," says Wiedinger, Graham's assistant counsel, "that the defendant is guilty."

In most cases, shortly after the clemency hearing, the governor signs the black-bordered death warrant. A date is set, usually 30 or 60 days later.

But most warrants don't really mean death. The courts issue a "stay of execution" while they weigh emergency appeals. While the judges are pondering, the warrants expire, and new ones must eventually be signed.

For every execution since 1973, Graham and Martinez have signed more than 10 warrants.

Warrants vs. executions

Critics say that the governors use death warrants as a vote-getter — the more warrants, the more votes. But more warrants don't mean more executions.

The Martinez record: 44 warrants, two executions.

Martinez argues that warrants are the only prod he has to keep cases moving. Defense attorneys can't stall if facing a date with the electric chair.

But using warrants to move capital cases is like using a sledgehammer to break an egg — it gets the job done, but makes a terrible mess.

When a warrant is signed, the system lurches into an expensive and inefficient overdrive. Everything costs more. Instead of mailing documents, lawyers use overnight express couriers. Airline tickets to distant courtrooms, booked on short notice, are always full-fare.

Judges must drop everything.

"When a death warrant is signed," says Florida Supreme Court Justice Gerald Kogan, "we get hit with appeals that are — and this is no exaggeration — a *foot* high. A thousand, 1,200 pages each.

"When we are served with this much documentation just a short time before an execution is scheduled, everything grinds to a halt while we deal with it."

Graham signed more death warrants than any Florida governor before him. But he always took care never to have more than four death warrants in effect at one time. "That was as much as the system could handle," Graham says.

Last month, by contrast, Martinez had *nine* warrants alive at the same time.

"That," says Justice Kogan, "creates a tremendous problem for us."

All nine warrants expired without an execution.

"We sign death warrants to move cases along — knowing full well that they're not going to get to the electric chair," Martinez explains. "Without the warrant, the case would just sit there."

Martinez considered Graham's four-warrant limit, but didn't like it. "Every office holder has to use his own judgment," he says.

The court's timetable

To simplify things, the Florida Supreme Court set a timetable for state appeals. This provides a way to keep cases moving without death warrants.

But Martinez has ignored the timetable. "There's nothing magic about the deadline," says Andrea Hillyer, Martinez's top death penalty lawyer.

Each time the timetable is ignored, Martinez sets off a costly warrant panic. An example: Fred Way, a Tampa man convicted of the arson-murder of his wife and daughter. His death warrant was signed last month.

Way had six months left under the timetable. When his warrant was signed, appellate lawyers on both sides had just days to study reams of court documents and write their legal arguments. They dumped everything on the appellate courts.

Costs soared. Judges called emergency hearings, halting the execution long enough to ponder the issues.

After weeks of frenzied labor, the warrant expired. Way's case stalled again. All this for a case that would have moved by itself in a couple of months anyway.

For years, people have talked about fixing the warrant problem.

Spalding, chief of the appellate defense lawyers, says he proposed a compromise with the governor: Both sides agree to deadlines for all appeals. As long as the deadlines are met, the governor would lay off the warrants.

"He'd sign fewer warrants and get more executions," Spalding says. But the governor wouldn't buy it.

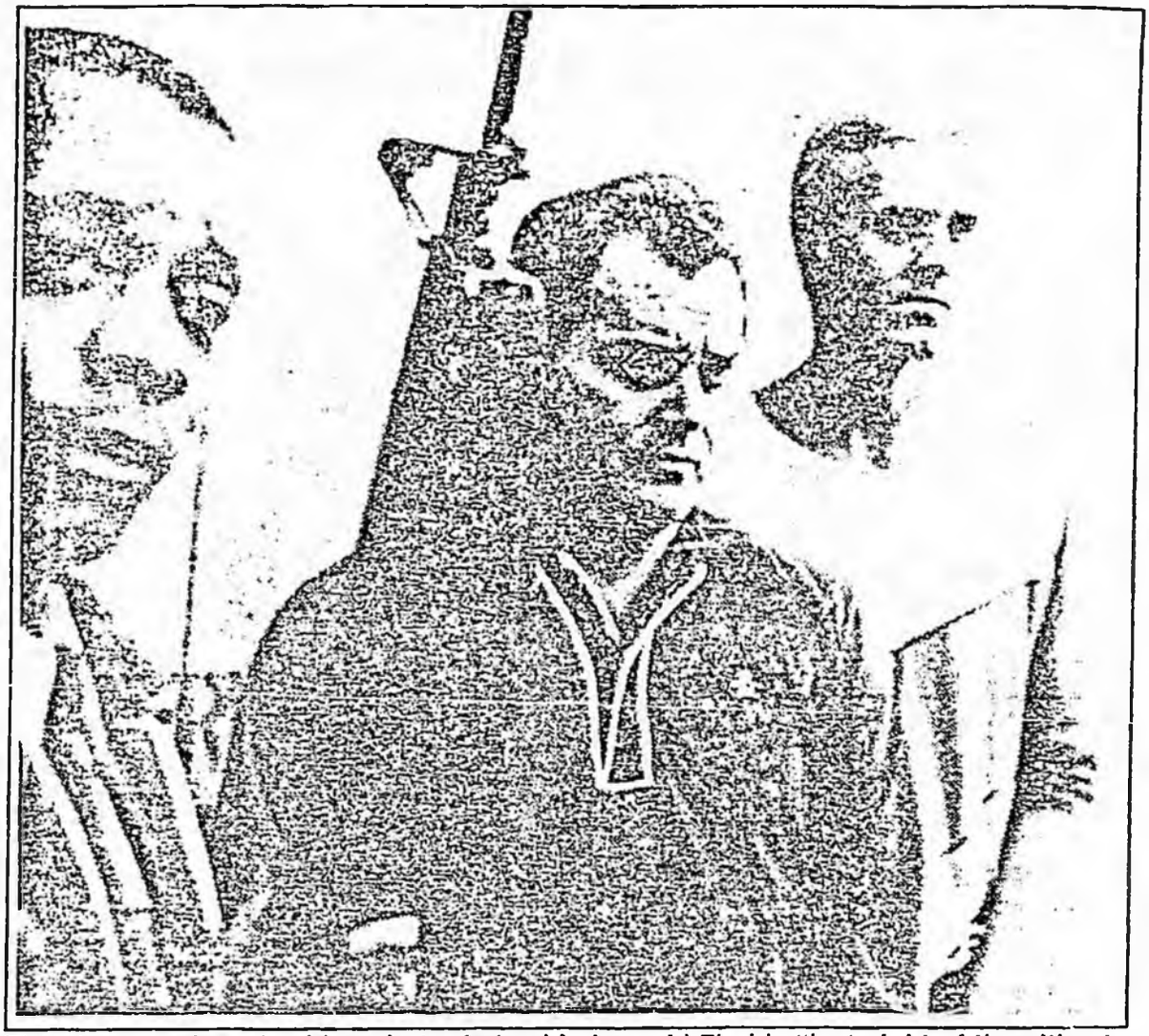
Baloney, answers the governor.

"We tried to work with him," says Joe Spicola, the governor's general counsel. "We are perfectly willing to work things out. But we are not going to sit back and let them prostitute the process."

The feud is poisoning an already ailing system. Martinez ordered an investigation of Spalding. Spalding bashes Martinez to judges and the press.

And each week in Florida, another killer steps into the costly line to the seldom-used electric chair.

CLEMENCY CONFUSION



The clemency board said no, but a federal judge said Florida "lost sight of the ultimate goal" of justice in the case of William Riley Jent (center) and Earnest Miller.

IT'S NOT easy to tell the winners from the losers

YES: Leatie Leo Alford won clemency in 1979 because there was no physical evidence linking him to the rape-murder of a 13-year-old girl. And Alford's lawyer produced a witness who testified that Alford was innocent. Serving life in prison.

NO: Lawyers for William Riley Jent and Earnest Lee Miller stood before Graham and the cabinet to ask for clemency in 1983. No physical evidence linked the half-brothers to the torch-murder of an unidentified young woman. And three witnesses came forward to say that Jent and Miller were innocent. In 1988, Jent and Miller were freed, after a federal judge said Florida "lost sight of the ultimate goal" of justice

YES: Darrell Edwin Hoy's case reached the clemency board in 1979. Two facts stood out Hoy's jury had recommended a life sentence and Hoy's accomplice had won a new trial on appeal. Serving life in prison.

NO: Beauford James White's case reached the board in 1982. White didn't kill anyone -- he was an accomplice to a Carol City mass murder. Two facts stood out: White's jury had recommended a life sentence and one accomplice was sentenced to just 20 years. In 1987, White was executed.

YES: Jesse Raymond Rutledge pleaded for mercy in early 1982. His lawyers argued Rutledge was innocent — that the key witness was pressured to finger the wrong killer. Serving life in prison.

NO: Joseph Green Brown asked for mercy late in 1982. His lawyers argued he was innocent — that the key witness blamed him because of a grudge. In 1986, a new trial was ordered. The next year, charges were dropped.

Former Gov. Bob Graham won't discuss these cases. But he argues that clemency cases are not necessarily supposed to make sense from one to the next. 'They are not meant to set precedents,' he says. Instead, he compares the governor's power to grant clemency to the power of kings in old England, not to be used 'on a wholesale basis.'

NO MERCY

In Florida, every doomed inmate has the right to a hearing before the governor and Cabinet prior to being executed. Circumstances overlooked, or undervalued, at the trial may convince the governor and Cabinet to reduce the death sentence to life in prison. Between 1925 and 1965, Florida's executives found more than one case in five worthy of clemency.

Under Bob Graham and Bob Martinez, however, the clemency process has withered and died.

		CLEMENCY		
Governor	Term	Requests	Granted	Pct.
Martin	1925-29	48	7	14.6
Carlton	1929-33	19	8	42.1
Sholtz	1933-37	24	3	12.5
Cone	1937-41	30	12	40.0
Holland	1941-45	39	4	10.3
Caldwell	1945-49	27	4	14.8
Warren	1949-53	19	2	10.5
Johns	1953-55	8	2	25.0
Collins	1955-61	38	9	23.7
Bryant	1961-65	16	6	37.5
TOTAL		268	57	21.3
Graham	1978-86	144	6	4.1
Martinez	1986-	58	0	0.0
TOTAL		202	6	3.0

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Cries for change

Both sides see flaws in capital punishment

By DAVE VON DREHLE
Herald Staff Writer

THE DEATH PENALTY
A FAILURE OF EXECUTION
Last of a series

In 1974, the year President Nixon left the White House and Americans lined up at the gasoline pumps, Charles Proffitt waited for the executioner on Florida's Death Row. Proffitt had stabbed a sleeping man with a bread knife.

Nearby waited Howard Douglas, the killer a jury thought should live and a judge thought should die. Vernon Cooper, who may or may not have killed a policeman, waited, too.

The executioner never came. In fact, if Florida's Death Row Class of '74 held a reunion, two-thirds of the inmates could attend.

In bluntest terms, the death penalty was supposed to kill these men. It failed, as it has failed in 97 percent of America's death cases in the past 15 years.

Scholars, lawyers, judges — even pro-death penalty politicians — conclude that such a dramatic failure demands change: Fix it or get rid of it. They propose a bunch of solutions, most of which would do neither.

Proffitt, Douglas and Cooper were among the first killers sentenced to die under new laws intended to make the death penalty rational and swift.

But just one in 30 people sentenced to death under those laws has been executed — leading some experts to argue that the laws aren't very rational. As for swift — consult the Class of '74.

America's death penalty enterprise has cost millions. Courts and legislatures have anguished uncounted hours. Capital punishment has driven an emotional wedge through the ranks of the law-abiding.

Now, attention is focused on a few highly publicized

cases — Ted Bundy's, for example. Undoubtedly, much of an angry public would hail the execution of Bundy as the triumph of capital punishment — cost, delay and frustration be damned.

And yet, the truth is that the death penalty is a failure in the overwhelming majority of cases. Almost everyone is dissatisfied, from advocates who demand vengeance to opponents who mourn each death.

Without dramatic change, America's capital punishment paralysis is going to get much worse. Here are the most discussed solutions:

Limit those eligible for execution

In most states, it is legal to execute juveniles and the mentally retarded.

But most Americans strongly oppose the idea of executing the mentally retarded. For example, a 1985 poll conducted in Florida showed eight of 10 people opposed. Americans also tend to oppose executions of juveniles — though many are undecided.

James Terry Roach was 17 and had an IQ of just 64 when he and two pals murdered a young couple in Columbia, South Carolina in 1976. A decade later, in 1986, Roach was electrocuted — despite pleas for mercy from Mother Teresa and the United Nations.

Increasingly, people argue that killers like Roach should not be executed. The Georgia Legislature recently outlawed executions of the retarded, and next year, the U.S. Supreme Court will take up the question of the death penalty for juveniles.

But eliminating juveniles wouldn't reduce the numbers noticeably: Only 32 of the more than 2,100 inmates on America's Death Rows were sentenced before their 18th birthday.

Joe Spicola, general counsel to Florida Gov. Bob Martinez, balks on principle. "A lot of our worst criminals are juveniles," he says. "You wouldn't believe some of the things they do."

No one knows how many condemned inmates are retarded. Some experts say hundreds. Even so, removing them from the process would not make a crucial difference to the nation's overloaded courts.

Executing the insane is a more difficult problem. Although laws forbid it, judges differ drastically on who's crazy and who isn't.

Anthony Antone, 66, his brain damaged by syphilis, did not meet the standard. He went to Florida's electric chair in 1984 convinced that when the surge went through him, his spirit would emerge via his pineal gland, ascend through the nine layers of the Universe, and come to rest on a throne from which he would rule the world.

David Funchess, executed by Florida in 1986, was diagnosed as suffering an uncontrollable violent reaction to the stress of Vietnam.

Criminologists have argued for decades over what constitutes insanity. Even if they agreed, the cost of thousands of lengthy psychiatric evaluations would be staggering.

Take politics out of the system

Florida's governors have not recommended clemency in a capital case since 1982. Their explanation is that the appeals process has become so refined that no marginal case gets as far as a clemency hearing.

In fact, though, Bob Graham and Bob Martinez acknowledge they have had substantial "problems" with 10 percent to 20 percent of the cases they have reviewed. Rather than reducing these sentences to life in prison, they have pitched them into limbo by refusing to sign death warrants.

Critics say Florida's governors don't grant clemency because it is politically unpopular. They believe the political dangers are exaggerated.

One of America's most popular governors, New York's Mario Cuomo, has twice vetoed capital punishment bills. When advocates complain, Cuomo answers: "If you like capital punishment so much, don't vote for me." Cuomo won re-election in a landslide.

Larry Spalding, director of the state agency that handles Death Row appeals, says Florida could "dramatically improve" the situation in another way: Eliminate "judicial override."

In more than 20 percent of Florida's capital cases judges have imposed the death penalty after juries recommended life. High courts have reversed seven out of 10 of these "judicial overrides."

Combined, elimination of judicial override and a meaningful clemency process could cut Florida's death penalty overload by 30 percent to 40 percent.

Florida could further reduce the overload by requiring jurors to agree unanimously on the death penalty, as most death penalty states do. This is less extreme than it appears at first, because prosecutors may exclude any potential juror who is categorically opposed to the death penalty.

Guarantee first-rank lawyers at trial

Death penalty laws are extremely complicated, and most criminal defense lawyers don't have much experience with capital cases. "Law schools don't teach about the death penalty because there's no money in it," says Clearwater defense attorney Pat Doherty, a veteran Death Row lawyer.

And because the vast majority of defendants are poor, they are represented by court-appointed attorneys.

"They tend to be lawyers who have small general practices — a real estate closing Monday, an uncontested divorce Tuesday and a capital murder case Wednesday," says Bob Mahler, director of a North Carolina agency that offers advice to death penalty defense attorneys. "It's the equivalent of going to a general practitioner for neurosurgery. No matter how good the general practitioner is, he can't do it."

Statistics show that first-rank lawyers lose fewer cases. Defense lawyer Doherty cites Steven Benson, the tobacco heir who pipebombed the family car.

"He blew up his family, *for money*, and didn't get the death penalty. The only difference between Benson and people on Death Row is that Benson had the greatest of all mitigating circumstances: He was rich, and rich people don't get the death penalty."

Hiring top lawyers for capital defendants would reduce the Death Row population. It would also reduce the enormous energy courts expend on appeals based on incompetency of defense lawyers.

New York proposed such a law several years ago. Predictably, it failed because taxpayers would have to pay millions for hot-shot lawyers.

Set time limits for federal appeals

Death Row defense attorneys have a favorite tactic for exploiting the federal courts to keep their clients alive, and their critics want to tighten up the rules.

Instead of filing one appeal that includes every imaginable argument for reducing the defendant's sentence, the lawyers file a separate appeal for each argument.

One at a time.

"If they have, say, three issues for the federal courts, they bring federal issue No. 1 first," explains former Florida Gov. Bob Graham. "When that appeal is completely finished, they bring federal issue No. 2. *Then* federal issue No. 3. And so on."

For six years, Southern legislators — including Florida's U.S. Sen. Lawton Chiles — have backed a bill to put a stop to that. Appeals would be lost forever if they weren't filed within a year after state appeals were exhausted.

Says Gov. Martinez, a strong proponent of Chiles' bill: "Let's agree on a time line. I think that would greatly enhance the whole system."

Defense attorneys fear the concept is flawed. In some cases, alibi witnesses refuse to talk until years after a trial. In others, facts that might exonerate a doomed inmate remain buried in old police files.

Earnest Lee Miller was convicted of the 1979 torch-murder of a Pasco County woman. Six years passed before fingerprints were located to show that the prosecutors had the wrong victim. Another year passed before a judge ordered police to turn over their files — which contained hidden testimony that supported Miller's alibi.

"I'm not going to argue about whether the death penalty is right or wrong," says Sandy Weinberg, a Tampa attorney who represented Miller. "But there is no question the system can't go faster as long as we've got cases like Earnie Miller's."

The Chiles bill — which has yet to get out of committee — contains provisions that address these fears. But defense attorneys argue that the provisions will not do much good if information surfaces after the defendant is dead.

Limit death penalty crimes

If the death penalty applied to fewer crimes, there would be fewer inmates on Death Row, fewer appeals burdening the courts, and more likelihood that condemned criminals would actually be executed.

Capital murders are supposed to be the most gruesome and vicious. People generally agree this makes sense in theory — but in practice, courts have had a very hard time distinguishing one murder from the next.

Some experts have proposed more specific laws. A death penalty only for killers of police officers, for example. Or a death penalty only for people who kill while serving a life sentence. Or a death penalty only for serial murderers — such as Ted Bundy.

These severe restrictions would permit society to keep the death penalty as an "ultimate penalty" — while greatly reducing the overload.

Abolish the death penalty, establish tougher life sentences

More and more people are asking whether something so costly, slow and inefficient as the death penalty is worth the trouble.

Florida Supreme Court Justice Parker Lee McDonald: "I think society needs to ask itself if the results justify the cost."

Former Florida Supreme Court Chief Justice Arthur England: "Is the value derived really worth all the trouble?"

Public confidence erodes as America pours millions each year into a system that doesn't work. And people wonder if the money couldn't be better spent.

"The same people who are saying, 'What about the victim?' are actually depriving the victims of services," says Jonathan Gradess, who studied the cost of the death penalty for the New York Assembly.

"We're spending millions on the death penalty. Why don't we put that money into counseling and compensation for the survivors who have lost a loved one and a breadwinner?"

The New York lawyer took note of Florida's most recent execution: "It's fine for Bob Martinez to stand up and pull the switch on Willie Darden, but I don't see him writing any checks to the widow."

In place of the death penalty, North Carolina's Mahler proposes a tough alternative: Lock 'em up and throw away the key.

"There are people on Death Rows who should never see the light of day," he says. "But this can be accomplished without a death penalty, and much, much cheaper — through life-without-parole that *really means* life-without-parole."

Such sentences are rare in America. Opponents argue it would be more cruel than execution. Some prison officials worry that these lifers would wreak havoc because they would have no incentive for good behavior.

But the idea of an ironclad life sentence instead of death is popular among Americans, according to several recent polls.

When asked simply whether or not they support capital punishment, 70 percent of Americans say yes. But when asked whether they prefer the death penalty over life-without-parole, the answers are evenly split.

And by a narrow majority, Americans *prefer* a life sentence — provided the defendant is made to work and his prison wages go to a fund for survivors of murder victims.

Some individuals, of course, stand by the death penalty as a matter of principle. No failures of execution will ever convince them to abandon it.

Gov. Martinez makes the case: "There must be an ultimate penalty. The death penalty is an expensive instrument — but it's an instrument of justice. And there should not be a cost factor on justice. You can't put a value on it.

"Even just one execution in a year shows that justice is being done, that it can work," says the governor.

For others, though, the time has arrived to put the death penalty on trial.

"It is a public policy question that must be decided," says Bob Spangenberg, a Boston lawyer who has advised 24 state and federal agencies on legal costs and the death penalty.

"The question is: When it gets down to decisions about health, education, law enforcement, highways — is the death penalty worth it?"

Price tag changed minds in Kansas

By DAVE VON DREHLE
Herald Staff Writer

Kansas state senators voted for the death penalty when they knew the governor would veto it. But when they got a new governor, pro-death penalty, the senators decided they had better take a hard look at the price tag.

What they saw made them change their minds.

Faced with a sagging farm economy, the conservative senators couldn't stomach the waste and expense of the modern-day American death penalty.

"I voted against it, and some people have tried to say I coddle criminals. Well, I don't coddle criminals," drawls Frank Gaines, a 16-year Senate veteran, one of the last of a dying breed of populist Kansas stump orators.

"It costs a lot more money to have capital punishment, and frankly, I think life in prison is just as tough a penalty," says Gaines. "You just get yourself a confining building and put all them animals in there together. If it was me, I'd rather be put out of my damn misery than have to live like that."

Senators who voted no had nightmares of political disaster. After all, the new governor, Mike Hayden, had made support of the death penalty a major part of his campaign. And voters gave him a solid victory.

But the backlash hasn't come.

"I never received as much mail as I did on that issue — but it was thank-you mail. That's real unusual," says Senate President Ross Doyen, who changed his mind after years of supporting the death penalty. "I think a lot of people say they favor it, but when you pin 'em down on the specifics, they're not so sure."

The most eye-opening specific was the bottom line: $11.5 million for the first year of the death penalty alone, according to the Legislature's researchers.

"And those costs are deceptive," says researcher Mary Galligan. "They stack up over the years."

The Senate killed the death penalty initiative. Doyen, the Senate president, doesn't expect the issue to decide any future elections.

"Some people will be upset with you because you support it, and some will be upset because you don't. But it's no pendulum swinger.

"I think this issue is greatly overplayed."

IS THE DEATH PENALTY DOOMED?

When judges, prosecutors and governors talk about the death penalty, more and more they talk about failure. Even staunch supporters are saying it may be time to give up.

'It is a quagmire. If the definition of justice is a system that administers equal and predictable results, then capital punishment in the United States today falls short. If a criminal feels that even if he's sentenced to death, the punishment won't be carried out, then that removes the rationale for capital punishment.'

Bob Graham, former governor of Florida, who signed more death warrants than any other Florida governor

'[We] have gone from pillar to post, with the result that the sort of reasonable predictability upon which legislatures, trial courts and appellate courts must . . . rely has been all but completely sacrificed.'

William Rehnquist, chief justice of the U.S. Supreme Court, the court's strongest supporter of the death penalty

'If you can't carry out the sentence within a reasonable amount of time, you should abolish the death penalty. When the execution comes 12 years after the crime, nobody remembers why you're doing it. The Supreme Court has a duty to fix it or get rid of it.'

Ed Austin, pro-death penalty state attorney for Jacksonville

'I think society needs to ask itself if the results justify the cost.'

Parker Lee McDonald, chief justice of the Florida Supreme Court

'The way things are now, it's a surprise when anybody goes to the chair. If they're not going to go through with it, then why have a death penalty on the books? It's the Legislature's job to decide.'

Ellen Morphonios, Dade circuit judge, who has sentenced nine people to die

DEMANDING CHANGE

Nationwide, polls show that 70 percent of Americans favor the death penalty. In Florida, the number is higher. But Floridians also favor substantial changes in the law.

Do Floridians favor or oppose capital punishment?

Strongly favor 67%
Somewhat favor 19%
Somewhat oppose 3%
Strongly oppose 10%
Don't know 1%

How do Floridians feel about the death penalty for the mentally retarded?

Favor 14%
Oppose 79%
Don't know 8%

How do Floridians feel about the death penalty for juveniles?

Favor 38%
Oppose 46%
Don't know 17%

Do Floridians prefer life in prison over the death penalty, provided the inmate works in a prison industry and his wages go to a fund for the survivors of murder victims?

Yes: 53%
No: 38%
Don't know: 10%

SOURCES: The Gallup poll, Cambridge Survey Research.

[428 US 242]

CHARLES WILLIAM PROFFITT, Petitioner,

v

STATE OF FLORIDA

428 US 242, 49 L Ed 2d 913, 96 S Ct 2960, reh den 429 US 875, 50 L Ed 2d 158, 97 S Ct 197, 97 S Ct 198

[No. 75–5706]

Argued March 31, 1976. Decided July 2, 1976.

SUMMARY

In response to the United States Supreme Court's decision in Furman v Georgia (1972) 408 US 238, 33 L Ed 2d 346, 92 S Ct 2726—which held that the imposition of the death sentence under certain state statutes constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments because under such statutes the juries had untrammeled discretion to impose or withhold the death penalty—the Florida legislature adopted new statutes that authorized the imposition of the death penalty on those convicted of first-degree murder. Under the new Florida statutes, (1) if a defendant is found guilty of first-degree murder, a separate presentence hearing is held before the jury, where arguments may be presented and where any evidence deemed relevant to sentencing may be admitted and must include matters relating to eight aggravating and seven mitigating circumstances specified in the statutes, (2) the jury is directed to weigh such circumstances and return an advisory verdict as to the sentence, to be determined by a majority vote, (3) the actual sentence is determined by the trial judge, who is also directed to weigh the statutory aggravating and mitigating circumstances, (4) if a death sentence is imposed, the trial court must set forth in writing its fact findings that sufficient statutory aggravating circumstances exist and are not outweighed by statutory mitigating circumstances, and (5) a death sentence is automatically reviewed by the Supreme Court of Florida, which considers its function to be to guarantee that the aggravating and mitigating reasons present in one case will reach a similar result to that reached under similar circumstances in another case. Upon a jury trial in a Florida state court under the new statutory scheme, the defendant was found guilty of first-degree murder and, after the statutory presentence hearing, was sentenced to death by the trial judge, who found as aggravating circumstances that (1) the murder was premeditated

Briefs of Counsel, p 1411, infra.

and occurred in the course of a felony (burglary), (2) the defendant had the propensity to commit murder, (3) the murder was especially heinous, atrocious, and cruel, and (4) the defendant knowingly, through his intentional act, had created a great risk of serious bodily harm and death to many persons. The trial judge also found specifically that none of the statutory mitigating circumstances existed. The Supreme Court of Florida affirmed (315 So 2d 461).

On certiorari, the United States Supreme Court affirmed. Although unable to agree on an opinion, seven members of the court agreed that the imposition of the death penalty for the crime of murder under the Florida statutes did not violate the prohibition against the infliction of cruel and unusual punishment under the Eighth and Fourteenth Amendments.

STEWART, POWELL, and STEVENS, JJ., announced the judgment of the court and filed an opinion, delivered by POWELL, J., expressing the view that (1) the death penalty did not, under all circumstances, constitute cruel and unusual punishment, (2) the Florida procedures satisfied the constitutional concerns identified in the Furman decision that the death penalty not be imposed in an arbitrary or capricious manner, since under the Florida statutes, the trial judge was required to weigh the aggravating and mitigating factors, thus focusing on the circumstances of the crime and the character of the individual defendant, and since any risk of arbitrary or capricious sentencing was minimized by the appellate review system ensuring that a death sentence was consistent with other sentences imposed in similar circumstances, (3) the Florida statutes were not rendered unconstitutional merely because the state's criminal justice system allowed discretion to be exercised with regard to the prosecutor's decision whether to charge a capital offense in the first place, his decision whether to accept a plea to a lesser offense, the jury's consideration of lesser included offenses, or the Executive's decision whether to commute a death sentence, and (4) the statutory provisions specifying "aggravating" and "mitigating" circumstances were not so vague or overbroad as to fail to adequately guide the trial court's sentencing discretion, since the Florida Supreme Court had construed the challenged provisions as to "aggravating" circumstances in such a manner as to provide adequate guidance, and since the challenged provisions as to "mitigating" circumstances required no more line-drawing than was commonly required of a factfinder in a law suit.

WHITE, J., joined by BURGER, Ch. J., and REHNQUIST, J., concurred in the judgment, expressing the view that (1) although the statutory aggravating and mitigating circumstances were not susceptible to mechanical application, they were not so vague and overbroad as to leave the discretion of the sentencing authority unfettered, (2) the Florida statutory scheme did not run afoul of the holding in the Furman case, since under Florida law, the sentencing judge was required to impose the death penalty on all first-degree murderers as to whom the statutory aggravating factors outweighed the mitigating factors, and it thus could be anticipated that as to such categories of murderers, the penalty would not be imposed freakishly or

rarely, but would be imposed with regularity, (3) the possibility that some murderers might escape the death penalty solely through exercise of prosecutorial discretion or executive clemency was immaterial, and (4) there was no merit to the defendant's argument that under the Eighth Amendment, the death penalty could never be imposed under any circumstances.

BLACKMUN, J., concurred in the judgment, referring to his dissenting opinion in the Furman case.

BRENNAN, J., dissenting in an opinion appearing at page 904, supra, expressed the view that (1) the cruel and unusual punishment clause must draw its meaning from evolving standards of decency that marked the progress of a maturing society, (2) the consideration of "evolving standards of decency" required focusing upon the essence of the death penalty itself, and not primarily or solely upon the procedure under which the determination to inflict the penalty upon a particular person was made, (3) the death penalty served no penal purpose more effectively than a less severe punishment would, and (4) our civilization and the law had progressed to the point where the court should hold that the punishment of death, for whatever crime and under all circumstances, was cruel and unusual, in violation of the Eighth and Fourteenth Amendments.

MARSHALL, J., dissented in an opinion appearing at page 907, supra, expressing the view that the death penalty was cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments because it was excessive, being unnecessary to promote the goal of deterrence of crime or to further any legitimate notion of retribution.

HEADNOTES

Classified to U. S. Supreme Court Digest, Lawyers' Edition

Criminal Law §§ 82, 83 — cruel and unusual punishment — death penalty

1a–1d. The prohibition against the infliction of cruel and unusual punishment under the Eighth and Fourteenth Amendments is not violated by the imposition of the death penalty for the crime of murder under a state's statutory scheme whereby (1) if a defendant is found guilty of first-degree murder, a separate pre-sentence hearing is held before the jury, where argument may be presented and where any evidence deemed relevant to sentencing may be admitted and must include matters relating to eight aggravating and seven mitigating circumstances specified in the statutes, (2) the jury is directed to weigh such circumstances and return an advisory verdict as to the sentence, to be determined by majority vote, (3) the actual sentence is determined by the trial judge, who is also directed to weigh the statutory aggravating and mitigating circumstances, (4) if a death sentence is imposed, the trial court must set forth in writing its factfindings that sufficient statutory aggravating circumstances exist and are not outweighed by statutory mitigating circumstances, and (5) a death sentence is automatically reviewed by the state's highest court, which considers its function to be to guarantee that the aggravating and mitigating reasons present in one case will reach a similar result to that reached under similar circumstances in another case. [Per Stewart, J., Powell, J., Stevens, J., White, J., Burger, Ch. J., Rehnquist, J., and Blackmun, J.]

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

21 AM JUR 2d, Criminal Law § 613

USCS, Constitution, 8th and 14th Amendments

US L ED DIGEST, Criminal Law §§ 82, 83

ALR DIGESTS, Criminal Law § 181

L ED INDEX TO ANNOS, Criminal Law; Cruel and Unusual Punishment

ALR QUICK INDEX, Capital Cases; Cruel and Unusual Punishment

FEDERAL QUICK INDEX, Capital Punishment; Cruel and Unusual Punishment

ANNOTATION REFERENCES

The federal constitutional guaranty against cruel and unusual punishment. 33 L Ed 2d 932.

Effect of abolition of capital punishment on procedural rules governing crimes punishable by death—post-Furman decisions. 71 ALR3d 453.

Binding effect upon state courts of opinion of United States Supreme Court supported by less than a majority of all its members. 65 ALR3d 504.

Manner of inflicting death sentence as cruel or unusual punishment. 30 ALR 1452.

Criminal Law §§ 82, 83 — cruel and unusual punishment — death penalty

2a, 2b. The death penalty does not, under all circumstances, constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. [Per Stewart, J., Powell, J., Stevens, J., White, J., Burger, Ch. J., and Rehnquist, J.]

Criminal Law §§ 82, 83 — cruel and unusual punishment — death penalty

3a, 3b. A state's statutory provisions governing the imposition of the death penalty for the crime of murder are not rendered unconstitutional as being violative of the prohibition against cruel and unusual punishment under the Eighth and Fourteenth Amendments merely because the state prosecutor has discretion in selecting cases to be prosecuted as capital offenses and in plea bargaining, or merely because of the possibility of executive clemency. [Per Stewart, J., Powell, J., Stevens, J., White, J., Burger, Ch. J., and Rehnquist, J.]

Criminal Law §§ 82, 83 — cruel and unusual punishment — death penalty

4a, 4b. The provisions of a state's death penalty statutes which specify "aggravating" and "mitigating" circumstances that must be weighed by the trial judge in determining whether a defendant convicted of first-degree murder shall be sentenced to death—particularly the "aggravating" circumstances that the crime was "especially heinous, atrocious, or cruel," and that the defendant "knowingly created a great risk of death to many persons," and particularly the "mitigating" circumstances that the defendant acted "under the influence of extreme mental or emotional disturbance," that the defendant's participation as an accomplice was "relatively minor," that the defendant's capacity "to conform his conduct to the requirements of law was substantially impaired," and that the defendant had no "significant history of prior criminal activity"—are not so vague and overbroad as to render the statutory scheme violative of the prohibition against the infliction of cruel and unusual punishment under the Eighth and Fourteenth Amendments for failing adequately to guide the trial court's sentencing discretion. [Per Stewart, J., Powell, J., Stevens, J., White, J., Burger, Ch. J., and Rehnquist, J.]

SYLLABUS BY REPORTER OF DECISIONS

Petitioner, whose first-degree murder conviction and death sentence were affirmed by the Florida Supreme Court, attacks the constitutionality of the Florida capital-sentencing procedure, that was enacted in response to Furman v Georgia, 408 US 238. Under the new statute, the trial judge (who is the sentencing authority) must weigh eight statutory aggravating factors against seven statutory mitigating factors to determine whether the death penalty should be imposed, thus requiring him to focus on the circumstances of the crime and the character of the individual defendant. The Florida system resembles the Georgia system upheld in Gregg v Georgia, ante, p 153, 49 L Ed 2d 859, except for the basic difference that in Florida the sentence is determined by the trial judge rather than by the jury, which has an advisory role with respect to the sentencing phase of the trial. *Held:* The judgment is affirmed.

315 So 2d 461, affirmed.

Mr. Justice Stewart, Mr. Justice Powell, and Mr. Justice Stevens, concluded that:

1. The imposition of the death penalty is not per se cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. Gregg, ante, at 168–187, 49 L Ed 2d 859.

2. On its face, the Florida procedures for imposition of the death penalty satisfy the constitutional deficiencies identified in Furman, supra. Florida trial judges are given specific and detailed guidance to assist them in deciding whether to impose a death penalty or

imprisonment for life, and their decisions are reviewed to ensure that they comport with other sentences imposed under similar circumstances. Petitioner's contentions that the new Florida procedures remain arbitrary and capricious lack merit.

(a) The argument that the Florida system is constitutionally invalid because it allows discretion to be exercised at each stage of the criminal proceeding fundamentally misinterprets Furman. Gregg, ante, at 199, 49 L Ed 2d 859.

(b) The aggravating circumstances authorizing the death penalty if the crime is "especially heinous, atrocious, or cruel," or if "[t]he defendant knowingly created a great risk of death to many persons," as construed by the Florida Supreme Court, provide adequate guidance to those involved in the sentencing process and as thus construed are not overly broad.

(c) Petitioner's argument that the imprecision of the mitigating circumstances makes them incapable of determination by a judge or jury and other contentions in a similar vein raise questions about line-drawing evaluations that do not differ from factors that juries and judges traditionally consider. The Florida statute gives clear and precise directions to judge and jury to enable them to weigh aggravating circumstances against mitigating ones.

(d) Contrary to petitioner's contention, the State Supreme Court's review role is neither ineffective nor arbitrary, as evidenced by the careful procedures it has followed in assessing the imposition of death sentences, over a third of which that court has vacated.

Mr. Justice White, joined by The Chief Justice and Mr. Justice Rehnquist, concluded that under the Florida law the sentencing judge is required to impose the death penalty on all first-degree murderers as to whom the statutory aggravating factors outweigh the mitigating factors, and as to those categories the penalty will not be freakishly or rarely, but will be regularly, imposed; and therefore the Florida scheme does not run afoul of the Court's holding in Furman. Petitioner's contentions about prosecutorial discretion and his argument that the death penalty may never be imposed under any circumstances consistent with the Eighth Amendment are without substance. See, Gregg v Georgia, ante, at 224–225, 49 L Ed 2d 859 (White, J., concurring in judgment) and Roberts v Louisiana, post, at 348–350; 350–356, 49 L Ed 2d 974 (White, J., dissenting).

Mr. Justice Blackmun concurred in the judgment. See Furman v Georgia, 408 US 238, 405–414 (Blackmun, J., dissenting), and id., at 375, 414, and 465, 33 L Ed 2d 346, 92 S Ct 2726.

Judgment of the Court, and opinion of Stewart, Powell, and Stevens, JJ., announced by Powell, J. White, J., filed an opinion concurring in the judgment, in which Burger, C. J., and Rehnquist, J., joined, post, p 260, 49 L Ed 2d, p 927. Blackmun, J., filed a statement concurring in the judgment, post, p 261, 49 L Ed 2d, p 928. Brennan, J., ante, p 227, 49 L Ed 2d, p 904, and Marshall, J., ante, p 231, 49 L Ed 2d, p 907, filed dissenting opinions.

APPEARANCES OF COUNSEL

Clinton A. Curtis argued the cause for petitioner.

Robert L. Shevin argued the cause for respondent.

Briefs of Counsel, p 1411, infra.

SEPARATE OPINIONS

Judgment of the Court, and opinion of Mr. Justice **Stewart**, Mr. Justice **Powell**, and Mr. Justice Stevens announced by Mr. Justice **Powell**.

[1a] The issue presented by this case is whether the imposition of the sentence of death for the crime of murder under the law of Florida violates the Eighth and Fourteenth Amendments.

I

The petitioner, Charles William Proffitt, was tried, found guilty, and sentenced to death for the first-degree

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murder of Joel Medgebow. The circumstances surrounding the murder were testified to by the decedent's wife, who was present at the time it was committed. On July 10, 1973, Mrs. Medgebow awakened around 5 a. m. in the bedroom of her apartment to find her husband sitting up in bed, moaning. He was holding what she took to be a ruler.[1] Just then a third person jumped up, hit her several times with his fist, knocked her to the floor, and ran out of the house. It soon appeared that Medgebow had been fatally stabbed with a butcher knife. Mrs. Medgebow was not able to identify the attacker, although she was able to give a description of him.[2]

The petitioner's wife testified that on the night before the murder the petitioner had gone to work dressed in a white shirt and gray pants, and that he had returned at about 5:15 a.m. dressed in the same clothing but without shoes. She said that after a short conversation the petitioner had packed his clothes and departed. A young woman boarder, who overheard parts of the petitioner's conversation with his wife, testified that the petitioner had told his wife that he had stabbed and killed a man with a butcher knife while he was burglarizing a place, and that he had beaten a woman. One of the petitioner's coworkers testified that they had been drinking together until 3:30 or 3:45 on the morning of the murder and that the petitioner had then driven him home. He said that the petitioner at this time was wearing gray pants and a white shirt.

The jury found the defendant guilty as charged. Subsequently,

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as provided by Florida law, a separate hearing was held to determine whether the petitioner should be sentenced to death or to life imprisonment. Under the state law that decision turned on whether certain statutory aggravating circumstances surrounding the crime outweighed any statutory mitigating circumstances found to exist.[3] At that hearing it was shown that the petitioner had one prior conviction, a 1967 charge of breaking and entering. The State also introduced the testimony of the physician (Dr. Crumbley) at the jail where the petitioner had been held pending trial. He testified that the petitioner had come to him as a physician, and told him that he was concerned that he would harm other people in the future, that he had had an uncontrollable desire to kill that had already resulted in his killing one man, that this desire was building up again, and that he wanted psychiatric help so he would not kill again. Dr. Crumbley also testified that, in his opinion, the petitioner was dangerous and would be a danger to his fellow inmates if imprisoned, but that his condition could be treated successfully.

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1. It appears that the "ruler" was actually the murder weapon which Medgebow had pulled from his own chest.

2. She described the attacker as wearing light pants and a pinstriped shirt with long sleeves rolled up to the elbow. She also stated that the attacker was a medium-sized white male.

3. See infra, at 248–250, 49 L Ed 2d 921–922.

The jury returned an advisory verdict recommending the sentence of death. The trial judge ordered an independent psychiatric evaluation of the petitioner, the results of which indicated that the petitioner was not, then or at the time of the murder, mentally impaired. The judge then sentenced the petitioner to death. In his written findings supporting the sentence, the judge found as aggravating circumstances that (1) the murder was premeditated and occurred in the course of a felony (burglary); (2) the petitioner has the propensity to commit murder; (3) the murder was especially heinous, atrocious, and cruel; and (4) the petitioner knowingly, through his intentional act, created a great risk of serious

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bodily harm and death to many persons. The judge also found specifically that none of the statutory mitigating circumstances existed. The Supreme Court of Florida affirmed. 315 So 2d 461 (1975). We granted certiorari, 423 US 1082, 47 L Ed 2d 94, 96 S Ct 1090 (1976), to consider whether the imposition of the death sentence in this case constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

II

[2a] The petitioner argues that the imposition of the death penalty under any circumstances is cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. We reject this argument for the reasons stated today in Gregg v Georgia, ante, at 168–187, 49 L Ed 2d 859, 96 S Ct 2909.

III

A

In response to Furman v Georgia, 408 US 238, 33 L Ed 2d 346, 92 S Ct 2726 (1972), the Florida Legislature adopted new statutes that authorize the imposition of the death penalty on those convicted of first-degree murder. Fla Stat Ann § 782.04(1) (Supp 1976–1977).[4] At the same time Florida

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adopted a new capital-sentencing procedure, patterned in large part on the Model Penal Code. See § 921.141 (Supp 1976–1977).[5] Under the new statute, if a defendant is found guilty of a capital offense, a separate evidentiary hearing is held before the trial judge and jury to determine his sentence. Evidence may be presented on any matter the

4. The murder statute under which petitioner was convicted reads as follows:

"(1)(a) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any arson, involuntary sexual battery, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person 18 years of age or older when such drug is proven to be the proximate cause of the death of the user, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in s 775.082.

"(b) In all cases under this section, the procedure set forth in s 921.141 shall be followed in order to determine sentence of death or life imprisonment." Fla Stat Ann § 782.04 (Supp 1976–1977).

Another Florida statute authorizes imposition of the death penalty upon conviction of sexual battery of a child under 12 years of age. § 794.011(2) (Supp 1976–1977). We do not in this opinion consider the constitutionality of the death penalty for any offense other than first-degree murder.

5. See Model Penal Code § 210.6 (Proposed Official Draft, 1962) (set out in Gregg v Georgia, ante, at 193–194, n 44, 49 L Ed 2d 859, 96 S Ct 2909).

judge deems relevant to sentencing and must include matters relating to certain legislatively specified aggravating and mitigating circumstances. Both the prosecution and the defense may present argument on whether the death penalty shall be imposed.

At the conclusion of the hearing the jury is directed to consider "[w]hether sufficient mitigating circumstances exist . . . which outweigh the aggravating circumstances found to exist; and . . . [b]ased on these considerations, whether the defendant should be sentenced to life [imprisonment] or death." §§ 921.141(2)(b) and (c) (Supp 1976–1977).[6] The jury's verdict is determined by

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majority vote. It is only advisory; the actual sentence is determined by the trial judge. The Florida Supreme Court has stated, however, that "[i]n order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." Tedder v State, 322 So 2d 908, 910 (1975). Accord, Thompson v State, 328 So 2d 1, 5

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(1976). Cf. Spinkellink v State, 313 So 2d 666, 671 (1975).[7]

The trial judge is also directed to weigh the statutory aggravating and mitigating circumstances when he determines the sentence to be imposed on a defendant. The statute requires that if the trial court imposes a sentence of death, "it shall set forth in writing its findings upon which the sentence of death is based as to the facts: (a) [t]hat sufficient [statutory] aggravating circum-

6. The aggravating circumstances are:
"(a) The capital felony was committed by a person under sentence of imprisonment.
"(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
"(c) The defendant knowingly created a great risk of death to many persons.
"(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.
"(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
"(f) The capital felony was committed for pecuniary gain.
"(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.
"(h) The capital felony was especially heinous, atrocious, or cruel."
§ 921.141(5) (Supp 1976–1977).
The mitigating circumstances are:
"(a) The defendant has no significant history of prior criminal activity.
"(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
"(c) The victim was a participant in the defendant's conduct or consented to the act.
"(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.
"(e) The defendant acted under extreme duress or under the substantial domination of another person.
"(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
"(g) The age of the defendant at the time of the crime." § 921.141(6) (Supp 1976–1977).

7. Tedder has not always been cited when the Florida court has considered a judge-imposed death sentence following a jury recommendation of life imprisonment. See, e.g., Thompson v State, 328 So 2d 1 (1976); Douglas v State, 328 So 2d 18 (1976); Dobbert v State, 328 So 2d 433 (1976). But in the latter case two judges relied on Tedder in separate opinions, one in support of reversing the death sentence and one in support of affirming it.

stances exist . . . and (b) [t]hat there are insufficient [statutory] mitigating circumstances . . . to outweigh the aggravating circumstances." § 921.141(3) (Supp 1976–1977).[8]

The statute provides for automatic review by the Supreme Court of Florida of all cases in which a death sentence has been imposed. § 921.141(4) (Supp 1976–1977). The law differs from that of Georgia in that it does

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not require the court to conduct any specific form of review. Since, however, the trial judge must justify the imposition of death sentence with written findings, meaningful appellate review of each such sentence is made possible, and the Supreme Court of Florida, like its Georgia counterpart, considers its function to be to "[guarantee] that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case. . . . If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great." State v Dixon, 283 So 2d 1, 10 (1973).

On their face these procedures, like those used in Georgia, appear to meet the constitutional deficiencies identified in Furman. The sentencing authority in Florida, the trial judge, is directed to weigh eight aggravating factors against seven mitigating factors to determine whether the death penalty shall be imposed. This determination requires the trial judge to focus on the circumstances of the crime and the character of the individual defendant. He must, inter alia, consider whether the defendant has a prior criminal record, whether the defendant acted under duress or under the influence of extreme mental or emotional disturbance, whether the defendant's role in the crime was that of a minor accomplice, and whether the defendant's youth argues in favor of a more lenient sentence than might otherwise be imposed. The trial judge must also determine whether the crime was committed in the course of one of several enumerated felonies, whether it was committed for pecuniary gain, whether it was committed to assist in an escape from custody or to prevent a lawful arrest, and whether the crime was especially heinous, atrocious, or cruel. To answer these questions, which are not unlike

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those considered by a Georgia sentencing jury, see Gregg v Georgia, at 197, 49 L Ed 2d 859, 96 S Ct 2909, the sentencing judge must focus on the individual circumstances of each homicide and each defendant.

The basic difference between the Florida system and the Georgia system is that in Florida the sentence is determined by the trial judge

8. In one case the Florida court upheld a death sentence where the trial judge had simply listed six aggravating factors as justification for the sentence he imposed. Sawyer v State, 313 So 2d 680 (1975). Since there were no mitigating factors, and since some of these aggravating factors arguably fell within the statutory categories, it is unclear whether the Florida court would uphold a death sentence that rested entirely on nonstatutory aggravating circumstances. It seems unlikely that it would do so, since the capital-sentencing statute explicitly provides that "[a]ggravating circumstances shall be *limited* to the following [eight specified factors.]." § 921.141(5) (Supp 1976–1977). (Emphasis added.) There is no such limiting language introducing the list of statutory mitigating factors. See § 921.141(6) (Supp 1976–1977). See also n 14, infra.

rather than by the jury.[9] This Court has pointed out that jury sentencing in a capital case can perform an important societal function, Witherspoon v Illinois, 391 US 510, 519 n 15, 20 L Ed 2d 776, 88 S Ct 1770, 46 Ohio Ops 2d 368 (1968), but it has never suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases.[10]

The Florida capital-sentencing procedures thus seek to
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assure that the death penalty will not be imposed in an arbitrary or capricious manner. Moreover, to the extent that any risk to the contrary exists, it is minimized by Florida's appellate review system, under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida "to determine independently whether the imposition of the ultimate penalty is warranted." Songer v State, 322 So 2d 481, 484 (1975). See also Sullivan v State, 303 So 2d 632, 637 (1974). The Supreme Court of Florida, like that of Georgia, has not hesitated to vacate a death sentence when it has determined that the sentence should not have been imposed. Indeed, it has vacated eight of the 21 death sentences that it has reviewed to date. See Taylor v State, 294 So 2d 648 (1974); Lamadline v State, 303 So 2d 17 (1974); Slater v State, 316 So 2d 539 (1975); Swan v State, 322 So 2d 485 (1975); Tedder v State, 322 So 2d 908 (1975); Halliwell v State, 323 So 2d 557 (1975); Thompson v State, 328 So 2d 1 (1976); Messer v State, 330 So 2d 137 (1976).

Under Florida's capital-sentencing procedures, in sum, trial judges are given specific and detailed guidance to assist them in deciding whether to impose a death penalty or imprisonment for life. Moreover, their decisions are reviewed to ensure that they are consistent with other sentences imposed in similar circumstances. Thus, in Florida, as in Georgia, it is no longer true that there is "'no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.'" Gregg v Georgia, at 188, 49 L Ed 2d 859, 96 S Ct 2909, quoting Furman v Georgia, 408 US, at 313, 33 L Ed 2d 346, 92 S Ct 2726 (White, J., concurring). On its face the Florida system thus satisfies the constitutional deficiencies identified in Furman.

9. Because the trial judge imposes sentence, the Florida court has ruled that he may order preparation of a presentence investigation report to assist him in determining the appropriate sentence. See Swan v State, 322 So 2d 485, 488–489 (1975); Songer v State, 322 So 2d 481, 484 (1975). These reports frequently contain much information relevant to sentencing. See Gregg v Georgia, ante, at 189, n 37, 49 L Ed 2d 859, 96 S Ct 2909.

10. See American Bar Association Project on Standards for Criminal Justice, Sentencing Alternatives and Procedures § 1.1, Commentary, pp 43–48 (Approved Draft 1968); President's Commission on Law Enforcement and Administration of Justice: The Challenge of Crime in a Free Society, Task Force Report: The Courts 26 (1967). See also Gregg v Georgia, ante, at 189–192, 49 L Ed 2d 859, 96 S Ct 2909. In the words of the Florida court, "a trial judge with experience in the facts of criminality possesses the requisite knowledge to balance the facts of the case against the standard criminal activity which can only be developed by involvement with the trials of numerous defendants." State v Dixon, 283 So 2d, 1, 8 (1973).

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B

As in Gregg, the petitioner contends, however, that, while perhaps facially acceptable, the new sentencing procedures in actual effect are merely cosmetic, and that arbitrariness and caprice still pervade the system under which Florida imposes the death penalty.

(1)

[3a] The petitioner first argues that arbitrariness is inherent in the Florida criminal justice system because it allows discretion to be exercised at each stage of a criminal proceeding—the prosecutor's decision whether to charge a capital offense in the first place, his decision whether to accept a plea to a lesser offense, the jury's consideration of lesser included offenses, and, after conviction and unsuccessful appeal, the Executive's decision whether to commute a death sentence. As we noted in Gregg, this argument is based on a fundamental misinterpretation of Furman, and we reject it for the reasons expressed in Gregg. See ante, at 199, 49 L Ed 2d 859.

(2)

[4a] The petitioner next argues that the new Florida sentencing procedures in reality do not eliminate the arbitrary infliction of death that was condemned in Furman. Basically he contends that the statutory aggravating and mitigating circumstances are vague and overbroad,[11] and that the statute gives no guidance as to how the mitigating and aggravating circumstances should be weighed in any specific case.

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(a)

Initially the petitioner asserts that the enumerated aggravating and mitigating circumstances are so vague and so broad that virtually "any capital defendant becomes a candidate for the death penalty . . . ." In particular, the petitioner attacks the eighth and third statutory aggravating circumstances, which authorize the death penalty to be imposed if the crime is "especially heinous, atrocious, or cruel," or if "[t]he defendant knowingly created a great risk of death to many persons." §§ 921.141(5)(h), (c) (Supp 1976–1977). These provisions must be considered as they have been construed by the Supreme Court of Florida.

That court has recognized that while it is arguable "that all killings are atrocious, . . . [s]till, we believe that the Legislature intended something 'especially' heinous, atrocious or cruel when it authorized the death penalty for first degree murder." Tedder v State, 322 So 2d, at 910. As a consequence, the court has indicated that the eighth statutory provision is directed only at "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." State v Dixon, 283 So 2d, at 9. See also Alford v State, 307 So 2d 433, 445 (1975); Halliwell v State, supra, at 561.[12]

11. As in Gregg, we examine the claims of vagueness and overbreadth in the statutory criteria only insofar as it is necessary to determine whether there is a substantial risk that the Florida capital-sentencing system, when viewed in its entirety, will result in the capricious or arbitrary imposition of the death penalty. See Gregg v Georgia, ante, at 201, n 51, 49 L Ed 2d 859, 96 S Ct 2909.

12. The Supreme Court of Florida has affirmed death sentences in several cases, including the instant case, where this eighth statutory aggravating factor was found, without specifically stating that the homicide was "pitiless" or "torturous to the victim." See,

We

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cannot say that the provision, as so construed, provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases. See Gregg v Georgia, ante, at 200–203, 49 L Ed 2d 859, 96 S Ct 2909.

In the only case, except for the instant case, in which the third aggravating factor—"[t]he defendant knowingly created a great risk of death to many persons"—was found, Alvord v State, 322 So 2d 533 (1975), the State Supreme Court held that the defendant created a great risk of death because he "obviously murdered two of the victims in order to avoid a surviving witness to the [first] murder." Id., at 540.[13] As construed by the Supreme Court of Florida these provisions are not impermissibly vague.[14]

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(b)

The petitioner next attacks the imprecision of the mitigating circumstances. He argues that whether a defendant acted "under the influence of extreme mental or emotional disturbance," whether a defendant's capacity "to conform his conduct to the requirements of law was substantially impaired," or whether a defendant's participation as an accomplice in a capital felony was "relatively minor," are questions beyond the capacity of a jury or judge to determine. See §§ 921.141(6)(b), (f), (d) (Supp 1976–1977).

He also argues that neither a jury

e.g., Hallman v State, 305 So 2d 180 (1974) (victim's throat slit with broken bottle); Spinkellink v State, 313 So 2d 666 (1975) ("career criminal" shot sleeping traveling companion); Gardner v State, 313 So 2d 675 (1975) (brutal beating and murder); Alvord v State, 322 So 2d 533 (1975) (three women killed by strangulation, one raped); Douglas v State, 328 So 2d 18 (1976) (depraved murder); Henry v State, 328 So 2d 430 (1976) (torture murder); Dobbert v State, 328 So 2d 433 (1976) (torture and killing of two children). But the circumstances of all of these cases could accurately be characterized as "pitiless" and "unnecessarily torturous," and it thus does not appear that the Florida Court has abandoned the definition that it announced in Dixon and applied in Alford, Tedder, and Halliwell.

13. While it might be argued that this case broadens that construction, since only one person other than the victim was attacked at all and then only by being hit with a fist, this would be to read more into the State Supreme Court's opinion than is actually there. That court considered 11 claims of error advanced by the petitioner, including the trial judge's finding that none of the statutory mitigating circumstances existed. It did not, however, consider whether the findings as to each of the statutory aggravating circumstances were supported by the evidence. If only one aggravating circumstance had been found, or if some mitigating circumstance had been found to exist but not to outweigh the aggravating circumstances, we would be justified in concluding that the State Supreme Court had necessarily decided this point even though it had not expressly done so. However, in the circumstances of this case, when four separate aggravating circumstances were found and where each mitigating circumstance was expressly found not to exist, no such holding on the part of the State Supreme Court can be implied.

14. The petitioner notes further that Florida's sentencing system fails to channel the discretion of the jury or judge because it allows for consideration of nonstatutory aggravating factors. In the only case to approve such a practice, Sawyer v State, 313 So 2d 680 (1975), the Florida court recast the trial court's six nonstatutory aggravating factors into four aggravating circumstances—two of them statutory. As noted earlier, it is unclear that the Florida court would ever approve a death sentence based entirely on nonstatutory aggravating circumstances. See n 8, supra.

nor a judge is capable of deciding how to weigh a defendant's age or determining whether he had a "significant history of prior criminal activity." See §§ 921.141(6)(g), (a) (Supp 1976–1977). In a similar vein the petitioner argues that it is not possible to make a rational determination whether there are "sufficient" aggravating circumstances that are not outweighed by the mitigating circumstances, since the state law assigns no specific weight to any of the various circumstances to be considered. See § 921.141 (Supp 1976-1977).

While these questions and decisions may be hard, they require no more line drawing than is commonly required of a factfinder in a lawsuit. For example, juries have traditionally evaluated the validity of defenses such as insanity or reduced capacity, both of which involve the same considerations as some of the above-mentioned

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mitigating circumstances. While the various factors to be considered by the sentencing authorities do not have numerical weights assigned to them, the requirements of Furman are satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.

The directions given to judge and jury by the Florida statute are sufficiently clear and precise to enable the various aggravating circumstances to be weighed against the mitigating ones. As a result, the trial court's sentencing discretion is guided and channeled by a system that focuses on the circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed.

(c)

Finally, the Florida statute has a provision designed to assure that the death penalty will not be imposed on a capriciously selected group of convicted defendants. The Supreme Court of Florida reviews each death sentence to ensure that similar results are reached in similar cases.[15]

Nonetheless the petitioner attacks the Florida appellate review process because the role of the Supreme Court of Florida in reviewing death sentences is necessarily subjective and unpredictable. While it may be true that that court has not chosen to formulate a rigid objective test as its standard of review for all cases, it does not follow that the appellate review process is ineffective or arbitrary. In fact, it is apparent that the Florida court has undertaken responsibly to perform its function of death sentence review with a maximum of

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rationality and consistency. For example, it has several times compared the circumstances of a case under review with those of previous cases in which it has assessed the imposition of death sentences. See, e. g., Alford v State, 307 So 2d, at 445; Alvord v State, 322 So 2d, at 540–541. By following this procedure the Florida court has in effect adopted the type of proportionality review mandated by the Georgia statute. Cf. Gregg v Georgia, at 204–206, 49 L Ed 2d 859, 96 S Ct 2909. And any suggestion that

15. State v Dixon, 283 So 2d, at 10.

the Florida court engages in only cursory or rubber-stamp review of death penalty cases is totally controverted by the fact that it has vacated over one-third of the death sentences that have come before it. See supra, at 253, 49 L Ed 2d 923.[16]

IV

[1b] Florida, like Georgia, has responded to Furman by enacting legislation that passes constitutional muster. That legislation provides that after a person is convicted of first-degree murder, there shall be an informed, focused, guided, and objective inquiry into the question whether he should be sentenced to death. If a death sentence is imposed, the sentencing authority articulates in writing the statutory reasons that led to its decision. Those reasons, and the evidence supporting them, are conscientiously reviewed by a court which, because of

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its statewide jurisdiction, can assure consistency, fairness, and rationality in the evenhanded operation of the state law. As in Georgia, this system serves to assure that sentences of death will not be "wantonly" or "freakishly" imposed. See Furman v Georgia, 408 US, at 310, 33 L Ed 2d 346, 92 S Ct 2726 (Stewart, J., concurring). Accordingly, the judgment before us is affirmed.

It is so ordered.

Mr. Justice White, with whom The Chief Justice and Mr. Justice Rehnquist join, concurring in the judgment.

[1c, 4b] There is no need to repeat the statement of the facts of this case and of the statutory procedure under which the death penalty was imposed, both of which are described in detail in the opinion of Mr. Justice Stewart, Mr. Justice Powell, and Mr. Justice Stevens. I agree with them, see Part III-B(2)(a) and (b), ante, at 255–258, 49 L Ed 2d 924–926, that although the statutory aggravating and mitigating circumstances are not susceptible of mechanical application, they are by no means so vague and overbroad as to leave the discretion of the sentencing authority unfettered. Under Florida law, the sentencing judge is *required* to impose the death penalty on all first-degree murderers as to whom the statutory aggravating factors outweigh the mitigating factors. There is good reason to anticipate, then, that as to certain categories of murderers, the penalty will not be imposed freakishly or rarely but will be imposed with regularity; and consequently it cannot be said that the death penalty in

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Florida as to those categories has ceased "to be a credible deterrent or measurably to contribute to any other end of punishment in the criminal justice system." Furman v Georgia, 408 US 238, 311, 33 L Ed 2d 346, 92 S Ct 2726 (1972) (White, J., concur-

16. The petitioner also argues that since the Florida Court does not review sentences of life imprisonment imposed in capital cases or sentences imposed in cases where a capital crime was charged but where the jury convicted of a lesser offense, it will have an unbalanced view of the way that the typical jury treats a murder case and it will affirm death sentences under circumstances where the vast majority of judges would have imposed a sentence of life imprisonment. As we noted in Gregg v Georgia, ante, at 204, n 56, 49 L Ed 2d 859, 96 S Ct 2909, this problem is not sufficient to raise a serious risk that the state capital-sentencing system will result in arbitrary and capricious imposition of the death penalty.

ring). Accordingly, the Florida statutory scheme for imposing the death penalty does not run afoul of this Court's holding in Furman v Georgia.

[2b, 3b] For the reasons set forth in my concurring opinion in Gregg v Georgia, ante at 224–225, 49 L Ed 2d 859, 96 S Ct 2909, and my dissenting opinion in Roberts v Louisiana, post, at 348–350, 49 L Ed 2d 974, 96 S Ct 3001, this conclusion is not undercut by the possibility that some murderers may escape the death penalty solely through exercise of prosecutorial discretion or executive clemency. For the reasons set forth in my dissenting opinion in Roberts v Louisiana, post, at 350–356, 49 L Ed 2d 974, 96 S Ct 3001, I also reject petitioner's argument that under the Eighth Amendment the death penalty may never be imposed under any circumstances.

I concur in the judgment of affirmance.

Mr. Justice **Blackmun**, concurring in the judgment.

[1d] I concur in the judgment. See Furman v Georgia, 408 US 238, 405–414, 35 L Ed 2d 346, 92 S Ct 2726 (1972) (Blackmun, J., dissenting), and id., at 375, 414, and 465, 35 L Ed 2d 346, 92 S Ct 2726.

Mr. Justice **Brennan** dissented in an opinion appearing at p 904, supra.

Mr. Justice **Marshall** dissented in an opinion at p 907, supra.

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TROY LEON GREGG, Petitioner,

v

STATE OF GEORGIA

428 US 153, 49 L Ed 2d 859, 96 S Ct 2909, reh den 429 US 875, 50 L Ed 2d 158, 97 S Ct 197, 97 S Ct 198

[No. 74–6257]

Argued March 31, 1976. Decided July 2, 1976.

SUMMARY

After the United States Supreme Court's decision in Furman v Georgia (1972) 408 US 238, 33 L Ed 2d 346, 92 S Ct 2726—which held that the imposition of the death sentence under Georgia (and Texas) statutes constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments because under such statutes the juries had untrammeled discretion to impose or withhold the death penalty—the Georgia legislature amended its statutory scheme. Under the new statutory provisions with regard to imposition of the death penalty for the crime of murder and other offenses, (1) guilt or innocence is determined, either by a jury or the trial judge, in the first stage of a bifurcated trial, with the judge being required to charge the jury as to any lesser included offenses when supported by the evidence, (2) after a verdict, finding, or plea of guilty, a presentence hearing is conducted, where the jury (or judge in a case tried without a jury) hears argument and additional evidence in mitigation or aggravation of punishment, (3) at least one of ten aggravating circumstances specified in the statutes must be found to exist beyond a reasonable doubt, and must be designated in writing, before the jury (or judge) may impose the death sentence on a defendant convicted of murder, the trial judge in jury cases being bound by the jury's recommended sentence, (4) on automatic appeal of a death sentence, the Supreme Court of Georgia must determine whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor, whether the evidence supported the finding of a statutory aggravating circumstance, and whether the death sentence was excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant, and (5) if a death sentence is affirmed, the decision of the Georgia Supreme Court must include reference to similar cases that the court considered. Upon a jury trial in a Georgia state court under the new statutory

Briefs of Counsel, p 1410, infra.

fication procedure[18] "does, of course, in the long run save time,

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energy, and resources and helps build a cooperative judicial federalism." Lehman Brothers v Schein, 416 US 386, 391, 40 L Ed 2d 215, 94 S Ct 1741 (1974). This Court has utilized certification procedures in the past, as have courts of appeals. Ibid. and cases cited therein at 390 nn 5 and 6, 40 L Ed 2d 215, 94 S Ct 1741.

The importance of speed in resolution of the instant litigation is manifest. Each day the statute is in effect, irretrievable events, with substantial personal consequences, occur. Although we do not mean to intimate that abstention would be improper in this case were certification not possible, the availability of certification greatly simplifies the analysis. Further, in light of our disapproval of a "parental veto" today in Planned Parenthood, we must assume that the lower Massachusetts courts, if called upon to enforce the statute pending interpretation by the Supreme Judicial Court, will not impose this most serious barrier. Insofar as the issue thus ceases to become one of total denial of access and becomes one rather of relative burden, the cost of abstention is reduced and the desirability of that equitable remedy accordingly increased.

V

[1c, 9b] We therefore hold that the District Court should have certified to the Supreme Judicial Court of Massachusetts appropriate questions concerning the meaning of § 12P and the procedure it imposes. In regard to the claim of impermissible discrimination due to the 1975 statute, a claim not raised in the District Court but subject to inquiry through an amended complaint, or perhaps by other means, we believe that it would not be inappropriate for the District Court, when any procedural requirement

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has been complied with, also to certify a question concerning the meaning of the new statute, and the extent to which its procedures differ from the procedures that must be followed under § 12P.

The judgment of the District Court is vacated, and the cases are remanded to that court for proceedings consistent with this opinion.

It is so ordered.

18. There is no indication that the Massachusetts certification procedure is inadequate. Indeed, the dissent in the District Court cited a prior case in which the procedure was employed with no apparent difficulty. 393 F Supp, at 864 n 15, citing Hendrickson v Sears, 495 F2d 513 (CA1 1974).

scheme, the defendant was convicted of two counts of armed robbery and two counts of murder, and the jury, after the penalty hearing in the bifurcated procedure, returned a sentence of death on each count, finding as statutory aggravating conditions that the murder offenses were committed while the defendant was engaged in the commission of the two other capital felonies of armed robbery of the murder victims, and that the defendant committed the murders for the purpose of receiving money and an automobile of one of the victims. After reviewing the trial record and comparing the evidence and sentence in similar cases, the Georgia Supreme Court affirmed the convictions and the imposition of the death sentences for murder, although the Georgia Supreme Court vacated the death sentences imposed for armed robbery on the grounds that the death penalty had rarely been imposed for that offense and the jury had improperly considered the murders as aggravating circumstances for the robberies after having considered the robberies as aggravating circumstances for the murders (233 Ga 117, 210 SE2d 659).

On certiorari, the United States Supreme Court affirmed. Although unable to agree on an opinion, seven members of the court agreed that the imposition of the death penalty for the crime of murder under the Georgia statutes did not violate the prohibition against the infliction of cruel and unusual punishment under the Eighth and Fourteenth Amendments.

STEWART, POWELL, and STEVENS, JJ., announced the judgment of the court and filed an opinion, delivered by STEWART, J., expressing the view that (1) the death penalty did not, under all circumstances, constitute cruel and unusual punishment, since (a) the Eighth Amendment was not to be regarded as a static concept, but was to draw its meaning from the evolving standards of decency that marked the progress of a maturing society, (b) although public perceptions of standards of decency were not conclusive—the Eighth Amendment requiring that punishment must accord with the dignity of man and not be excessive either as to its form or severity—nevertheless a legislature was not required to select the least severe penalty possible, so long as the penalty selected was not cruelly inhumane or disproportionate to the crime involved, and a heavy burden rested on those attacking the judgment of the representatives of the people, (c) at the time the Constitution and its amendments were adopted, capital punishment was accepted as a common sanction, and the Supreme Court, for nearly 200 years, had repeatedly recognized that capital punishment was not invalid per se, (d) after the decision in the Furman case, at least 35 states enacted new statutes providing for the death penalty for certain crimes, thus indicating society's endorsement of the death penalty, (e) retribution and deterrence, as social purposes served by the death penalty, were matters that could properly be considered by legislatures in terms of their own local conditions, and (f) capital punishment for murder could not be said to be invariably disproportionate to the crime, but instead was an extreme sanction, suitable to the most extreme of crimes; (2) the concerns expressed in the Furman decision that the death penalty not be imposed in an arbitrary or capricious manner could be met by a carefully drafted statute ensuring that the sentencing authority was given adequate guidance and information for determining the appropriate sentence, a bifurcated sentenc-

ing proceeding being preferable as a general proposition; (3) the Georgia capital—sentencing procedures were constitutional, since they required the jury to consider the circumstances of the crime and the character of the defendant before recommending sentence, and required the Georgia Supreme Court to determine whether a death sentence was the result of passion or prejudice, was supported by evidence establishing a statutory aggravating circumstance, and was not disproportionate in comparison with sentences imposed on similarly situated defendants in other cases; (4) the Georgia statutes were not rendered unconstitutional merely because of the opportunities for discretionary action inherent in the processing of any murder case under Georgia law with regard to the prosecutor's unfettered authority to select those persons who would be prosecuted for a capital offense and to plea bargain with them, the jury's power to convict a defendant of a lesser included offense, or the authority of the Governor and the Georgia Board of Pardons and Paroles to commute a death sentence; (5) the Georgia statutes, particularly the provisions specifying aggravating circumstances, were not so vague or overbroad as to leave juries free to act arbitrarily and capriciously in imposing the death penalty, there being no reason to assume that the statutes would be given open-ended construction by the Georgia Supreme Court, which had already held that certain provisions were impermissibly vague; and (6) the state court properly allowed a wide scope of evidence and argument at presentence hearings, it being desirable for the jury to have as much information before it as possible when it made the sentencing decision.

WHITE, J., joined by BURGER, Ch. J., and REHNQUIST, J., concurred in the judgment, expressing the view that (1) the death penalty imposed for murder under the new Georgia statutory scheme could be constitutionally carried out, since (a) the statutes not only guided the jury in its exercise of discretion in determining whether it would impose the death penalty, but also gave the Georgia Supreme Court the power and duty to decide whether in fact the death penalty was being administered for any given class of crime in a discriminatory, standardless, or rare fashion, and (b) the defendant had failed to establish that the Georgia Supreme Court had not performed its task in the instant case or that it was incapable of performing its task adequately in all cases; (2) the statutory scheme was not unconstitutional on the ground that the prosecutor's decisions in negotiating pleas or in declining to charge capital murder were standardless, since it could not be assumed that prosecutors would be motivated by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicted; and (3) the defendant's contention that the death penalty, however imposed and for whatever crime, constituted cruel and unusual punishment was without merit.

BURGER, Ch. J., and REHNQUIST, J., filed a statement joining the opinion of WHITE, J., agreeing with its analysis that Georgia's system of capital punishment comported with the holding in the Furman case.

BLACKMUN, J., concurred in the judgment, referring to his dissenting opinion in the Furman case.

BRENNAN, J., dissenting, expressed the view that (1) the cruel and unusual punishment clause must draw its meaning from evolving standards of decency that marked the progress of a maturing society, (2) the consideration of "evolving standards of decency" required focusing upon the essence of the death penalty itself, and not primarily or solely upon the procedure under which the determination to inflict the penalty upon a particular person was made, (3) the death penalty served no penal purpose more effectively than a less severe punishment would, and (4) our civilization and the law had progressed to the point where the court should hold that the punishment of death, for whatever crime and under all circumstances, was cruel and unusual, in violation of the Eighth and Fourteenth Amendments.

MARSHALL, J., dissented, expressing the view that the death penalty was cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments because it was excessive, being unnecessary to promote the goal of deterrence of crime or to further any legitimate notion of retribution.

HEADNOTES

Classified to U. S. Supreme Court Digest, Lawyers' Edition

Criminal Law §§ 82, 83 — cruel and unusual punishment — death penalty

1a–1d. The prohibition against the infliction of cruel and unusual punishment under the Eighth and Fourteenth

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21 AM JUR 2d, Criminal Law § 613

USCS, Constitution, 8th and 14th Amendments

US L ED DIGEST, Criminal Law §§ 82, 83

ALR DIGESTS, Criminal Law § 181

L ED INDEX TO ANNOS, Criminal Law; Cruel and Unusual Punishment

ALR QUICK INDEX, Capital Cases; Cruel and Unusual Punishment

FEDERAL QUICK INDEX, Capital Punishment; Cruel and Unusual Punishment

ANNOTATION REFERENCES

The federal constitutional guaranty against cruel and unusual punishment. 33 L Ed 2d 932.

Effect of abolition of capital punishment on procedural rules governing crimes punishable by death—post-Furman decisions. 71 ALR3d 453.

Binding effect upon state courts of opinion of United States Supreme Court supported by less than a majority of all its members. 65 ALR3d 504.

Manner of inflicting death sentence as cruel or unusual punishment. 30 ALR 1452.

Amendments is not violated by the imposition of the death penalty for the crime of murder under a state's statutory scheme whereby (1) guilt or innocence is determined, either by a jury or the trial judge, in the first stage of a bifurcated trial, with the judge being required to charge the jury as to any lesser included offenses when supported by any view of the evidence, (2) after a verdict, finding, or plea of guilty, a presentence hearing is conducted, where the jury (or judge in a case tried without a jury) hears argument and additional evidence in mitigation or aggravation of punishment, (3) at least one of 10 aggravating circumstances specified in the statutes must be found to exist beyond a reasonable doubt, and must be designated in writing, before the jury (or judge) may elect to impose the death sentence on a defendant convicted of murder, the trial judge in jury cases being bound by the jury's recommended sentence, (4) on automatic appeal of a death sentence, the state's highest court must determine whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor, whether the evidence supported the finding of a statutory aggravating circumstance, and whether the death sentence was excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant, and (5) if a death sentence is affirmed, the decision of the state's highest court must include reference to similar cases that the court considered. [Per Stewart, J., Powell, J., Stevens, J., White, J., Burger, Ch. J., Rehnquist, J., and Blackmun, J.]

Criminal Law §§ 82, 83 — cruel and unusual punishment — death penalty

2a, 2b. The death penalty does not, under all circumstances, constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. [Per Stewart, J., Powell, J., Stevens, J., White, J., Burger, Ch. J., and Rehnquist, J.]

Criminal Law §§ 82, 83 — cruel and unusual punishment — death penalty

3a, 3b. A state's statutory provisions governing the imposition of the death penalty for the crime of murder are not rendered unconstitutional as violative of the prohibition against cruel and unusual punishment under the Eighth and Fourteenth Amendments merely because the state prosecutor has discretion in selecting cases to be prosecuted as capital offenses and in plea bargaining. [Per Stewart, J., Powell, J., Stevens, J., White, J., Burger, Ch. J., and Rehnquist, J.]

SYLLABUS BY REPORTER OF DECISIONS

Petitioner was charged with committing armed robbery and murder on the basis of evidence that he had killed and robbed two men. At the trial stage of Georgia's bifurcated procedure, the jury found petitioner guilty of two counts of armed robbery and two counts of murder. At the penalty stage, the judge instructed the jury that it could recommend either a death sentence or a life prison sentence on each count; that the jury was free to consider mitigating or aggravating circumstances, if any, as presented by the parties; and that the jury would not be authorized to consider imposing the death sentence unless it first found beyond a reasonable doubt (1) that the murder was committed while the offender was engaged in the commission of other capital felonies, viz., the armed robberies of the victims; (2) that he committed the murder for the purpose of receiving the victims' money and automobile; or (3) that the murder was "outrageously and wantonly vile, horrible and inhuman" in that it "involved the depravity of [the] mind of the defendant." The jury found the first and second of these aggravating circumstances and returned a sentence of death. The Georgia Supreme Court affirmed the convictions. After reviewing the trial transcript and record and comparing the evidence and sentence in similar cases the court upheld the death sentences for the murders, concluding that they had not resulted from prejudice or

any other arbitrary factor and were not excessive or disproportionate to the penalty applied in similar cases, but vacated the armed robbery sentences on the ground, inter alia, that the death penalty had rarely been imposed in Georgia for that offense. Petitioner challenges imposition of the death sentence under the Georgia statute as "cruel and unusual" punishment under the Eighth and Fourteenth Amendments. That statute, as amended following Furman v Georgia, 408 US 238, 33 L Ed 2d 346, 92 S Ct 2726 (where this Court held to be violative of these Amendments death sentences imposed under statutes that left juries with untrammeled discretion to impose or withhold the death penalty), retains the death penalty for murder and five other crimes. Guilt or innocence is determined in the first stage of a bifurcated trial, and if the trial is by jury, the trial judge must charge lesser included offenses when supported by any view of the evidence. Upon a guilty verdict or plea a presentence hearing is held where the judge or jury hears additional extenuating or mitigating evidence and evidence in aggravation of punishment if made known to the defendant before trial. At least one of 10 specified aggravating circumstances must be found to exist beyond a reasonable doubt and designated in writing before a death sentence can be imposed. In jury cases, the trial judge is bound by the recommended sentence. In its review of a death sentence (which is automatic), the State Supreme Court must consider whether the sentence was influenced by passion, prejudice, or any other arbitrary factor; whether the evidence supports the finding of a statutory aggravating circumstance; and whether the death sentence "is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." If the court affirms the death sentence it must include in its decision reference to similar cases that it has considered. *Held:* The judgment is affirmed.

233 Ga 117, 210 SE2d 659, affirmed.

Mr. Justice Stewart, Mr. Justice Powell, and Mr. Justice Stevens concluded that:

(1) The punishment of death for the crime of murder does not, under all circumstances, violate the Eighth and Fourteenth Amendments.

(a) The Eighth Amendment, which has been interpreted in a flexible and dynamic manner to accord with evolving standards of decency, forbids the use of punishment that is "excessive" either because it involves the unnecessary and wanton infliction of pain or because it is grossly disproportionate to the severity of the crime.

(b) Though a legislature may not impose excessive punishment, it is not required to select the least severe penalty possible, and a heavy burden rests upon those attacking its judgment.

(c) The existence of capital punishment was accepted by the Framers of the Constitution, and for nearly two centuries this Court has recognized that capital punishment for the crime of murder is not invalid per se.

(d) Legislative measures adopted by the people's chosen representatives weigh heavily in ascertaining contemporary standards of decency; and the argument that such standards require that the Eighth Amendment be construed as prohibiting the death penalty has been undercut by the fact that in the four years since Furman, supra, was decided, Congress and at least 35 States have enacted new statutes providing for the death penalty.

(e) Retribution and the possibility of deterrence of capital crimes by prospective offenders are not impermissible considerations for a legislature to weigh in determining whether the death penalty should be imposed, and it cannot be said that Georgia's legislative judgment that such a penalty is necessary in some cases is clearly wrong.

(f) Capital punishment for the crime of murder cannot be viewed as invariably disproportionate to the severity of that crime.

2. The concerns expressed in Furman that the death penalty not be imposed arbitrarily or capriciously can be met by a carefully drafted statute that ensures

that the sentencing authority is given adequate information and guidance, concerns best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of that information.

3. The Georgia statutory system under which petitioner was sentenced to death is constitutional. The new procedures on their face satisfy the concerns of Furman, since before the death penalty can be imposed there must be specific jury findings as to the circumstances of the crime or the character of the defendant, and the State Supreme Court thereafter reviews the comparability of each death sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate. Petitioner's contentions that the changes in Georgia's sentencing procedures have not removed the elements of arbitrariness and capriciousness condemned by Furman are without merit.

(a) The opportunities under the Georgia scheme for affording an individual defendant mercy—whether through the prosecutor's unfettered authority to select those whom he wishes to prosecute for capital offenses and to plea bargain with them; the jury's option to convict a defendant of a lesser included offense; or the fact that the Governor or pardoning authority may commute a death sentence—do not render the Georgia statute unconstitutional.

(b) Petitioner's arguments that certain statutory aggravating circumstances are too broad or vague lack merit, since they need not be given overly broad constructions or have been already narrowed by judicial construction. One such provision was held impermissibly vague by the Georgia Supreme Court. Petitioner's argument that the sentencing procedure allows for arbitrary grants of mercy reflects a misinterpretation of Furman and ignores the reviewing authority of the Georgia Supreme Court to determine whether each death sentence is proportional to other sentences imposed for similar crimes. Petitioner also urges that the scope of the evidence and argument that can be considered at the presentence hearing is too wide, but it is desirable for a jury to have as much information as possible when it makes the sentencing decision.

(c) The Georgia sentencing scheme also provides for automatic sentence review by the Georgia Supreme Court to safeguard against prejudicial or arbitrary factors. In this very case the court vacated petitioner's death sentence for armed robbery as an excessive penalty.

Mr. Justice White, joined by The Chief Justice and Mr. Justice Rehnquist, concluded that:

1. Georgia's new statutory scheme, enacted to overcome the constitutional deficiencies found in Furman v Georgia, 408 US 238, 33 L Ed 2d 346, 92 S Ct 2726, to exist under the old system, not only guides the jury in its exercise of discretion as to whether or not it will impose the death penalty for first-degree murder, but also gives the Georgia Supreme Court the power and imposes the obligation to decide whether in fact the death penalty was being administered for any given class of crime in a discriminatory, standardless, or rare fashion. If that court properly performs the task assigned to it under the Georgia statutes, death sentences imposed for discriminatory reasons or wantonly or freakishly for any given category of crime will be set aside. Petitioner has wholly failed to establish that the Georgia Supreme Court failed properly to perform its task in the instant case or that it is incapable of performing its task adequately in all cases. Thus the death penalty may be carried out under the Georgia legislative scheme consistently with the Furman decision.

2. Petitioner's argument that the prosecutor's decisions in plea bargaining or in declining to charge capital murder are standardless and will result in the wanton or freakish imposition of the death penalty condemned in Furman, is without merit, for the assumption cannot be made that prosecutors will be motivated in their charging decisions by factors other than the strength of their case and

the likelihood that a jury would impose the death penalty if it convicts; the standards by which prosecutors decide whether to charge a capital felony will be the same as those by which the jury will decide the questions of guilt and sentence.

3. Petitioner's argument that the death penalty, however imposed and for whatever crime, is cruel and unusual punishment is untenable for the reasons stated in Mr. Justice White's dissent in Roberts v Louisiana, post, p 337, 49 L Ed 2d 974.

Mr. Justice Blackmun concurred in the judgment. See Furman v Georgia, 408 US, at 405–414 (Blackmun, J., dissenting), and id., at 375 (Burger, C. J., dissenting); id., at 414 (Powell, J., dissenting); id., at 465, 33 L Ed 2d 346, 92 S Ct 2726 (Rehnquist, J., dissenting).

Judgment of the Court, and opinion of Stewart, Powell, and Stevens, JJ., announced by Stewart, J. Burger, C. J., and Rehnquist, J., filed a statement concurring in the judgment, post, p 226, 49 L Ed 2d, p 904. White, J., filed an opinion concurring in the judgment, in which Burger, C. J., and Rehnquist, J., joined, post, p 207, 49 L Ed 2d, p 893. Blackmun, J., filed a statement concurring in the judgment, post, p 227, 49 L Ed 2d, p 904. Brennan, J., post, p 227, 49 L Ed 2d, p 904, and Marshall, J., post, p 231, 49 L Ed 2d, 907, filed dissenting opinions.

APPEARANCES OF COUNSEL

G. Hughel Harrison argued the cause for petitioner.

G. Thomas Davis argued the cause for respondent.

Briefs of Counsel, p 1410, infra

SEPARATE OPINIONS

[428 US 158]

Judgment of the Court, and opinion of Mr. Justice **Stewart**, Mr. Justice **Powell**, and Mr. Justice **Stevens**, announced by Mr. Justice **Stewart**.

[1a] The issue in this case is whether the imposition of the sentence of death for the crime of murder under the law of Georgia violates the Eighth and Fourteenth Amendments.

I

The petitioner, Troy Gregg, was charged with committing armed robbery and murder. In accordance with Georgia procedure in capital cases, the trial was in two stages, a guilt stage and a sentencing stage. The evidence at the guilt trial established that on November 21, 1973, the petitioner and a traveling companion, Floyd Allen, while hitchhiking north in Florida were picked up by Fred Simmons and Bob Moore. Their car broke down, but they continued north after Simmons purchased another vehicle with some of the cash he was carrying. While still in Florida, they picked up another hitchhiker, Dennis Weaver, who rode with them to Atlanta, where he was let out about 11 p.m.

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A short time later the four men interrupted their journey for a rest stop along the highway. The next morning the bodies of Simmons and Moore were discovered in a ditch nearby.

On November 23, after reading about the shootings in an Atlanta newspaper, Weaver communicated with the Gwinnett County police and related information concerning the journey with the victims, including a description of the car. The next afternoon, the petitioner and Allen, while in Simmons' car, were arrested in Asheville, N. C. In the search incident to the arrest a .25-caliber pistol, later shown to be that used to kill Simmons and Moore, was found in the petitioner's pocket. After receiving the warnings required by Miranda v Arizona, 384 US 436, 16 L Ed 2d 694, 86 S Ct 1602, 10 Ohio

Misc 9, 36 Ohio Ops 2d 237, 10 ALR3d 974 (1966), and signing a written waiver of his rights, the petitioner signed a statement in which he admitted shooting, then robbing Simmons and Moore. He justified the slayings on grounds of self-defense. The next day, while being transferred to Lawrenceville, Ga., the petitioner and Allen were taken to the scene of the shootings. Upon arriving there, Allen recounted the events leading to the slayings. His version of these events was as follows: After Simmons and Moore left the car, the petitioner stated that he intended to rob them. The petitioner then took his pistol in hand and positioned himself on the car to improve his aim. As Simmons and Moore came up an embankment toward the car, the petitioner fired three shots and the two men fell near a ditch. The petitioner, at close range, then fired a shot into the head of each. He robbed them of valuables and drove away with Allen.

A medical examiner testified that Simmons died from a bullet wound in the eye and that Moore died from bullet wounds in the cheek and in the back of the head. He further testified that both men had several bruises

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and abrasions about the face and head which probable were sustained either from the fall into the ditch or from being dragged or pushed along the embankment. Although Allen did not testify, a police detective recounted the substance of Allen's statements about the slayings and indicated that directly after Allen had made these statements the petitioner had admitted that Allen's account was accurate. The petitioner testified in his own defense. He confirmed that Allen had made the statements described by the detective, but denied their truth or ever having admitted to their accuracy. He indicated that he had shot Simmons and Moore because of fear and in self-defense, testifying they had attacked Allen and him, one wielding a pipe and the other a knife.[1]

The trial judge submitted the murder charges to the jury on both felony-murder and nonfelony-murder theories. He also instructed on the issue of self-defense but declined to instruct on manslaughter. He submitted the robbery case to the jury on both an armed-robbery theory and on the lesser included offense of robbery by intimidation. The jury found the petitioner guilty of two counts of armed robbery and two counts of murder.

At the penalty stage, which took place before the same jury, neither the prosecutor nor the petitioner's lawyer offered any additional evidence. Both counsel, however, made lengthy arguments dealing generally with the propriety of capital punishment under the circumstances and with the weight of the evidence of guilt. The trial judge instructed the jury that it could recommend either a death sentence or a life prison sentence on each count.

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The judge further charged the jury that in determining what sentence was appropriate the jury was free to consider the facts and circumstances, if any, presented by the parties in mitigation or aggravation.

Finally, the judge instructed the jury that it "would not be authorized

1. On cross-examination the State introduced a letter written by the petitioner to Allen entitled, "[a] statement for you," with the instructions that Allen memorize and then burn it. The statement was consistent with the petitioner's testimony at trial.

to consider [imposing] the penalty of death" unless it first found beyond a reasonable doubt one of these aggravating circumstances:

> "One—That the offense of murder was committed while the offender was engaged in the commission of two other capital felonies, to-wit the armed robbery of [Simmons and Moore].
>
> "Two—That the offender committed the offense of murder for the purpose of receiving money and the automobile described in the indictment.
>
> "Three—The offense of murder was outrageously and wantonly vile, horrible and inhuman, in that they [sic] involved the depravity of [the] mind of the defendant." Tr 476–477.

Finding the first and second of these circumstances, the jury returned verdicts of death on each count.

The Supreme Court of Georgia affirmed the convictions and the imposition of the death sentences for murder. 233 Ga 117, 210 SE2d 659 (1974). After reviewing the trial transcript and the record, including the evidence, and comparing the evidence and sentence in similar cases in accordance with the requirements of Georgia law, the court concluded that, considering the nature of the crime and the defendant, the sentences of death had not resulted from prejudice or any other arbitrary factor and were not excessive or disproportionate to the penalty applied in similar cases.[2] The death

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sentences imposed for armed robbery, however, were vacated on the grounds that the death penalty had rarely been imposed in Georgia for that offense and that the jury improperly considered the murders as aggravating circumstances for the robberies after having considered the armed robberies as aggravating circumstances for the murders. Id., at 127, 210 SE2d, at 667.

We granted the petitioner's application for a writ of certiorari limited to his challenge to the imposition of the death sentences in this case as "cruel and unusual" punishment in violation of the Eighth and the Fourteenth Amendments. 423 US 1082, 47 L Ed 2d 93, 96 S Ct 1090 (1976).

II

Before considering the issues presented it is necessary to understand the Georgia statutory scheme for the imposition of the death penalty.[3] The Georgia statute, as amended after our decision in Furman v Georgia, 408 US 238, 33 L Ed 2d 346, 92 S Ct 2726 (1972), retains the death penalty for six categories of crime: murder,[4]

2. The court further held, in part, that the trial court did not err in refusing to instruct the jury with respect to voluntary manslaughter since there was no evidence to support that verdict.

3. Subsequent to the trial in this case limited portions of the Georgia statute were amended. None of these amendments changed significantly the substance of the statutory scheme. All references to the statute in this opinion are to the current version.

4. Georgia Code Ann § 26-1101 (1972) provides:

> "(a) A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.
>
> "(b) A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice.