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enumerated, the factual substantiation of the verdict, and the validity of the sentence.

Added by Laws 1977, Ex.Sess., ch. 206, § 7, eff. June 10, 1977.

Library References

Criminal Law ⇨1026, 1068½ et seq. C.J.S. Criminal Law §§ 1668, 1701.

10.94.900 Severability—1977 ex.s. c 206

If any provision of this 1977 amendatory act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected.

Enacted by Laws 1977, Ex.Sess., ch. 206, § 10, eff. June 10, 1977.

Historical Note

Reviser's Note: This applies to the amendments to RCW 9A.32.040, 9A.32.045, 9A.32.046, and 9A.32.047 and to RCW 9.01.200, 10.94.010, 10.94.020, 10.94.030, and 10.94.900 as enacted by 1977 ex.s. c 206.

Wyoming Code

CHAPTER 2

Offenses Against the Person

Article 1. Homicide

Article 2. Kidnapping and Related Offenses

Article 3. Sexual Assault

Article 4. Robbery and Blackmail

Article 5. Assault and Battery

ARTICLE 1. HOMICIDE

Cross references. — As to aggravated assault and battery on pregnant woman, see § 6-2-502. As to civil action for wrongful death when the death shall have been caused under such circumstances as amounts in law to murder in the first or second degree or manslaughter, see § 1-38-101. For provision that felonious taking of life precludes inheritance or insurance benefits, see § 2-14-101. As to penalty if death results from willful destruction, etc., of railroad tracks or fixtures, see § 37-12-103.

Am. Jur. 2d, ALR and C.J.S. references. — Corporation's criminal liability for homicide, 45 ALR4th 1021.

§ 6-2-101. Murder in the first degree; penalty.

(a) Whoever purposely and with premeditated malice, or in the perpetration of, or attempt to perpetrate, any sexual assault, arson, robbery, burglary, escape, resisting arrest or kidnapping, or by administering poison or causing the same to be done, kills any human being is guilty of murder in the first degree.

(b) A person convicted of murder in the first degree shall be punished by death or life imprisonment according to law. (Laws 1982, ch. 75, § 3; 1983, ch. 171, § 1.)

I. General Consideration.
II. Purpose, Premeditation and Malice.
III. Felony Murder.

I. GENERAL CONSIDERATION.

Death penalty constitutional. — The death penalty, if administered in a humane fashion, is constitutional. Hopkinson v. State, 664 P.2d 43 (Wyo.), cert. denied, 464 U.S. 908, 104 S. Ct. 262, 78 L. Ed. 2d 246 (1983).

Constitutionality of former statute imposing mandatory death penalty for murder when its commission involved certain aggravating circumstances. — See Kennedy v. State, 559 P.2d 1014 (Wyo. 1977).

Second-degree murder may be lesser included offense. — The elements of the lesser offense of murder in the second degree are identical to part of the elements of murder in the first degree; both contain the elements of the killing of a human being with malice and purpose. State v. Selig, 635 P.2d 786 (Wyo. 1981).

On information charging all elements of murder in the first degree as well as elements of second degree and on a plea of guilty defendant could be sentenced for second degree murder. Hollibaugh v. Hehn, 13 Wyo. 269, 79 P. 1044 (1905).

Where indictment charges assault with intent to commit murder in the first degree, defendant may be convicted of assault with intent to commit murder in the second degree, as the latter is an included offense. Brantly v. State, 9 Wyo. 102, 61 P. 139 (1900).

But felony murder is not divisible into lesser degrees of homicide since the necessary elements of first degree murder — premeditation, deliberation and malice aforethought — are imputed in felony murder by a conclusive presumption. Richmond v. State, 554 P.2d 1217 (Wyo. 1976).

Manslaughter is not an offense necessarily included in robbery and therefore is not a lesser included offense of the crime of felony murder. Richmond v. State, 554 P.2d 1217 (Wyo. 1976).

Aggravated robbery and felony murder are two distinct statutory offenses, and imposition of consecutive sentences for the violation of these statutes, whether as a principal or as an accessory, does not violate the double jeopardy provisions of either the constitution of the State of Wyoming or the constitution of the United States. Burt v. State, 744 P.2d 1117 (Wyo. 1987).

Aiding and abetting voluntary manslaughter is lesser-included offense of aiding and abetting first degree murder. Jahnke v. State, 692 P.2d 911 (Wyo. 1984).

Motive as probative factor. — While motive, defined as that which leads or tempts the mind to indulge in a criminal act, is not an element of a crime and proof of it is not essential to sustain a conviction, it does have great probative force in determining guilt, especially in cases which depend on circumstantial evidence. Jones v. State, 568 P.2d 837 (Wyo. 1977).

The absence of motive is an important fact in determining the degree of guilt, particularly when the claim is of an accidental shooting. Buckles v. State, 500 P.2d 514 (Wyo.), cert. denied, 409 U.S. 1026, 93 S. Ct. 475, 34 L. Ed. 2d 320 (1972).

Information held sufficient. — An information charging murder purposely and with premeditated malice, under this section, will sustain conviction for murder upon proof showing murder was committed during attempted robbery, notwithstanding art. 1, § 10, Wyo. Const., giving accused right to demand nature and cause of accusation. Harris v. State, 34 Wyo. 175, 242 P. 411 (1926).

Instructions as to burden of proving lack of self-defense. — When self-defense is properly raised, the jury should be specifically instructed that the state has the burden to prove absence of self-defense beyond a reasonable doubt. Small v. State, 689 P.2d 420 (Wyo. 1984), cert. denied, 469 U.S. 1224, 105 S. Ct. 1215, 84 L. Ed. 2d 356 (1985).

Effect of guilty plea. — The effect of a plea of guilty was tantamount to a confession and it waived the state's need to convict. Pixley v. State, 406 P.2d 662 (Wyo. 1965).

On prosecution for murder in perpetration of rape, plea of guilty dispenses with proof of corpus delicti and venue. State v. Brown, 60 Wyo. 379, 151 P.2d 950 (1944).

Plea of self-defense. — The obvious nature or quality of the plea of self-defense is that of justification or excuse for an otherwise unlawful homicide or aggravated assault and bat-

sity of the proof thereof. Osborn v. State, 672 P.2d 777 (Wyo. 1983), cert. denied, 465 U.S. 1051, 104 S. Ct. 1331, 79 L. Ed. 2d 726 (1984).

Time sequence is not important in felony murder as long as the evidence, including the inferences, point to one continuous transaction. Whether the homicide preceded, followed or was contemporaneous with the robbery is immaterial. Cloman v. State, 574 P.2d 410 (Wyo. 1978).

Fact that pistol was discharged in struggle for its possession during robbery made no difference in the degree of murder. State v. Best, 44 Wyo. 383, 12 P.2d 1110 (1932).

Codefendants equally guilty. — If two or more persons are jointly engaged in the perpetration of or an attempt to perpetrate a robbery, and a human being is killed during its commission by any one of the persons so jointly engaged, then each of the offenders is equally guilty of the homicide.; Clay v. State, 15 Wyo. 42, 568 P.2d 837, 86 P. 17 (Wyo. 1977) See also, rehearing denied, 86 P. 544 (1906).

Evidence of intent to kill during robbery sustains capital punishment eligibility. — The evidence was sufficient of the defendant's intent to kill during an armed robbery and to thus sustain his eligibility for capital punishment. Engberg v. State, 686 P.2d 541 (Wyo.), cert. denied, 469 U.S. 1077, 105 S. Ct. 577, 83 L. Ed. 2d 516 (1984).

Evidence held sufficient. — Evidence that defendant shot deceased after having unsuccessfully attempted an entrance through locked door of truck owned by deceased with intent to pilfer same is sufficient to sustain conviction of murder in the first degree. State v. Lindsay, 77 Wyo. 410, 317 P.2d 506 (1957).

Evidence sufficient to sustain conviction of attempted sexual assault felony murder. — See Murray v. State, 671 P.2d 320 (Wyo. 1983).

§ 6-2-102. Presentence hearing for murder in the first degree; mitigating and aggravating circumstances; effect of error in hearing.

(a) Upon conviction of a person for murder in the first degree the judge shall conduct a separate sentencing hearing to determine whether the defendant should be sentenced to death or life imprisonment. The hearing shall be conducted before the judge alone if:

(i) The defendant was convicted by a judge sitting without a jury;

(ii) The defendant has pled guilty; or

(iii) The defendant waives a jury with respect to the sentence.

(b) In all other cases the sentencing hearing shall be conducted before the jury which determined the defendant's guilt or, if the judge for good cause shown discharges that jury, with a new jury impaneled for that purpose.

(c) The judge or jury shall hear evidence as to any matter that the court deems relevant to a determination of the sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (h) and (j) of this section. Any evidence which the court deems to have probative value may be received regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements, and provided further that only such evidence in aggravation as the state has made known to the defendant or his counsel prior to his trial shall be admissible.

(d) Upon conclusion of the evidence and arguments the judge shall give the jury appropriate instructions, including instructions as to any aggravating or mitigating circumstances, as defined in subsections (h) and (j) of this section, or proceed as provided by paragraph (ii) of this subsection:

(i) After hearing all the evidence, the jury shall deliberate and render a recommendation of sentence to the judge, based upon the following:

(A) Whether one (1) or more sufficient aggravating circumstances exist as set forth in subsection (h) of this section;

(B) Whether sufficient mitigating circumstances exist as set forth in subsection (j) of this section which outweigh the aggravating circumstances found to exist; and

(C) Based upon these considerations, whether the defendant should be sentenced to death or life imprisonment.

(ii) In nonjury cases, the judge shall determine if any aggravating or mitigating circumstances exist and impose sentence within the limits prescribed by law, based upon the considerations enumerated in subparagraphs (A), (B) and (C) of [paragraph (i) of] this subsection.

(e) The death penalty shall not be imposed unless at least one (1) of the aggravating circumstances set forth in subsection (h) of this section is found. The jury, if its verdict is a recommendation of death, shall designate in writing signed by the foreman of the jury the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. If the jury cannot, within a reasonable time, agree on the punishment to be imposed, the judge shall impose a life sentence.

(f) Unless the jury trying the case recommends the death sentence in its verdict, the judge shall not sentence the defendant to death but shall sentence the defendant to life imprisonment as provided by law. Where a recommendation of death is made, the court shall sentence the defendant to death.

(g) If the trial court is reversed on appeal because of error only in the presentence hearing, the new trial which may be ordered shall apply only to the issue of punishment.

(h) Aggravating circumstances are limited to the following:

(i) The murder was committed by a person under sentence of imprisonment;

(ii) The defendant was previously convicted of another murder in the first degree or a felony involving the use or threat of violence to the person;

(iii) The defendant knowingly created a great risk of death to two (2) or more persons;

(iv) The murder 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, sexual assault, arson, burglary, kidnapping or aircraft piracy or the unlawful throwing, placing or discharging of a destructive device or bomb;

(v) The murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

(vi) The murder was committed for pecuniary gain;

(vii) The murder was especially heinous, atrocious or cruel;

(viii) The murder of a judicial officer, former judicial officer, district attorney, former district attorney or former county and prosecuting attorney, during or because of the exercise of his official duty.

(j) Mitigating circumstances shall be the following:

(i) The defendant has no significant history of prior criminal activity;

(ii) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(iii) The victim was a participant in the defendant's conduct or consented to the act.

(iv) The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor;

(v) The defendant acted under extreme duress or under the substantial domination of another person;

(vi) 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;

(vii) The age of the defendant at the time of the crime. (Laws 1982, ch. 75, § 3; 1983, ch. 171, § 1.)

Cross references. — As to sentence and judgment generally, see Rule 33, W.R. Cr. P.

Editor's notes. — There is no subsection (i) in this section as it appears in the printed acts.

Constitutionality. — The death penalty provisions as set forth in this section and § 6-2-103 are not unconstitutional on their face. Hopkinson v. State, 632 P.2d 79 (Wyo. 1981), cert. denied, 455 U.S. 922, 102 S. Ct. 1280, 71 L. Ed. 2d 463 (1982).

The Wyoming death penalty provisions are constitutional. Hopkinson v. State, 664 P.2d 43 (Wyo.), cert. denied, 464 U.S. 908, 104 S. Ct. 262, 78 L. Ed. 2d 246 (1983); Hopkinson v. Shillinger, 645 F. Supp. 374 (D. Wyo. 1986).

The Wyoming death penalty provisions are not unconstitutional; they do not usurp the supervisory and rule-making power of the supreme court nor expand its jurisdiction in violation of the Wyoming constitution. Osborn v. State, 672 P.2d 777 (Wyo. 1983), cert. denied, 465 U.S. 1051, 104 S. Ct. 1331, 79 L. Ed. 2d 726 (1984).

Each defendant sentenced separately. — Each specific individual convicted of a capital offense must be separately dealt with in the decision to impose the death penalty; leniency in one case does not invalidate the death penalty in others. Hopkinson v. State, 664 P.2d 43 (Wyo. 1983), cert. denied, 464 U.S. 908, 104 S. Ct. 262, 78 L. Ed. 2d 246 (1983).

To justify death penalty for one who does not do actual killing, there must be present an intent that a killing will take place or that lethal force will be employed. Hopkinson v. State, 664 P.2d 43 (Wyo.), cert. denied, 464 U.S. 908, 104 S. Ct. 262, 78 L. Ed. 2d 246 (1983).

Instruction on defendant's due process rights not necessary. — An instruction in a death penalty case, requiring the jury to determine that the defendant's constitutionally guaranteed right to due process of law has been adequately protected throughout the course of the proceedings, is not necessary. Hopkinson v. State, 664 P.2d 43 (Wyo.), cert. denied, 464 U.S. 908, 104 S. Ct. 262, 78 L. Ed. 2d 246 (1983).

Defendant cannot challenge death penalty provisions where he is given life sentence. Alberts v. State, 642 P.2d 447 (Wyo. 1982).

Jury right upon retrial after remand. — After an appeal and remand for new sentencing trial, if the previous conviction had been by jury, then there must now be a sentencing trial with a new jury impaneled for that purpose, unless the defendant exercises his right to waive a jury in the resentencing phase. Hopkinson v. State, 664 P.2d 43 (Wyo.), cert. denied, 464 U.S. 908, 104 S. Ct. 262, 78 L. Ed. 2d 246 (1983).

Appellate review of finding of aggravating circumstances. — All aggravating circumstances are, on review, measured as to the sufficiency of the evidence beyond a reasonable doubt according to the standard set by Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). The question is whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements beyond a reasonable doubt. Hopkinson v. State, 664 P.2d 43 (Wyo.), cert. denied, 464 U.S. 908, 104 S. Ct. 262, 78 L. Ed. 2d 246 (1983).

§ 6-2-103. Review of death sentences; notice from clerk of trial court; factors to be considered by supreme court; disposition of appeal.

(a) The judgment of conviction and sentence of death is subject to automatic review by the supreme court of Wyoming within sixty (60) days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed thirty (30) days by the supreme court for good cause shown. Such review by the supreme court shall have priority over all other cases.

(b) Within ten (10) days after receiving the transcript, the clerk of the trial court shall transmit the entire record and transcript to the supreme court of Wyoming together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a statement of the judgment, the crime and punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the supreme court of Wyoming.

(c) The supreme court of Wyoming shall consider the punishment as well as any errors enumerated by way of appeal.

(d) With regard to the sentence, the court shall determine if:

(i) The sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor;

(ii) The evidence supports the jury's or judge's finding of an aggravating circumstance as enumerated in W.S. 6-2-102 and a lack of sufficient mitigating circumstances which outweigh the aggravating circumstances;

(iii) The sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(e) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, may:

(i) Affirm the sentence of death;

(ii) Set the sentence aside and impose a sentence of life imprisonment; or

(iii) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. (Laws 1982, ch. 75, § 3; 1983, ch. 171, § 1.)

Cross references. — As to stay of execution and relief pending appeal, see Rule 2.11, W.R.A.P.

Constitutionality. — The death penalty provisions as set forth in § 6-2-102 and this section are not unconstitutional on their face. Hopkinson v. State, 632 P.2d 79 (Wyo. 1981), cert. denied, 455 U.S. 922, 102 S. Ct. 1280, 71 L. Ed. 2d 463 (1982).

The Wyoming death penalty provisions are not unconstitutional; they do not usurp the supervisory and rule-making power of the supreme court nor expand its jurisdiction in violation of the Wyoming constitution. Osborn

v. State, 672 P.2d 777 (Wyo. 1983), cert. denied, 465 U.S. 1051, 104 S. Ct. 1331, 79 L. Ed. 2d 726 (1984).

Appellate review of finding of aggravating circumstances. — All aggravating circumstances are, on review, measured as to the sufficiency of the evidence beyond a reasonable doubt according to the standard set by Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). The question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements beyond a reasonable doubt. Hopkinson v. State, 664 P.2d 43 (Wyo.), cert. denied, 465 U.S. 1051, 104 S. Ct. 262, 78 L. Ed. 2d 246 (1983).

Death penalty imposed for felony murder during armed robbery not excessive or disproportionate. — See Engberg v. State, 686 P.2d 541 (Wyo.), cert. denied, 469 U.S. 1077, 105 S. Ct. 577, 83 L. Ed. 2d 516 (1984).

Accomplices in crime need not be sentenced alike, as a sentence should be patterned to the individual defendant. Leniency in one case does not invalidate the death penalty in others. Osborn v. State, 672 P.2d 777 (Wyo. 1983), cert. denied, 465 U.S. 1051, 104 S. Ct. 1331, 79 L. Ed. 2d 726 (1984).

Quoted in Hopkinson v. State, 704 P.2d 1323 (Wyo. 1985).

Cited in Turner v. State, 624 P.2d 774 (Wyo. 1981).

Law reviews. — See article, "The Evolution of Capital Punishment in Wyoming: A Reconciliation of Social Retribution and Humane Concern?" XIII Land & Water L. Rev. 865 (1978).

For case note, "Is the Current Test of the Constitutionality of Capital Punishment Proper? Hopkinson v. State, 632 P.2d 79 (Wyo. 1981)," see XVII Land & Water L. Rev. 681 (1982).

For article, "Goodbye 3-Card Monte: The Wyoming Criminal Code of 1982" (part one), see XIX Land & Water L. Rev. 107 (1984).

For case note, "Constitutional Law — Double Jeopardy — The New Role of Double Jeopardy in Capital Sentencing. Hopkinson v. State, 664 P.2d 43 (Wyo. 1983)," see XIX Land & Water L. Rev. 743 (1984).

For comment, "Reforming Criminal Sentencing in Wyoming," see XX Land & Water L. Rev. 575 (1985).

§ 6-2-104. Murder in the second degree; penalty.

Whoever purposely and maliciously, but without premeditation, kills any human being is guilty of murder in the second degree, and shall be imprisoned in the penitentiary for any term not less than twenty (20) years, or during life. (Laws 1982, ch. 75, § 3.)

I. General Consideration.
II. Purpose.
III. Malice.

I. GENERAL CONSIDERATION.

Proof necessary to sustain conviction. — In order to sustain a conviction of second-degree murder, the state must prove beyond a reasonable doubt that the defendant killed the victim purposely, meaning intentionally or deliberately, and maliciously. Kennedy v. State, 422 P.2d 88 (Wyo. 1967). See also State v. Bruner, 78 Wyo. 111, 319 P.2d 863 (1958); Nunez v. State, 383 P.2d 726 (Wyo. 1963); Reeder v. State, 515 P.2d 969 (Wyo. 1973).

Elements of first- and second-degree murder identical in part. — The elements of the lesser offense of murder in the second degree are identical to part of the elements of murder in the first degree, as both contain the elements of the killing of a human being with malice and purpose. State v. Selig, 635 P.2d 786 (Wyo. 1981).

Defendant's attempt to commit second-degree murder was complete when he stabbed victim with the ice pick; that he stabbed her eight more times leaves little doubt but that he had attempted to kill her. If calling an ambulance saved her life, it also saved defendant from being convicted of the crime of murder and perhaps a more severe sentence, but, with respect to the attempt, that crime was complete, as he had passed beyond the point at which abandonment was legally possible. Accordingly, he was not entitled to an instruction on that defense. Ramirez v. State, 739 P.2d 1214 (Wyo. 1987).

Reversal denied when evidence of malice and intent present to counter defendant's testimony. — Reversal will be denied, despite the Eagan Rule which holds that, when the defendant is the sole witness of an alleged crime, his testimony, if not impeached, nor

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THE SACRAMENTO BEE

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CLOSING DEATH ROW WOULD SAVE STATE $90 MILLION A YEAR

If California's death penalty law were abolished tomorrow, taxpayers could save $90 million a year. It now costs the state much more to attempt to execute someone than to lock the person up for life without parole.

If California resumed executions today at its historical rate of six a year, the total costs of having capital punishment -- defense and prosecution fees, court costs and incarceration on death row -- would come to at least $15 million per execution, according to figures compiled by The Bee.

On the other hand, it costs about $930,240 to imprison an inmate for life, based on an average life expectancy of 40 years in prison, according to figures supplied by prison officials.

Eleven years ago, California re-enacted the death penalty. Since that time, prosecutors have filed death-penalty charges against more than 2,000 defendants, according to the California Appellate Project, which finds attorneys to handle appeals for death-row clients.

But while Californians clamor for fresh executions, the state's current death-penalty law has so many protections built into it that it's nearly impossible to execute someone who has a good lawyer.

Earlier this year, Texas inmate Robert Streetman was executed six days after he was finally assigned an attorney. "By then it was too late for the attorney to do anything," said University of Texas law professor Scott Howe.

But in California, the state Supreme Court spends $3.6 million a year on experienced death-penalty defense lawyers to make sure accused murderers get a fair shake.

The investment has paid off. There is no evidence that California has executed an innocent person this century, according to a recent Stanford Law Review study.

But a review of thousands of pages of court documents, coupled with dozens of interviews with prosecutors, defense attorneys, law-enforcement experts and court officials, reveals an expensive capital-punishment system clogged at every level.

Gov. Deukmejian said costs are secondary to the government's need to protect the public from murderers.

"The victim of a murder has lost everything, and his family also suffers a great loss," Deukmejian said. "The costs of crime and the costs of punishing criminals both carry a high price tag."

To help ease the financial burden created by death penalty trials, California spends $10 million a year reimbursing counties for expert witnesses, investigators and other death-penalty defense costs, plus $2 million more to help pay for the overall cost of murder trials in smaller counties.

But despite this infusion of state funds, many financially strapped smaller counties still can't afford to prosecute complicated death-penalty cases, district attorneys said.

--- counties have only one prosecutor with little or no experienc in death-penalty cases, no investigators, a single Superior Court judge, an not enough unbiased people to qualify as potential jurors.

Other criminal cases are delayed for years while death-penalty cases are decided. Ironically, Sierra County has had to cut police services to pick up the tab.

For prosecutors, taking on a death-penalty case is a high-stakes gamble with low odds of success. Only one in 10 capital cases filed in California results in a death verdict, according to the California Appellate Project.

Every death verdict is automatically appealed to the California Supreme Court, which now spends more than half its time reviewing death cases, exper noted. Nearly 200 death cases are currently under review by the high court, which gets about 30 new such cases each year.

The current California Supreme Court, headed by Chief Justice Malcolm Lucas, is deciding death cases at twice the rate of the previous court heade by Rose Bird.

But even at the current court's accelerated pace, it will be impossible t erase the backlog. The Supreme Court, which has more than 400 criminal and civil cases pending, is reviewing ways to speed up its work; one proposal is to hire a pool of lawyers to work exclusively on death-penalty cases for the court.

Only 14 inmates on San Quentin's death row have had their verdicts affirmed by the California Supreme Court. Those cases have kicked around the courts for an average of eight years. They have cost the taxpayers an averag of $1.7 million each, according to information compiled by San Quentin information officer Dave Langerman, and the meter is still running.

State officials said the case of Earl Lloyd Jackson, convicted of murdering two elderly Los Angeles women in 1977, has already cost more than $5 million.

"The cost of a death-penalty case could range from $750,000 to -- the sky's the limit," said Deputy Attorney General Michael Wellington. His boss, Chief Assistant Attorney General Steve White, estimated that each death-penalty case has cost at least $1 million to prosecute so far at both the trial and appellate levels.

The prosecution of Robert Alton Harris -- a seemingly open-and-shut case that included six confessions -- has dragged through the court system for 10 years. Harris, considered the most likely person to be executed next in California, was convicted in 1979 of murdering two youngsters to steal their car for a robbery.

The case "symbolizes the people's efforts over the last 15 years to establish a working, valid capital-punishment law," said Deputy Attorney General Michael Wellington. "We don't have an execution date yet. I can't even say we've got an execution date in sight."

Defenders must be paid

Prosecutors and defense attorneys alike agree that California's death-penalty law, as a practical matter, doesn't work.

"You're not getting your money's worth," said Michael Millman, director of the California Appellate Project. "It's true that the money could be spen on AIDS research or a lot of things, but the worst thing about capital punishment is that it's an irrelevant diversion from the problems of society. The ethos is, we will feel better if we kill the SOB rather than taking the money and using it to prevent the causes of violent crime."

Chief Assistant Attorney General White also expressed dissatisfaction with the capital-punishment system. "We have the worst of all possible worlds: a society that has the death penalty as a social and moral judgment and then doesn't have the character to carry it out," he said.

Wellington favors a law that would force a defendant to make all his lega challenges at trial instead of dragging out the issues through a seemingly endless series of appeals the way Harris did. "If you give them (Harris' attorneys) nine more years, they'll think up other issues. There's never goin to be a time that imaginative defense counsel runs out of issues," said Wellington.

Gov. Deukmejian and many prosecutors claim that the removal of Chief

1986 will speed a condamned man's trip to the gas chamber. But seven Southern states, which have managed to sufficiently speed up the legal process so that executions now take place regularly, require an average of seven years to execute someone from the date of his arrest, Millman said.

Because "death is a different kind of punishment from any other," in the words of the U.S. Supreme Court, death-penalty cases must be tried differentl from other murder cases. In California, defendants of capital cases are entitled to not one but two defense attorneys at public expense during the trial stage. Taxpayers also pay for psychiatrists, forensic specialists and other expert witnesses for the defense.

San Francisco Public Defender Jeff Brown said a typical death-penalty defense costs an additional $25,000-$50,000 for a special investigation of th case; and $15,000 for psychiatrists or other expert witnesses."

Months -- and sometimes years -- go by before the actual trial starts. Potential jurors must be questioned individually to probe their personal biases and feelings on capital punishment. Jury selection routinely takes six weeks or more.

Death-penalty trials are often stalled by dozens of pre-trial maneuvers: a change of venue because of blanket pre-trial publicity; a community attitude survey; suppression of evidence or a confession; requests for release of additional evidence or exclusion of witnesses; motions for a dismissal or a new trial.

Michael Burt, a San Francisco deputy public defender, said defense attorneys and prosecutors battled seven months over one pre-trial motion concerning the admissibility of bloodstained evidence during a recent trial i San Diego.

Once a defendant is found guilty of murder, a special penalty trial is hel to decide whether to impose death or life without possibility of parole.

The added time and expense of capital cases are enough to discourage some small counties from seeking the death penalty, said Assistant Attorney Genera White.

"In talking to district attorneys, some of them have taken the view that it is so expensive and so unlikely to get a death judgment that they will simply seek life imprisonment without possibility of parole," White said.

Marin County recently signed a novel agreement with six defense attorneys hired to represent three San Quentin inmates accused of conspiring to murder correctional officer -- a crime punishable by death. Each attorney will receive a flat fee of $225,000, said court administrator Howard Hanson.

Hanson acknowledged that the cap on attorney fees could jeopardize the defendants' right to a fair trial if the trial costs far exceed the cap. But Hanson said that the defendants agreed to the contract. If the trial lasts tw years as projected, he said, defense attorneys will receive the equivalent of $75 an hour.

But San Francisco Deputy Public Defender Burt said that if the trial lasts longer than expected, "they could end up making $2.25 an hour."

The real battle is joined before the state Supreme Court, which routinely takes five years to uphold or overturn a death verdict. By then, virtually no defendants can afford their own lawyer, so the court assigns them a new attorney, at taxpayers' expense. A typical death-penalty appeal consumes abou 1,000 attorney hours a year -- about $62,000 -- according to the California Judicial Council.

Other states have decided that the expense of the death penalty outweighs any benefits. Last year, the Kansas Legislature voted down the death penalty. -- even though Gov. Mike Hayden campaigned on a promise to bring it back and polls indicated that 80 percent of the population supports it.

A coalition of Kansas death-penalty opponents estimated that capital punishment would cost Kansas taxpayers in excess of $50 million by the time a 100-innate death row had been built and the first person was executed.

Imperial County's lesson

In California, county officials who balk at the high price of capital trials could learn a lesson from Imperial County, which in 1982 refused to pa $13,000 for the defense of a man it was trying to send to the gas chamber.

Instead of saving money, Imperial County ended up spending $500,000, only to see accused murderer Robert "King Kong" Corenevsky go free more than five years after he was arrested and charged with the murder and robbery of a Manhattan Beach jeweler in a Calexico motel room.

The county budget officer also spent three days in jail for refusing to pay the bill.

Imperial County supervisors argued at the time that the Corenevsky case could bankrupt the county and said they'd "be damned" if they'd pay for a murderer's defense. (Corenevsky's past included a murder conviction in Mexico).

This brazen policy ended up costing Imperial a bundle. Superior Court Judge William Lehnhardt reduced the charges and took away the county's right to seek the death penalty -- which meant the state no longer had to reimburse the county for defense costs.

The case went all the way to the California Supreme Court, which threatened to send troops to the county auditor's office to collect.

Corenevsky's lawyer, Stephen Feldman, said the case "is an allegory for what happens in a system that doesn't fairly deliver services to a man the state is trying to kill. This innocent man could have been killed because the state illegally refused to pay for his defense."

County Supervisor James Bucher, a former judge, agreed that the death-penalty system is a failure, but for different reasons: "I don't believe justice has much to do with the court system any more; it's all dollars and cents and gamesmanship. There should be limits on what people are expected to pay for these bastards who get themselves in trouble. We pay for his doctors, his housing, his attorney and he's a goddamned convicted killer."

Corenevsky commented, "If you believe they should have the death penalty in California, you believe in Santa Claus. It's never gonna happen because it's never gonna be fair. Jesus Christ himself couldn't have had a fair trial in Imperial County."

LEGAL TIME IS MONEY

Death-penalty trials take an average of two years from arraignment to verdict -- three times longer than other murder cases, The Bee found. And the longer the case, the more margin for error and grounds for appeal, said prosecutors and defense lawyers.

Death-penalty trials cost an average of six times more than other murder trials -- $592,500 compared to $93,000, based on an analysis of average daily court costs.

There are 328 capital trials in progress in California. If the cases follow the normal course, approximately 175 of them will be decided by juries, 70 will result in life in prison or death for the defendant and 35 defendants will wind up on death row.

Since death-penalty trials cost more and last longer than standard murder cases -- about $7,500 a day for 79 days instead of $6,200 a day for 15 days for a standard murder case -- California taxpayers spend an extra $78 million a year on death-penalty trials.

Additionally, each year the state spends an extra $2.8 million for special housing of death-row inmates, another $1.8 million to prosecute death row inmates on appeal, and yet another $7.6 million defending condemned prisoners on appeal.

Add it all up and you get $90 million a year spent on the death penalty.

This doesn't include the cost of federal appeals. "The first federal appeal and the first habeas corpus petition consume an average of 1,000 hours of attorney time, or $75,000 to the taxpayers," Millman said.

No one knows how many people will be executed in California in a given year, but when the state was executing inmates, it averaged about six per year.

In Texas, where more murderers are executed than in any other state, about five inmates have been given lethal injections each year since 1982.

Thus, if California continues as expected to pursue the death penalty at a cost of $90 million per year -- and if the state moves at its historical rate of six per year -- it will cost taxpayers about $15 million per execution.

THE WASHINGTON POST
2/28/88/C5

Execution Does Not Pay

Barbarism Aside, the Death Penalty Simply Isn't Cost Efficient

By Jonathan E. Gradess

FIFTEEN years ago the Supreme Court ruled that the death penalty as then applied in the United States was unconstitutional *(Furman v. Georgia)*. One brief sentence in Thurgood Marshall's opinion, overlooked by many, noted that "when all is said and done, there can be no doubt that it costs more to execute a man than to keep him in prison for life."

Today, there are more than 1,900 men, women and children as young as 16 on death row, and American policy makers, political officials and criminal justice experts are beginning to regret skipping so lightly over Justice Marshall's comment.

In 1982, my office conducted a national survey to determine the cost of capital litigation. We examined the nature of capital cases, identified 11 levels of review and defined a minimum of 144 "cost centers" that determine the total price-tag of capital litigation. Based on proposed but never enacted legislation to reinstate the death penalty in New York, and using conservative estimates, we projected the potential costs of litigating a model New York capital case across just the first three levels of review—the trial and penalty phase, the appeal to the New York State Court of Appeals, and subsequent review in the United States Supreme Court. The cost of that limited process: $1.8 million per case. The cost of life imprisonment for 40 years: $602,000.

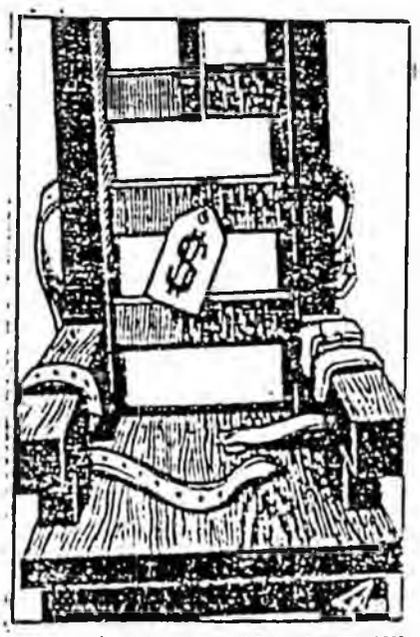
Since then, many more states have looked at the cost of capital punishment, including Maryland, Alaska, Hawaii, Vermont, Texas, Florida, Kansas, Ohio and New Jersey. Some authorities have estimated that capital cases cost 10 times as much as non-capital cases. A Pennsylvania journalist has estimated the cost of a single capital case at $5 to $7 million. There is no longer any doubt that criminal-justice systems with a death penalty cost inordinately more to maintain and expand than criminal-justice systems without a death penalty.

Before policy can change, however, the American people need to understand why capital cases cost more than non-capital cases, why there is no chance that costs can be reduced, and why we can expect that they will exponentially increase yearly until the death penalty is abolished.

Capital cases are more expensive than non-capital cases essentially for three reasons: they are *practically* different than non-capital cases; they are *legally* different; and they are *reviewed more thoroughly*.

■ *The practical difference.* For more than a century, capital cases have been treated differently from non-capital cases. They take longer. Frequently more than one attorney is appointed for a capital defendant. Because life is at stake, trial judges provide more latitude and appeal judges search more carefully for reversible error. (The reversal rate is about 50 percent for death cases and about 7 percent for non-capital cases.) Because the decision to kill is unpleasant, responsibility in capital cases is often diffused—which makes for longer trials, lengthy delays and frequent reversals.

■ *The legal difference.* Ten years ago, the Supreme Court made it clear that heightened standards of due process must be applied to death penalty cases. Consequently, a new jurisprudence—a "super due process"—has evolved governing the trial and appeal of such cases. The investigation is more extensive, the number of pretrial proceedings is substantially increased, and jury selection takes longer. After conviction, a separate "penalty phase" is conducted to determine the sentence. Because mandatory death sentences have been ruled unconstitutional, the sentencing jury must consider a defendant's individual characteristics. Preparation for this phase is extensive; in essence, it is a trial for life. The defense commonly tries to talk with as many of the defendant's friends, associates, teachers and co-workers as it can reach, to trace his life history, to visit all of the places he has lived and to vigorously pursue all leads in the search for mitigating evidence.



DAVE MEMEHAN FOR THE WASHINGTON POST

■ *Longer review.* Any defendant convicted in a state court has the right to initiate judicial review at 11 different levels. However, the Supreme Court's ruling that poor people are entitled to appointed counsel applies to only the first two stages; representation in the

Jonathan Gradess is executive director of the New York State Defenders Association.

remaining nine stages essentially depends on volunteer counsel. Ordinarily, lawyers do not volunteer to represent an indigent robber, burglar or non-capital murderer at those stages, but they routinely do so for death-penalty defendants. While these lawyers are not paid, the final stages of a capital case can last a decade or more and generate enormous litigation costs. Police officers and witnesses are brought in. State attorneys general are called upon to respond. Judges must preside. Court time is used up. The United States Court of Appeals for the 11th Circuit in Atlanta, deep in the heart of the nation's death-penalty belt, complains that more than 30 percent of its docket is tied up with death-penalty cases. And all the while, the prisoner is held in a costly high-security death-row cell year after year.

What, then, is the answer? Short-circuit the process and step up the pace of executions? Most Americans recognize that our sophisticated appellate-review process, though seemingly laborious, is a fundamental part of our legal system and protects our citizens against government error and abuse. Even with 11 levels of review, we still convict and condemn the innocent. A study in the November 1987 Stanford Law Review cites more than 100 examples of innocent people sentenced to death since 1900, of whom 23 were executed.

Nor is it reasonable to expect a significantly quickened pace of execution. Since 1977, when we reintroduced the idea of slaying citizens to stop crime, there have been more than 200,000 homicides in the United States, about 2,000 death sentences but fewer than 100 executions. Not even death-penalty proponents believe the American people would tolerate the wave of executions needed to empty death row and keep it that way.

Since both the Constitution and a permanent death-row population are likely to be with us for some time, the cost of the death penalty is certain to grow at an ever-greater rate. The numbers of capitally-sentenced defendants will continue to increase. As cases are appealed, new issues decided in favor of death-penalty defendants will affect all cases not yet final. As issues increase in scope and complexity, costs will escalate. And these factors will combine with the high costs of death-row construction and security.

The cost of the death penalty is emerging as one of our most serious public policy questions. In Kansas last year, the newly-elected governor promised Kansans a death penalty while simultaneously calling for budget cuts for each state agency. The high cost of capital litigation, the establishment of a death row, maintenance of death-row prisoners, the high costs and inordinate delays of the appellate process were debated not only by politicians but by university professors, governmental research units and by Kansas citizens. Opponents cited racial discrimination in the conduct of capital punishment, its lack of deterrence, its inability to stop crime, its potential for erroneous convictions, its immorality and—not least—its high cost. In the end, massive numbers of citizens declared "no" to the reintroduction of the capital sanction and the death penalty was defeated.

Other Americans will eventually realize, as did the citizens of Kansas, that there is not an endless supply of money for the criminal-justice system. Policy choices need to be made. From a conservative cost-benefit analysis, we must declare the death penalty an inordinate waste of resources that deprives our citizens of adequate police protection and reconciliation systems to make both victims and offenders whole.

As the New Jersey public defender budgets more than $100,000 per capital case and anticipates total defense costs in the millions, as the federal judiciary bemoans the resource drain caused by capital litigation and as California prosecutors declare cases non-capital at the outset to save money, the dollars and cents of the death penalty may in fact be the clarion call that sounds the defeat of this archaic and brutal policy.

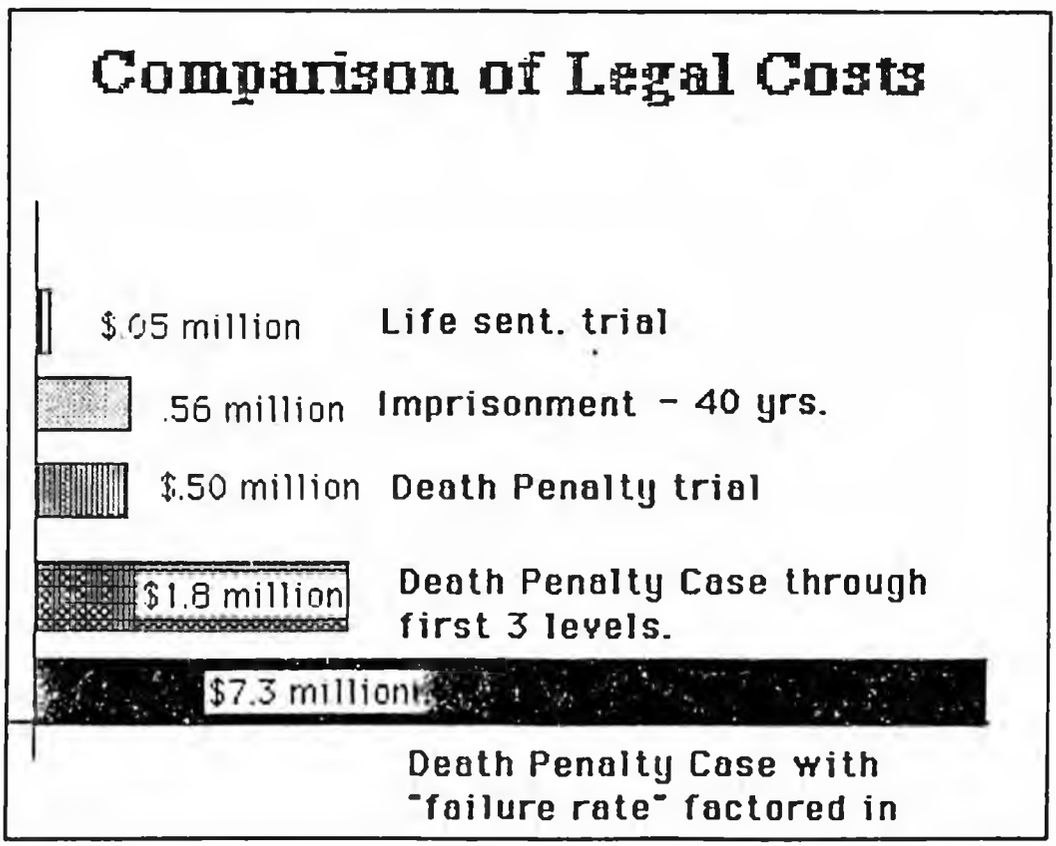
Costs and the Death Penalty

There has been debate surrounding the death penalty for as long as the punishment has existed and many arguments have been explored on both sides of the issue. But the excessive costs associated with capital punishment were not really a factor until fairly recently.

Executions were designed to be graphic warnings to others that certain crimes would be severely punished by death. Hangings were public and followed quickly upon sentencing. Later, to avoid abuse, executions were centralized in one part of the state and carried out with just a few witnesses. Still, it remained relatively swift. For the 52 people executed in Maryland for murder since 1923, the average length of time elapsing between imposition of sentence and execution was 220 days. Today the situation is totally different. Richard Tichnell has been on Maryland's death row longer than any person - over 8 years - and he is still far from the gas chamber. This length of time has become the norm around the country where 2,000 people are on death row.

As a matter of fact, the delay factor in Maryland is likely to become much longer. Just in the past year the Supreme Court has accepted two Maryland cases (*Booth* and *Mills*) which affect the viability of our capital punishment statute. It is a very real possibility that **all** of Maryland's death sentences will be overturned in the current session of the Supreme Court. Then, if we so choose, the long process of new sentencings and appeals would begin again.

All of this has a direct bearing on the cost associated with the death penalty. They not only far exceed the costs of imprisoning someone for life, they are becoming an intolerable burden on both the state's financial and judicial resources. Special Appeals Court Judge Alan Wilner raised this issue recently when he said that, "in Maryland the cost of pursuing this (the death penalty) largely fruitless course, not just in terms of money, but, more importantly, in the commitment of judicial resources, has become so high that public attention should be directed to the reality of the situation."



A LOOK AT THE NUMBERS

Since Maryland has not had an execution in over 26 years, we do not yet know what carrying the process through to an execution actually costs. However, there have been some studies done in Maryland and in other states from which it is possible to form a clearer picture.

In 1983 the Maryland House Appropriations Committee asked the Public Defender and the Chief Judge of Maryland's Court of Appeals to provide information on the fiscal impact of processing death penalty cases. A committee was formed and a report submitted in April 1985. One of their key findings was that filings that resulted in the death penalty averaged higher costs for **each** justice component than filings where the outcome was a non-death sentence. Unfortunately, the study does not include any estimates of appeals' costs which represent a major portion of costs in such cases. Nor does the data include information from Prince George's County or Baltimore City. The study concludes by suggesting that the issue of costs can only be resolved by a more comprehensive survey.

"The cost of pursuing this largely fruitless course has become so high that public attention should be directed to the reality of the situation."

- Judge Alan Wilner

Chief Judge Robert C. Murphy confirmed the inadequacy of this study in his 1987 State of the Judiciary Message. But he also noted that "studies in other states indicate that death penalty litigation is enormously expensive." A similar conclusion was reached by the Public Defender's Office concerning their Interim Report on Death Penalty Costs in October, 1986. Their figures represent just "the tip of the iceberg" and the Death Penalty Defense Unit believes that it is **many times** more expensive to try a case capitally than to try it non-capitally and costs more to execute than to incarcerate for a lifetime.

With respect to costs, there is considerable evidence from around the country that the financial burden is becoming intolerable. The most extensive and frequently quoted study was done by the *N.Y. State Defenders Association* in 1982. Even this study, which is cited by both Judge Wilner and Chief Judge Murphy, acknowledges that its estimates are conservative and include only the first three levels of capital litigation. Nevertheless, their conclusion illustrated in the table below, is that just these **three phases cost the state $1.8 million per case.**

Naturally, the goal of the state in expending such resources is an eventual execution. But it is well known that a high percentage of cases are overturned on subsequent appeal. Judge Wilner points out that if we rightly assume a "failure rate" of 75% in these cases, then the actual costs **per execution** are an astounding $7.3 million.

To put this into perspective, the cost of incarcerating an individual in the Maryland Penitentiary is about $14,000 per year. Thus, a real life sentence of say 40 years would cost the state $560,000, and during this time a prisoner could be productive and perhaps make some restitution to either the state or the victim's family.

Other states, using different methods of accounting, have arrived at different numbers but similar conclusions. In California, it has been estimated that it costs a minimum of $500,000 just to complete a death penalty **trial** in that state. And according to a report in the *Wall Street Journal*, only 10% of these cases are " successful" and thus it costs the citizens of California **$4.5 million just to sentence one person to death.**

Here are some cost figures from other states:

- Oregon estimates its costs per case to be $700,000.
- The Ohio Public Defender's Office cites costs of at least $1 million per execution.
- One county in Georgia spent seven times its entire annual budget for criminal prosecutions on one death penalty case.

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

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

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

• In Kansas, the death penalty was recently rejected and costs played a deciding role as some senators switched their votes. The director of the Indigent Defense Service there estimated that costs in his office would spiral to $7-8 million in two years with the death penalty.

• Texas leads the country in executions. Some officials there estimate that the state's pursuit of capital punishment has cost taxpayers $183.2 million. There have been 26 executions in Texas since re-instatement.

• Florida's first post-1972 execution was of John Spenkelink in May, 1979. It has been estimated that the execution cost the state $5 million. And the murder rate in Florida rose in the months following this execution.

The topic of judicial time spent on these cases is another area of concern which should be explored further. Judge Wilner examined the judicial complexities which have become part of death penalty cases and concluded with this dilemma: "The question, then, in light of the history in this State of no executions in 26 years, an 86% failure rate at the trial level, and a further 50% failure rate at the appellate level, is whether it's really worth the effort."

In matters where lives are being weighed on both sides of the issue, costs and time necessarily take second place. But if the money and time spent is failing to procure anyone's goals then the expenditures should be reconsidered. If millions of dollars are spent to produce one execution perhaps ten years after the crime, then certainly little is done in the name of deterrence or for the victim's family.

"Because of the Supreme Court's rulings, there is no way to streamline this elaborate process. Any attempt to do so would deny a defendant the protections guaranteed under the Constitution and increase the possibility of sending innocent people to their death."

-Richard Moran & Joseph Ellis in the Wall Street Journal

There may be some who feel that these excessive costs can be alleviated by cutting back on the appeals process. But that tactic has been found unacceptable by our own courts and by the Supreme Court as well. Insufficient care at the early junctures just means re-trials and re-sentencings at later levels and hence even higher costs. The article mentioned above from the Wall Street Journal concludes that: "Nor can these costs be significantly lowered... Because of the Supreme Court's rulings, there is no way to streamline this elaborate process. Any attempt to do so would deny a defendant the protections guaranteed under the Constitution and increase the possibility of sending innocent people to their death...Like it or not, the Supreme Court has made it abundantly clear that shortcuts to justice are legally unacceptable."

The article goes on to say that New York and California could save $75 million and $125 million respectively by not having the death penalty. The same is true to some extent in Maryland as well. Ways could be explored to use the money which would be saved in this state to aid the families of victims and to institute programs which would be more productive in preventing serious crime.

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Death penalty foe criticizes expense

By Anne Belli
Staff Writer of The Dallas Morning News

The death penalty is racist, expensive and can result in the execution of innocent people, the leader of a national coalition that seeks to abolish capital punishment said Friday.

"I understand people being outraged over crime," said Robert Bryan, chairman of the Washington, D.C.-based National Coalition to Abolish the Death Penalty. "But people need to know the facts."

Bryan's group is holding its annual conference this week at Southern Methodist University. He said the three-day meeting, which began Friday, is being held in Dallas "because of the problem in Texas."

Texas, with 27 executions, has employed the death penalty more than any other state since the penalty was reinstated by the U.S. Supreme Court in 1976. Nationwide, 101 people have been executed in the past 12 years, he said.

The state also has the second largest death row population in the nation, with 269 prisoners awaiting execution, compared with 2,110 nationwide.

The latest Texas Poll, conducted by telephone on Oct. 19, found that 86 percent of Texans favor the death penalty, although 73 percent said they do not favor capital punishment for convicted capital murderers who are mentally retarded.

Bryan said legal costs for a capital murder case average $1.9 million. In Texas, he said, the costs have been even higher, about $2.6 million per case. Legal costs connected with non-capital murder cases average much less — about $700,000 — because the trials are shorter and there usually are fewer appeals, he said.

"When a capital case is prosecuted, everybody, including the government, is spending an enormous amount of money," said Bryan, a California lawyer who said he has tried more than 100 murder cases.

"Also, in spending all that money to kill someone, sometimes we kill innocent people," he added. "Not only is that shocking morally, but also it's a huge waste of money."

Recent cases have raised questions regarding evidence available at trials. In Texas, there is the case of Randall Dale Adams, who was convicted in 1977 of killing a Dallas police officer. Adams' case recently was reopened by a state district judge after the release of a documentary film, The Thin Blue Line, that raised questions about his guilt.

In Florida, the case of Willie Darden has been the subject of similar speculation. Darden was executed in March.

"One innocent person executed is too much," Bryan said. "And it's going on in our country."

DALLAS MORNING NEWS

SAT. 11-19-88

The New York Times Sunday, August 7, 1988

NEW JERSEY OPINION

No Savings In Lives or Money With Death Penalty

By LEIGH BIENEN

THE recent Federal drug bill reintroducing capital punishment for certain drug-related murders in an election year is further evidence that politics never changes. You can fool some of the people, but, one hopes, not all of the time.

The death penalty is a fraud upon the public. The taxpayers are being sold a bill of goods. Both a simple and a complex analysis of the costs and benefits of the death penalty, and of the logic behind re-enactment, indicate that the policy accomplishes nothing its proponents claim, and its cost is exorbitant.

Since 1976, 34 jurisdictions have reintroduced the death penalty. There are now over 2,000 people on death row. And last spring the United States Supreme Court handed down an opinion stating that it would not invalidate state capital punishment schemes, even if those schemes were not applied in a manner that was neutral with regard to race. Capital punishment is back, and for all the wrong reasons.

The public was led to believe that the reintroduction of the death penalty would produce several desirable outcomes, soon, if not immediately. There would be less crime. The crime rate would go down because those people who commit violent and heinous crimes would know about the re-enactment of capital punishment and decide not to commit those murders.

But everything we know about murderers indicates that they don't act after rationally weighing their actions. And everything we know about the imposition of the death penalty tells us that it is just those who are too enfeebled, or mentally deficient, or hapless to plan their actions or participate in their defense who end up being sentenced to death.

In fact, the rational murderer could well conclude that his chances of being executed are minimal. In the whole United States, there have been 190 executions since 1976, and more than 240,000 murders have been committed in the same period.

People want to go back to the good old days when everyone respected law and order. Whether or not there ever were any such good old days, they weren't brought about by the infliction of capital punishment.

In New Jersey capital punishment was the law from Colonial days until 1972, and the Legislature re-enacted it in 1982. From 1907, when formal records were kept, the high point for capital punishment was 1930, when 18 people were sentenced to death and 11 executed. It wasn't until after 1930 that most death sentences were appealed.

In 1940 nobody was sentenced to death and nobody was executed, and there were 50 homicides recorded. In 1950 in New Jersey one person was sentenced to death; nobody was executed, and 99 homicides were reported. In 1964 in New Jersey, 450 homicides were reported, and fewer than 10 people were sentenced to death.

Equally illogical are the supposedly sophisticated arguments about the death penalty and deterrence, which are once again being put forward. That work has been conclusively discredited. But no one has discredited the statistical evidence, from study after study, in jurisdictions from Kentucky to Florida, showing that race of the victim is as important in determining who gets the death penalty as the presence of another crime, or even that the defendant has been previously convicted of murder.

> Society's price is an unjust system.

The public believes that it will save money by executing murderers. Nothing could be farther from the truth. The cost of the reimposition of capital punishment runs into the millions of dollars. Texas says the re-enactment of capital punishment has cost the state $183.3 million. In Ohio it's been estimated that it costs $1 million per execution, and a California study estimated over four times that. The cost of death-penalty trials, the costs of appeals, of separate places of confinement for prisoners, all far exceed the cost of keeping murderers in prison for the rest of their days. In New Jersey the state has spent millions of the taxpayers' money to house some 20 murderers under special guard at the maximum security prison.

Well, some reply, let's get rid of those expensive due-process guarantees, which are wasted on our worst citizens anyway.

But does this society really want to get rid of the premise that the accused is entitled to representation and innocent until proven guilty? Or is that promise now only going to operate for certain classes of likable or sympathetic criminals? People tend to think due-process guarantees are a luxury until one of their own is accused of a crime.

A more honest, but disturbingly cynical, point of view is the belief that the society needs capital punishment because the criminal-justice system is not to be trusted.

Cases where murderers have been let out, or considered for parole in what seems to be an alarmingly short period of time, have received a great deal of attention. They are, however, few and far between.

The majority of states, including New Jersey, now have in place sentencing statutes that insure that murderers and others convicted of serious crimes will actually spend many, many years, or the remainder of their lives, in prison. In New Jersey the mandatory minimum terms for murder is 30 years, that is 30 calendar years, and it can be longer if one has additional convictions or prior offenses.

The public's distrust and frustration with the criminal-justice system is the worst reason to dust off the electric chair. And it is just that fear and paranoia that is played upon when support is drummed up for capital punishment. Executing a few who are selected by a system that is capricious, arbitrary and not racially neutral will not do away with the public's distrust of the legal system. It will only buttress the arguments of those who say the criminal-justice system exists now for the many and the poor for the benefit of the few and the rich.

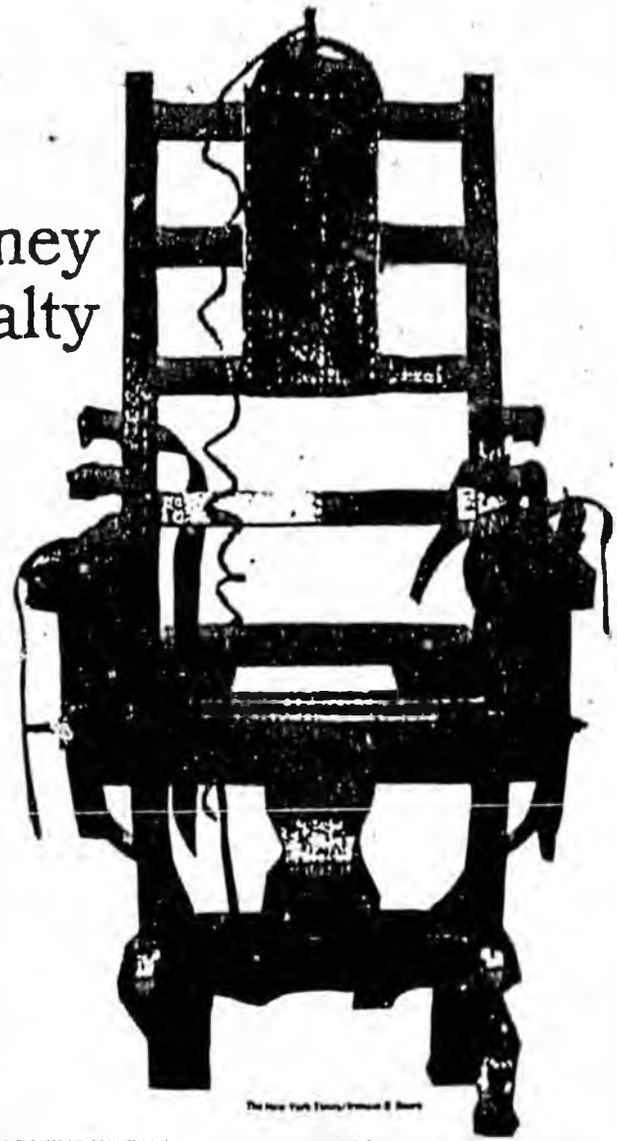
It is a statistical certainty that some of those executed will be entirely innocent of their crimes. It is just as certain that for every executed person there will be 3 or 4 or 20 whose crimes were just as horrible, but whose lives were spared for reasons of luck or prosecutorial discretion, or because they had competent counsel, and race and jurisdiction will not have been irrelevant.

The costs of capital punishment are staggering, much more than the dollars and cents of court time, transcripts and appeals. The true cost of capital punishment is the establishment and perpetuation of a system of sanction that has repeatedly been shown to be counterproductive and discriminatory. It isn't fashionable to talk about justice, and the concept of justice for victims has added a new and valued dimension to the debate.

But what kind of justice for victims is it when only a select few are prosecuted for capital murder? The families and loved ones of the other thousands of victims see their cases disposed of as ordinary, noncapital murders. The message to them is clear: Society's resources aren't going to be spent on you.

The price of capital punishment is the support of a system that is unjust, and perceived to be unjust, as well as wasteful and inefficient. The price of capital punishment is that the public is misled and then disappointed. Capital punishment was going to accomplish desirable objectives, like reducing or deterring crime, and that was never possible.

The price of capital punishment is the hypocrisy introduced into the compact between the legislators and the governed, between the suppliers and consumers of public policy. If you will. The millions of public money wasted on capital punishment are measurable, but rarely mentioned. The price of capital punishment is beyond counting. ■



Electric chair in museum at Correction Officers Training Academy.

Leigh Bienen is a public defender who has just completed a study on homicide in New Jersey.

WALL STREET JOURNAL October 15, 1986

Price of Executions Is Just Too High

By Richard Moran
And Joseph Ellis

When people argue that the death penalty costs too much, they are usually speaking about the human and social costs of the state's decision to take a life. While these costs are undoubtedly great, when we say that the death penalty costs too much we mean quite literally that it is much more expensive than life imprisonment. Here is the reason.

In 1972 the Supreme Court in *Furman v. Georgia* held that "arbitrary" and "capricious" application of the death penalty violated the Eighth Amendment's prohibition against "cruel and unusual punishment." This meant that a defendant had to be prosecuted and convicted in a way that was extraordinarily rigorous and free of any kind of prejudice. Since then the Supreme Court has fashioned what is generally called a "super due process" model for death penalty cases. In a series of subsequent decisions, involving effectiveness of counsel, the right to a fair and impartial jury, as well as "cruel and unusual punishment," the court has held consistently that special substantive and procedural protections are required before a state court can impose the death penalty.

The "super due process" requirement has made the prosecution of death penalty cases enormously expensive. In a recent University of California at Davis law review article, Margot Garey has calculated that it costs a minimum of $500,000 to complete a death penalty trial in California. And between August 1977 (when the current law took effect) and December 1985, only 10% (190 of 1,847 cases) have actually resulted in a death sentence.

Since statistical evidence is notoriously subject to manipulation, there are a number of ways to figure the costs. We think it is fair to say that it costs the citizens of California about $4.5 million ($500,000 x 0.90 failure-rate) to sentence one person to death. Data from New York state suggest that if it adopted the death penalty the cost would be $1,828,100 per capital trial. Assuming even a 0.75 failure-rate, it would cost about $7.3 million to sentence one person to death in New York.

And, of course, not all people sentenced to death will be executed. Many if not most will have their sentences commuted to life imprisonment. Even if we do not include the costs of keeping a man on death row for an average of four years prior to his execution (about $160,000), or the cost to maintain and operate the gas chamber or the electric chair, and if we naively assume that all people condemned to die will be executed (all 55 cases in California have been overturned), it will still cost $4.5 million to execute one felon in California, and $7.3 million in New York.

Nor can these costs be significantly lowered. Since each trial is unique, and most of the costs are incurred in the trial phase—not on appeal—there really is no economy of scale. The $4.5 million and $7.3 million figures do not include appeals that average only $100,000. When a defendant faces a possible death sentence, more time is spent investigating the facts of the case, more pre-trial motions are filed, the trial tends to last much longer, more expert witnesses are called to testify, and there are, of course, many legal objections and appeals. Most of all, there is no cost-saving plea bargaining when the prosecution seeks the death penalty.

Because of the Supreme Court's rulings, there is no way to streamline this elaborate process. Any attempt to do so would deny a defendant the protections guaranteed under the Constitution and increase the possibility of sending innocent people to their death. And the recent decision in the case of Alvin Ford—that a condemned man is entitled to a court hearing on the question of his mental competence before he can be executed—can only further the delays and increase the costs. Like it or not, the Supreme Court has made it abundantly clear that shortcuts to justice are legally unacceptable.

Nationally, the average offender who is sentenced to death is about 30 years old. Let's say he lives to 70—40 more years. At $20,000 a year to keep him in prison that adds up to $800,000. Indeed, if all people charged with capital offenses were actually sentenced to death, then the death penalty would be slightly cheaper in some states. But, in California, for example, only one out of 10 is sentenced to death—so 90% of the cases bear the costs of both a capital trial and life imprisonment.

It isn't necessary to be an accountant to realize that if you substitute life imprisonment for the death penalty, you will save almost $500,000 per trial for first-degree murder in California, and $1.8 million in New York. And since there are about 250 such trials in California per year, the abolition of the death penalty would save the taxpayers about $125 million a year. In New York it has been estimated to be $75 million. Put another way, the death penalty consumes a disproportionate share of our criminal justice dollars.

No one should mistake the above argument as a reduction of a great moral and philosophical issue to a question of accounting. Behind our simple economic argument lies a more haunting moral and legal complexity that has made these costly and cumbersome constitutional protections necessary. The dollars reflect doubts. Not even the most avid supporter of the death penalty wants to execute people capriciously. But the costs incurred in easing our doubts and assuring fairness in capital cases have now reached the point at which they constitute eloquent testimony in their own right. Until scholarly research can prove that the death penalty is more cost effective in deterring murder than life imprisonment, we think that our elected officials might do well to choose the cheaper option.

Mr. Moran is professor of sociology at Mount Holyoke College, where Mr. Ellis is professor of history and dean of faculty.

WALL STREET JOURNAL October 15, 1986

Price of Executions Is Just Too High

By Richard Moran
And Joseph Ellis

When people argue that the death penalty costs too much, they are usually speaking about the human and social costs of the state's decision to take a life. While these costs are undoubtedly great, when we say that the death penalty costs too much we mean quite literally that it is much more expensive than life imprisonment. Here is the reason.

In 1972 the Supreme Court in *Furman v. Georgia* held that "arbitrary" and "capricious" application of the death penalty violated the Eighth Amendment's prohibition against "cruel and unusual punishment." This meant that a defendant had to be prosecuted and convicted in a way that was extraordinarily rigorous and free of any kind of prejudice. Since then the Supreme Court has fashioned what is generally called a "super due process" model for death penalty cases. In a series of subsequent decisions, involving effectiveness of counsel, the right to a fair and impartial jury, as well as "cruel and unusual punishment," the court has held consistently that special substantive and procedural protections are required before a state court can impose the death penalty.

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THE HOUSTON POST
12/7/86/3B

Death, dollars and the scales of justice

Weighing the costs of capital punishment, life imprisonment

By DAN GROTHAUS
Post Reporter

What does capital punishment cost the state? The state doesn't know. Conventional criminal justice wisdom says it costs more to keep 'em than to kill 'em.

But in reality, it costs the state more to execute an inmate convicted of capital murder than it would cost to convict the same suspect of non-capital murder and lock him up — literally — for life.

Considering the current prison housing shortage, the state could build a new prison holding 2,250 inmates for what it has spent to place 212 inmates on death row since 1980 and keep them there.

Since executions began again in 1982, Texas has executed 19 inmates, more than any other state.

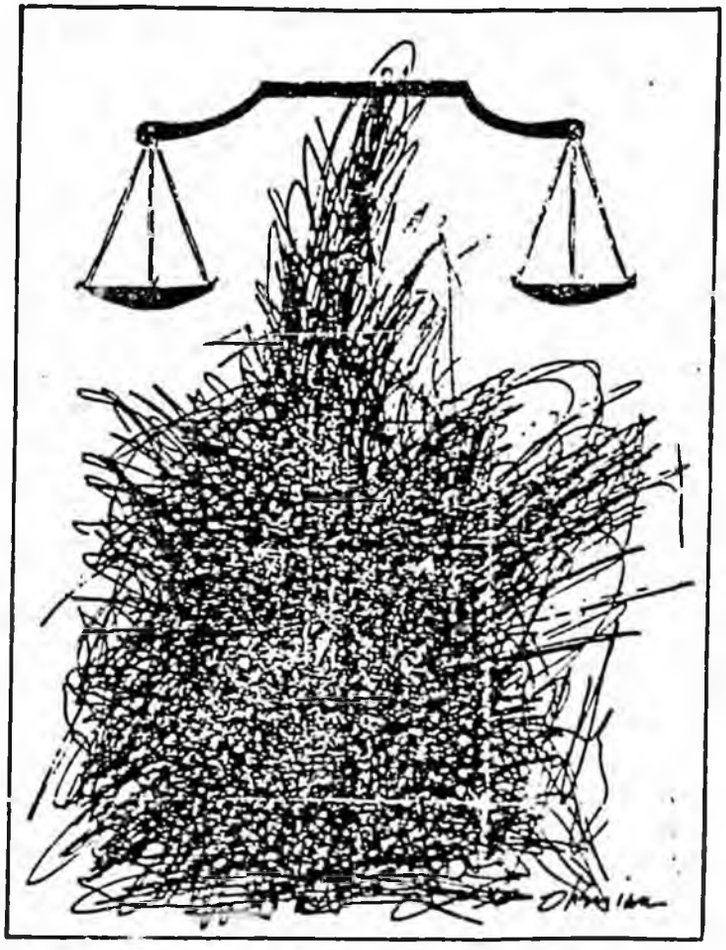
In Harris County alone, the pursuit of death sentences in the 245 capital murder trials held since 1980 represents approximately $86.3 million, or about $1 million per death row inmate sentenced in Harris County. Only 88 death sentences were granted in those 245 capital murder trials. If those cases had been prosecuted for non-capital murder and the 88 death row inmates were instead locked up until age 65, the cost would have been $40,672,370. The difference would be $45.6 million.

However, no one at the state or county level has ever attempted to determine the cost of capital punishment.

Management questions

"You're asking for basic management questions," answered Scott McCown, the Attorney General's law enforcement chief. "And the state gives us no money to provide answers like that. We're just inundated with (appelate) work."

However, the question of capital punishment's cost-effectiveness is gaining attention in other parts of the country. Last year the American Bar Association endorsed a research project that developed a formula to determine the actual cost of capital punishment.



Since 1978, the only three studies that assessed the cost of capital punishment concluded that the death penalty was not cost-effective. "The argument that the death penalty costs less to punish than does life imprisonment is erroneous," concluded a heavily documented article published in 1965 in the University of California-Davis Law Review.

Statewide, since 1980, only 40 percent (212) of the state's capital murder trials (519) have resulted in a death sentence.

Of those death sintences, the Court of Criminal Appeals, since 1972, has reversed 30 percent of all death penalty cases it has reviewed. That cort currently has 122 cases pending on apeal.

Using Harris Couty cost figures, the state's pursuit of th death penalty has cost taxpayers $183.2million.

If these same suspcts had been prosecuted for non-capitalmurder and placed in prison until their 6th birthday rather than sent to death row it would have cost the state $103.6 millio, or $79.6 million less. The projected costs of building the new prison in Palestine, for 2,250 inmates, is $67 million.

These figures were derived from computerized averages of capital murder trials in Harris County, actual cost figures from the Texas Department of Corrections and estimates of average appellate costs based on more than 30 interviews at the county, state and federal level.

In Harris County, the average capital murder trial costs $305,825. The average appellate process and death row incarceration costs an additional $176,305. The total: $482,130.

Figuring the cost

The cost of capital punishment includes court costs, court-appointed attorneys' fees, average appellate costs at the county, state and federal level, housing costs during the average six years spent on death row awaiting execution and the $36.95 cost of the lethal injection.

The cost of capital punishment was compared to the county court administrator's average cost of a non-capital murder trial (where life is the maximum penalty) and TDC's costs of locking up someone until age 65. The average capital murder suspect in Texas is 27 at the time of conviction.

The average cost of a non-capital murder trial is $22,640. The TDC says incarceration costs $11 388 per inmate per year, or $432,744 for 38 years. The total: $455,384.

Harris County District Attorney John B. Holmes said he was "not surprised" at these cost figures or the results of this comprehensive yet unscientific study.

"But the cost doesn't enter into it when I look at pursuing the death penalty," Holmes said. "That should be a factor for the Legislature to question: Should we have a death penalty, or is it too costly a luxury?"

State Sen. Ray Farabee of Wichita Falls, who serves on the state affairs and criminal justice committees, said he supports the feelings of his constituents, no matter how much it costs the state to execute a convicted killer. "I'm not surprised at those figures (almost $500,000 to gain and affirm a death sentence), but my constituency is overwhelmingly in favor of the death penalty," he said.

Referring to the statewide cost of capital punishment since 1980 compared to the cost of a new prison, he said, "That's an impressive comparison, but it still costs more to keep them in prison than execute them."

"It ought to be a capital offense to use that kind of logic," said Henry Schwarzschild, with the American Civil Liberties Union. "The notion that executing two people will save $30,000 from next year's prison budget is laughable."

Favor executions

The vice chairman of the House committee on law enforcement also feels Texans want capital punishment no matter what the cost. State Rep. Allen Hightower of Huntsville, when told the cost of the state's 212 death sentences since 1980 would more than pay for the new prison being built in Palestine, said, "I think you'll find the people in Texas would still rather pursue the death penalty regardless of the cost."

There are currently 241 inmates awaiting execution on the state's death row, including 81 from Harris County.

TDC's death row population in Huntsville ranks second only to Florida. If Harris County were a state, its death row population would rank sixth in the nation.

Texas ranks first in modern-day executions with 19. Five of those executed inmates were convicted in Harris County.

The 1986 Texas Crime Poll, released Nov. 19 by the Criminal Justice Center at Sam Houston State University, showed that 85 percent of those questioned favored the death penalty. Nearly 75 percent, the survey stated, believe too few criminals have been executed.

Although popular support of the death penalty where capital punishment exists hasn't diminished, there is a small movement around the country to re-evaluate the actual cost of capital punishment.

One study, completed in 1982 by the New York State Defenders Association, was based on hypothetical figures drawn from proposed capital punishment legislation. The executive director of that association said the total costs may vary from state to state but the cost difference between pursuing a death or a life sentence remains the same.

"The cost ratio of 10 to 1 ($500,000 to $50,000) for a capital murder trial versus a non-capital murder trial is what we found in New York and what we would expect to find anywhere else," said Johnathon Grades.

In the most recent study, Margot Garey concluded that the minimum cost of carrying out one execution was $600,000.

"Although the cost of lifelong incarceration surely would be high, the cost of execution with constitutional protections is staggering," said Garey in a lengthy, heavily documented article, published July 1985 in the University of California-Davis Law Review. As a result of these questions being raised, the American Bar Association has decided it is time to provide factual answers to questions on the cost of capital punishment.

Research formula developed

Last year, a committee of prosecutors, defense attorneys and judges developed a research formula to determine the actual expense of seeking the death penalty.

"We did it because no one had ever done it before," said North Carolina Supreme Court's Chief Justice-elect James Exum. The conventional wisdom that an execution was ultimately less expensive than a life sentence has never been tested against an actual study, he said.

Exum hopes to use the formula next year to assess the cost of capital punishment in North Carolina.

The project's director, Richard Van Duizend of the National Center for State Courts in Virginia, refused to speculate on what he expects will be "the actual cost of capital punishment."

District Attorney Holmes, who has sent more convicts to death row than any other prosecutor in the state, believes in the death penalty, although he is not a zealous proponent of executions.

Holmes said the death penalty serves as a deterrent, "even if it keeps just one guy from killing an innocent person."

But if there were such a thing as a life sentence without parole, Holmes belives most citizens and juries would prefer assessing life in prison rather than death sentences, "especially if it's not cheaper to kill them . . ."

However, Holmes belives there is another factor supporting the death penalty, regardless of the cost: "It comforts people to know that that retribution (the death penalty) is available. If we don't have that option, society may decide to scratch that itch itself, like Bernard Goetz did in the New York subway."

One last factor to be considered is the cost of irreversible error.

Following last Thursday's execution of a convicted killer out of Dallas, Attorney General Jim Mattox said he believes one of the 19 inmates executed since 1982 may have been wrongly sentenced to die. He refused to identify the dead man.

Mattox also told reporters there are "legitimate questions" involving the death sentences of two other unidentified inmates currently on death row.

"I think there are cases that it could be argued the punishment chosen was not the proper one, but I don't think I've seen any glaring abuse," Mattox said.

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 PRICE OF VENGEANCE

The death penalty costs more than life in prison. Here's how much more. The numbers show the range of estimates.

TRIAL & SENTENCING: $36,000-$116,700

The average death penalty case requires more investigation, more pretrial motions, more expert witnesses and a longer jury selection process. A separate sentencing trial is also required — not required in nondeath cases.

MANDATORY STATE REVIEW: $69,480-$160,000

Every death sentence must be reviewed by the state Supreme Court — not required in nondeath cases.

ADDITIONAL APPEALS: $274,820-$1 million-plus

After conviction is affirmed by the state Supreme Court, at least six levels of appeals remain open.

JAIL COSTS: $37,600-$312,600

Death Row requires extra guards for high security.

EXECUTION COSTS: $845

Florida pays $150 for the executioner, $150 for a death suit, $20 for the last meal and $525 for burial.

SOURCES: Miami Herald research; Florida Department of Corrections; Florida attorney general; Florida Office of Capital Collateral Representative; American Bar Association Post-Conviction Death Penalty Representation Project; Criminal Justice Act Division, Administrative Office of the U.S. Courts; Committee to Study the Death Penalty in Maryland; Kansas Legislative Research Department; Alaska Department of Corrections; *Capital Losses*, a report to the New York Assembly Ways and Means Committee; *The Cost of the Death Penalty*, in the University of California Davis Law Review

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."

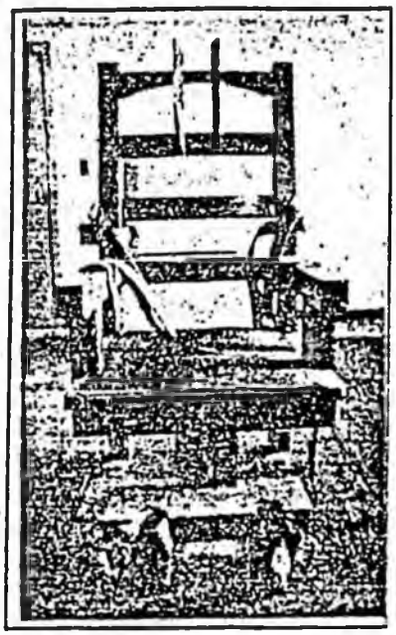
For capital punishment advocates, this is a bitter pill. Just two years ago, former Florida Attorney General Jim Smith pumped up his campaign for governor by promising two executions a month or more. "This delay couldn't go on forever," he said.

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.

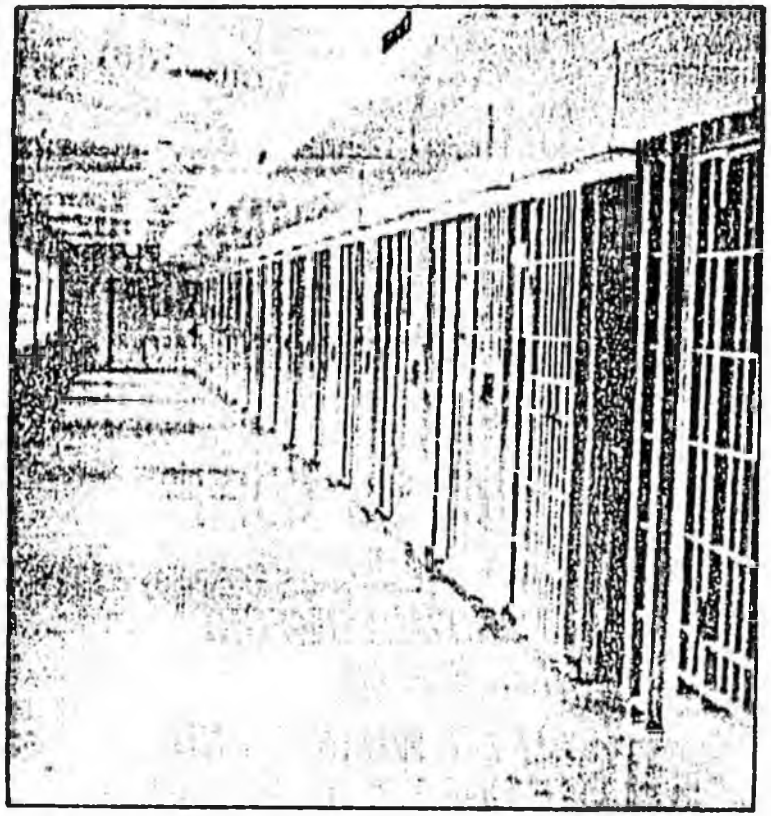
Specifically, the federal courts in California have but a single death penalty case on their dockets. Soon, the caseload will be 80. After the wave hits California, it will hit Ohio. Then Illinois, Pennsylvania, Arizona.

"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, Ja ies McCray, Vernon Cooper.

13 YEARS: Ronald Jackson, Jacob Dorgan, Alvin Ford, Lewis Aldrich, Charles Messer, Douglas Meeks, William Lliedge, Thomas Knight, Lenson Hargrave.

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

11 YEARS: Henry Street 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, Hollie Martin, William Christopher, Raleigh Potter, 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 Scull, Larry Johnson, Theodore Bassett, Bobby Lusk, Gregory Mills, Bernard Bolander, Robert Combs, Robert Waterhouse, William Middleton, Terrell Johnson, Robert Tellefeller, Kenneth Quince, James Agan, Dan Poully, Ernest Fitzpatrick, Sonny Dale Jr., Larry Mond, Oscar Mason, Jellery Daugherty, Linroy Bolfoson, 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 Hoffman, 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, Andrea Jackson, Harry Phillips, Robert Reese, Richard Cooper, Jason Mallon, Michael Lambrix, Ernesto Suarez, William Kelley, Anthony DeViolotti, Robert Glock, Carl Durafh, David Johnston, Jason Deaton, Donald Lloyd, James Huff, John Marek, Jeffrey Muehleman, Thomas Provenzano, Eduardo Lopez.

3 YEARS: Charles Knight, James Floyd, James Hamblen, Juan Melendez, Gregory Koral, Oscar Torres-Abreledo, 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 Amores, Donald Kritzman, Johnny Robinson, Harold Harvey Jr., Hector Fuente, Juan Banda, Jesus Scull.

LESS THAN 2 YEARS: Etheria Jackson, John Merrill, Paul Baldwin, Kenneth Stewart, Robert Roundtree, Walter Brown, Cleo Leroy, Allen Moore, Walter Kyser, Charles Pridgen, Willie Mitchell Jr., John Edwards, Arthur Rutherford, Rudolph Holton, James Harmon, Leonard Spencer, Grover Reed, Kayse Dudley, Darryl Barwick, Mark Davis, Timothy Hudson, James Brown, Paul Brown, George Morris, Wilburn Lamb, Carla Caillier, Charlie Thompson, Alberto Farinas, George Hill, Carlos Bello, John Henry, Michael Rivera, Darrell Hallman, Arthur Schafer, Melvin Trotter, Jorge Zerquera, James Mack, Samuel Rivera, James Dailey, Manuel Colins, 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 Stochor, Antonio Carter, Krishna Maharaj, Michael Keen, Guy Christian, John Freeman, Frederick Nowlike, Clinton Jackson, Peter Ventura, Bradley Scott, Edward Castro, David Pentecost, George Soulli, David Young, Richard Anderson, Raymond Thompson, George Porter Jr., Johnnie Boone Jr., Walter Caruak, Bernell Heywood, 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
7/11/88/1A,8A

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 cnallenge 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 rarely executed without a glance from appel-

[illegible]rman 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.

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.

▶ **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.

THE MIAMI HERALD
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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.

Morphomos 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."

THE MIAMI HERALD
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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 265 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 Learie 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: Learie 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 1986, 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.

Governor	Term	CLEMENCY 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.

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INTRODUCTION

The moral legitimacy of capital punishment polarizes society. Individuals advance countless ethical and practical arguments either supporting or opposing the punishment.[1] Both supporters and opponents espouse moral justifications for their positions, and both are equally adamant in their beliefs.[2] In an effort to garner public support for the

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[1] For representative examples, see THE DEATH PENALTY IN AMERICA 305-82 (H. Bedau 3d ed. 1982) [hereafter DEATH PENALTY]; THE DEATH PENALTY IN AMERICA 120-231 (H. Bedau rev. ed. 1968) [hereafter DEATH PENALTY 1968].

[2] For supporters' view of the death penalty, see, e.g., W. BERNS, FOR CAPITAL PUNISHMENT 164-76 (1979) (criminals are punished principally for retribution; the worst are executed out of moral necessity); van den Haag, *In Defense of the Death Penalty: A Legal—Practical—Moral Analysis*, 14 CRIM. L. BULL. 51, 66 (1978) ("If there is nothing for the sake of which one may be put to death, can there be nothing worth dying for? If there is nothing worth dying for, is there any moral value worth living for?"); *id.* ("No society can profess that the lives of its members are secure if those who did not allow innocent others to continue living are themselves allowed to continue living — at the expense of the community."). For opponents' view of the death penalty, see, e.g., C. BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE (2d ed. 1981) (the process of choosing who dies continues to be standardless and mistake-prone); Amnesty International, *Proposal for a Presidential Commission on the Death Penalty in the United States of America*, in DEATH PENALTY, *supra* note 1, at 375-82 (the death penalty is a violation of human rights); Amsterdam, *Capital Punishment*, in DEATH PENALTY, *supra* note 1, at 346-58 (capital punishment does not undo the wrong done by the murderer, kills some people in error, and is discriminatorily imposed); Black, *Death Sentences and Our Criminal Justice System*, in DEATH PENALTY, *supra* note 1, at 359-64 (capital punishment is too final, brutal, and subject to human fallibility to be tolerated); Schwarzschild, *In Opposition to Death Penalty Legislation*, in DEATH PENALTY, *supra* note 1, at 364-70 (public that argues for the death penalty is generally uninformed about social facts surrounding the penalty and often merely responds to seemingly insoluble problem of crime; human judgment and human institutions are too fallible to have absolute certainty needed before considering executing a person); Yoder, *A Christian Perspective*, in DEATH

death penalty, some proponents also argue that the death penalty saves money because the cost of executing convicted murderers is less than the cost of imprisoning them.[3] This argument is disturbing since it reduces the moral complexity of state imposed killing to a debate over dollars and cents. However, since simplistic arguments often sway public opinion,[4] the factual merit of this "cost-effective" justification for the death penalty warrants examination.

Assessing the financial cost of capital punishment requires an examination of the special features of capital prosecutions and judicial review of capital convictions. Constitutional safeguards that guide the state and ensure a fair process for the defendant are of heightened importance in capital cases. As the United States Supreme Court repeatedly has stated, "death is different."[5] Consequently, the Supreme Court has required that states accord capital defendants procedural and substantive protections beyond those required for noncapital defendants.

Part I of this Comment examines the due process safeguards required for a constitutional system of state imposed execution. Part II outlines the financial costs of maintaining a constitutional execution process. Part III concludes that the execution process costs more than

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PENALTY, *supra* note 1, at 370-75 (one way government can keep society's violence at a minimum is to proclaim human life inviolate and prohibit killing even though secular justice may seem to sanction killing).

[3] *See, e.g.*, U.S. DEPARTMENT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS — 1983, at 278 (1984) (In fact, 9% of the persons who explained why they support the death penalty stated that jail sentences cost society too much money.); WASHINGTON RESEARCH PROJECT, THE CASE AGAINST CAPITAL PUNISHMENT 61 (1971) (copy on file with *U.C. Davis Law Review*).

[4] *See* Sarat & Vidmar, *Public Opinion, The Death Penalty, and the Eighth Amendment: Testing the Marshall Hypothesis*, 1976 WIS. L. REV. 171, 195 (finding that when death penalty supporters were more informed about capital punishment, especially its utilitarian aspects, a substantial portion changed their opinion); Thomas, *Eighth Amendment Challenges to the Death Penalty: The Relevance of Informed Public Opinion*, 30 VAND. L. REV. 1005, 1029-30 (1977) (much of public support for death penalty stems from utilitarian belief in its deterrent effect — the strong support appears to result from uninformed opinion, and given the lack of evidence of the death penalty's deterrent effect, a far too generous assessment of deterrence; public support frequently lacks a detailed factual understanding of the criminal justice system and generally reflects attitudes and beliefs).

[5] *See, e.g.*, Gardner v. Florida, 430 U.S. 349, 357-58 (1977) (citations omitted) ("[D]eath is a different kind of punishment from any other which may be imposed in this country. . . . From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action.").

imprisoning a person for life and notes the ramifications of the death penalty for the criminal justice system. Acknowledging that "death is different," the system attempts to adapt accordingly. However, it must be remembered that the death penalty is an alternative punishment; life imprisonment, with or without parole, is another punishment. If the goal is a more effective criminal justice system, retentionists should reassess the overall practicality and desirability of continuing capital punishment when its costs, both financially and morally, undermine the system.

I. Death Penalty Safeguards: A Scheme to Prevent Unconstitutional Executions

The spectrum of alternatives available to the Supreme Court when assessing the constitutionality of the death penalty, as with all spectra, has two extremes. At one extreme, the Court could rule that the the death penalty is per se an unconstitutional punishment. Although some members of the Court favor this view,[6] a majority of the Justices has never embraced this interpretation.[7] At the other end of the spectrum, the Court could declare that the death penalty is per se constitutional and a matter to be left to the states' political leaders.[8] The Court has

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[6] Justices Marshall and Brennan took such an approach in *Furman*. They concluded that the death penalty was per se unconstitutional as it is always cruel and unusual punishment. Furman v. Georgia, 408 U.S. 238, 305-06 (1972) (Brennan, J., concurring); *id.* at 360-61 (Marshall, J., concurring); *see also* Enmund v. Florida, 458 U.S. 782, 801 (1982) (Brennan, J., concurring); Godfrey v. Georgia, 446 U.S. 420, 433 (1980) (Marshall, J., concurring, joined by Brennan, J.); Lockett v. Ohio, 438 U.S. 586, 619 (1978) (Marshall, J., concurring); Gardner v. Florida, 430 U.S. 349, 364-65 (1976) (Brennan, J., separate opinion); *id.* at 365 (Marshall, J., dissenting); Woodson v. North Carolina, 428 U.S. 280, 306 (1976) (Marshall, J., concurring); Gregg v. Georgia, 428 U.S. 153, 230-31 (1976) (Brennan, J., dissenting); *id.* at 231 (Marshall, J., dissenting).

[7] In *Furman* three of the five Justice plurality concluded that the death penalty was unconstitutional as applied in the cases before the Court, but did not believe that the death penalty was unconstitutional per se. 408 U.S. at 253, 256-57 (Douglas, J., concurring); *id.* at 309-10 (Stewart, J., concurring); *id.* at 312-13 (White, J., concurring); *see also* Enmund v. Florida, 458 U.S. 782, 798 (1982); Godfrey v. Georgia, 446 U.S. 420, 428 (1980); Lockett v. Ohio, 438 U.S. 586, 601 (1978); Gregg v. Georgia, 428 U.S. 153, 169 (1976).

[8] In *Furman* the four dissenting Justices concluded that judicial restraint in reviewing the death penalty statutes should be exercised, and changes in death penalty law should be left to the legislatures. 408 U.S. at 405, 410, 466, 468; *see also* Enmund v. Florida, 458 U.S. 782, 801-02 (1982) (O'Connor, J., dissenting); Lockett v. Ohio, 438 U.S. 586, 633 (1978) (Rehnquist, J., dissenting).

never endorsed this approach[9] and implicitly has rejected it by holding mandatory imposition of the death penalty unconstitutional.[10] Between these extremes lies the Supreme Court's current approach to death penalty adjudication.

A. Adjudication in Death Penalty Cases: Conflicting Tensions in the Supreme Court

The Supreme Court's concern about the constitutionality of the death penalty derives from the nature of the penalty and the criminal justice system. Death differs from other state imposed punishments in its finality and irrevocability.[11] After the sentence is carried out, a factual mistake[12] or change in the law is irremediable. Because of the severity of the death penalty, a critical concern in the Court's determination of the punishment's constitutionality is its moral and ethical ramifications.[13] Consequently, the Court reviews the appropriateness of death as punishment, as well as the constitutionality of the process, within the pa-

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[9] The right to be free from cruel and unusual punishments requires judicial enforcement of the eighth amendment. " 'The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.' " *Furman*, 408 U.S. at 268-69 (Brennan, J., concurring) (quoting West Virginia State Board of Educ. v. Barnette, 319 U.S. 624, 638 (1943)); *see also* Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1782 (1970) (statutory authorization is not sufficient to constitutionally authorize a punishment).

[10] *See* Woodson v. North Carolina, 428 U.S. 280 (1976) (mandatory imposition of the death penalty for first degree murder unconstitutional).

[11] *See* Gregg v. Georgia, 428 U.S. 153, 187 (1976) (death penalty unique in its severity and irrevocability); Furman v. Georgia, 408 U.S. 238, 289 (1972) (Brennan, J., concurring) (unusual severity of death manifested by its finality and enormity); *id.* at 306 (Stewart, J., concurring) (penalty of death unique in its total irrevocability).

[12] *See generally* Bedau, *Murder, Errors of Justice, and Capital Punishment*, in DEATH PENALTY 1968, *supra* note 1, at 434; *see also* L.A. Daily J., Sept. 4, 1984, at 4, col. 4 (in 1974, four of the seven men on New Mexico's death row were later found to be innocent — they had been convicted on perjured testimony).

[13] Coker v. Georgia, 433 U.S. 584, 597 (1977) ("[T]he Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment."); Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishment Clause*, 126 U. PA. L. REV. 989, 1030-33 (1978) (majority of Court has adopted the view that meaning of "cruelty" is variable and is dictated by society's present view of cruelty); Tao, *Beyond* Furman v. Georgia: *The Need For a Morally Based Decision on Capital Punishment*, 51 NOTRE DAME LAW. 722, 736 (1976) (moral value of capital punishment should determine the penalty's constitutionality).

rameters of our society's "evolving standards of decency."[8] The Court's goal is a fair process that scrupulously safeguards a capital defendant's constitutional rights. Without the safeguards and judicial review, imposition of the death penalty is unconstitutional.[9]

As a theoretical punishment, the death penalty has been held constitutional.[10] The practical application of the punishment, however, may violate constitutional protections. Our evolving standards of decency, and the Court's mandate against excessive punishments and arbitrarily and capriciously imposed death sentences, may sometimes render the death penalty invalid. For example, in *Coker v. Georgia*,[11] the Court held that the death penalty for rape was an excessive and therefore an unconstitutional punishment. *Coker* also illustrates the potentially discriminatory application of the death penalty. From 1930 until the 1977 *Coker* decision, 455 men had been executed for rape; 405 of those men were black.[12] Although not addressed in *Coker*, the fact that eighty-nine percent of those executed for rape were black clearly indicates the potential for discriminatory imposition of the punishment.[13] The likelihood for unjust death has led to the Supreme Court's rules governing the specific application of the sentence.

The Court's restrictions on the death penalty were developed only recently and require significant judicial involvement. From 1966 to

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[8] *See* Trop v. Dulles, 356 U.S. 86, 101 (1958) (eighth amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society"); *see also* Lockett v. Ohio, 438 U.S. 586, 620 (1978) (Marshall, J., concurring); Woodson v. North Carolina, 428 U.S. 280, 301 (1976); Gregg v. Georgia, 428 U.S. 153, 173 (1976); Furman v. Georgia, 408 U.S. 238, 242 (1972) (Douglas, J., concurring); Comment, *The Impact of a Sliding Scale Approach to Due Process on Capital Punishment Litigation*, 30 SYRACUSE L. REV. 675, 681 (1979) (to satisfy due process, capital sentencing must meet "evolving standards").

[9] *See, e.g.*, Goodpaster, *Judicial Review of Death Sentences*, 74 J. CRIM. L. & CRIMINOLOGY 786, 796-802 (1983) (judicial review implicit in concept of cruel and unusual punishment; circumscribes potential arbitrariness; is required to ensure equal protection).

[10] In *In re* Kemmler, 136 U.S. 436, 447 (1890), the Court reasoned that the death penalty did not violate the eighth amendment since the death penalty had a long history of acceptance in this country. The Court concluded that execution was not torture, basically on the theory that the death penalty was not considered cruel and unusual when the Bill of Rights was framed.

[11] 433 U.S. 584, 598 (1977).

[12] *See* Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143, 1158 n.54 (1980).

[13] *See* Furman v. Georgia, 408 U.S. 238, 256-57 (1972) (Douglas, J., concurring) (death penalty statutes in *Furman* were unconstitutional in their operation since death sentences were imposed discriminatorily).

1976, largely due to the efforts of the NAACP Legal Defense and Educational Fund, there was a ten-year hiatus in executions.[8] Because death sentences were not carried out, the Court was not pressured to develop a constitutional framework for imposing the sentence. However, as the public outcry against crime and violence increased,[9] the Supreme Court again broached the emotional question: when may the state constitutionally impose death as a punishment? In answering this question, the Court has adopted an ad hoc system of constitutional interpretation.[10] The countless possible constitutional challenges[11] and the infinite variety of circumstances surrounding a murder warrants a case-by-case approach. Although careful drafting of death penalty statutes can eliminate some arbitrariness, implementation of these statutes is subject to much discretion by prosecutors, judges, and juries. Thus, while statutes may specify the special circumstances justifying a death sentence,[12] only a reviewing court can determine if the sentencer cor-

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[8] There was a de facto moratorium from 1966 to 1976. The decline in executions, however, began in the 1940's due to various social forces. For example, doubts about the morality of capital punishment, the fact that most of Western Europe had abandoned the death penalty, empirical evidence that undermined the belief that capital punishment was effective as a deterrent, and empirical evidence that indicated the racially discriminatory imposition of the death penalty resulted in the Court's willingness to delay executions and consider constitutional challenges. *See* Bedau, *Background and Developments*, in DEATH PENALTY, *supra* note 1, at 24-25.

[9] *See* Bedau, *American Attitudes Toward the Death Penalty*, in DEATH PENALTY, *supra* note 1, at 67 (national consciousness regarding increase in crime rate began with 1968 elections, when "law and order" and "crime in the streets" became important political issues).

[10] A defendant sentenced to death receives an automatic direct appeal to the state supreme court. *See* Gregg v. Georgia, 428 U.S. 153, 198 (1976). Although it is unclear whether the Court approved judicial review or constitutionally required it, the Court has subsequently concluded that one aspect of the death penalty statute in *Gregg* is not constitutionally required. In Pulley v. Harris, 104 S. Ct. 871 (1984), the Court held that proportionality review, a comparison of the defendant's sentence with sentences imposed in similar cases, is not constitutionally required. *See infra* notes 74-77 and accompanying text.

[11] Possible constitutional challenges include. The punishment of death is excessive to the crime, *see* Coker v. Georgia, 433 U.S. 584 (1977); mitigating evidence was excluded, *see* Lockett v. Ohio, 438 U.S. 586 (1978); the language of death penalty statutes is vague and ambiguous, *see* Godfrey v. Georgia, 446 U.S. 420 (1980); the punishment is not penologically justifiable, *see* Enmund v. Florida, 458 U.S. 782, 798-801 (1982).

[12] For example, California's special statutory circumstances, some of which are listed below, specify how the line should be drawn in Penal Code § 190.2:

> (a) The penalty for a defendant found guilty of murder in the first degree shall be death or confinement in state prison for a term of life without the possibility of parole in any case in which one or more of the fol-

rectly and constitutionally applied those circumstances in any particular

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lowing special circumstances has been charged and specially found under Section 190.4, to be true:

(1) The murder was intentional and carried out for financial gain.

(2) The defendant was previously convicted of murder in the first degree or second degree . . . .

(3) The defendant has in this proceeding been convicted of more than one offense of murder in the first or second degree . . . .

(5) The murder was committed for the purpose of avoiding or preventing a lawful arrest or to perfect, or attempt to perfect an escape from lawful custody . . . .

(7) The victim was a peace officer . . . who, while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a peace officer engaged in the performance of his duties . . . and was intentionally killed in retaliation for the performance of his official duties . . . .

(10) The victim was a witness to a crime who was intentionally killed for the purpose of preventing his testimony in any criminal proceeding, and the killing was not committed during the commission, or attempted commission or the crime to which he was a witness; or the victim was a witness to a crime and was intentionally killed in retaliation for his testimony in any criminal proceeding . . . .

(14) The murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity, as utilized in this section, the phrase especially heinous, atrocious or cruel manifesting exceptional depravity means a conscienceless, or pitiless crime which is unnecessarily torturous to the victim.

(15) The defendant intentionally killed the victim while lying in wait.

(16) The victim was intentionally killed because of his race, color, religion, nationality or country of origin.

(17) The murder was committed while the defendant was engaged in or was an accomplice in the commission of, attempted commission of, or the immediate flight after committing or attempting to commit the following felonies:

(i) Robbery in violation of Section 211.

(ii) Kidnapping in violation of Sections 207 and 209.

(iii) Rape in violation of Section 261.

(iv) Sodomy in violation of Section 286.

(v) The performance of a lewd or lascivious act upon person of a child under the age of 14 in violation of Section 288.

(vi) Oral copulation in violation of Section 288a.

(vii) Burglary in the first or second degree in violation of Section 460.

(viii) Arson in violation of Section 447.

(ix) Train wrecking in violation of Section 219.

(18) The murder was intentional and involved the infliction of torture. For the purpose of this section torture requires proof of the infliction of extreme physical pain no matter how long its duration.

(19) The defendant intentionally killed the victim by the administration of poison.

case." The Supreme Court's approach recognizes that only the courts can fully maintain the constitutionally required dividing line between capital and noncapital defendants."

To provide for a constitutional execution system while protecting the rights of capital defendants, the Court has placed a burden upon the judicial system to review individual claims with exacting scrutiny. Yet unless one adopts the extreme positions of the spectrum — per se unconstitutional or per se constitutional — the ad hoc approach is essential. The following section describes the Supreme Court's attempt to constitutionalize the penalty: to limit its scope and to prevent its arbitrary and capricious application.

B. Due Process for Death

Recognizing the inherent problems in imposing the death penalty, the Supreme Court has adopted what has been called a "super due process"[7] approach to capital punishment procedures. This approach

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(b) Every person whether or not the actual killer found guilty of intentionally aiding, abetting, counseling, commanding, inducing, soliciting, requesting, or assisting any actor in the commission of murder in the first degree shall suffer death or confinement in state prison for a term of life without the possibility of parole, in any case in which one or more of the special circumstances enumerated in paragraphs (1), (3), (4), (5), (6), (7), (8), (9), (10), (11), (12), (13), (14), (15), (16), (17), (18), or (19) of subdivision (a) of this section has been charged and specially found under Section 190.4 to be true . . . .

CAL. PENAL CODE § 190.2 (West Supp. 1985).

[6] A recurring issue is whether a jury can sufficiently understand a statute, its accompanying instructions, and then subsequently conclude fairly that a defendant falls within the class of individuals that the legislature has deemed eligible for execution. As the Court concluded in Godfrey v. Georgia, 446 U.S. 420, 433 (1980), the aggravating factor that death qualified the defendant could not be applied in a principled way to distinguish the defendant's case from the many cases in which the death penalty was not imposed.

Additionally, studies generally conclude that the language of jury instructions is very difficult for jurors to understand and can frequently lead to improper verdicts. *See, e.g.* Severance, Greene & Loftus, *Toward Criminal Jury Instruction That Jurors Can Understand*, 75 J. CRIM. L. & CRIMINOLOGY 198, 202 (1984) (studies find that jurors understand only about one-half of legal instructions they are given; many criminal trial verdicts reflect misunderstandings of juror's role and of what the law requires).

[7] In Zant v. Stephens, 462 U.S. 862, 878-80 (1983) the Court reaffirmed the necessity of appellate review of the sentencer's initial decision that a defendant is among the class of persons that the legislature has deemed eligible for execution.

[7] The concept of super due process for death sentencing procedures is a theory derived from the Court's conclusion that capital trials require increased and unique procedural safeguards. *See* Radin, *supra* note 18, at 1143-48.

first surfaced in *Furman v. Georgia*[7] in which the Court held that arbitrary and capricious application of the death penalty was itself cruel and unusual punishment.[8] The Court has since fashioned substantive and procedural protections to ensure that the death penalty is not imposed unjustly.[9] In prescribing a constitutional procedure, the Court has focused on three major concerns.

1. Cruel and Unusual Punishment

The eighth amendment to the United States Constitution prohibits the state from inflicting cruel and unusual punishments.[10] Although the Supreme Court has struggled to define this concept,[11] changing mores have prevented any static interpretation.[12] The difficulty is that what constitutes cruel and unusual punishment largely reflects prevailing societal attitudes.[13] Nevertheless, the death penalty, because of society's

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[7] *See* Furman v. Georgia, 408 U.S. 238 (1972); *infra* notes 36-41 and accompanying text; *see also* Radin, *supra* note 18, at 1150.

[8] *Furman*, 408 U.S. at 239-40; *see also* Radin, *supra* note 18, at 1144 (a process can be as unconstitutionally cruel as the event it authorizes).

[9] The Court has continued to espouse the need for super due process in death penalty sentencing to prevent arbitrary imposition of the death penalty. *See* Radin, *supra* note 18, at 1144.

[10] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. The eighth amendment was incorporated into the fourteenth amendment and made applicable to the states in Robinson v. California, 370 U.S. 660 (1962).

[11] In *Furman*, Justice Brennan noted that the Court has found only three punishments unconstitutional since adoption of the eighth amendment: Robinson v. California, 370 U.S. 660 (1962) (imprisonment for narcotics addiction); Trop v. Dulles, 356 U.S. 86 (1958) (expatriation for wartime desertion); Weems v. United States, 217 U.S. 349 (1910) (12 years in chains at hard and painful labor for falsifying a public document). *Furman*, 408 U.S. at 282. The nine separate opinions in *Furman* illustrate the difficulty of defining what constitutes cruel and unusual punishment. *See infra* note 38.

[12] In Weems v. United States, 217 U.S. 349, 373 (1910), the Court stated that "[t]ime . . . brings into existence new conditions and purposes," and that when applying the Constitution "our contemplation cannot be only of what has been but of what may be." The Court further noted that what constitutes cruel and unusual punishment changes as "public opinion becomes enlightened by a humane justice." *Id.* at 378. Following this position in Trop v. Dulles, 356 U.S. 86, 101 (1958), the Court concluded that the eighth amendment derived its meaning from "the evolving standards of decency that mark the progress of a maturing society."

[13] *See* Bedau, *Witness to a Persecution: The Death Penalty and the Dawson Five*, 8 BLACK L. J. 7, 19 (1983) (moral attitudes of society have banished such punishments as branding, flogging, and maiming people); *see also* Vidmar & Ellsworth, *Public Opinion and the Death Penalty*, 26 STAN. L. REV. 1245, 1246 (1974) (interpretation of the eighth amendment's prohibition of cruel and unusual punishment appears to

changing beliefs, the moral issues it raises, its questionable penological justification, and its finality and severity, inevitably requires the Court to determine whether it constitutes cruel and unusual punishment."[1] The eighth amendment's cruel and unusual prohibition has therefore become the focal point for resolving the constitutionality of any given death sentence. Interpreting the eighth amendment, the Court has concluded that some state procedures for imposing the death penalty are unconstitutional and that death is a cruel and unusual punishment for some crimes. In both areas, the Court has found that certain state statutory schemes fall within the unconstitutional per se end of the spectrum. However, the Court also has concluded that with sufficient safeguards, a process for imposing death may be constitutional.

In *Furman v. Georgia*,[2] the Supreme Court declared, for the first time, that the death penalty as then imposed[3] constituted cruel and unusual punishment. In nine separate opinions, the Justices attempted to define cruel and unusual punishments.[4] A plurality of the Justices found that the death penalty was unconstitutional as applied in the

include assessment of society's values). A recent Gallup Poll found that 70% of Americans favored capital punishment. However, if life imprisonment without parole were a certainty, the support fell to 50%; and a similar decline occurred (to 51%) if evidence were to show that the death penalty did not deter. Sacramento Bee, Feb. 3, 1985, Pt. A, at 25.

[1] In *Furman*, Justice Brennan concluded that inherent in the cruel and unusual clause are the principles that a severe punishment must not be unacceptable to contemporary society, a punishment is unconstitutionally excessive if a significantly less severe punishment adequately achieves the purpose for which the punishment is inflicted, a punishment must not by its severity degrade human dignity, and punishment cannot be inflicted arbitrarily. *Furman*, 408 U.S. at 281-82 (Brennan, J., concurring).

[2] 408 U.S. 238 (1972).

[3] In McGautha v. California, 402 U.S. 183, 196, 199 (1971), decided just one year before *Furman*, the Supreme Court rejected the petitioner's assertion that standardless imposition of the death penalty was a constitutional violation. The Court concluded that standardless discretionary judgment on the facts of each case was the only way to distinguish which crimes warranted executing the defendant and which defendants deserved death.

[4] A plurality of five Justices agreed in the per curiam judgment. Three Justices concluded that the death penalty was unconstitutional as applied in the cases before the court, but did not believe the death penalty was unconstitutional per se. *Id.* at 256-57, 310, 311. Justice Stewart found that in these cases, the death penalty was unconstitutional because it was wantonly and freakishly imposed. *Id.* at 310. "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual . . . . [T]he petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed." *Id.* at 309-10. Justice Douglas also found the death penalty unconstitutional as applied in these cases.

cases before the Court. The Justices who formed the plurality found that a death penalty statute that leaves to judges and juries standardless and uncontrolled discretion to decide whether someone should live or die constitutes cruel and unusual punishment.[39] The *Furman* plurality focused on a number of unconstitutional results with the then existing death penalty scheme. Justice Douglas found that the imposition of the death penalty was "pregnant with discrimination."[40] Justice Stewart

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> People live or die, dependent on the whim of one man or of 12 . . . . [T]hese discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on "cruel and unusual punishments."

Id. at 253, 256-57. Justice White concluded that the death penalty statutes involved in these cases violated the eighth amendment because as administered, "the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice." *Id.* at 313. He believed that if a punishment does not meet the social ends it was deemed to serve, in the case of death, it would mean the "pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes." *Id.* at 312. Justices Marshall and Brennan found the death penalty per se unconstitutional as it is always cruel and unusual punishment. Justice Brennan, stating that the death penalty is "fatally offensive to human dignity," concluded that the punishment of death is always

> "[c]ruel and unusual," and the States may no longer inflict it as a punishment for crimes. Rather than kill an arbitrary handful of criminals each year, the States will confine them in prison. "The State thereby suffers nothing and loses no power. The purpose of punishment is fulfilled, crime is repressed by penalties of just, not tormenting, severity, its repetition is prevented, and hope is given for the reformation of the criminal."

Id. at 305-06 (quoting Weems v. United States, 217 U.S. 349, 381 (1910)). Justice Marshall, after a thorough explanation of the evolving meaning of cruel and unusual and a discussion of the history of capital punishment in the United States, concluded that the death penalty per se violates the eighth amendment as it is an excessive and unnecessary punishment. *Id.* at 358. Additionally, he concluded that the death penalty "shocks the conscience and sense of justice" of an informed public and is therefore unconstitutional as it is "morally unacceptable to the people of the United States at this time in their history." *Id.* at 360-61. The four dissenting Justices asserted that changes in the law regarding the extent of imposing the death penalty were better and more appropriately made in the legislature. *Id.* at 405. The nine Justices, in as many opinions, attempted to define whether a punishment is cruel and unusual. *Furman* presents a good example of the difficulty in defining the terms.

[39] Although each stated a different reason for his conclusion, Justices Douglas, Stewart, and White found that the death penalty violated the eighth amendment's prohibition of cruel and unusual punishment, as it was imposed arbitrarily and capriciously. *See supra* note 38. In *Furman*, three petitioners sentenced to die were before the Court. Two were sentenced pursuant to Georgia law; one was convicted of murder, and one was convicted of rape. The third petitioner was convicted of rape pursuant to Texas law.

[40] 408 U.S. at 257.

believed that the death sentence violated the eighth amendment if it was wantonly and freakishly imposed, as arbitrarily as if the defendant were "struck by lightning."[41] Although not ruling the death penalty unconstitutional per se, the *Furman* majority did hold that, at a minimum, death penalty statutes must provide some rational basis for deciding who shall live and who shall die.

Furman invalidated death penalty statutes in over three-fourths of the states and in sections of the Federal Criminal Code.[42] States responded by reenacting death penalty statutes along two different lines to avoid the arbitrariness found unconstitutional in *Furman*. One scheme involved statutes that provided juries with guidelines for imposing the death penalty.[43] The second method provided mandatory death penalty statutes that theoretically would remove all sentencing discretion from the sentencer.[44] In formulating eighth amendment requirements for imposing the death penalty, the Supreme Court ultimately resolved the constitutionality of both approaches.

A constitutional process for determining how and upon whom the death penalty is imposed requires that a state's death penalty statute provide guidance to limit the jury's discretion. In *Gregg v. Georgia*,[45] the Court reviewed Georgia's guided discretion statute. Concluding that the death penalty is not per se unconstitutional, the Court found the constitutional infirmities of the *Furman* statutes could be corrected by providing juries with proper guidance, providing the defendant with a bifurcated proceeding, and entitling the defendant sentenced to death to an automatic direct appeal to the state supreme court.[46] Thus, *Gregg* established a constitutional scheme for imposing the death penalty. First, the statute authorizing the penalty must outline the aggravating factors that warrant the death penalty, thus guiding the sentencer's discretion.[47] To impose the sentence, the sentencer must find at least one

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[41] *Id.* at 309.

[42] In each of these jurisdictions, the sentencing choice of death was left to the sentencer's unguided discretion. *See* Note, *Capital Punishment: A Review of Recent Supreme Court Decisions*, 52 NOTRE DAME LAW. 261, 273 (1976).

[43] *See infra* notes 45-54 and accompanying text; *see also* MODEL PENAL CODE § 210.6 comment, at 156 n.144 (15 states enacted guided discretion statutes in response to *Furman*).

[44] *See infra* notes 59-61 and accompanying text; *see also* MODEL PENAL CODE § 210.6 comment, at 156 n.145 (18 states enacted mandatory death penalty statutes in response to *Furman*).

[45] 428 U.S. 153 (1976).

[46] *Id.* at 195, 206-07.

[47] The Georgia statute, as quoted in *Gregg*, 428 U.S. at 165 n.9, listed the following aggravating circumstances:

of the factors present.[41] Second, the defendant should receive a bifurcated trial:[42] one proceeding to determine the defendant's guilt, and if found guilty, a second proceeding to determine and impose the sentence. At the sentencing proceeding the defendant may provide the sentencer with additional information that would not be admissible at the

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(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

Act of Mar. 28, 1973, No. 74 § 3, 1973 Ga. Laws 159, 163-65 (currently codified at GA. CODE ANN. § 27-2534.1(b) (1983)).

[41] According to the Georgia statute, even if the sentencer identifies an aggravating circumstance, it may nonetheless choose not to impose the death sentence. It may instead sentence the capital defendant to life in prison. GA. CODE ANN. § 27-2534.1(b) (1983) (death penalty "may be authorized"). Consequently, the Georgia statute provides more general guidelines for the sentencer, but also leaves a legal option should the jury believe the specific defendant does not deserve to die.

[42] *Gregg*, 428 U.S. at 163.

guilt trial, thereby increasing the probability of imposing an appropriate sentence.[28] The third safeguard, automatic state supreme court review,[29] ensures that the sentence resulted from application of the statutory guidelines, and not from arbitrary factors.[30] Satisfied with these provisions, the Court upheld Georgia's guided discretion statute,[31] believing that it would prevent juries from wantonly and freakishly imposing the death sentence.[32]

Although the Court approved the guided discretion approach, a guided discretion statute may still be constitutionally infirm. For example, the statutory language and jury instructions that guide sentencer discretion must not be ambiguous. In *Godfrey v. Georgia*,[33] the defendant argued that the aggravating factor used to justify his death sentence was unconstitutionally vague.[34] The Court agreed, chastising the Georgia Supreme Court for affirming a death sentence that could not, in a principled way, be distinguished from the many cases in which the death penalty is not imposed.[35] Although the Court may have remedied the error for Godfrey, the case illustrates the problems that surround

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[28] *Id.* at 195.

[29] The Georgia Supreme Court is to consider the punishment, as well as errors enumerated by the appeal. The court is to determine whether passion, prejudice, or any other arbitrary factor influenced the choice of death, whether the evidence supports the aggravating factor that permits the imposition of death, and whether death is disproportionate or excessive when compared with penalties in similar crimes, considering the offender and the offense. GA. CODE ANN. § 27-2537(b), (c) (1983).

[30] Note, *Constitutional Procedure for the Imposition of the Death Penalty — Godfrey v. Georgia*, 30 DE PAUL L. REV. 721, 726 (1981) (purpose of automatic review is to "correct any deviation from consistent jury sentencing") [hereafter, Note, *Constitutional Procedure*].

[31] *Gregg*, 428 U.S. at 206-07.

[32] The Court reviewed and upheld two other guided discretion statutes the same day as *Gregg*. Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976).

[33] 446 U.S. 420 (1980).

[34] The statutory aggravating circumstance permitted the imposition of death if the defendant was convicted of murder and if it was found beyond a reasonable doubt that the offense "was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Act of Mar. 28, 1973, No. 74, § 3, 1973 Ga. Laws 159, 163-65 (currently codified at GA. CODE § 27-2534.1(b)(7) (1983)). In *Godfrey*, the defendant shot his estranged wife and his mother-in-law. He immediately notified the authorities and asked them to pick him up. 446 U.S. at 425.

[35] 446 U.S. at 433; *see also* Note, *Constitutional Procedure*, *supra* note 52, at 730 (Court's attention was on role and responsibility of state supreme court in sentencing process).

the death penalty.[41] While guided discretion statutes may be theoretically constitutional, their language and application may still produce unconstitutional results.

In addition to Georgia's method for avoiding the *Furman* result, the Court tested the constitutionality of removing all discretion from the sentencer. The Court in *Woodson v. North Carolina*[42] invalidated a mandatory death penalty statute because the process was unconstitutional. The Court stated that the mandatory process would result in an arbitrary and wanton imposition of the death penalty, since the procedure would lead to "refusal of juries to convict murderers rather than subject them to automatic death sentences."[43] The procedure violated the eighth and fourteenth amendments because it treated "all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death."[44] Thus, the Court recognized the need for some jury discretion when imposing the death penalty. Subsequently, the Court addressed the degree of discretion permitted for the sentencing portion of a constitutionally imposed death sentence.

In *Lockett v. Ohio*[45] the defendant contended that the Ohio death penalty statute was unconstitutional because it prevented the sentencer from considering the defendant's mitigating factors.[46] The defendant ar-

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[41] As Justice White noted in his dissent, the majority adopts the argument " 'that no matter how effective the death penalty may be as a punishment, government, created and run as it must be by humans, is inevitably incompetent to administer it.' " 446 U.S. at 456 (White, J., dissenting) (quoting *Gregg*, 428 U.S. at 226 (White, J., concurring)). White's words imply a frustration with a system that will not permit the imposition of a theoretically constitutional penalty. *Gregg*, 428 U.S. at 226 (1976) (White, J., concurring in judgment) (human incompetence cannot be accepted as a proposition of constitutional law).

[42] 428 U.S. 280 (1976).

[43] *Id.* at 290, 303.

[44] *Id.* at 304. In Roberts v. Louisiana, 428 U.S. 325 (1976), decided the same day as *Woodson*, the Court also found Louisiana's mandatory death penalty statute unconstitutional, for the same reason put forth in *Woodson*.

[45] 438 U.S. 586 (1978).

[46] Lockett waited in a getaway car while her three co-participants robbed a pawnshop. During the robbery, the pawnbroker was accidentally killed. Lockett's role in the crime as getaway driver was sufficient to convict her of murder. Lockett's case also presented the issue whether the death penalty was an unconstitutional punishment for a co-felon in a felony murder who did not kill. The Court did not have to decide this issue since it found Lockett's sentence unconstitutional on other grounds. However, a number of the Justices discussed whether death could be imposed when the defendant did not intend the death of the victim. *Id.* at 613-16, 624.

gued that her sentence was invalid since the mitigating factors she offered — her age, lack of specific intent to cause death, and relatively minor part in the crime — justified a sentence less than death.[42] The Court reversed Lockett's death sentence because a capital sentencing statute that prevents a sentencer "from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty."[43]

In addition to regulating the process by which a death sentence may be imposed, the Court has concluded that a death sentence may only be imposed if proportionate to the crime. In *Coker v. Georgia*, the Court concluded that the eighth amendment prohibits "punishments . . . that are 'excessive' in relation to the crime committed."[44] An excessive, and therefore unconstitutional punishment, is one that "(1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime."[45] Applying this standard, the Court held that death was an excessively disproportionate penalty for the crime of rape.[46]

In 1982, the Court again considered the class of persons who may be

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[42] *Id.* at 597.

[43] *Id.* at 605. Unlimited mitigation and individualized sentencing is another attempt by the Court to ensure that the most appropriate sentence is imposed. However, according to some commentators, the *Lockett* decision returned to sentencers the discretion that *Furman* held result[ed] in the unconstitutional imposition of death. *See, e.g.*, Radin, *supra* note 18, at 1153-5. 'death is not a permissible punishment since fairness requires flexibility and nonar[bitra]riness, requirements that vary inversely to each other). Others assert that the two decisions are reconcilable. *See, e.g.*, Hertz & Weisberg, *In Mitigation of the Penalty of Death:* Lockett v. Ohio *and the Capital Defendant's Right to Consideration of Mitigating Circumstances*, 69 CALIF. L. REV. 317, 373-76 (1981) (eighth amendment does not require that the discretion to afford mercy be guided). As one author noted, the emphasis in *Lockett* was on the importance of providing unlimited *mitigation*, and on individualizing the sentence, *Furman* only prohibits arbitrary and capricious imposition of death, not capricious imposition of mercy. *See* Comment, *Dark Year on Death Row: Guiding Sentencer Discretion After* Zant, Barclay, *and* Harris, 17 U.C. DAVIS L. REV. 689, 698-99 (1984) (as it is only in the aggravation of the sentence that a defendant receives death, the Court distinguished between permitting discretion in mitigation, and limiting discretion in aggravation). Nonetheless, as a result of *Lockett*, the reviewing court must ensure that the defendant's mitigating factors were considered, while preventing a sentence based on arbitrary factors.

[44] 433 U.S. 584, 592 (1977).

[45] *Id.*

[46] *Id.* at 598.

constitutionally sentenced to death. In *Enmund v. Florida*,[8] the Court concluded that an accomplice defendant convicted of first degree murder cannot be punished by death unless the state proves an intent to kill. The Court reiterated that to be constitutional a death sentence must be (1) proportionate to the severity of the crime,[9] and (2) penologically justifiable, that is, serve the purposes of retribution and deterrence.[10] The Court found neither constitutional requirement satisfied by executing a person who neither killed, intended to kill, nor attempted to kill. Although a state can still charge an aider or abettor with first degree murder under the felony-murder doctrine,[11] it may not impose the death penalty unless the defendant had the intent to kill. Imposing the death penalty by using felony murder's legal fiction of presumed intent to kill is unconstitutional.[12]

In its effort to maintain a constitutional execution system, the Court has designed procedures that limit the arbitrary and capricious imposition of the death penalty. Direct review by the state supreme court was considered one means of achieving a constitutional system. However, in *Pulley v. Harris*[13] the Court decided that the eighth amendment did not require proportionality review. Proportionality review is a sentencing comparison by the state supreme court between the defendant's sentence and the sentences imposed in similar cases.[14] Justice White writing for the Court observed that although *Gregg*'s guided discretion statute included a proportionality review of a death sentence by the state supreme court as a safeguard against jury inconsistency, it was not

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[8] 458 U.S. 782, 797 (1982); *see also* People v. Garcia, 36 Cal. 3d 539, 684 P.2d 826, 205 Cal. Rptr. 265 (1984) (*Carlos* decision, requiring an instruction on intent to kill when the special circumstance is tried to a jury, shall apply retroactively to all cases not yet final), Carlos v. Superior Court, 35 Cal. 3d 131, 672 P.2d 862, 197 Cal. Rptr. 79 (1983) (proof of intent to kill or intent to aid a killing is essential to establish a felony-murder special circumstance under the California death penalty statute), Note, Enmund v. Florida: *The Constitutionality of Imposing the Death Penalty Upon a Co-Felon in Felony Murder*, 32 DE PAUL L. REV. 713, 734-35 (1983).

[9] 458 U.S. at 788, 798.

[10] *Id.* at 798-99.

[11] Felony murder is a killing or unintended death during the commission or attempted commission of a felony. *See, e.g.*, W. LAFAVE & A. SCOTT, JR., HANDBOOK ON CRIMINAL LAW § 71, at 545-58 (1972).

[12] 458 U.S. at 799-801.

[13] 104 S. Ct. 871, 881 (1984).

[14] *See id.* at 874. A controversy regarding proportionality is whether the comparison pool includes only other cases resulting in death judgments, all cases in which death was a possible punishment, or variations between these categories. Comments on earlier draft from Michael Millman, Executive Director, Cal. Appellate Project (Feb. 11, 1985) (copy on file with *U.C. Davis Law Review*).

required for a constitutional capital punishment scheme."[9] Observing that discretion is adequately guided by requiring the jury to find at least one special circumstance, that no procedure is perfect, and that occasional aberrations are inevitable, Justice White concluded that the potential for arbitrary and capricious imposition was not significant."[10]

The Supreme Court's treatment of the cruel and unusual punishments prohibition raises the difficult question of how to ensure a just and fair death sentence. The Court has developed some contours for answering that question — too much or too little discretion is unconstitutional — but unresolved areas persist."[11] With new studies presenting

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[9] *Harris*, 104 S. Ct. at 873.

[10] *Id.* at 881. As Justice White noted, Jurek v. Texas, 428 U.S. 262 (1976), a case upholding a guided discretion statute decided the same day as *Gregg*, did not include a proportionality review. *Harris*, 104 S. Ct. at 878. However, Texas' death penalty scheme included review by the Texas Supreme Court, and as the *Jurek* Court noted, Texas had provided for the evenhanded, rational, and consistent imposition of death. *Id.* at 878; *Jurek*, 428 U.S. at 276. Consequently, as the concurrence suggests, *Harris* may imply the necessity of some form of judicial review, *Harris*, 104 S. Ct. at 881-82, particularly because the decision was limited to proportionality review. *Id.* at 879. In fact, the Court itself has reviewed death penalty cases by comparing capital sentences in similar cases. *See, e.g.*, Comment, *Dark Year on Death Row: Guiding Sentencer Discretion After* Zant, Barclay, *and* Harris, 17 U.C. DAVIS L. REV. 689, 727 (1984).

The *Harris* decision is dismaying because it suggests that some arbitrary and capricious death sentences will be tolerated. As Justices Brennan and Marshall emphasized in their dissent, compelling evidence indicates that the death penalty violates the eighth amendment since racial discrimination influences the application of the penalty. *Harris*, 104 S. Ct. at 887-88; *see also* Spencer v. Zant, 715 F.2d 1562 (1983) (case remanded because district court did not adequately analyze petitioner's data that death penalty was disproportionately imposed based on factors of race, sex, and poverty). Consequently, they conclude that a system without proportionality review by a court of statewide jurisdiction will necessarily result in arbitrary, capricious, and therefore unconstitutional imposition of the death penalty. *Harris*, 104 S. Ct. at 888.

[11] There are countless examples of arbitrary and capricious imposition of the death penalty. Some of the factors that commentators have isolated include: (1) prosecutorial discretion, *see* Bedau, *supra* note 34, at 25; Paternoster, *Race of Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina*, 74 J. CRIM. L. & CRIMINOLOGY 754, 784-85 (1983) [hereafter Paternoster, *South Carolina*]; Paternoster, *Prosecutorial Discretion in Requesting the Death Penalty: A Case of Victim-Based Racial Discrimination*, 18 LAW & SOC'Y REV. 437 (1984) [hereafter Paternoster, *Prosecutorial Discretion*]; Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 HARV. L. REV. 1690, 1714, 1716 (1974); (2) race of the defendant, *see* Bedau, *The Laws, the Crimes, and the Executions*, in DEATH PENALTY, *supra* note 1, at 32; Browning, *The New Death Penalty Statutes: Perpetuating a Costly Myth*, 9 GONZ. L. REV. 651, 661 (1974); Note, *Constitutional Procedure*, *supra* note 52, at 733; (3) poverty of the defendant, *see* Greenberg, *Capital Punishment as a System*, 91 YALE L. REV. 908, 910 (1982); (4) race of the victim, Bowers & Pierce,

compelling evidence that death sentences continue to be imposed discriminatorily and arbitrarily,[79] the cruel and unusual prohibition will continue to be a focal point for resolving the constitutionality of capital punishment.

2. Ineffective Assistance of Counsel

The constitutional guarantee of effective counsel in death penalty cases derives from both the sixth and eighth amendments. The sixth amendment provides that in "all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel."[80] However, the eighth amendment is also implicated since a death sentence due to ineffective assistance would constitute a cruel and unusual punishment. Effective assistance is necessary to ensure that a capital defendant receives the super due process[81] that the Constitution requires.[82] When

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*Arbitrariness and Discrimination Under Post-*Furman *Capital Statutes*, 26 CRIME & DELINQ. 563 (1980), (5) jury composition, *see Death Qualification*, 8 LAW & HUMAN BEHAV. 1-195 (1984); Schnapper, *Taking* Witherspoon *Seriously: The Search for Death-Qualified Jurors*, 62 TEX. L. REV. 977 (1984).

[79] Bowers, *The Pervasiveness of Arbitrariness and Discrimination Under Post-*Furman *Capital Statutes*, 74 J. CRIM. L. & CRIMINOLOGY 1067 (1983); Jameson, *Ethnic Background May Influence Jurors' Decisions*, 16 TRIAL, Mar. 1980, at 11; Paternoster, *South Carolina*, *supra* note 78; Paternoster, *Prosecutorial Discretion*, *supra* note 78; Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 HARV. L. REV. 456 (1981). As Justice Brennan noted in his dissenting opinion in *Harris*, studies continue to suggest that discrimination by race of the defendant, race of the victim, gender, socio-economic status, and geographical location within a state, are factors applied in deciding who dies. *Harris*, 104 S. Ct. 871, 888 (1984).

[80] U.S. CONST. amend. VI.

[81] As previously indicated, the constitutionality of the death penalty depends upon compliance with the safeguards designed to prevent unjust executions. *See supra* notes 27-30 and accompanying text.

[82] *See, e.g.*, Strickland v. Washington, 104 S. Ct. 2052, 2064 (1984) (quoting McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970)) ("[T]he right to counsel is the right to the effective assistance of counsel."); Cuyler v. Sullivan, 446 U.S. 335, 344 (1980) ("[I]nadequate assistance does not satisfy the sixth amendment right to counsel . . . ."). In Faretta v. California, 422 U.S. 806 (1975), a noncapital case, the Court held that the sixth amendment guarantees the defendant the right to represent himself without counsel. The Court recognized, however, that its decision ran counter to the basic premise that "the help of a lawyer is essential to assure the defendant a fair trial." *Id.* at 832-33. Additionally, the Court stated that "a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel.'" *Id.* at 835 n.46. Arguably, the Court would not permit a capital defendant to proceed pro se. In *Faretta*, the Court concluded that the state may appoint "standby counsel," even over the defend-

defense counsel fails to protect adequately her client's interests, imposition of death is unjust.

Death penalty appeals and habeas corpus petitions frequently include claims of ineffective assistance of counsel.[81] A major reason for this may lie in the uniqueness of death penalty trials. In *Gregg*, the Court endorsed a bifurcated proceeding — one trial for the guilt phase and one for the penalty phase.[82] The penalty phase places the defense attorney in a novel and difficult position. Her role shifts from one of defending the accused's innocence to one of advocating an affirmative case for life.[83]

Many defense attorneys fail to make the transition and do not adequately prepare or effectively present the defendant's penalty phase trial. For example, a defense attorney may structure a guilt trial strategy that is inconsistent with the penalty phase theory. This situation may negate any effective defense at the penalty proceeding since a consistent trial strategy increases the defendant's believability and credibility. Should a guilty verdict be rendered in the guilt phase, it is imperative that the jury believe the defendant's mitigating circumstances proffered in the penalty phase.[84] Therefore, the defense attorney cannot

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ant's objection, in the event the court deems it necessary to end the defendant's self-representation. *Id.*

[81] *See, e.g., Death Row on Trial*, N.Y. Times, Nov. 13, 1983, § 6 (Magazine), at 80, 100. As noted by a former Deputy Attorney General, although ineffective assistance of counsel is one of the most common arguments in capital appeals, "the truth of the matter is that many, many, many times these people *were* represented by incompetent counsel . . . . Historically, we have taken the most serious of cases, where the defendant's life was at stake, and because the defendant was poor allowed him to be represented by inexperienced young lawyers." *Id.* (emphasis in original).

[82] *See supra* notes 49-50 and accompanying text; *see also* Goodpaster, *supra* note 15, at 790 (bifurcated trials reduce arbitrary sentencing by permitting the jury to consider guilt evidence apart from sentence evidence and therefore focus on sentencing guidelines, and by permitting the jury to hear mitigating evidence necessary for an individualized sentence, which might be inadmissible at a unitary trial).

[83] Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. Rev. 299, 337 (1983) (defense advocates must establish a prima facie case for life), *see also* Farmer & Mullin, *Capital Trial Emphasis on the Punishment Stage of a Case* (1977), *reprinted in* California Office of State Public Defender, 2 California Death Penalty Manual N-24-25 (1980) (attorney's role is to help the jury understand the defendant and view him as a human being).

[84] At the penalty phase, the defense attorney's goal is to convince the jury that the human life they are judging has value, in spite of the crime that was committed. The defense attorney should establish a rapport between the defendant and the jury, and, whenever possible, not present a guilt phase defense that jeopardizes that rapport for the sentencing phase. For example, if at the guilt phase a defendant claims an alibi that

plan the theory of the guilt phase trial independent of the penalty phase. She must develop and structure a defense theory that will include the penalty phase. Because the preparation required for structuring a bifurcated proceeding is categorically different from that required for a noncapital trial, defense counsel who may be very competent in complex noncapital criminal trials may, without training, be ineffective in capital trials.[87] For example, many defense attorneys fail to present any penalty phase evidence or any mitigating circumstances.[88] As a result, the jury may lack the meaningful individualized circumstances required by *Lockett*[89] in making its decision whether to impose death.

Recognizing the importance of effective counsel, the Supreme Court has developed standards to ensure effective representation. The Court in *Strickland v. Washington*[90] recently addressed minimum standards for effective assistance of counsel during the sentencing phase in a capital trial. Justice O'Connor, writing for the Court, concluded that the traditional standard applied to ineffective assistance claims is sufficient to "ensure that the adversarial testing process works to produce a just result."[91] Consequently, despite the Court's recognition that death is

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the jury disbelieves in light of the state's overwhelming contrary evidence, the jury may likewise disbelieve the defendant when he proffers mitigating circumstances at the penalty phase. *See* Farmer & Mullin, *supra* note 85, at N-27.

[87] Even though competent "defense counsel will reasonably exhaust every possible means to save his client from execution," Furman v. Georgia, 408 U.S. 238, 358 (1972) (Marshall, J., concurring), many attorneys do not understand how to use the bifurcated trial. *See generally* Farmer & Kinard, *The Trial of the Penalty Phase* (remarks at the National Legal Aid and Defender Association Convention, Philadelphia, 1976), *reprinted in* CALIFORNIA DEATH PENALTY MANUAL, *supra* note 85, at N-13. A competent defense counsel's inability to present effectively her client's case for life at the penalty phase was exemplified in Hopkinson v. State, 632 P.2d 79 (Wyo. 1981). In *Hopkinson*, the defense attorney, at the close of the guilt phase, informed the judge that he needed merely two minutes for the penalty phase since the jury would do what it wanted to, making it unnecessary to take more time. *Id.* at 197 n.13.

[88] *See e.g.*, Blake v. Zant, 513 F. Supp. 772, 779-81 (S.D. Ga. 1981) (experienced attorney failed to present any evidence at penalty phase), Collins v. State, 271 Ark. 825, 833-36, 611 S.W.2d 162, 166-90 (no penalty phase argument), *cert. denied*, 452 U.S. 973 (1981); People v. Jackson, 28 Cal. 3d 264, 285, 618 P.2d 149, 156, 168 Cal. Rptr. 603, 610 (1980) (no penalty phase evidence,.only argument), *cert. denied*, 450 U.S. 1035 (1981).

[89] Lockett v. Ohio, 438 U.S. 586 (1978). In *Lockett*, Chief Justice Burger's opinion for the Court concluded that "the nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence." *Id.* at 604-05, *see supra* notes 62-65 and accompanying text.

[90] 104 S. Ct. 2052 (1984).

[91] *Id.* at 2064.

different, the standard for attorney performance, as with a noncapital trial, is that of reasonably effective assistance. The defendant must show that counsel's representation fell below an objective standard[12] of reasonableness and prove that the unreasonable representation resulted in prejudice.[13] The Court's opinion in *Strickland* requires the same case-by-case review of ineffective assistance claims in the penalty phase as a defendant would receive in the guilt phase or in a noncapital trial.[14] Therefore, given the requirement that ineffective assistance be considered in light of the circumstances of the case, reviewing courts should apply the standards with concern for the capital defendant's unique constitutional protections.[15]

3. Fair and Impartial Jury

Ensuring that the final arbiters of guilt and punishment will be fair and impartial is another integral constitutional protection in a criminal case.[16] With society's inherent prejudices, the judicial system must

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[12] An objective standard is one that measures the attorney's performance against the performance customary of an attorney with ordinary training and skill in the criminal law — reasonableness under prevailing professional norms. *See id.* at 2065; *see also* Moore v. United States, 432 F.2d 730, 736 (3d Cir. 1970).

[13] *Strickland*, 104 S. Ct. at 2064-65.

[14] *Id.* at 2073.

[15] The *Strickland* Court affirmed the defendant's death sentence, although his attorney failed to investigate possible mitigating factors. Consequently, despite Chief Justice Burger's opinion for the Court in *Lockett*, which required the sentencer to consider a defendant's mitigating circumstances, *Strickland* concludes that the counsel's conduct was reasonable in not presenting such mitigation for the sentencer's consideration. *Id.* at 2070. Moreover, the Court noted that even assuming the counsel's conduct was unreasonable, the defendant suffered insufficient prejudice to warrant setting aside his death sentence. *Id.* Even Justice Brennan, who finds the death penalty per se unconstitutional, concurred in the Court's opinion, while dissenting in the judgment. *Id.* at 2071. He noted that the Court's "standards are sufficiently flexible to accommodate the wide variety of [ineffective assistance claims]," but also admonished the Court to apply the standards with the special consideration required for capital sentencing review. *Id.* at 2073. Since the penalty phase representation in *Strickland* was minimal, and the attorney failed even to investigate the defendant's mitigating factors, the Court's conclusion that the representation was effective is questionable. Apparently, the defendant's constitutional right to have the sentencer consider mitigating evidence is significant only if counsel effectively obtains and presents the evidence. *See, e.g.*, Note, Washington v. Strickland: *Defining Effective Assistance of Counsel at Capital Sentencing*, 83 COLUM. L. REV. 1544, 1569 (1983) (defense counsel should be required to undertake investigation that sufficiently enables her to discover defendant's mitigating circumstances).

[16] "In all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury . . . ." U.S. CONST. amend. VI.

guard against unfairly imposed death sentences. The Supreme Court has been confronted with challenges to the composition of juries and has attempted to formulate constitutional standards for assessing the impartiality and fairness of death penalty juries.

In *Witherspoon v. Illinois*,[59] the Court held that excluding prospective jurors for cause[60] merely because they have general objections to or conscientious beliefs against imposing the death penalty denied a capital defendant an impartial jury on the sentencing issue.[61] The Court stated that excluding all prospective jurors who had "conscientious or religious scruples" against the death penalty produced a jury composed only of those "uncommonly willing to condemn a man to die."[62] The Court, however, rejected the defendant's argument that a jury composed only of persons favoring the death penalty resulted in an unrepresentative jury on the issue of guilt or unconstitutionally increased the risk of conviction.[63] The Court stated that the record before it did not permit

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[59] 391 U.S. 510 (1968).

[60] In selecting a jury, an attorney can excuse a prospective juror in two ways. She can challenge for cause for actual or implied bias; or she may challenge peremptorily, i.e., excuse without stating a reason. An attorney can challenge for cause an unlimited number of jurors; however, the number of peremptory challenges available to her is limited by statute. *See infra* note 167.

[61] *Witherspoon*, 391 U.S. at 518.

[62] *Id.* at 521; *accord* Adams v. Texas, 448 U.S. 38 (1980). Decided before *Furman*, *Witherspoon* was not based upon the super due process concept or the conclusion that arbitrary and capricious imposition of the death penalty is an eighth amendment violation. Nonetheless, the Court recognized the constitutional infirmity of permitting dismissal for cause for mere misgivings about imposing death.

[63] *Witherspoon*, 391 U.S. at 517-18 (petitioner's data too tentative to establish whether exclusion of jurors opposed to capital punishment results in an unrepresentative jury on issue of guilt or whether risk of conviction is substantially increased). In Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985), the court held that the practice of excluding for cause from the guilt phase jurors holding absolute scruples against the death penalty violated the defendant's sixth amendment right to a jury composed of a representative cross-section of the community. The court concluded that a jury with *Witherspoon* excludables stricken for cause is "conviction prone and, therefore, does not constitute a cross-sectional representation in a given community." *Id.* at 229. At least one court disagrees with this approach. Keeten v. Garrison, 742 F.2d 129 (4th Cir. 1984). The *Keeten* court held that the exclusion of *Witherspoon*-excludable jurors did not create a conviction prone jury in violation of due process or in violation of defendant's right to a jury selected from a fair cross-section of the community. *Id.* at 133. The court stated that the right to a jury trial "does not include the right to be tried by jurors who are unable or unwilling to follow the law and the instructions of the trial judge in a capital case." *Id.*; *cf.* Smith v. Balkcom, 660 F.2d 573, 578 (5th Cir. 1981) (court held that excluding two persons from the guilt phase venire for cause when they unambiguously expressed their opposition to the death penalty, indicating that they

this conclusion. However, recent studies indicate that even though a jury may be constitutionally sound under *Witherspoon* for the penalty phase, it tends to be more willing to find a defendant guilty.[102] Moreover, this tendency may increase given the Court's recent modification of the *Witherspoon* standard. In *Wainwright v. Witt*,[103] the Court concluded that prospective jurors whose doubts about the propriety of the death penalty may prevent or substantially impair the performance of their duties as jurors may be excused for cause.

Studies also indicate that the death qualification process may deny the capital defendant a fair trial on the issue of guilt. A death-qualified jury has been circumscribed by its willingness to impose the death penalty and barraged with questions regarding its views on the death penalty.[104] Even before the trial begins, the potential punishment has been discussed before the jury at length, thus creating expectations and preconceptions about the case they will hear and the defendant they

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would automatically vote against imposing the death penalty, did not violate the defendant's right to an impartial jury), *cert. denied*, 459 U.S. 862 (1982).

[102] Studies conclude that a death-qualified jury is guilt prone. *See* Cowan, Thompson & Ellsworth, *The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation*, 8 LAW & HUM. BEHAV. 53 (1984); Gross, *Determining the Neutrality of Death-Qualified Juries: Judicial Appraisal of Empirical Data*, 8 LAW & HUM. BEHAV. 7 (1984); Thompson, Cowan, Ellsworth & Harrington, *Death Penalty Attitudes and Conviction Proneness: The Translation of Attitudes into Verdicts*, 8 LAW & HUM. BEHAV. 95 (1984). However, the Supreme Court has not required a separate jury for the guilt and for the penalty phase. The Court apparently accepts the view that since a class of people who have absolutely no reservations about the death penalty do not constitute a cognizable group the sixth amendment does not provide the defendant with a challenge for the guilt phase. Nonetheless, the inability of this class of people to fit snugly into the language of the sixth amendment does not address the issue. Moreover, prosecutors can use their peremptory challenges to exclude persons who have only general objections to the death penalty, but who believe that they could impose it in the proper case, and effectively structure a jury that has absolutely no reservation about imposing the death penalty. *See* People v. Fields, 35 Cal. 3d 329, 342-53, 673 P.2d 680, 687-95, 197 Cal. Rptr. 803, 810-18 (1983); *see also* Hovey v. Superior Court, 28 Cal. 3d 1, 27-42, 616 P.2d 1301, 1314-26, 168 Cal. Rptr. 128, 142-53 (1980) (overview of conviction prone studies; expert witnesses testified to strong correlation between attitudes toward capital punishment and tendency to convict).

[103] 105 S. Ct. 844, 852 (1985) (stating that the Court was reaffirming the standard adopted in Adams v. Texas, 448 U.S. 38, 45 (1980)).

[104] *See* Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process*, 8 LAW & HUM. BEHAV. 121, 122, 151 (1984) (biasing effects that flow from the death qualification process may deny defendant fair and impartial jury); *see also* Hovey v. Superior Court, 28 Cal. 3d 1, 74-81, 616 P.2d 1301, 1350-55, 168 Cal. Rptr. 128, 177-82 (1980).

will sentence.[101]

In construing the eighth amendment's cruel and unusual clause and the sixth amendment's right to counsel and an impartial jury, the Supreme Court has attempted to define the constitutionally permissible execution. This task has not been easy, nor is it finished. In each area of the Court's concern, unanswered questions remain. But for the moment, the Supreme Court has articulated some guidelines for imposing the death penalty. Although complex, these guidelines represent only the minimum required by the Constitution. The next part of this Comment will explore the financial costs of these minimum guidelines.

II. Financial Costs of a Constitutional Execution Process

The Supreme Court has decided that the death penalty is constitutional when its imposition complies with certain protections. Part II of this Comment focuses on the financial costs required by a constitutional capital punishment system. Little information exists on the costs of capital litigation, although commentators frequently allude to its astronomical dimensions.[104] While cost arguments, focusing solely on expense, should never replace a moral discussion concerning the sanctity of life, financial considerations are nonetheless important; findings regarding costs can be used to assess the common claim that the death penalty is cheaper than sentencing a person to life imprisonment.

Because of constitutional requirements and the diligence of attorneys in capital cases, death penalty litigation is a long, expensive process.[105]

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[101] *See* Haney, *supra* note 104, at 126-29 (death qualification process appears to increase juror belief in defendant's guilt, encourages belief that the law disapproves of persons who oppose the death penalty, and persuades jurors to believe that the death penalty is an appropriate sentence).

[104] Amsterdam, *Capital Punishment*, in Death Penalty, *supra* note 1, at 354 (cost of life imprisonment in most secure prison is less than cost of legal proceedings needed to execute a defendant); L.A. Times, July 27, 1983, Pt. II, at 5, col. 3 (cost of life imprisonment is one-third the cost of death penalty litigation); L.A. Daily J., Sept. 4, 1984, at 4, col. 4 (death penalty prosecution costs upwards of $2 million per successful conviction, with time delays of up to 12 years).

[105] As Justice Marshall stated in *Furman*, "defense counsel will reasonably exhaust every possible means to save his client from execution." 408 U.S. at 358 (Marshall, J., concurring); *cf. False Statistic*, Nation, Dec. 31, 1983-Jan. 7, 1984, at 685 (judges who cite the number of previous appeals a prisoner has made to either deny last minute pleas, or as Chief Justice Burger stated when referring to a defendant who made 14 appeals during his 10 years on death row, to demonstrate "the specious suggestion of a 'rush to judgment,'" often fail to disclose that the number of times a court *actually* considered the defendant's argument, may be closer to zero than to 14).

Although the cost of life-long incarceration surely would be high, the cost of execution with constitutional protections is staggering. This part examines the costs of the death penalty as the defendant moves toward execution.[108]

A. Pretrial Costs

The added costs of a death penalty system begin to accrue long before the trial. Limited plea bargaining, lengthy and complex pretrial motions, extensive investigation, and increased use of psychiatrists, psychologists, and other experts are impelled by the greater stakes in capital cases. These factors, as well as the constitutional requirements, result in a substantial financial toll on the criminal justice system.

In the usual criminal case, prosecution and defense attorneys commonly engage in plea bargaining. Under this arrangement, the defendant pleads guilty in return for certain concessions, such as the reduction of charges or the promise of a lenient sentence.[109] Statistics indicate that eighty-five to ninety percent of noncapital felony cases reaching the arraignment stage result in a plea of guilty,[110] which eliminates the need

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[108] Collecting cost data on each aspect of capital litigation is difficult. Much of the data upon which this Comment is based was collected through questionnaires sent to capital defense attorneys and district attorneys throughout the country. The questionnaire sent to 50 district attorneys and 50 defense attorneys in states with death penalty statutes is included in the Appendix. The responses to the questionnaires are on file with *U.C. Davis Law Review*. Additionally, the four counties in California that represent approximately 63% of the death penalty filings in the state were surveyed by in-person and telephone interviews. From 1977, when California enacted a new death penalty statute, to the end of 1983, 1948 special circumstances cases were filed in California. There were 950 filed in Los Angeles County; 95 in Orange County; 93 in Alameda County; and 90 in Sacramento County. Telephone interview with Linda Lenker, Legal Administrator, Cal. Appellate Project, a non-profit corporation established by the California State Bar (Feb. 26, 1985).

[109] Vorenberg, *Decent Restraint on Prosecutorial Power*, 94 HARV. L. REV. 21, 1533 (1981) (in return for defendant's decision to plead guilty, the prosecution offers a lighter punishment, either by reducing the charge or by recommending a reduced sentence).

[110] H. REYNOLDS, COPS AND DOLLARS — THE ECONOMICS OF CRIMINAL LAW AND JUSTICE 205 (1981) (for prosecutors, plea bargaining answers the problem of how to prosecute large case load with severely limited resources because it expedites the case; without plea bargaining the prosecutorial staff may not be able to handle the same quantity of cases and many defendants may have to be released and the charges against them dropped); Carney & Fuller, *A Study of Plea Bargaining in Murder Cases in Massachusetts*, 3 SUFFOLK U.L. REV. 292, 293, 306 (1969) (plea bargaining is a necessary and expedient means of dealing with criminal cases; without plea bargaining courts would be overwhelmed and the criminal justice system severely impaired; courts

for a trial. Thus, plea bargaining has become an accepted resolution to an overburdened criminal justice system because it reduces the number of trials.[111]

In capital cases, however, plea bargaining is less effective in reducing the probability of proceeding to trial. In death penalty cases, the prosecutor is dissuaded from plea bargaining since reducing the charge or promising a lighter sentence would render the case noncapital.[112] Without the prosecutor's offer of a lesser charge or less severe punishment, the death-eligible defendant gains little, if anything, by pleading guilty to capital murder.[113] If he did, he would proceed directly to the penalty phase of his trial, waiving any defense. In economic terms, therefore, the immediate effect of the prosecutor's decision to seek the death penalty is that capital cases become jury trials.[114] Moreover, to meet constitutional safeguards these trials have evolved into separate proceedings on guilt and penalty.[115]

A second area disproportionately increasing the costs in capital cases is pretrial motions.[116] In a capital case, the number of pretrial motions

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depend upon guilty pleas even when a defendant is charged with first or second degree murder); Nakell, *The Cost of the Death Penalty*, 14 CRIM. L. BULL. 69, 71 (1978) (85-90% of criminal cases, including murder cases, are resolved by guilty pleas and are therefore resolved without trials).

[111] JUDICIAL COUNCIL OF CALIFORNIA, 1984 ANNUAL REPORT 3 (1985) (increase of over 3000 cases per year disposed of by guilty plea rather than by trial); Vorenberg, *supra* note 109, at 1532 (United States Supreme Court, American Bar Association, President's Crime Commission, and American Law Institute endorse plea bargaining).

[112] Nakell, *supra* note 110, at 71 (if the prosecution offers capital murder defendant a lesser degree of homicide in exchange for a guilty plea, the defendant is no longer death-eligible). In a 1982-83 California death penalty case, the defendant was found guilty. However, in the penalty phase, the jury deadlocked at 11-1 for death. Although it was acknowledged that a retrial would hurt the already financially strapped county, the prosecutor declined a plea offer and pursued a retrial. The county auditor estimated that the retrial would be more expensive than the first trial. *Proctor: Death Penalty Worth the Cost!*, Redding (Cal.) Record Searchlight, Feb. 4, 1983, at 1, col. 1.

[113] Even in a case with overwhelming evidence of guilt, going to trial on guilt and presenting a reasonable doubt defense may benefit the defendant. For example, if the defendant is found guilty, the prosecution may forego presenting some of the vivid evidence and the aggravating factor evidence during the penalty phase. Thus, the guilt phase may help separate and distance the sentencer from the prosecution's strongest case against the defendant. Additionally, permitting the sentencer to observe the defendant for a longer time, that is, during two trials, may induce the sentencer to view the defendant more favorably. *See, e.g.*, Goodpaster, *supra* note 85, at 331-32.

[114] Nakell, *supra* note 110, at 71 (ten times as many trials for capital cases as there are for noncapital cases).

[115] *See supra* notes 49-50 and accompanying text.

[116] SOUTHERN POVERTY LAW CENTER, MOTIONS FOR CAPITAL CASES 2 (1981)

filed is at least double, but more often three or four times the number of motions filed in a noncapital case.[117] Defense attorneys assert that the increased number of pretrial motions in capital cases ranges from twice as many to as much as five to six times the number of motions as in noncapital cases.[118] District attorneys generally conclude the number of motions they file is approximately twice the number filed for noncapital murder cases but note that this may result from the increased number of defense motions.[119]

Although many of the motions are those typically filed in a criminal case and address the specific aspects of the defendant's criminal charges, even these motions increase costs because in a capital case they have greater ramifications, are often more complex,[120] and generally raise more evidentiary issues.[121] Another factor resulting in a lengthier process is that a capital defense attorney may have a dual goal when pursuing a motion in a capital case. Her primary concern may be with structuring a defense that will render the case noncapital.[122] Consequently, extensive planning and strategy are involved in preparing motions and collecting data to provide the proof and legal arguments to support the motions.[123] Additionally, the defense attorney also requests legal relief unique to capital cases.[124] In a capital case, a main goal is to prevent the penalty of death.[125] Because the potential punishment is so extraordinary, the defense attorney should, from the beginning, structure a defense that challenges the constitutionality of the death penalty generally, as well as its appropriateness for the individual defendant.

[hereafter MOTIONS FOR CAPITAL CASES]

[117] NEW YORK STATE DEFENDERS ASS'N, INC., CAPITAL LOSSES: THE PRICE OF THE DEATH PENALTY FOR NEW YORK STATE 12 (1982) [hereafter CAPITAL LOSSES] (usual number of pretrial motions in noncapital cases between five and seven as compared to between ten and twenty-five for capital cases); *see also* MOTIONS FOR CAPITAL CASES, *supra* note 116, at 2.

[118] Questionnaires on file with *U.C. Davis Law Review*; interview with James Thomson, Attorney, Sacramento, Cal. (Apr. 5, 1985).

[119] *Id.*

[120] CAPITAL LOSSES, *supra* note 117, at 13 (ordinary motions take on different meaning in death penalty cases; routine motions are generally longer, more complicated, and more heavily litigated).

[121] Telephone interview with Stuart Rappaport, Bureau Chief, Los Angeles Public Defender (Apr. 4, 1985).

[122] *See, e.g.*, MOTIONS FOR CAPITAL CASES, *supra* note 116, at 5.

[123] *Id.* at 6.

[124] *See, e.g., id.* at 10-17.

[125] A critical factor to keep in mind is that a defense victory in a capital case often means a life sentence. *See id.* at 1.

General arguments, for example, challenge the penological justification of the death penalty, its arbitrary and capricious nature, and its cruelty.[126] Motions that are generally included in a death penalty case include: Change of venue;[127] challenging those aspects of the charge that render the defendant death-eligible;[128] motions for individual *voir dire*;[129] and sequestration of jurors during *voir dire*.[130] Motions are also made to request funds for investigators,[131] expert witnesses,[132] and pri-

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[126] *Id.* at 233-36. In answering the question regarding defense motions filed in capital cases, defense attorneys generally listed *voir dire* motions, jury composition, challenges to the death qualification process, change of venue, challenges to the constitutionality of the death penalty in general and the constitutionality of the state's statute specifically, as common capital case motions. Questionnaires on file with *U.C. Davis Law Review*; interview with James Thomson, Attorney, Sacramento, Cal. (Apr. 5, 1985).

[127] *See, e.g.*, CAL. PENAL CODE § 1033 (West Supp. 1985). *See generally* THE NATIONAL JURY PROJECT, JURYWORK—SYSTEMATIC TECHNIQUE § 7 (2d ed. 1983).

[128] For example, in California, the defendant would file a Penal Code § 995 motion to challenge the special circumstance of his charge. If defendant's motion were granted, the case no longer would be capital. Consequently, thorough preparation of this motion is critical. *See* CAL. PENAL CODE § 995 (West 1970 & Supp. 1985).

[129] In California, individual sequestered *voir dire* is judicially required in capital cases. *See* Hovey v. Superior Court, 28 Cal. 3d 1, 80, 616 P.2d 1301, 1354, 168 Cal. Rptr. 128, 181 (1980). Pennsylvania statutorily requires individual *voir dire* for capital cases unless defendant waives the right. *See* 42 PA. CONS. STAT. ANN. R. CRIM. P. 1106(e) (Purdon 1964). A Texas statute mandates individual sequestered *voir dire* at request of the state or defendant. TEX. CRIM. PROC. CODE ANN. § 35.17(2) (Vernon Supp. 1985). According to one experienced capital defense attorney, individual sequestered *voir dire* is the most important procedure in a death penalty case. There are numerous justifications for individual *voir dire*: Collective *voir dire* educates the jury panel on prejudicial and incompetent material; each juror hears the question as each attorney questions; and collective *voir dire* may be embarrassing and result in untruthful answers, especially when the questions explore bias and prejudice. Goodpaster, *supra* note 85, at 327.

[130] *See* Kaplan, *The Problem of Capital Punishment*, 1983 U. ILL. L. REV. 555, 571 (some states require sequestration of remaining jurors while questioning of prospective jurors proceeds).

[131] For example, the defense attorney will make a motion requesting funds for an investigator. In California, the defense will file a Penal Code § 987.9 motion. The statute states, in relevant part:

> In the trial of a capital case the indigent defendant, through his counsel, may request the court for funds for the specific payment of investigators, experts, and others for the preparation or presentation of the defense . . . . The ruling on the reasonableness of the request shall be made at an in camera hearing. In making the ruling, the court shall be guided by the need to provide a complete and full defense for the defendant.

CAL. PENAL CODE § 987.9 (West Supp. 1985).

Pretrial investigation is essential. The capital defense attorney must prepare for both

vate psychologists and psychiatrists.[111] Although expensive, the exhaustive filing of motions is necessary to provide the defendant with the constitutional rights of super due process, effective assistance of counsel,

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proceedings and extensively investigate the defendant's life history to present mitigating evidence during the sentencing phase. *See* Goodpaster, *supra* note 85, at 344. Of course, the prosecution will conduct its own investigations to present aggravating circumstances to rebut the defense's mitigating circumstances.

[111] The types of expert witnesses needed will vary with differing facts of the case. In response to a questionnaire, defense attorneys listed the following experts as those most frequently requested in capital cases: Psychiatric; jury selection and composition; forensic; criminologists; and experts on the arbitrary and capricious imposition of the death penalty. Questionnaires on file with *U.C. Davis Law Review*; interview with James Thomson, Attorney, Sacramento, Cal. (Apr. 5, 1985).

A recent article vividly described the impact of lack of investigative funds in an Arizona case. The defendant was sentenced to death for allegedly murdering his two children by setting fire to their bedroom. The defense retained an arson investigator as an expert witness. After initial preparations and testing, the expert billed the public defender's office $1300 ($40 an hour). Although the expert needed more time to investigate, the public defender could no longer afford the cost. The defense attorney's motion that the investigator be appointed by the court was denied. The prosecution presented two expert witnesses to support the state's theory of the fires. The defense expert had conducted sufficient tests to testify that the markings in the charred room could have been caused by means other than that in the state's theory, and in fact, that some of the consequences of the fire could not be explained by the state's theory. The first trial resulted in a hung jury. In the defendant's second trial, the judge excluded almost all of the expert testimony since it was not prepared in an exact replica of the bedroom. However, the earlier denial of the defense funds for the expert precluded the defense from further testing. Although the exclusion of the expert testimony was the only significant difference between the two trials, the jury found the defendant guilty. Brill, *An Innocent Man on Death Row*, AM. LAW., Dec. 1983, at 1, 87-88.

[112] Most state death penalty statutes allow mitigation based on the defendant's mental state. Generally, the jury may consider whether the defendant suffered a mental health problem during the commission of the act or generally suffers a serious mental health problem, even though the mental state does not satisfy the criteria for an insanity defense. Additionally, the defendant may present evidence of drug addiction or alcoholism. SOUTHERN POVERTY LAW CENTER, TRIAL OF THE PENALTY PHASE 16-17 (1981) [hereafter TRIAL OF THE PENALTY PHASE]. For example, California's death penalty statute lists, as mitigating factors to be considered by the sentencer, the following factors regarding the defendant's mental state:

> . . (d) whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance . . . . (h) whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects (sic) of intoxication . . . .

CAL. PENAL CODE § 190.3 (West Supp. 1985).

and a fair trial.[114]

A third pretrial cost is investigators' fees.[115] The sixth amendment provides the defendant with the right to effective assistance of counsel.[116] To be effective, the defense attorney must thoroughly investigate both the facts of the case and the background and character of the capital defendant.[117] Much of this investigation is conducted during the filing of the pretrial motions to allow thorough preparation of the defendant's capital trial and to support the motions factually. The cost of capital case investigations is particularly high for two reasons: A capital trial is qualitatively different from noncapital trials; and an effective attorney must prepare to introduce mitigating circumstances during the penalty phase of the trial and therefore must extensively investigate the defendant's background.[118] This investigation may include an exploration of the past twenty, thirty, or forty years.[119] One capital case in-

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[114] Sevilla, *Between Scylla and Charybdis: The Ethical Perils of the Criminal Defense Lawyer*, 2 NAT'L J. CRIM. DEF. 237, 271 (1976) (defense counsel has ethical and professional responsibility to file nonfrivolous pretrial motions that advance client's interests). Establishing a record for the capital defendant is critical. Pretrial motions establish and protect the defendant's record for appeal. *See, e.g.*, Sevilla, *Motions*, in INEFFECTIVE ASSISTANCE OF COUNSEL SEMINAR SYLLABUS 1 (J. Thomson comp. 1985); *see also* People v. Pope, 23 Cal. 3d 412, 426, 590 P.2d 859, 867, 152 Cal. Rptr. 732, 740 (1979) (in an ineffective assistance challenge, the conviction will be affirmed when the record sheds no light on why counsel acted or failed to act in the manner challenged, unless no satisfactory explanation exists for the attorney's act or omission).

[115] *See supra* note 131.

[116] *See supra* notes 80-81 and accompanying text.

[117] *See, e.g.*, Keenan v. Superior Court, 31 Cal. 3d 424, 431, 640 P.2d 108, 112-13, 180 Cal. Rptr. 489, 493-94 (1982) (citing 1 ABA STANDARDS FOR CRIM. JUSTICE, THE DEFENSE FUNCTION 4-42 (2d ed. 1980), for proposition that capital defense counsel's responsibility includes thorough preparation of factual and legal circumstances of case prior to trial).

[118] *See* Goldpaster, *supra* note 85, at 323-24 (trial counsel's duty includes investigating client's life history and emotional and psychological makeup, i.e., inquiring into client's childhood, upbringing, education, relationships, friendships, formative and traumatic experiences, personal psychology, and present feelings); *see also* TRIAL OF THE PENALTY PHASE, *supra* note 133, at 15-16 (clergy, teachers, and social workers provide helpful testimony, the value of which is enhanced by their neutrality since they are not related to either the victim or the defendant); OFFICE OF THE PUBLIC DEFENDER, STATE OF MARYLAND, OPERATIONAL OVERVIEW—IMPACT DEATH PENALTY CASES—1982 FISCAL YEAR 3 (1982) (minimum capital defense requirements include extensive use of investigators and paralegals to locate and interview witnesses; a recent case listed 106 state's witnesses) [hereafter OPERATIONAL OVERVIEW].

[119] Telephone interviews with capital defense attorneys: Jim Merwin, Orange County (Mar. 6, 1985); Joe Najpaver, Alameda County (Mar. 6, 1985); Lawrence Biggam, Biggam, Christensen & Minsloff, Santa Cruz County (Mar. 10, 1985); James

volved interviewing 240 persons, one-half of whom became witnesses at the trial.[140] The investigation often includes extensive travel throughout the country and requires a skilled investigator who can locate persons from the defendant's past and persuade them to participate in a death penalty trial.[141] An investigation for capital trials is generally three to five times longer than that for noncapital trials,[142] and may take as long as two years.[143]

A fourth step in the pretrial process that increases the cost of the capital case is the use of psychiatrists. Psychiatric evaluations are used to prove diminished actuality, diminished capacity, an insanity defense, or more commonly, are presented at the penalty phase as mitigating evidence.[144] Additionally, the prosecution generally obtains the services of another psychiatrist to provide a contrary view of the defendant's psychiatric condition.[145] Moreover, the court may occasionally find it necessary to employ a third opinion, one not provided by either the defense or the prosecution.[146] The Supreme Court recently held that due

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Thomson, Sacramento County (Apr. 5, 1985); Stuart Rappaport, Bureau Chief, Los Angeles County Public Defender (Apr. 4, 1985).

[140] People v. Trillo, Cal. Super. Ct. 61425. Telephone interview with Roy Simmons, Sacramento County Public Defender's Office (Mar. 7, 1985).

[141] Telephone interviews with private investigators: Margaret Erickson, Santa Cruz, Cal. (Mar. 7, 1985); Rodney Harmon, Harmon Investigations, Sacramento, Cal. (Apr. 5, 1985); Casey Cohen, Criminal Justice Consultant, Beverly Hills, Cal. (Apr. 5, 1985).

[142] Questionnaire on file with *U.C. Davis Law Review*. Telephone interviews with private investigators: Margaret Erickson, Santa Cruz, Cal. (Mar. 7, 1985); Rodney Harmon, Harmon Investigations, Sacramento, Cal. (Apr. 5, 1985); Casey Cohen, Criminal Justice Consultant, Beverly Hills, Cal. (Apr. 5, 1985).

[143] Telephone interview with Lawrence Biggam, Attorney, Biggam, Christensen & Minsloff, Santa Cruz, Cal. (Mar. 10, 1985).

[144] During the penalty phase, the defense can present any aspect of a defendant's character or record as a mitigating factor in arguing for the defendant's life. Lockett v. Ohio, 438 U.S. 586, 604 (1978); *see also* Robinson v. State, 548 S.W.2d 63, 65 (Tex. 1977); TRIAL OF THE PENALTY PHASE, *supra* note 133, at 25 (courts readily approve use of traditional expert witnesses such as psychologists and psychiatrists). For example, in California, evidence of a defendant's mental disease, mental defect, or mental disorder is admissible to prove whether or not the defendant actually formed the required specific intent, premeditation, deliberation, or malice aforethought, when the crime was committed. *See* CAL. PENAL CODE § 28 (West Supp. 1985). A court may consider evidence of diminished capacity or a mental disorder at the time of sentencing. *See* CAL. PENAL CODE § 25 (West Supp. 1985).

[145] District attorneys assert that psychiatric evaluations are more commonly used in capital trials than in noncapital murder trials. Questionnaires on file with *U.C. Davis Law Review*.

[146] In critical criminal trials, there are occasions when the court will seek psychiatric

process requires that a state provide an indigent defendant access to a psychiatrist's assistance if the defendant's sanity at the time of the offense is likely to be a significant factor at trial.[127] The typical cost of the psychiatrist is approximately $700 a day, exclusive of expenses.[128] The per hour rate is in the range of $110 an hour for examinations and $125 an hour for in-court testimony.[129] When the defense, the prosecution, and the court all require evaluations, the cost to the state is clearly substantial.

Additional expert and auxiliary services necessary before trial include medical examiners, polygraph experts, and experts who provide data regarding race bias and death penalty bias for jury selection. In rendering effective assistance to the capital defendant, the defense attorney has an ethical obligation to present the best defense and the best possible case for life.[130] This obligation translates into case preparation that extensively uses experts.[131] A typical cost breakdown for use of experts includes the following: a medical examiner costs approximately $700 to $1000 per day;[132] a polygraph expert costs approximately $200-300 per day for courtroom testimony and $150-250 for the poly-

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evaluation and testimony not prepared by either defense or prosecution. Telephone interview with Martin Blinder, M.D., San Francisco, Cal. (Jan. 11, 1985).

[127] Ake v. Oklahoma, 105 S. Ct. 1087, 1092 (1985).

[128] CAPITAL LOSSES, *supra* note 117, at 15 (figure quoted by Psychological Evaluations, Inc., an Atlanta based firm that provides psychiatric evaluations in capital cases throughout the country). The fee in California can run as much as $1500 per day. Telephone interview with Martin Blinder, M.D., San Francisco, Cal. (Jan. 11, 1985).

[129] CAPITAL LOSSES, *supra* note 117, at 15 (figure quoted by Chicago psychiatrist who has testified in several capital cases; fee quoted is exclusive of expenses).

[130] *See supra* notes 80-82 and accompanying text; *see also* OPERATIONAL OVERVIEW, *supra* note 138, at 4 (although no constitutional or statutory right to expert witnesses exists for the indigent capital defendant, denial of expert witnesses establishes an "abhorrent double standard" when a defendant's life is at stake). Asked whether they attempted to obtain the "best" experts for capital trials, defense attorneys answered affirmatively. However, they also stated that they attempt to obtain the best experts for noncapital murder trials. Questionnaires on file with *U.C. Davis Law Review*; interview with James Thomson, Attorney, Sacramento, Cal. (Apr. 5, 1985).

[131] The use of experts, although varying with each case, is generally acknowledged to increase in death penalty case preparation. The costs of using experts also extend into the trial stage. *See, e.g.*, TRIAL OF THE PENALTY PHASE, *supra* note 133, at 25-26 (generally, use of expert witnesses readily approved, although use of expert testimony regarding unique aspects of capital trial not as commonly approved; nonetheless, experts' knowledge is used in defense preparation); questionnaires on file with *U.C. Davis Law Review*.

[132] CAPITAL LOSSES, *supra* note 117, at 15 (figure quoted by medical examiner in Atlanta, Georgia, as the going rate for medical examiner services).

graph examination;[111] an expert witness concerning eyewitness identification costs approximately $500 per day for courtroom testimony and $100 per hour for consultation;[112] and a witness who testifies concerning *Witherspoon*[113] issues could run $500 per day.[114]

Increased pretrial costs must be viewed in terms of its impact on the public defender or court appointed defense attorney, the prosecutor, the judge, and attendant court costs. Capital defendants are almost always poor,[115] and the state provides indigent defendants with an attorney. Additionally, although capital case prosecution costs are not generally apparent because expenditures may appear as part of the office's overall budget, documented prosecution costs are often greater than defense costs.[116] Also, the state puts more resources and time into prosecuting capital cases, increasing the complexity of the case that the defense at-

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[111] *Id.* (figure quoted by Georgia firm that has participated in approximately 25 capital trials). The research and procedure, which generally takes at least three hours, costs approximately $250 at a minimum. Telephone interview with LeClair and Associates, Sacramento, Cal. (Jan. 11, 1985). If the examination involves a single issue, the cost is approximately $200, however, if it is for a complicated homicide case with substantial discovery records, the cost often increases to $400 or more. In-court testimony costs $250 for one-half day. Telephone interview with John Smith, Polygraph Examiner, Sacramento, Cal. (Apr. 5, 1985).

[112] CAPITAL LOSSES, *supra* note 117, at 15 (fee quoted by eyewitness identification expert).

[113] *See supra* notes 97-100 and accompanying text.

[114] The approximate cost for testimony regarding death qualification of a jury is $500 per day plus expenses. A typical case might be a two-witness day for defense. Telephone interview with Samuel Gross, Acting Professor of Law, Stanford University, Palo Alto, Cal. (Jan. 14, 1985).

[115] The attorney costs involved in capital litigation invariably will be paid by the state. Almost all capital defendants are indigent and are assigned a defense attorney. *See* Greenberg & Himmelstein, *Varieties of Attack on the Death Penalty*, 15 CRIME & DELINQ. 112, 114 (1969) (almost 100% of the persons executed from 1930 until 1967 were poor); *see also* L.A. Daily J., Aug. 27, 1982, at 5, col. 3 (almost without exception people on death row are poor); San Francisco Chron., Oct. 13, 1982, at 39, col. 1 (quoting Clinton Duffy, former San Quentin Prison Warden who opposed the death penalty: "Only the poor and underprivileged are put to death. In the 60 years I have been around prisons, I have never known of one man who had wealth or position who has ever been executed.").

[116] *See, e.g.*, Kirsch, *Rural Justice at the Crossroads*, 4 CAL. LAW., Apr. 1984, at 22, 24 (during five-year period from 1975 to 1980, prosecution costs in California increased $138.4 million; public defender increases were $45.4 million); New York State Defenders Association, THE DEFENDER, Mar.-Apr. 1983, at 25, 25-26 (89% of the cost of a recent trial against an inmate defendant is attributable to the prosecution); L.A. Daily J., Feb. 3, 1983, at 2, col. 5 (58% of the money spent for the Juan Corona trial attributed to prosecution — 40% to defense). The prosecution also has access to law enforcement services. *See, e.g.*, Sacramento Union, Mar. 20, 1985, at A2, col. 1.

torney must address.[159] Moreover, the cost of the judge's time and courtroom costs are significant. The cost of running a courtroom for a day is approximately $2186.[160] The total courtroom time varies depending on the number of motions and the vigor with which they are pursued. The defense attorney carries the burden of presenting an impeccable defense. Consequently, she contests every viable issue and vigorously argues law and motions.[161]

B. Trial Costs

1. Voir Dire

The goal of *voir dire* is a fair and impartial jury, not one that will impose the death penalty arbitrarily or capriciously. The defense attempts to identify biases about the death penalty and prejudice against the defendant. If racism, a guilt prone bias, or a death penalty prone bias influences the jury's decision on the defendant's guilt or whether to impose the death penalty, the result is the unconstitutional imposition of death. To avoid this unconstitutional result, many states require sequestration of the jury panel while individual jurors are questioned, or permit sequestration upon motion by the defense.[162] In noncapital cases, jurors can be questioned collectively on certain issues, saving a considerable amount of time during *voir dire*.[163] In capital cases, however, the magnitude of the penalty warrants sequestered *voir dire*. Sequestered *voir dire* increases the likelihood that prospective jurors will provide their own answers, rather than give those answers that they have learned from other jurors are favored.[164] This individualized question-

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[159] Telephone interview with Stuart Rappaport, Bureau Chief, Los Angeles Public Defender (Apr. 4, 1985); interview with Gary Goodpaster, Professor of Law, U.C. Davis (Apr. 8, 1985).

[160] JUDICIAL COUNCIL OF CALIFORNIA, 1984 ANNUAL REPORT, at 53 (1984). This amount, however, does not include the cost of extra security or daily transcripts, both of which are often used in capital trials. Interview with Gary Goodpaster, Professor of Law, U.C. Davis (Mar. 22, 1985).

[161] *See generally* MOTIONS FOR CAPITAL CASES, *supra* note 116.

[162] *See supra* notes 129-30 and accompanying text.

[163] Kaplan, *supra* note 130, at 571. For example, the trial judge generally asks a series of questions of prospective jurors to determine their qualifications to serve as jurors in a criminal case. These include: Whether bias or prejudice would prevent a fair decision; whether they have heard of or have any prior knowledge of the case; and whether they or any member of their family or a close friend has been a witness or victim in a criminal case. *See, e.g.*, CAL. R. OF CT. APP. § 8.5.

[164] Although favored answers may occur and prejudice may go undetected during collective *voir dire* in noncapital trials, the cost and time of sequestering overrides these

ing generally takes longer for the attorney to gain sufficient knowledge about each juror."[163]

The use of peremptory challenges in a capital case also adds to the cost. During jury selection, attorneys dismiss prospective jurors by two methods. A peremptory challenge allows dismissal without cause.[164] The number of peremptory challenges available in a capital case is greater than that in a noncapital case.[165] Since it is permissible to peremptorily excuse a greater number of prospective jurors in a capital case, the result is a lengthier *voir dire* process. Moreover, the procedure is extended further because the lengthy questioning often permits an attorney to exercise her unlimited number of dismissals for cause. For example, jurors are questioned on their beliefs about the death penalty.[166] If a juror expresses opposition to the death penalty, the defense attorney will try to "rehabilitate" her to prevent the prosecution from having the prospective juror dismissed for cause. If the defense is able to get the juror to express only general misgivings about the death penalty, and to state that the misgivings will not interfere with her impartiality and the discharge of her duties, the prosecution cannot constitutionally dismiss the juror for cause.[167] The prosecution may,

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concerns when the punishment is less than death. *See, e.g.*, Kaplan, *supra* note 130, at 571.

[164] Attorneys recognize the need to be fully informed about jurors' attitudes in death penalty cases because jurors usually have strong feelings about both the specific case and the death penalty generally. In People v. Williams, 29 Cal. 3d 392, 406, 628 P.2d 869, 877, 174 Cal. Rptr. 317, 325 (1981), the California Supreme Court concluded that attorneys should be allowed to inquire into matters when strong feelings about a case are held by the local community or public at large for the purpose of conducting peremptory challenges.

[165] *See infra* notes 167, 169 and accompanying text.

[166] For example, in California, each attorney is permitted 10 peremptory challenges in a noncapital case and 26 peremptory challenges in a capital case. *See* CAL. PENAL CODE § 1070 (West Supp. 1985).

[167] Kaplan, *supra* note 130, at 571 (jurors closely questioned on their attitudes toward the death penalty). For example, the California Supreme Court has held that *voir dire* dealing with the death penalty should be performed individually and in sequestration. *See* Hovey v. Superior Court, 28 Cal. 3d 1, 80, 616 P.2d 1301, 1353, 168 Cal. Rptr. 128, 181 (1980).

[168] *See* Witherspoon v. Illinois, 391 U.S. 510, 522 n.21 (1968) (prospective jurors opposed to the death penalty may not be excused for cause on that basis unless they make it unmistakably clear that they would automatically vote against the death penalty regardless of the evidence at trial, and that their attitudes would prevent an impartial decision on the defendant's guilt); *cf.* Wainwright v. Witt, 105 S. Ct. 844, 852 (1985) (prosecutor may challenge for cause prospective juror who states that her doubts about the death penalty may impair the performance of her duties as a juror).

however, excuse this person by using a peremptory challenge.[170] The defense may also question a jury panel on prejudice, especially if the race of defendant and the victim differ.[171] Although some answers may permit the defense to have the jurors dismissed for cause, the peremptory challenges must be available to rid the jury box of racism. Thus, even with a greater number of peremptory challenges available to the defense attorney, she must use care in exercising those challenges.

This extensive process seeks to ensure the defendant's sixth amendment right to an impartial jury. Because the penalty is death, super due process requires or permits individual questioning, longer questioning, and more challenges.[172] Jury selection is estimated to take, on the average, 5.3 times longer than jury selection for a noncapital case[173] and courtroom time alone may increase the cost to the system by as much as $87,440.[174]

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[170] *See supra* note 167.

[171] *See*, NATIONAL JURY PROJECT, *supra* note 131, §§ 10-50 to -56; Note, *Restricting Inquiry Into Racial Attitudes During the Voir Dire — Rosales-Lopez v. United States, 451 U.S. 182 (1981)*, 19 AM. CRIM L. REV. 719 (1982); Note, *Probing Racial Prejudice on Voir Dire: The Supreme Court Provides Illusory Justice for Minority Defendants — Rosales-Lopez v. United States, 101 S. Ct. 1629 (1981)*, 72 J. CRIM. L. & CRIMINOLOGY 1444 (1981).

[172] *See, e.g.*, Goodpaster, *supra* note 85, at 328 n.132 (majority of jurisdictions give the attorneys leeway in asking questions since information gleaned may lead to intelligent use of peremptory challenges).

[173] L. Saunders, B. Moore & B. Gaal, An Empirical Study Attempting to Compare the Trial Costs of Capital Cases with the Trial Costs of NonCapital Cases (Spring 1983) (study of 20 California cases involving first degree murder convictions — 10 capital, and 10 noncapital — reveals that jury selection in capital cases lasted an average of 16 days as compared to 3 days for noncapital) (unpublished manuscript) (copy on file with *U.C. Davis Law Review*). Both district attorneys and defense attorneys assert that capital case *voir dire* lasts substantially longer than noncapital case *voir dire*. The estimated increase ranged from two days to two months — the average being approximately two weeks. Questionnaires on file with *U.C. Davis Law Review*; interview with James Thomson, Attorney, Sacramento, Cal. (Apr. 5, 1985). Another reason that capital case jury selection takes longer than noncapital cases is that more prospective jurors try to disqualify themselves, claiming that a lengthy death penalty trial will cause hardship, that is, that prior personal obligations do not permit the time commitment a capital trial requires. Additionally, the process is lengthier because the attorney is essentially picking a jury for two trials — the guilt and penalty phase. Moreover, prospective jurors' strong attitudes about the death penalty generally increase the *voir dire* time as the attorney attempts to filter through the jurors' answers to determine whether they will fairly and impartially apply the law. Telephone interview with Stuart Rappaport, Bureau Chief, Los Angeles County Public Defender (Apr. 4, 1985).

[174] Telephone interviews with defense attorneys and questionnaire responses indicated that death penalty *voir dire* can take as long as two months. Questionnaires on

2. The Trial

Due process for capital cases requires a lengthy and costly trial process. It has been estimated that it takes approximately 3.5 times longer to try capital cases than to try noncapital murder cases.[105] Attorneys contend that the average difference between a noncapital trial and capital trial is thirty days.[106] If this increase is multiplied by the cost per day of operating a courtroom, the additional cost for courtroom time alone is $65,580.[107] The additional attorney hours spent on capital trials must also be included.[108] A Maryland study estimated the cost of the defense attorney through trial disposition to range from $50,000 to $75,000 per capital case.[109] Moreover, because of the magnitude of capital trials, the state and the defendant may be assigned two attorneys.[110] Additionally, the expense is increased due to the large number of wit-

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file with *U.C. Davis Law Review*; telephone interviews conducted with Joe Najpaver, Alameda County (Mar. 6, 1985); Roy Simmons, Sacramento County (Mar. 7, 1985); James Thomson, Sacramento County (Apr. 5, 1985). Given the cost of a courtroom per day as $2186, *see supra* note 160, the total cost for *voir dire* would be approximately $87,440.

[105] L. Saunders, B. Moore & B. Gaal, An Empirical Study Attempting to Compare the Trial Costs of Capital Cases with the Trial Costs of NonCapital Cases (Spring 1983) (capital trials averaged 42 days and noncapital trials averaged 12 days in study of 20 California cases involving first degree murder convictions (10 capital and 10 noncapital)) (unpublished manuscript) (copy on file with *U.C. Davis Law Review*).

[106] *See id.*; questionnaires on file with *U.C. Davis Law Review*. However, the increased number of trial days can be substantially more. Interview with James Thomson, Attorney, Sacramento, Cal. (Apr. 5, 1985).

[107] The cost of operating a court room is approximately $2186 per day. *See supra* note 160 and accompanying text. The cost for 30 days is $65,580.

[108] *See supra* notes 120-21, 173, & 175 and accompanying text. A major cost to some small public defender offices comes from having to assign to outside counsel the caseload that would be handled by staff, but which is displaced when the staff attorney is assigned a capital case. Questionnaires on file with *U.C. Davis Law Review*; telephone interview with Larry Biggam, Attorney, Biggam, Christensen & Minsloff, Santa Cruz, Cal. (Mar. 10, 1985).

[109] *See* OPERATIONAL OVERVIEW, *supra* note 138, at 2.

[110] *See, e.g.*, Keenan v. Superior Court, 31 Cal. 3d 424, 434, 640 P.2d 108, 114, 180 Cal. Rptr. 489, 495 (1982). The *Keenan* court held that given the constitutionally mandated distinction between death and other penalties, the trial court abused its discretion when it denied defendant's motion for appointment of a second attorney. *See* CAL. PENAL CODE § 987(d) (West Supp. 1985) (authorizes funds for appointment of a second attorney if the trial court finds that the second attorney is needed to provide a complete and full defense for the defendant); *see also* L.A. Times, July 27, 1983, Pt. II, at 5, col. 3 (complexity of capital case may entitle defendant to the appointment of two attorneys; prosecution also often assigns two attorneys to capital case).

nesses necessary in a capital trial.[101]

The capital trial process itself is more expensive because it includes two trials — the guilt phase and the penalty phase.[102] The capital trial lawyer must structure the bifurcated proceeding around the possible sentence. This requires that competent counsel thoroughly investigate and evaluate both the guilt and penalty phase evidence prior to trial to present a case in the guilt phase that will support the penalty phase strategy.[103] This requirement increases the capital trial cost because the penalty phase investigation demands thorough research of the defendant's life.

The penalty phase of a capital trial is categorically different, in character, procedure, and magnitude from any counterpart in a noncapital trial, and it accounts for the greatest increase in cost before the appellate stage.[104] In noncapital cases, the judge generally imposes the sentence, the procedure is brief, and the attorney's role is minimal.[105] By contrast, the capital defendant receives a second trial solely to determine whether he should be sentenced to death. Constitutionally, the court must permit the defense attorney to present any mitigating evidence.[106]

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[101] *See supra* notes 140-41 and accompanying text.

[102] Moreover, in addition to investigating and defending the charge or charges in the defendant's instant case, the defense attorney may also have to investigate and defend against uncharged offenses that the prosecution offers as evidence of aggravation during the penalty phase. *See, e.g.*, CAL. PENAL CODE § 190.3 (West Supp. 1985) (state may present evidence of "criminal activity" by the defendant that involved use or attempted use of force or violence or threat to use force or violence and the "criminal activity" does not require a conviction).

[103] *See, e.g.*, Goodpaster, *supra* note 85, at 334 (defense counsel should integrate "guilt phase defense and penalty phase case for life," to prevent inconsistency between penalty phase argument and guilt phase defense).

[104] A recent California case exemplifies the costs that can be incurred solely from the retrial of the penalty phase. The defendant was convicted in the guilt phase, but the jury could not decide whether the defendant should be sentenced to death or to life in prison without parole. The judge declared a mistrial for the penalty phase. The defense attorney suggested that the defendant might consider accepting the life without parole sentence and forego an appeal, but the district attorney stated he would not agree to a plea bargain. The county auditor commented that the retrial of the penalty phase would be more expensive than the first trial, which cost $10,000 just for defense investigation and defense expert witnesses. Moreover, the court costs alone would "skyrocket," since the judge granted a motion to move the penalty phase retrial to another county. *See Proctor: Death Penalty Worth the Cost?*, Redding (Cal.) Record Searchlight, Feb. 4, 1983, at 1, col. 1.

[105] *See, e.g.*, Goodpaster, *supra* note 85, at 328 (probation reports and mandatory sentencing schemes minimize role of defense attorney in noncapital case).

[106] Lockett v. Ohio, 438 U.S. 586 (1978); *see supra* notes 62-65 and accompanying text.