ALASKA LEGISLATURE COMMITTEE FILES 1993-1994 8672
8303 SENATE JUDICIARY

Alaska State Legislature

Please enter into the record my testimony to the House + Senate Judiciary Committees
committee name

committee on Capital Punishment, dated 11/16/93.
bill/subject

I am opposed to HB 162, SB 127 and HJR 43 for a wide variety of reasons. In part, these items pander to our fears and our need for revenge. I am not convinced ~~the~~ that the death penalty has been or will be applied evenly and fairly. I know a white male who killed someone and did not spend any time in prison. I know an Eskimo man who killed someone and he will spend most of his life in prison. The difference, in part, was personal wealth. Add this to the possibility of killing innocent persons and the system

(over)

Signed: John J. Shaffer
Testifier

self
Representing (Optional)

303 Kinsham Sitka Alaska 99835-7124
Address

907-747-8725
Phone No.

has too many flaws. A lot of people will lie to gain favors from the system for their own crime and time.

These bills and resolution promotes the philosophy that we (society) will make a witness against murder by sponsoring state sanctioned murder. That is not logical to me!

I would prefer living in a state that did not have that philosophy.

Alaska State Legislature

Please enter into the record my testimony to the Joint Judiciary Committees
committee name

committee on HB162/SB 127 , dated 11/16/93 .
bill/subject

I unequivocally support capital punishment for murder. While it is arguable, at least in light of existing statistics, whether capital punishment is a deterrent to the Commission of murder, I submit that lack in deterrent effect heretofore indicated results ~~from that~~ not from the punishment itself, but from a failure by the judiciary to impose and carry out capital punishment in a consistent and unswerving manner.

PLEASE ensure that ALASKA punishes murder in a just and appropriately retributive manner - with capital punishment.

Signed: Charles B. Dean / C

Testifier

Pro Se

Representing (Optional)

P.O. Box 2282, Sitka, AK 99835

Address

907-747-1072

Phone No.

Alaska State Legislature

Please enter into the record my testimony to the Joint Judiciary Committee
committee name

committee on Capital Punishment, dated 11/16/93.
bill/subject

I am opposed to capital punishment. I am for lifetime imprisonment without change of parole. I believe people who have committed heinous crimes who should never be freed to live in society. I also believe in the sanctity of human life, from conception to NATURAL death.

If we decide to kill someone because they've killed someone else, we would be no better than the murderer. We would have stooped to their level of behavior.

Currently, statistics say it's not even "cost-effective" to kill someone by capital punishment. It's "cheaper" to imprison for life. This way of thinking is distorted, in my opinion. How can life ever be equated to cost?

If life is not respected, then why not continue to promote a death culture by promoting abortion, euthanasia, assisted suicide? Why NOT destroy the weak and the old? They're not "cost-effective" to our society either.... There is another reason I am opposed to capital Punishment. Innocent people; wrongly accused, sentenced to death. Two thousand years ago a man named Jesus Christ was put to death by capital punishment. As I pondered this event, I began to wonder WHY we would desire to put someone to death in 1994. Aren't there enough deaths in AK? Isn't there enough violence? Doesn't violence breed more violence?

From what I can tell, there is no correlation between enforcement of capital punishment and reduced crime rates, nor do I see a correlation between increased crime rates and states that ban capital punishment. Clearly, capital punishment is not a proven deterrant to crime.

Maybe, just maybe, life imprisonment with NO CHANCE of parole would be a deterrant. Lets work on "NO CHANCE OF PAROLE" and see if we can make some progress. Going to prison should NOT BE A JOKE. It should be a FATE WORSE than death. Thank-you for listening/reading

Signed: Mary L. Soltis
Testifier

Representing (Optional)

615 DeGroff Sitka AK 99835
Address

(907) 747-5624
Phone No.

Please enter into the Record Jt Judiciary

My name is Mark Boesser. I live at Lena Cove, Juneau. I have been a priest of the Episcopal Church for 42 years, serving 33 of those years in Alaska.

My question is: How can any society possibly benefit from re-enacting the very violence it so vehemently condemns? In my opinion we neither want nor need the death penalty.

If, as has been well documented, the death penalty does not serve as a deterrent ....., what purpose can it possibly serve?

I once naively thought it would save money. However I learn, to my surprise, that just the opposite is the case. For a number of reasons the death penalty proves to be even more expensive than holding an offender in prison for life.

If, as indeed the facts bear out, the death penalty is creating an ever increasing problem for correctional systems all across the country, why should we take upon ourselves problems we can avoid?

Historically the death penalty has been shown to be capricious, unfair, and racially biased.. served disproportionately upon economically disadvantaged members of ethnic minorities. Is that what is wanted? Surely not!

What purpose can it possibly be conceived to serve unless it be vengeance, and, I ask you, is that mankind's prerogative? It certainly cannot heal the devastating rage and grief of the victim's families. What is possibly gained by attempting to take vengeance into one's own hands?

The General Convention of the Episcopal Church, it's national deliberative and legislative body, has opposed capital punishment on the basis that the life of an individual is of infinite worth in the sight of Almighty God, and the taking of such a life falls within the providence of Almighty God and not within the right of human beings.

This opposition of the Episcopal Church to capital punishment has been reaffirmed again and again (1958, 1969, 1979).

The institutionalized taking of human life prevents the fulfillment of Christian commitment to seek the redemption and reconciliation of the offender.

And the reality is that there are incarceration alternatives for those who are judged to be too dangerous to be set free in society.

Given such considerations, the Episcopal Church has called upon its dioceses and members of the Church to work actively to abolish the death penalty in states that have it.

I, personally, am proud and grateful that the Territorial Legislature of Alaska had the wisdom to reject the death penalty years ago. To turn our back upon that wisdom and choose the death penalty now would, to my mind, be to take a tragic, tragic step backwards.

I urge you with all my heart to reject HB 162
and SB 167

Thank you.

The Rev. Mark A. Boesser
17585 Lena Loop Rd.
Juneau, Alaska 99801
ph. (907) 789-1445

2. of two

Alaska State Legislature

Please enter into the record my testimony to the _____
committee name

committee on Death Penalty, dated Nov. 16, 1993.
bill/subject

In such a violent age, it is a gross mistake to perpetrate more violence by conveniently "killing our mistakes". Putting to death those who once merited our protection as an abused or neglected child. At what point do we withdraw that concern for those who are so deranged, angry etc. as to kill and in turn decide to kill back? It is inhuma in a society where we are afraid to spank a child on one hand but if he grows up sick we will kill him. We need to stop "growing" criminals to begin with, concern ourselfs with preserving our children, retaining family values and somehow stop the killer before he becomes one.

Signed: Rinka Chana Zorea
Testifier

Representing (Optional)

7540 E. 17th Ave
Address

3334037
Phone No.

Alaska State Legislature

Please enter into the record my testimony to the House/Senate Judiciary Comm.
committee name

committee on Death Penalty, dated 11/16/93.
bill/subject

I apologize for not being able to wait long enough to testify. I do wish to register my objection to House Bill 162 + Senate Bill 127 - Aside from the factual argument that the death penalty is not a deterrent (evidenced by 37 states usage) implementation of the proposals would serve to actually lessen the value of human life in Alaska. When 99yr sentences [66 w/ good time] are available [likely more] a deterrent than threat of death to most offenders the need to kill for retribution is made clear. Such a joining with the mind set of the offender is not a positive for Alaska nor will anyone be safer for it.

Signed: Moshe Dalberg Zorea
Testifier

Representing (Optional)

7540 E. 17th Ave. Anchorage 99504
Address

337741
Phone No.

Alaskans AGAINST the Death Penalty

ALASKANS AGAINST THE DEATH PENALTY - *STATEMENT OF PURPOSE*

Alaskans Against the Death Penalty (AADP) is a coalition of organizations and individuals who have joined together to oppose House Bill 162 and Senate Bill 127. If adopted, these bills will permit the death penalty in Alaska.

We oppose the death penalty for numerous and diverse reasons; the organizations and individuals which make up this group represent a broad range of viewpoints about why the death penalty legislation should be defeated. These reasons include:

CONCERN ABOUT COST. Executions have proven far more expensive than putting murderers in jail for life. Establishing a death penalty in Alaska will cost more than $21 million dollars in the first four years. Maintaining a death penalty system will continue to require tens of millions of dollars each year. These vast expenditures will do very little to increase public safety and are unwarranted in times of declining oil revenues.

CONCERN ABOUT CRIME. The death penalty does not deter murderers. Instead, it will divert resources from effective crime prevention programs and law enforcement efforts that could actually reduce the crime rate in our state. Our criminal justice system should focus on preventing the tragedy of violent crime; the death penalty accomplishes nothing towards this end.

CONCERN ABOUT FAIRNESS. Studies repeatedly show that racial prejudice and poverty often influence sentencing. Our nation's death rows have always held a disproportionately large population of African-Americans. In Alaska, Alaska Natives comprise a disproportionately large segment of the jail population, and would likely receive a disproportionate number of death sentences. Indigent people who cannot afford highly skilled trial lawyers are also more likely to end up on death row. Additionally, nothing in the proposed bills would bar the execution of persons with mental illness or mental retardation, or minors who may not comprehend the magnitude of their crimes. Implementing a death penalty under these circumstances would run counter to fundamental concepts of justice and fairness.

CONCERN ABOUT MISTAKES. Every year, news reports are published about innocent people who were convicted and sentenced to death for crimes they did not commit. Mistaken identification, perjury, prejudice and governmental misconduct have each contributed to erroneous convictions. In the past twenty years alone, 48 convicted persons have been released from death rows in the U.S. because of well-established innocence.

CONCERN ABOUT BETTER ALTERNATIVES. Nationwide, [illegible] show that most people prefer alternatives to the death penalty, such as sentencing murderers to life in prison without the possibility of parole for at least 25 years and requiring that restitution payments be made over time by the prisoner to the victim's family. Increasingly, people are recognizing that we can get "tough on crime" without the death penalty.

We believe that our fellow Alaskans, if informed about the realities associated with the imposition of the death penalty, will join us in opposing House Bill 162 and Senate Bill 127. We encourage you to join the efforts of the coalition by voicing your objections to the death penalty, volunteering your time, or offering your financial support. Please feel free to call us if you have questions. We invite all inquiries and interest.

ALASKANS AGAINST THE DEATH PENALTY
P.O. BOX 202296
ANCHORAGE, ALASKA 99520-2296
(907) 258-2296

MURDER

Continued from Page 1

whatever Susie had to endure."

So today, when Jaeger hears people talk of wanting revenge, she understands perfectly.

But don't expect her to agree.

A torturous internal struggle to reconcile her urge for revenge with her religious beliefs left Jaeger certain of one thing. Society must resolve its problems through something other than violence.

Which is why Jaeger will be part of the Journey of Hope.

"I know people think this lady is off the wall," she said. "Or they think — and this really hurts me so — they think I must not really have loved my little girl."

But that couldn't be further from the truth. Because Jaeger's opposition, ultimately, was born of love.

"I argued and argued with God and really had a wrestling match. I gave God permission to change my heart."

First, though, would come a test — agonizing and heartbreaking.

Within days of the disappearance, police received a call from the kidnapper offering to exchange Susie for a ransom. Other calls would follow, but the suspect could never decide how to make the exchange.

The family's hopes rose and fell as reports of possible suspects and tips surfaced, then fizzled.

During that time, Jaeger took an unusual step.

"I began to pray for him every day, which initially was the last thing I felt like doing," she said.

"I worked hard to discipline myself, to remind myself this man was a son of God, even if he hadn't behaved like one."

Then, after a wire service story about Susie's disappearance appeared a day before the one-year anniversary, the kidnapper called again.

"It became clear he was calling to taunt me," Jaeger said. "But in spite of the fact he was being very smug and very nasty, to my own amazement, I realized that I was feeling genuine concern and compassion for him."

That concern stunned the kidnapper. He broke down and wept and the two began a conversation that would last an hour.

Jaeger flooded him with questions about her daughter: "How are you keeping her? Is she getting any education? How are you fixing her hair? What kind of clothes is she wearing?"

The call provided investigators with some much-needed clues. Coupled with other information — and details gleaned from another call to Jaeger — police arrested a 25-year-old man named David Meirhofer nearly three months later.

A search at an abandoned Montana ranch turned up a chilling hint of Susie's fate, however: part of a backbone experts believed came from a young female child.

Later, Meirhofer admitted he had killed Susie about a week after he'd taken her.

Even so, Jaeger said she had no interest in revenge. She wanted Meirhofer treated, not executed.

"To have him killed in Susie's name would be to violate the goodness, the sweetness and beauty of who Susie was," her mother reasoned.

Meirhofer accepted an offer from federal authorities to plead guilty in exchange for life imprisonment. Four hours later, though, he committed suicide.

"It was not what I wanted for him," Jaeger said. "It was another terrible blow."

Since her daughter's death, Jaeger has met many parents who have lost children to acts of violence.

And she has seen the effects of keeping a vindictive mind-set.

"While I've been there and know it is a normal, valid human response, I also know we have to get beyond that," Jaeger said.

"I'm not saying you forgive and forget, because you never forget."

And she certainly doesn't believe people who commit violent crimes should be put back on the street.

But Jaeger rejects the notion that putting killers to death is a measure of justice for their victims' families.

"There are," she said, "no amount of retaliatory deaths that will compensate for the loss of our loved ones."

A change of heart

Bill Pelke is a steel worker in Portage who hadn't given the death penalty a second thought.

Until 1985.

That was the year his 78-year-old grandmother — Ruth Pelke of Gary — was beaten and stabbed to death by a group of girls who knocked on her door requesting Bible lessons.

A 15-year-old girl named Paula Cooper was arrested and charged as the ringleader.

At the time, Bill Pelke wanted nothing less than her death.

"My thoughts were, they were handing out the death penalty for serious crimes and if she didn't get it, it would devalue the life of my grandmother," Pelke said.

He thought his prayers had been answered when the teenager was convicted and sentenced to die.

Four months later, he had a change of heart.

Personal troubles had set Pelke thinking about his life, his grandmother's life and her death.

He pictured tears running down his grandmother's face — tears he believed could stem only from love and compassion she felt for her young assailant, now sitting alone in a jail cell.

Convinced that his grandmother would want a family member to speak out against Cooper's execution, Pelke became active in the anti-death penalty movement. He participated in protest marches in Florida in 1990 and in Texas in 1991.

During the Texas march, Pelke suggested a march be held in Indiana and that Murder Victims' Families for Reconciliation — on whose board he serves — should be its sponsor.

The Indiana event is expected to be one of the largest anti-death penalty events in recent years, drawing participants from across the country.

"Murder is a horrible crime," Pelke insisted. "But there has to be some other way than the death penalty."

Painful childhood memories

When Sam Sheppard talks about executions, childhood pain from long ago still seeps through.

In 1954, his father, Dr. Sam Sheppard, was a 30-year-old surgeon who owned a Dutch Colonial home in suburban Cleveland, a sporty Jaguar and a Lincoln Continental convertible.

His mother, Marilyn Sheppard, was 31 and four months' pregnant.

Life, in short, was good.

But in July of that year, Sheppard's world was turned upside down.

"My mother was murdered when I was 7 years old. Within five to six months [of the murder], the State of Ohio asked the jury to execute my father for a crime he didn't commit," Sheppard said.

"So my view is I lived through the trauma of a murdered parent and then was terrorized by the state with the threat of the execution of my father," said Sheppard, also a board member of Murder Victims' Families for Reconciliation.

A jury ultimately found the elder Sheppard guilty of second-degree murder, instead of first-degree, which meant the death penalty could not be imposed.

Eventually, Sheppard won a new trial and was exonerated in 1966. He died four years after being released from prison.

His son still shudders at the thought of what could have happened.

"I know that if they had convicted him of first-degree murder and executed him within six to 18 months, which they were doing in those days, I would not be alive.

"I could not have withstood another trauma of that magnitude in my life."

Like Pelke and Jaeger, Sheppard believes violence — whether in the form of guns on the street or electric chairs in state penitentiaries — is not the solution to violent crime.

"I sincerely believe it hurts people more, particularly the children," said Sheppard, who lives in Cambridge, Mass.

"I went to high school in Indiana, to Culver Military Academy. I know first-hand that people in Indiana are decent, solid people," he said.

"I think if they are exposed to the truth, they will be able to decide for themselves."

'Journey' to abolish death penalty starts at prison, ends at Statehouse

Star Staff Report

"Journey of Hope . . . from Violence to Healing" is the creation of Murder Victims' Families for Reconciliation, several other national groups and Amnesty International.

The journey will begin with a rally at the Indiana State Prison in Michigan City on June 5. It will conclude two weeks later with a rally at the Indiana Women's Prison and a march to the state Capitol.

In between, it will make stops at a number of cities in Indiana and surrounding states.

Here is the full "Journey of Hope" itinerary:

June 5: March and rally at the Indiana State Prison, Michigan City.

June 7: Gary and Hammond.

June 8: South Bend and Mishawaka.

June 9: Elkhart and Goshen.

June 10: Lafayette.

June 11: Fort Wayne.

June 12: Chicago.

June 14: Bloomington.

June 15: Richmond, Ind., and Dayton, Ohio.

June 16: Evansville.

June 17: Louisville, Ky.

June 18: Meeting at Christian Theological Seminary, Indianapolis, 7 p.m., and at Martin University, 7:30 p.m.

June 19: March from the Indiana Women's Prison to the state Capitol at 10 a.m. Closing and concert at the United Auto Workers Hall, 8204 East 30th Street.

For information about specific events in each city, call the Journey of Hope office at (219) 982-7751.

THE INDIANAPOLIS STAR

3 who have been touched by murder unite in stand against death penalty

Love-filled memories stronger than a desire to bring about revenge.

By Rob Schneider
STAR STAFF WRITER

Marietta Jaeger was a mom, Bill Pelke was a steel worker, and Sam Sheppard was a 7-year-old boy without a care in the world.

Living in different parts of the country, chances are their paths never would have crossed.

But murder has brought them together. In different times and places, each lost family members to crimes of stunning viciousness.

This week, all three will journey to Indiana to take part in a statewide demonstration — a two-week "Journey of Hope," sponsored, in part, by the families of murder victims.

And they, along with members of other organizations participating in the event, have a most

Marietta Jaeger conquered her rage by praying for her daughter's killer.

astonishing goal:

An end to the death penalty.

Ask Marietta Jaeger, and she will tell you about anger.

It overflowed within her one June day in 1973.

Her 7-year-old daughter, Susie, had been missing for days, kidnapped from her tent in a Montana campground.

The FBI, local authorities and volunteers had combed the area for clues. But they found nothing.

Finally, the searchers turned their attention to a river that ran next to the campground, dragging it for signs of the girl's body.

"The boat would move and it would stop. Every time it would stop, my heart would stop because I was so afraid they would find Susie," Jaeger said.

As she watched, it began to dawn on Jaeger that she might never see her daughter again.

And the anger began to well up inside her.

"Finally, I just couldn't keep it squelched anymore," Jaeger said. Her image of herself as a "good Catholic girl" began to crack.

By the time she went to bed that night, she could barely contain her rage.

"I said to my husband . . . 'I could kill him,' " said Jaeger, who now lives in Detroit. "I meant it with every fiber of my being. I'm sure I could have done it with my bare hands and a smile on my face.

"I felt it was a matter of justice, that he needed to pay for what we had already gone through and for

See MURDER Page 2

MAGDALENO ROSE-AVILA

MAGDALENO ROSE-AVILA is the Western Regional Director of Amnesty International USA in Los Angeles, California. Amnesty International (AI) is an independent worldwide movement working impartially for the release of all prisoners of conscience, fair and prompt trials for political prisoners, and an end to torture and executions. AI received the Nobel Peace Prize in 1977 for its work to promote human rights worldwide.

Mr. Rose-Avila has been a long-time human rights activist and outspoken opponent of the death penalty. Prior to commencing his current position in 1990, he was National Director of AIUSA's Campaign to Abolish the Death Penalty from 1987 to 1990. In that capacity, he coordinated international and national efforts to end capital punishment and traveled to other countries on behalf of abolition, including an Amnesty mission to Jamaica. From 1985-87, he served as Southern Regional Director of AIUSA in Atlanta, Georgia. In 1988, he was Media Coordinator for AI's Worldwide Human Rights Concert Tour, "Human Rights Now!," which featured Bruce Springsteen, Sting, Peter Gabriel, Tracy Chapman, and Youssou N'Dour and traveled to 18 countries, including Argentina, Brazil, Zimbabwe, Ivory Coast and Hungary.

Prior to joining Amnesty's staff, Mr. Rose-Avila was a Special Assistant to the Chair of the Democratic National Committee from 1981 to 1984, and a coordinator for the Peace Corps in Guatemala and Nicaragua from 1978 to 1980. He has also served as a Special Assistant at the U.S. Department of Labor (1986-88), as Director of the Colorado Migrant Council (1985-86), and as an organizer for the United Farmworkers of America (1970-74). Mr. Rose-Avila received a BA degree in Theater, Journalism and Communications from the University of Colorado at Boulder, and is the founder of Your Human Rights Theater and Teatro de Valle. He most recently acted in the Los Angeles production of <u>The Last Pad</u> by William Inge, a play about the last days of a death row inmate.

MARIETTA JAEGER

MARIETTA JAEGER lost her 7-year-old daughter to violent crime in 1973. She is the author of THE LOST CHILD, a book that chronicles her experiences and spiritual journey surrounding the kidnap and murder of her daughter during a family camping trip. She is currently a Board Member of MURDER VICTIMS FAMILIES FOR RECONCILIATION, a national support group of murder victims' family members who work for abolition of the death penalty. In her passionate advocacy against state killing, Ms. Jaeger has stated:

> Concerning the claim of justice for the victim's family, I say there is no amount of retaliatory deaths that would compensate to me the inestimable value of my daughter's life, nor would they restore her to my arms. To say that the death of any other person would be just retribution is to insult the immeasurable worth of our loved ones who are victims. We cannot put a price on their lives. That kind of justice would only dehumanize and degrade us because it legitimates an animal instinct for gut-level, blood-thirsty revenge.

Ms. Jaeger is an active member of Amnesty International, and in 1989 led AI's Campaign Against the Death Penalty in Japan and South Korea. She is a member of the National Coalition Against the Death Penalty, the Michigan Coalition Against the Death Penalty, and a past Director of the Michigan Coalition for Human Rights. She has spoken extensively against capital punishment at local and national conferences. She has also been a presenter for numerous lectures, workshops and retreats on forgiveness, reconciliation, peacemaking and non-violence in the U.S. and Canada. Ms. Jaeger lives in inner-city Detroit, Michigan, where she is a member of the Detroit Peace Community and Promotion Manager for THE WITNESS, an ecumenical social justice journal.

WHAT DO MVFR MEMBERS SPEAK ABOUT?

MVFR members describe the experience of losing a loved one through murder and their eventual recognition, unique to each one, of how hatred and a desire for revenge is deleterious and even destructive to themselves most of all. They share their struggles to let go of their vindictive feelings to move on an up to a healthier, more humane way of responding to the offender and dealing with their grief. Audiences are witnesses to their triumphs as MVFR members attest to the inner peace and healing which is restored to their hearts and minds as they begin to seek compassion and concern for the persons responsible for the crimes which took away loved ones from their lives. Many folks tell stories of forgiveness and reconciliation; all, for a variety of credible and compelling reasons, articulately and vehemently oppose the death penalty.

-MVFR

FEDERAL PUBLIC DEFENDER
for
THE DISTRICT OF ALASKA

Nancy Shaw
Federal Public Defender

510 L Street, Suite 400
Anchorage, AK 99501

(907) 271-2277/FAX (907) 271-2271

November 16, 1993

Honorable Brian Porter
3111 C Street
Anchorage, Alaska 99501

Dear Mr. Porter:

The Federal Defender was appointed in April 1992 to represent R.D. Cheely, one of several individuals charged in a case in which the death penalty is sought. I know that the Legislature is seriously considering a capital sentencing scheme this session, and I understand that you have expressed reservations about the cost of implementing a death penalty.

If you could spare me a few minutes, I would like to share with you a compilation of the expenses incurred to date in U.S.A. v. Cheely, et al. I will also provide you, if you like, with some information from death penalty states having to do with the cost of this sort of litigation.

Very truly yours,

Nancy Shaw
Federal Public Defender

NS:lmw

lynn\files\nancy\porter.ltr

5 Δ = 10 lawyers
3 plead
2 ⇒ Trial
Cost of Def. $895,000 – To Date
NO appeals yet
US Courts
budget allot. 376K per client
Michael M

Death Penalty Testimony before the Judiciary Committee of the Alaska Legislature.
Nov 16, 1993

My name is John Havelock. I am a former Attorney General of the State. After that I served as the Director of the Criminal Code Revision project that successfully revised Alaska's criminal code. I also served as the Director of the Alaska Justice Center and as a Professor of Justice at the University of Alaska, Anchorage for ten years. For fifteen years I also served as a consultant to the Governor's Commission on the Administration of Justice. I have taught, written and litigated questions of Alaska constitutional law.

I would like first to disassociate myself from those who oppose executions based on weakness of stomach or a misguided sense of mercy. I do not believe the State is required to show mercy to those who have shown themselves to be incapable of it. Current law allows the summary execution of persons at large who are believed to pose an immediate and substantial danger to the public. I am not offended by this law. Neither am I persuaded to oppose the death penalty by the fact that some day, a person may be executed who is innocent of the crime charged. Every year we sentence innocent people to death by failing to adopt or enforce stiff safety codes in the fishing and timber industries, to take some obvious examples. Innocents have often paid the penalty for political or economic institutions said to confer a benefit. Nor would I be bothered if death was offered as an annual option to a convicted felon who has no reasonable expectancy of ever being released alive from imprisonment, though I have no reason to suppose such a proposal has any public support.

However, I do not believe that the mandatory execution of a person, for whom life imprisonment is always an alternative, is desirable under the particular circumstance of administration of justice in Alaska. Nor do I think that it is possible to impose executions under Article I, Section 12 of the Alaska Constitution, so I believe your death penalty proposal, as framed, is dead on arrival. Those who want an electric chair as the pinnacle to our temples of justice, instead of the female figure of blind justice with scales, need a constitutional amendment.

Let me address the Alaska -specific issue of desirability of the death·penalty. First, it is a fact that the racial characteristics of those executed is a point of high interest among the general public, particularly among minority peoples.

Historically, for all but the last decade or so of this century, the death penalty was used primarily in the southern states and primarily to execute black people that committed crimes against whites. This discriminatory impact has been eliminated by executing more whites. However, it is still the case that the race of the victim is a prime determinant of execution of the offender. Also, black people are still executed disproportionately to their percentage of the total population, but not disproportionately to their percentage of persons charged with murder. Black people, in general are disproportionately a higher part of the criminally charged population because of their lower economic status.

Alaska has never been a part of the southern tradition in the race relations. On the contrary, we who have lived for some time in Alaska, take some pride in long having been a multi-racial society. No other state of the United States has such a large Native American population. Only Hawaii has a similar tradition of multi-racialism.

It is also a fact that since Alaska's Native Americans are disproportionately in the economic underclass, they show up in disproportionate numbers in our prison population. Thus it is safe to predict that there is a considerable chance that the first or second person you set out to execute, if you pass such a law, is going to be an Inupiat or a Upik or an Athapaskan or a Thlinget or Haida or an Aleut.

Regardless of whether a particular execution is seen as fair, the racial characteristics of the person executed will be a featured aspect. If we do execute a minority, it will exacerbate racism in both the white and minority population. It will become a focal point of the charging decision by the District Attorney. And incidentally, do not miss the fact that life and death discretion shifts, under such a proposal, from the judicial branch to the politicians. This has been a problem with all the recent so called reforms in sentencing by restricting judicial discretion - the power is shifted to the executive branch from the judicial. But my question with regard to the death penalty, based on principles of administration of justice, is this: does the social good in meeting popular demand for executions, outweigh the problems caused by raising the level of racial animosity in this state? I think not.

The issue of justification is also raised in Article I, Section 12 of the Alaska Constitution. I am frankly surprised that your lawyers have not identified the magnitude of the problem. Section 12 states, "Penal Administration shall be based

on the principle of reformation and upon the need for protecting the public." You don't reform a person by killing him. As for protecting the public, so long as you have life imprisonment as an option, execution is an excessive means of protecting the public.

This constitutional provision was adopted at a time when death penalties were out of favor and out of practice. There is nothing in subsequent Alaska Supreme Court decisions interpreting this section that would lead one to believe that a penalty which exceeded the need to protect the public would stand muster under this constitutional provision. Legislation which raises false expectation merely stirs up and frustrate the public. This legislation offers only injury to the administration of justice and I recommend you bury it.

The Constitutional Problem with an Alaska Death Penalty in a Nutshell.

by John Havelock (testimony of Nov 16, 1993)

Mr. Chairman, it may help the committee if I set out in as few words as possible why this bill is unconstitutional when obviously somebody has told you that it is constitutional. In a nutshell, the person so advising you has put too much reliance on a statement on the floor of the convention by a committee chair and not enough on the plain meaning doctrine and the importance of other doctrines used in making constitutional law.

At the convention, (1309), Delegate Awes was asked by Delegate McLauglin, "was it the intent of this clause to abolish capital punishment on the theory that you cannot reform a dead man?"

Delegate Awes replied: " "...this sentence has been almost the identical words as in other state constitutions, and in those states the supreme court upheld that it does not abolish capital punishment..." Delegate Doogan goes on to say that he believes the Supreme court of Indiana has so ruled and this clause was taken from Indiana.

Please note, and I will come back to it, that the Alaska delegates believed that what a Supreme Court said about this language at a particular time and place was the guiding principle in determining its meaning.

Delegate Doogan goes on to say, "it was purported to intend that this clause would have nothing to do until the time a person was sentenced... that this statement was more or less advisory or instructive to the penal institutions that they would work on the basis of reformation and not go back to the bread and water stage, but it was intended that it would apply after a person had received sentence...."

Let me first point out that statements of delegates and legislators while useful are not determinative. As the Supreme Court has said in Division of Elections of State v Johnstone, "adherence to the common understanding of words is especially important in construing provisions of the Alaska Constitution because the court must look to the meaning that the voters have placed on its provisions." That is, it is what the people might have thought, not what the delegates thought that is the determinative factor in legislative history. What was the plain meaning of the words? The plain

meaning was obviously the common observation of Delegate McLaughlin: dead men cant be reformed.

The other thing to remember is that the gloss that is put on a constitution over the years is far more important to understanding that constitution than the actual words. For example with regard to the U.S. Constitution, what did the original delegates think was included in due process or equal protection? Do you think they thought that it could control legislative apportionment? Even considering the present subject, do you think the Philadelphia delegates had the slightest notion that due process would result in the present constitutional fabric which governs the death penalty under the federal constitution? Surely the answer is "no" if not "hell no". The framers set out generalized principles and it is for the courts of succeeding generations to set out what these principles mean in particular applications just as it was for the Indiana court to determine the meaning of this language in its particular application given the evidence and the state of science at the time.

For an example of the treatment of the opinion of a delegate, look what Delegate Doogan said in the quote I gave. Is Doogan's interpretation the law today? "Hell no", any reasonably informed lawyer would answer. In dozens of cases, the court has held that this language is mandatory and not advisory, that it covers sentencing and that the judiciary is bound by it and it applies long before the person is sentenced. So much for Doogan's opinion.

So why is Awes shot in the dark any more likely to hit on what this general language means thirty five years later? As she said, the language is subject to the interpretation of courts. The court will consider the application of this phrase in its particular setting: social, economic, scientific not in 1956 but in 1990whatever, if you make the mistake of passing this. It will hear evidence on whether the death penalty is required to meet the twin goals of sentencing, that it has embraced many times: protection of the public and reform of the offender. It will be weighed in the context of the constitutional doctrine (not available to delegate Hawes or to the Indiana Supreme Court) that the right to life is a fundamental interest and that the state must show a compelling interest to deprive a person of that right. Where is the evidence that would uphold this law? I just don't think it is there. And at the same time you have all kinds of evidence of legislative intent that runs against the argument built on protection of the public. No one can predict perfectly what a court will do, but I wouldn't give you more than a 10% chance of sustaining this bill.

file

Kathy Kainer
311 Melody Place, Apt A
Anchorage, AK 99504

November 16, 1993

To the Honorable Representatives and Senators of the House and Senate Judiciary Committees:

I want to thank those of you who took time out of your busy schedules to listen to public comments about House Bill 162 and Senate Bill 167 - Capital Punishment for Murder. Although I was allowed to testify, the hour was late and I am a better writer than speaker, so please allow me to supplement my remarks with this letter.

I want to commend you on your efforts to make this state a safer place for law abiding citizens to live. I agree that it is the state's responsibility to protect us from violent crime. As an Anchorage resident who is afraid to walk the two blocks from my home to the nearest store after dark, I thank you for your attention to this issue. However, I think with the testimony you heard today you should realize that importing the death penalty will not make the streets of Anchorage or any other Alaskan city safer.

Representative Sanders stated that even if the death penalty does not serve as a deterrent this bill should be passed because it is the will of the people. He cited polls showing that the vast majority of Americans support the death penalty. Randall Burns countered that if people are informed about the option of life without parole and the costs associated with administering the death penalty, support drops to less that 45%. If you had asked me in 1985 if I supported the death penalty I would have said "yes", since I had never given the issue much thought. Once I joined Amnesty International and was exposed to the facts about the death penalty, I changed my mind. If you go back to your constituents and ask them about their support of the death penalty, spend some time sharing with them some of the facts you heard today about the cost and it's inability to deter based on the experience of states that have the death penalty, and offer them the alternative solution of life without parole, I think you will find that support for the death penalty is a mile wide and an inch deep.

There will alway be those who clamor for revenge, regardless of the cost. The desire for vengance should not dictate public policy.

I encourage you to research the experience of our allies who have abolished the death penalty and still manage to have a much lower rate of murder and other violent crimes

than the United States. Ask your neighbors in Canada why they think Vancouver has such a lower crime rate than Seattle. They are both large cities, less than 100 miles apart, and Washington has a death penalty law that supposedly deters crime. Their answers may surprise you.

I hope you will carefully consider the testimony you heard today, abandon your efforts to import a death penalty and begin to focus on real solutions to the problem of crime in our communities.

Sincerely,

Kathy Kainer

Tom Moyer
2047 Amy Dyan Road
Fairbanks, AK 99712

FAXED 11/15

November 15, 1993

Representative Jerry Sanders
716 4th Avenue Suite 360
Anchorage, AK 99501

Re: Capital Punishment

Dear Representative Sanders:

In anticipation of the hearings on November 16, I would like to take the opportunity to put my opinion of HB 162 and related measures (SB 127 and HJR 43) on the record.

Personally, I am inalterably opposed to the death penalty. As a former legislator, I had the chance to spend a great deal of time reviewing the arguments from both sides of the capital punishment issue. My contemplations and research reinforced my personal belief that there simply is no argument that justifies the use of the death penalty.

Admittedly, there is considerable support for the death penalty in our society. In far too many cases, the support for capital punishment stems from vengeance, anger and hate. Some advocates say it no longer matters whether it serves as a deterrence or not, that retribution alone justifies capital punishment, that society must exercise control and "do something". I cannot agree with those who think that vengeance is a human instinct and that it should be transformed into a judicial principle. The statistics show that the actual numbers of executions in our country are relatively low. Criminal justice experts believe this reflects the public's deep-seated ambivalence about the issue despite the fact that over three quarters of respondents to public opinion polls say they support the death penalty. Sometimes it is the job of a lawmaker to work to change "societal norms" when they are misguided rather than comply with them. That is a true test of leadership.

Friends or family members of the murder victims are understandably among the most fervent supporters of the death penalty. Demanding an "eye for an eye, a tooth for a tooth" is easy at such times. However, it is my belief that the state should not participate in what it forbids its citizens. It is our duty as citizens and the duty of our government to be rational at such times on behalf of all society. It is nothing less than a moral imperative that society as a whole enforce a rational, higher standard of conduct for our government. Do our laws allow the Commissioner of Corrections to "establish a procedure" to rape rapists or burn the homes of arsonists as punishment? No, of course not! Yes, murder is a more serious crime, the most serious of all; but using the official power to execute is simply an admission that we have failed as a contemporary society. Innocent people have been executed in the name of justice. Minorities and the poor have been given the death penalty in disproportional numbers. The former warden of San Quentin, Mr. Clinton Duffy once said, "The death penalty is the privilege of the poor." Rehabilitation efforts have been mixed at best. Abandoning them in favor of retribution is also an inexcusable admission that we have simply given up.

Cannot a modern, dignified, humane society, one on the verge of an unprecedented time of world peace, find better ways to prevent murder, help the victim's family, and treat the offenders than simply killing them? A life sentence without parole is not soft on crime, so says Mr. William D. Leeke, former South Carolina Commissioner of Corrections who had hoped never to have to go through an execution but was responsible for overseeing two late in his career. He said: "We would have a much more civilized society if we could find a way not to kill people, but that is perceived as idealistic and soft on crime and liberal, but I think putting people in prison for the rest of their lives is not being soft on crime."

The death penalty may even make great politics for some, but it is not good social public policy. Thank you for your attention.

Sincerely,

Tom Moyer

cc: Chairs, House and Senate
Judiciary Committees

November 18, 1993

Senator Robin Taylor
Chair, Senate Judiciary
P.O. Box 1441
Wrangell, Alaska, 99929-1441

Senator Taylor;

I am writing to you in re. to your role as the Chair person of the Senate Judiciary and pertaining to the hearing held on 11-16-93 re. the death penalty in Alaska. I was not able to attend the hearing, and so may sound redundant or misinformed at times in this correspondence.

I am an avid gun collector, and believe that one must maintain the right to defend one's freedom, safety, property, family, etc. from any entity that violates historical social boudaries, and that this defense is acceptable at whatever level is deemed to meet the definition of necessary or justifiable force for that moment. Thomas Jefferson, Paine, et al even went so far as to identify domestic governments, individuals, etc. as acceptable targets of that force if certain criteria were established.

I am also a licensed clinical social worker, a mental health professional, a licensed marital AND family therapist, a member of the AkCLU, ACLU, NRA, etc. I have a newborn baby daughter; Rayna Kathryn Nelson. I contemplate the legislation dicussed at the hearing this past Tuesday when I look at her. I know that if someone were to victimize her physically,sexually, etc. that I would quite likely contemplate or even act in re. to seeking serious vengeance.

At the same time,I know that we live in arbitrary, fickle, unpredictable and illogical times. The occurrences of prosecutorial power being abused (see the Randy Weaver case, though I detest racists/aryan scoundrels, also see the case of Geronimo Pratt and Leonard Peltier), the frequency of over-zealous law enforcement, and the reality of victory in court often times being more based on who provides the best circumstantial evidence (drama), and who has the most manipulative attorney leads me to fear the thought of a very imperfect and biased system being able to define who lives and who dies. In the case of the person who witnesses the murdering of a family member, and takes the life of the perpetrator there on the spot with no question as to guilt or innocense, I have no problem with that. I do have a problem with an obviously flawed, biased system defining past events for which none of them were present, then ruling on who lives and who dies.

If this law were to include a section stating that if it were found after the execution of the sentence was carried out that there was reasonable evidence that the accused had, in fact, not committed thealledged crime, that the judge, jury members, law enforcement officers, and prosecutors all serve the maximum amount of time allowable for negligent homocide (as that is what they would have committed), and that this was

unwaivering conditions for any and all trials involving a potential death sentence then I would not have as great a problem with the proposal as the persons behind such a verdict would be establishing their faith in the system at a very suitable level.

This is the same system that said that the recriminalization of marijuana, unconstitutional as it was, would not be enforced, but was rather just to make a statement to the "children." The same system that saw John Collette looking at life without parole for cultivation of marijuana less than three years later. Yes, Senator Taylor, it is a fickle, arbitrary and illogical system that I would certainly not trust with the power to decide life and death. In my work s a mental health practitioner, I have seen rapists sentenced and released after serving fifteen months, then watched as a first-time offender is sentenced to thirty-five years without parole for involvement in a non-violent and mutually agreed upon cocaine sale. Senator Taylor, the lack of logic and obvious lack of ability to prioritize criminal behavior scares the breath out of me when considering giving this "system"the power to kill people.

I beg of you to please consider this when deciding on the future of this very dangerous legislation.

Sincerely,

Dirk R. Nelson,LCSW, LMFT
P.O. Box 2437
Valdez, Alaska, 99686

Home Phone: (907)-835-5894
Work Phone: (907)-835-2838

cc; House Representative Brian Porter
House Judiciary Chair
716 W. 4th Ave.
Suite 640
Anchorage, Alaska, 99501-2133

Legislative correspondence file

THOM F. BPSHMAN
Investigator
P.O. Box 384
Sterling, Ak. 99672
(907) 262-3287 1-800-478-3289

11-18-93

BRIAN PORTER
716 4th Avenue, Suite 640
Anchorage, AK. 99501-2133

Dear Mr. Porter,

I do not know if you remember me. I am the son of Earl Hibpshman and I have known you for many years.

Since I have seen your name in the Anchorage papers lately, concerning the proposed bills advocating the execution of persons that would commit certain types of crimes, I wish to point out to you some things that are of great concern to me.

There are few that think higher of law enforcement officers than I do. My history, as you know, is one of knowing and socially engaging with police officers. Policemen and policewomen are as much a part of my past as anything else. Also, I commonly work to defend police officers and their departments and detachments when they are sued for deadly force, etc. Because of my attitude toward police officers, I hope that you will be able to open-mindedly consider what I am about to say to you.

It is true that anyone that commits the crime of homicide against a police officer should suffer the greatest punishment. I am fully in agreement with capital punishment and I have been for as long as I can recall. Yet you are not correct in deciding that those that commit certain types of homicide are any more deserving of capital punishment than those that commit other types of murder.

If a police officer is working in his or her line of duty and becomes the victim of a homicide, is he or she more special than a taxi driver, a prostitute, a grocery clerk, a fireman, a school teacher, an insurance fraud investigator, etc.? Why would we consider the crime of killing a policeman more serious than the crime of killing anyone else?

Anyone that I have talked to about this, and there are many, agree with me that this is purely a special interest law that you are proposing. The police officers associations (which have wrongfully become political lobby groups working to create laws, instead of working to enforce them as the people command) have more money and man power than the average citizen. I have found no one that does not feel this way, with the exception of some police officers.

Some of the police officers that I have talked to about this say that this is a step in the right direction. That is a naiive statement. It is a slap ion the face to some of the common men and women in our state.

I have not written this letter to offend you. I stress to you that you are correct in pushing for a capital punishment bill. We need some sort of serious deterent to thwart the killings of innocent persons in our state. Yet you and the political lobbyists that are pushing these bills are making a serious mistake because you are offending those that are not law enforcement personnel. The public sees this bill as nothing more than a proposal brought by those that have the power and

the money, with no consideration for the common individual. This bill is wrong and should be stopped in its present form.

The days of the public seeing the policeman as a hero and protector of good are gone. It is my personal opinion that the labor unions that invaded the police departments have caused too high of wages. This has resulted in persons wishing to become police officers because of salaries, instead of taking the job because of a desire for intrigue, and a wish to serve the people. The public is outraged at the mistakes that have been made over the years by some of the officers around the state, and at the manner in which those incidents have been handled by the police department administrators. I have been active in defending against some of the litigations that were brought because of some of those mistakes. Because of my background and my career in defending departments and officers, I must say that what you are trying to do will only serve to further alienate the public from the police officers in our state.

While the opinions that I am about to express are not my own, I feel that you should know about them, if you do not already.

Many of the public see that the police are better armed than they (the public), and the public does not trust the common police officer because of this.

The public does not feel that the common police officer is more honest than the average citizen.

The public feels that the average policeman (state troopers and A.P.D.especially) is grossly overpaid.

There are currently many persons that feel that, if they are the victim of a serious crime, they will simply handle the matter themselves, rather than trust their situation to a policeman.

There are many in the public that see a policeman wearing a bullet-proof vest, driving a government automobile, equipped with a shotgun, connected to other officers with a radio, etc. and are in no more danger at work than a commercial fisherman or those in other professions. When the seemingly outrageous salaries of A.P.D. and the troopers are brought into consideration, the result is a common person seeing a policeman as an over protected man or woman that makes too much money for the services they render, and that cannot be trusted because of these things.

These are some of the reasons that people are rude to police officers or simply disregard what an officer says or does. This is a serious problem that is growing each day and the bill that you are proposing is only making the situation worse.

I feel that we are rapidly moving toward social upheaval. Respect is something that is not as common as it used to be. The crime rate is through the roof. The public attitude toward police officers is growing worse. The bill that you are proposing, while obviously well-intended, will cause even more social unrest because it is appearing to the public that police officers feel that they are above those that they are sworn to protect and to serve, and that this bill says that it is a more serious crime to kill an officer in the line of duty than it is to kill anyone else while they are at work.

I feel that you would be more correct to propose a bill that states that anyone that is convicted of 1st degree murder should suffer execution. Period. It should not matter whether the punishment takes the form of lethal injection, hanging, firing squad, or anything else. The only thing that should matter is that the person purposely killed another human being without justification. There should be no more criteria involved.

There are those that say that the killing of a police officer is more serious because the policeman is an agent of the government and therefore killing him or her is to attack our government and

society as a whole. True, a policeman, doing his duty, is a representative of the good of the society. Yet that does not mean that he or she is better or more important than the rest of society and that the the killing of that officer is a more serious crime. The police officer is an important part of our social structure. Yet he is no more important than the common lay person.

It is not my intent to attack what you are trying to do because I agree that cop killers are the lowest of our society. Yet is a cop killer lower than a baby killer, one that assasinates for hire, one that dissects prostitutes, one that robs and kills the owner of a liquor store, or anyone else in our state?

Please consider what you are proposing. This bill is causing outrage in the middle class of our state and it should not be made into law until the wording includes captial punishment for the killers of any innocent person, not just police officers and those that have been tortured, etc.

Sincerely,

THOM HIBPSHMAN

303 K STREET
ANCHORAGE, ALASKA
99501

(907) 264-0547
FAX (907) 276-6985

ARTHUR H. SNOWDEN II
Administrative Director

Alaska Court System

November 12, 1993

The Honorable Robin L. Taylor, Chair
Senate Judiciary Committee
The Honorable Brian Porter, Chair
House Judiciary Committee
P. O. Box V
Juneau, Alaska 99811

Dear Senator Taylor and Representative Porter:

Thank you for your invitation to present the views of the supreme court on Senate Bill 127 and House Bill 162, relating to capital punishment.

I brought your request to the attention of the supreme court. Because our constitution leaves matters of public policy such as this to the judgment of the legislature, the court believes that it would not be proper for it to express an opinion regarding the enactment of capital punishment legislation. This is in keeping with the court's general policy of neither supporting nor opposing legislation which does not directly affect the internal operation of the judicial branch; comments are normally limited to a bill's impact on the court system's budget and workload.

The court system has previously submitted fiscal notes for both SB 27 and HB 162. These represent our best estimate of the impact these bills will have, based upon the number of capital cases which the Department of Law expects to try. We would be happy to address any questions or comments you may have concerning these notes. We will also advise you if our review of the legislation reveals any

purely technical changes which might be made to reduce the court system's workload.

Sincerely,

Arthur H. Snowden, II
Administrative Director

cc: The Honorable Jerry Sanders

BRISTOL BAY
NATIVE CORPORATION
800 CORDOVA / P.O. BOX 100220 / ANCHORAGE, ALASKA 99510 / (907) 278-3602
TELECOPY (907) 276-3924

TESTIMONY OF TREFON ANGASAN ON HB 162

HOUSE JUDICIARY COMMITTEE

NOVEMBER 16, 1993

My name is Trefon Angasan, and I am the Vice President of Corporate Affairs of the Bristol Bay Native Corporation. I am testifying today on behalf of the 5,400 shareholders of the Bristol Bay Native Corporation, most of whom live in Alaska.

First, I am testifying as an Alaska Native upon behalf of Alaska Natives. Alaska Natives share the concern of the House Judiciary Committee with crime--specifically, with the crime that is the subject of HB 162: first degree murder. Let me explain why Alaska Natives have this concern. Homicide ranks as the sixth or seventh most common cause of death among Alaska Natives, a murder rate four times the national average. Native male homicide victims outnumber native women victims by about three to one. Nevertheless, Native women face a higher risk of death by homicide than women elsewhere in the United States.

Let me cite a few more statistics to show you why Alaska Natives are concerned with crime. Thirty four per cent of the Alaska prisoner population are Natives, although Natives represent only sixteen per cent of the total population.

Now, let me explain to you the reason for the Alaska Native crime rate. The vast majority of crimes committed by Alaska Natives are due to alcohol. A study of the Alaska Justice Forum in 1991 concluded that in those rural Alaska Native villages that were the subject of that study that ninety five per cent of felonies involved alcohol.

I cite these statistics to you so that you will appreciate the perspective of Alaska Natives on crime. We believe that the Alaska legislature should deal with the cause of crime and not place its emphasis on capital punishment. Captial punishment will not prevent an alcoholic from committing crime--it merely will eliminate him as a person. Please take all of the money that will be spent on the administration of a bill providing capital punishment, and spend it on the prevention and treatment of alcoholism.

I would also like to add that Alaska law enforcement officials treat Alaska Natives at times as though capital punishment was already a part of Alaska law. For example, the Alaska police department recently shot and killed a shareholder of the Bristol Bay Native Corporation whose major problem was alcoholism and not crime. This is happening to Alaska Natives across Alaska. Too often, Alaska law enforcement officials use lethal means of self defense when bullets are not called for in law enforcement.

In conclusion, I would like to address that provision of HB 162 which calls for an advisory vote at the November 1994 general election on capital punishment. Alaska Natives as well as many other Alaskans have called for a vote of Alaskans on the question of a preference for subsistence in times of need in rural Alaska.

Alaska Natives believe that the question of subsistence--a life or death issue for many Alaskans--certainly deserves a place on the ballot if the Alaska legislature decides to place capital punishment on the ballot.

Calista Corporation

Statement
of
Matthew Nicolai
Senior Vice President

Before the November 16, 1993 Joint Public Hearing

Alaska State Senate, Judiciary Committee
Alaska House of Representatives, Judiciary Committee

Concerning

Senate Bill No. 127
and
House Bill No. 162

Mr. Chairman, Robin Taylor of the Alaska State Senate, Mr. Chairman, Brian Porter of the Alaska House of Representatives, Members of the Joint Committees of the Senate and House Judiciary Committees'. My Name is Matthew Nicolai, Senior Vice President, Calista Corporation.

Calista Corporation is an regional Alaska Native Corporation established under the Alaska Native Claims Settlement Act of 1971. Calista Corporation has an enrollment of 13,308 shareholders. Calista region 56 villages encompass the Kuskokwim and the lower Yukon Rivers' of a population base over 20,000 people.

We appreciate the opportunity to testify before you today to discuss the Senate Bill 127 and House Bill 162 as it relates to the Yupik people of the Calista region. Calista Corporation is not in favor of either Senate Bill 127 or House Bill 162. We are not in favor of the death penalty.

In 1990 Calista Corporation published a paper to understand the plight of the Yupik people in western Alaska. "The Calista Region, A Gentle People- A Harsh Life," was prepared by our Land and Natural Resources Department and the Village Management Services to better educate the public of the lives of the Yupik people in our region. We attributed a whole chapter on, "A New Crisis in the Calista Region-'The Decline of Native Well-Being,' " examined alcohol abuse, suicides, domestic violence, child welfare.

We published our findings to bring this issues in the forefront of policy makers. We wanted to address problems faced by our Natives. We invested time and energy to develop testimony to bring forth our problems we face in the villages. We testified before federal and state committees on economic problems of our villages.

Our traditional values and customs have changed drastically over a short time period. The drastic change of lifestyles has eroded our established patterns of trust we have to our Elders. In the Yupik lifestyles, Elders were the center of traditional governing bodies and

justice system. Our traditional child rearing lifestyles are virtually non-existence in the villages.

Without Elders guidance and not understanding of new policies affecting our villages, we began to see confrontation by our young.

Lifestyle change is like an walking into an lions den that awaits its prey to tear apart. Alaska Natives are those people that have walked into the lions den. An unkind world with many laws that confront our own unwritten traditional laws. Confrontation breeds violence. Violence leads to heinous crimes and other crimes of passion.

Studies by state and federal governments show alcohol related violence is the leading cause of accidents and deaths in Alaska. We read every day of violence related crimes of our own Alaska Natives. The states correctional facilities all over the state list the Alaska Natives as it leading residents.

Passage of Senate Bill No. 127 and House Bill No. 162 will further erode our cultures. We do not favor the passage. However, we would like for these committees to investigate the Natives plight in the states justice system.

We thank the committees of the senate and house for holding hearing on these bills. We are available for further comment if necessary.

DEATH PENALTY

INTRODUCTION

My name is Ted Lemaire. I have lived in Alaska for twenty-six years. My wife and I have reared two sons and a daughter here. We have found Alaska to be a great place to live. In a quiet way, we have tried to be well informed and active in our community. When we left the flat-lands of Ohio, our ideas were that we were abandoning the over crowded cities and their ever increasing crime rates. Thus, we are not happy to see the increase in crime that is around about us. For this reason, we are urging this legislature to take a very hard, serious look at all of the anti-crime bills that have been introduced. One of which concerns the introduction of the death penalty, which is our purpose for being here today.

Many folks would think that because of an event that occurred on August 22, 1991 that I would be in favor of the death penalty. There is nothing further from the truth. On that date, my eleven year old granddaughter was kidnapped, sexually assaulted, and murdered. One week ago, her murderer was sentenced to 114 years in jail. Thus ended the hardest twenty-eight months of my life.

Today, as much as is humanly possible, I am at peace with this situation. Death is an ugly visitor that visits every home, sooner or later. I am not disturbed that death paid us a visit. Death is something over which none of us have any control, or at least very limited amount of control. I could have lost a granddaughter just as easily by accident or disease. That part, I have no trouble in reconciling. In some ways, that must be worse. To see a child suffer two to five years from leukemia must be a very devastating experience. The real problem for my family was the aspect of crime. As crime becomes more senseless, the harder it is to bear.

To say that I am in favor of the death penalty because of Mandy's death is a huge falsehood. For I have been of that persuasion at least all of my adult life, and possibly longer.

Crime is a very real problem. My insurance investigator friends say there are only two types of people. Those that have had an accident. And those that will have an accident. As crime becomes more prevalent and violent, the sooner it will reach you, not as a legislator, but as a person or as a family. Perhaps not directly. Someone close to you will become the primary victim of crime. You will be only the secondary victim of crime. I can tell you from personal experience, it is not a great position to have! It contains nothing but great unbearable agony.

1. THE DEATH PENALTY AS A DETERRENT

The first argument that the opponents of the death penalty use is that there is no proof that it is a deterrent to the criminal. That statement shows that they fail to understand crime and the criminal. One of the basic differences between the criminal and the rest of us is that it is impossible to deter the criminal. They can be slowed-up or be forced to reschedule the event. Even modern technology does not deter the criminal. He just finds a new technique. But they <u>will</u> accomplish the planned act.

My granddaughter's killer is an example of this fact. He stalked at least two other girls before he achieved his goal. These two girls are alive today only by strange twists of fate. The two girls were spared only because a car suddenly appeared on the same road. The first girl lived a short distance from the killer and knew him by face and name. The second girl lived over 20 miles away from the killer. She did not know him. This attempt was prevented by a passing motorist. He recognized the girl as a daughter of a friend. He read panic on her face. When the killer left the scene, the motorist questioned what he had seen. Since the girl was safe, whatever the problem was, it was then a moot question. The motorist, further, was a neighbor of the killer and recognized his vehicle. That would have been adequate reason for a normal person to abandon such activities. But it did <u>NOT</u> deter the killer. He kept searching for the right opportunity.

Have you considered the difference between you and a bank robber? The difference is very slight. Both go into a bank and give the teller a small piece of paper. Your's may be a check or a deposit slip. Standard commerical paper. The bank robber uses a note saying something to the effect of placing all your money in the bag. It is not that we never have bad thoughts. The fact is we do. The difference between us and the criminal is that we can be deterred by a host of things. The criminal cannot. He has real tenacity. And he will repeat the same act over and over again.

A few months ago, we witnessed on TV a confrontation between a police officer and a gunman. You will recall this episode that occurred near Tudor and Muldoon. The gunman could not be deterred by a sizeable contingent of police officers nor their weapons. Death means nothing to a criminal. And he was a repeat offender.

The death penalty is a very real deterrent to crime to thinking people. The criminal may display cunning, craftiness, mechanical wizardry, shrewdness, and the ability to manipulate people. But lack the ability to see how the principles of right and wrong applies to them. The real test of deterrent is on the law abider and not on the criminal.

One of the reasons that the death penalty deterrent factor cannot be tested on the criminal is that it has never been consistently practiced. The law must be applied to all that commit the specific crimes listed.

If you want to see the criminal mind at work, and the impossibility of deterring it, consider two fellows by the names of Gustafson and Cheley. Being locked up in prison would not, and could not, keep them from continuing their murderous career.

2. CRUEL AND UNUSUAL PUNISHMENT

This is the other favorite argument of the opponent. These words are taken from the most important document that man has ever written. The death penalty is recognized within this document as being proper.

In addition, I think that the opponent has things reversed. It is cruel and unusual punishment on the law-abider to let the criminal live. This is true for at least three reasons:

A. The effect upon the criminal.

B. The ever present threat of crime.

C. The family of the criminal can have finality over their loved-one.

A. The effect upon the criminal.

If there was a mad dog loose on Fourth Avenue at this hour, we all would know the solution to the problem. It would be fast and simple. I use that illustration in spite of being known as the biggest animal lover anywhere. It is because I have even stronger feelings for my fellow human. That is why I am speaking here today.

Dogs and people can both become psychic because of the mistreatment that they have received from humans. They both can reach a level of psychosis that is totally unacceptable. The practitioners of the mental health industry are unable to provide any cures for the criminal. Fancy diagnoses are offered, but no cures. These diagnoses appear to be a big hinderance to the solution of our crime problem.

Since there is no cure, is our only option to warehouse them like merchandise on a shelf? That idea is very offensive to me. That is definitely cruel beyond words! To lock a person away for such long periods and to remove almost all of the usual and basic human drives and abilities, for something that will not work, is beyond comprehension. Either indefinitely or permanently to lose the right to take a walk, drive a car, select ones friends, or go out to dinner is not life. It is only logical that if we are going to take away the right to life, or the right to live, take it away fully.

B. The ever present threat of crime.

Please watch our law enforcement people at work. It is astounding the number of times that they come in contact with someone that they call by name. When you come in contact with an officer, are you immediately recognized? I would doubt it, in spite of the regularity that your face appears in a public meeting, or is on TV, or in the newspaper.

A name is broadcast on the police radio. Another officer will call in giving a more current address, aliases used, names of associates, modus operandi, types of weapons carried, contraband material frequently transported, where they hang out, or their disposition toward violence. This information becomes available long before the computer will locate it. This is possible only because of the huge number of repeat offenders.

Our beloved country has tried the technique of being nice to our criminals. <u>AND IT HAS BLOWN UP IN OUR FACE.</u> I have a retired friend. He now enjoys basking in the sunshine year-round. He tells how, as a kid, he was always in trouble. Then one day, he met a judge who gave the choice of joining the Army or prison. He chose the Army. After basic training, he was sent to Germany as a prison guard. How is that for irony? This prison was

jointly operated by the US and German governments, along Europeon concepts. The nicest thing to be said was that it was not operated in the Hilton style like ours. At that point, he made the decision that he had seen all of prison life that he desired. He became a good and productive law abiding citizen.

Yes, reformation is possible. But I don't see it as a product of our Hilton prisons. Do I want to return to the times of Devil's Island? No, that is cruel and unusual punishment. There is a big gap between the two ideas that can be profitably used.

Recycling is a present day topic. However, the recycling of our prisoners must stop. We are running criminals in, and out, and back in again to prison time after time. Repeat offenders, even of so called minor offenses, must be dealt with firmly. I am tempted to say harshly. I would not object to seeing the death penalty applied to those that refuse to be reformable. Crime has become a way of life to them, and the death penalty is the only way to break the habit of crime.

C. The effect upon the criminal's family.

I know that as a parent I cannot live my children's life. They must make many decisions for themselves. The consequences of these decisions will be theirs. I am proud that in the main, the decisions of my children have been good ones.

As a parent, I do not know how I would react upon my child being accused of committing a crime. Worse, if that child was found guilty and was sentenced. I was taught as a child never to bring embarrassment to the family name. Usually when a police car came to our neighborhood, it was to notify the next of kin of a death. For a police car to be there for some other reason would bring down the scorn of the neighbors. I did not live in Podunk Center. It was in the big city of Detroit, Michigan. For some reason those ideas seem to have been forgotten in 1993.

For the families of those convicted of crime, this must be a horrendous event. A prison must be absolutely the last place that they would want their child. They must worry about the safety, the associates being cultivated, and the things being learned by their kid while in prison. Present day experience shows that is a justifiable cause to worry.

Parents would have to worry about if and when they would be released and what is the possibly of repeat offenses. I once worked with a lady that had a close relative that was serving time. He was a repeat offender. His record was that sixteen years of his thirty-two years was spent behind bars. I was not aware of this situation until one day that I noticed her highly visible nervous condition. This was not her normal conduct. She did not want him loose. In less than thirty days after his release, he committed another major crime that resulted in the loss of a life.

Is it reasonable to think that a parent will forget their own flesh and blood? Involuntarily, they will carry the stigma until their dying day. It would seem to me that the death penalty would help to remove the stigma. This would be a way that the parents could achieve finality with the deed or deeds of their child. They certainly would have to be relieved that he could not cause any additional pain or death. One of the important facets of the grief process is to be able to find finality.

What would the friends or other relatives say to the parents during the incarceration? Would they ask about his well being? Perhaps, it be easier to ignore the subject. Whatever is their position, it will cause the parents pain.

Do I think House Bill 162 will accomplish my desired, and most Alaskan, goals? Yes, I do. I know that this law can do nothing for my Mandy. Statisticans may claimed that I should escape from further personal involvement with serious crime. Fine, but you are still exposed. The next victim can be anybody.

We are guaranteed by the Constitution, and the Bill of Rights, not only the right to life, but also the pursuit of happiness. I am here to tell you that when you become a crime victim, you are deprived of those rights. The primary crime victim loses his

life, or the desire to continue it. The secondary crime victim loses the desire to pursue happiness. This is because there is no basis to believe that happiness is possible. Christmas loses it appeal. The same is true with birthdays and anniversaries. The interest in hobbies are replaced with the desire to sit and brood. It results in the deterioration of all of the relationships that you hold dear.

The biggest problem that I see in the use of the death penalty is the legal hassles generated. I personally get so fed-up with all of the appeals filed. The large bulk of them are not based on law, facts, evidence, or simple right or wrong. The action is based on wild emotion. A very unstable commodity at best. Our legal system is breaking down by weight of the frivolous suits and appeals. Only one way to put an end to this. Penalize the attorney that filed it. Get him in the pocketbook, royally. That will catch his attention.

I urge the passage of this House Bill 162. It will enhance all of our lives. It is a very reasonable and effective process.

Thank you.

Senator Taylor: 11-15-94

Our neighborhood, at Community Council Meeting, agreed our most urgent priority is to stem the ever increasing Crime. To protect the neighborhood.

I'm here to support Senate Bill 162 or a Combination of Senate and House Bills, whichever can be made most direct, least amount of time for appeals, and still meet the Criteria of the U.S. Supreme Court for just procedures. Please don't let this die in Jeneau. Let there be an advisory vote and Capital Punishment Law. effective Jan. 1, 1995 at the latest.

Lethal Injection with a Choice to the murderer as Hanging as an alternate. This can be a deterrent, but I emphasize just punishment for justice's sake. I am pleased to agree with Ed Malley and the fact that Gov. Hickle supports Death Penalty.

I am not a Victim of Crime. 33 years ago, in Anchorage, you didn't even lock your door! We didn't need this then, but a Full Range of Punishment is absolutely mandatory now. Please don't cartoon to Rights Mongering while our Police and Children suffer from, (or our neighborhoods) are undergoing needless heinous death. Lets treat the Death Penalty with the same urgency as going to War. Its a strange Society that will take our young men, put a gun in their hands, and send them 7/8 to kill for civil rights or Land Disputes or

political dissention and yet there are some who would "fight for their Country" and will not fight for the rights of innocent victims. I trust this Committee will ignore A.C.L.U. and give Alaskans the opportunity of an advisory Vote on a good Capital Felony Law.

Thank you,

Terry Burrell.

OLd BILL

Replaced with SSHB 162

8-LS0414\A
* Co-sponsors added 11/1/93

HOUSE BILL NO. 162

IN THE LEGISLATURE OF THE STATE OF ALASKA

EIGHTEENTH LEGISLATURE - FIRST SESSION

BY REPRESENTATIVES SANDERS, Olberg, Bunde, Kott, Vezey, James *

Introduced: 2/18/93
Referred: Judiciary, Finance

A BILL

FOR AN ACT ENTITLED

"An Act authorizing capital punishment, classifying murder in the first degree as a capital felony, and establishing sentencing procedures for capital felonies; authorizing an advisory vote on instituting capital punishment; amending Alaska Rules of Criminal Procedure 32, 32.1, and 32.3 and Alaska Rules of Appellate Procedure 204, 209, 210, and 212; and providing for an effective date."

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

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

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

(2) is consistent with the criminal sentencing goal of community condemnation in that, by its use, the state affirms society's norms and condemns most severely the

appearance bond will not reasonably assure the appearance of the person, or will pose a danger to other persons and the community.

* Sec. 4. AS 12.30.040(b) is amended to read:

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

* Sec. 5. AS 12.47.110(b) is amended to read:

(b) On or before the expiration of the initial 90-day period of commitment, the court shall conduct a hearing to determine whether or not the defendant remains incompetent. If the court finds by a preponderance of the evidence that the defendant remains incompetent, the court may recommit the defendant for a second period of 90 days. The court shall determine at the expiration of the second 90-day period whether the defendant has become competent. If at the expiration of the second 90-day period the court determines that the defendant continues to be incompetent to stand trial, the charges against the defendant shall be dismissed without prejudice and continued commitment of the defendant shall be governed by the provisions relating to civil commitments under AS 47.30.700 - 47.30.915 unless the defendant is charged with a crime involving force against a person and the court finds that the defendant presents a substantial danger of physical injury to other persons and that there is a substantial probability that the defendant will regain competency within a reasonable period of time, in which case the court may extend the period of commitment for an additional six months. If the defendant remains incompetent at the expiration of the additional six-month period, the charges shall be dismissed without prejudice and either civil commitment proceedings shall be instituted or the court shall order the release of the defendant. If the defendant remains incompetent for five years after the charges have been dismissed under this subsection, the defendant may not be charged again for an offense arising out of the facts alleged in the original charges, except if the original charge is a class A felony, [OR] unclassified felony, <u>or capital felony</u>.

* Sec. 6. AS 12.55.025(i) is amended to read:

(i) Except as provided by AS 12.55.125(a)(3), 12.55.125(k), 12.55.145(d),

CORRECTION

THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY

OLD BILL

Replaced with SSHB 162

8-LS0414\A
* Co-sponsors added 11/1/93

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

(2) is consistent with the criminal sentencing goal of community condemnation in that, by its use, the state affirms society's norms and condemns most severely the

premeditative taking of human life or the taking of life under circumstances manifesting extreme indifference to its value;

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

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

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

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

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

* Sec. 2. AS 11.41.100(b) is amended to read:

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

* Sec. 3. AS 12.30.020(a) is amended to read:

(a) A person charged with an offense shall, at that person's first appearance before a judicial officer, be ordered released pending trial on the person's personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer unless the offense is a capital felony, an unclassified felony, or a class A felony or unless the officer determines that the release of the person will not reasonably assure the appearance of the person as required, or will pose a danger to other persons and the community. If the offense with which a person is charged is a felony, on motion of the prosecuting attorney, the judicial officer may allow the prosecuting attorney up to 48 hours to demonstrate that release of the person on the person's personal recognizance or upon the execution of an unsecured

appearance bond will not reasonably assure the appearance of the person, or will pose a danger to other persons and the community.

* Sec. 4. AS 12.30.040(b) is amended to read:

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

* Sec. 5. AS 12.47.110(b) is amended to read:

(b) On or before the expiration of the initial 90-day period of commitment, the court shall conduct a hearing to determine whether or not the defendant remains incompetent. If the court finds by a preponderance of the evidence that the defendant remains incompetent, the court may recommit the defendant for a second period of 90 days. The court shall determine at the expiration of the second 90-day period whether the defendant has become competent. If at the expiration of the second 90-day period the court determines that the defendant continues to be incompetent to stand trial, the charges against the defendant shall be dismissed without prejudice and continued commitment of the defendant shall be governed by the provisions relating to civil commitments under AS 47.30.700 - 47.30.915 unless the defendant is charged with a crime involving force against a person and the court finds that the defendant presents a substantial danger of physical injury to other persons and that there is a substantial probability that the defendant will regain competency within a reasonable period of time, in which case the court may extend the period of commitment for an additional six months. If the defendant remains incompetent at the expiration of the additional six-month period, the charges shall be dismissed without prejudice and either civil commitment proceedings shall be instituted or the court shall order the release of the defendant. If the defendant remains incompetent for five years after the charges have been dismissed under this subsection, the defendant may not be charged again for an offense arising out of the facts alleged in the original charges, except if the original charge is a class A felony, [OR] unclassified felony, <u>or capital felony</u>.

* Sec. 6. AS 12.55.025(i) is amended to read:

(i) Except as provided by AS 12.55.125(a)(3), 12.55.125(k), 12.55.145(d),

12.55.155(f), and 12.55.165, or in determining if a sentence of death should be imposed under AS 12.58. the preponderance of the evidence standard of proof applies to sentencing proceedings.

* Sec. 7. AS 12.55.125(a) is amended to read:

(a) A defendant convicted of murder in the first degree shall be sentenced to a definite term of imprisonment of at least 20 years but not more than 99 years, or shall be sentenced to death. A defendant convicted of murder in the first degree, but not sentenced to death, shall be sentenced to a mandatory term of imprisonment of 99 years when

(1) the defendant is convicted of the murder of a uniformed or otherwise clearly identified peace officer, fire fighter, or correctional officer who was engaged in the performance of official duties at the time of the murder;

(2) the defendant has been previously convicted of

(A) murder in the first degree under AS 11.41.100 or former AS 11.15.010 or 11.15.020;

(B) murder in the second degree under AS 11.41.110 or former AS 11.15.030; or

(C) homicide under the laws of another jurisdiction when the offense of which the defendant was convicted contains elements similar to first degree murder under AS 11.41.100 or second degree murder under AS 11.41.110; or

(3) the court finds by clear and convincing evidence that the defendant subjected the murder victim to substantial physical torture.

* Sec. 8. AS 12.55.125(f) is amended to read:

(f) If a defendant is sentenced under (a) or (b) of this section,

(1) imprisonment for the prescribed minimum term may not be suspended under AS 12.55.080;

(2) imposition of sentence may not be suspended under AS 12.55.085;

(3) imprisonment for the prescribed minimum term may not be otherwise reduced;

(4) a sentence of death may not be suspended under AS 12.55.080.

* Sec. 9. AS 12.55.145(a) is amended to read:

(a) For purposes of considering prior convictions in imposing sentence under AS 12.55.125(c), (d)(1), (d)(2), (e)(1), (e)(2), or (i)

(1) a prior conviction may not be considered if a period of 10 or more years has elapsed between the date of the defendant's unconditional discharge on the immediately preceding offense and commission of the present offense unless the prior conviction was for a capital. [AN] unclassified, or class A felony;

(2) a conviction in this or another jurisdiction of an offense having elements similar to those of a felony defined as such under Alaska law at the time the offense was committed is considered a prior felony conviction;

(3) two or more convictions arising out of a single, continuous criminal episode during which there was no substantial change in the nature of the criminal objective are considered a single conviction unless the defendant was sentenced to consecutive sentences for the crimes; offenses committed while attempting to escape or avoid detection or apprehension after the commission of another offense are not part of the same criminal episode or objective.

* Sec. 10. AS 12.55.155(f) is amended to read:

(f) Under this section, if [IF] the state seeks to establish a factor in aggravation at sentencing or if the defendant seeks to establish a factor in mitigation at sentencing, written notice must be served on the opposing party and filed with the court not later than 10 days before the date set for imposition of sentence. Under this section, factors [FACTORS] in aggravation and factors in mitigation must be established by clear and convincing evidence before the court sitting without a jury. All findings must be set out with specificity.

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

CHAPTER 58. CAPITAL PUNISHMENT.

ARTICLE 1. ELECTION TO SEEK DEATH PENALTY.

Sec. 12.58.010. PROSECUTOR'S ELECTION TO SEEK DEATH PENALTY. The district attorney assigned to the prosecution of a capital felony shall determine whether to seek the death penalty against the defendant. If the prosecutor elects to seek the death penalty, the prosecutor shall give notice of election to the court, the

defendant, and the defendant's attorney within 10 days of arraignment of the defendant on the capital felony indictment, or within 10 days of arraignment of the defendant if indictment has been waived.

ARTICLE 2. IMPOSITION OF SENTENCE.

Sec. 12.58.100. SENTENCING PROCEDURE FOR A CAPITAL FELONY. (a) If, after a trial by jury, a defendant is convicted of a capital felony for which the district attorney has elected under AS 12.58.010 to seek the death penalty, the court shall conduct a separate sentencing proceeding before the trial jury as soon as practicable. If a jury trial has been waived or if the defendant has pled guilty, the sentencing proceeding shall be held before a jury impaneled for the purpose.

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

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

(1) unanimously beyond a reasonable doubt that a statutory aggravating factor or factors exist to justify the death sentence;

(2) unanimously by a preponderance of the evidence that the aggravating factor or factors outweigh any mitigating factors found to exist by a preponderance of the evidence by one or more of the jurors; and

(3) that the defendant should be sentenced to death.

Sec. 12.58.110. SENTENCE IMPOSITION FOR CAPITAL FELONY. (a) After considering the evidence and the recommended sentence, the court shall enter a sentence of death or a term of imprisonment in accordance with AS 12.55.125(a). The court may not impose the death sentence unless the jury (1) finds beyond a

reasonable doubt at least one statutory aggravating factor, (2) finds by a preponderance of the evidence that that factor or those factors are not outweighed by any mitigating factors found to exist by a preponderance of the evidence, and (3) recommends that the defendant be sentenced to death. If the jury findings include a statutory aggravating factor or factors that are not outweighed by one or more of the mitigating factors and if the jury recommends a sentence of death, the court shall sentence the defendant to death. If a sentence of death is not recommended by the jury, the court shall sentence the defendant to a term of imprisonment under AS 12.55.125(a).

(b) When the court enters a sentence of death, it shall state in writing the jury's findings of

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

(2) mitigating factors considered but found insufficient to outweigh the aggravating factors.

(c) A judgment of conviction for which a sentence of death is imposed is subject to automatic review under AS 12.58.200.

Sec. 12.58.120. AGGRAVATING FACTORS. In determining whether to impose a sentence of death, the following aggravating factors may be considered:

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

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

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

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

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

(6) the defendant knowingly directed the conduct constituting the

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

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

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

(9) the defendant was a member of an organized group of five or more persons, and the offense was committed to further the criminal objectives of the group.

Sec. 12.58.130. MITIGATING FACTORS. In determining whether to impose the death sentence, all mitigating factors shall be considered, including, but not limited to, the following:

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

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

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

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

ARTICLE 3. SENTENCE REVIEW.

Sec. 12.58.200. REVIEW OF JUDGMENT OF CONVICTION OF A CAPITAL FELONY. (a) A judgment of conviction of a capital felony for which a sentence of death is imposed shall automatically be reviewed by the supreme court within 60 days after imposition of the sentence. This time limit may be extended by the supreme court for good cause.

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

(1) the sentence was imposed under the influence of passion, prejudice,

or other arbitrary factor;

(2) the evidence supports the finding of an aggravating factor under AS 12.58.120 and whether the jury has properly considered mitigating factors under AS 12.58.130;

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

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

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

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

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

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

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

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

Sec. 12.58.210. ISSUANCE OF DEATH WARRANT. If the supreme court upholds a judgment of conviction and sentence of death, the court shall issue a death warrant that specifies a date of execution. The specified date of execution must be not less than 30 days nor more than 60 days after the date of the warrant. The death warrant shall be delivered to the commissioner of corrections.

ARTICLE 4. ADMINISTRATION OF THE DEATH PENALTY.

Sec. 12.58.300. ADMINISTRATION OF THE DEATH PENALTY. The commissioner shall establish a procedure for the execution of a sentence of death ordered by the state supreme court at the time and place legally appointed.

Sec. 12.58.310. EXECUTION UNDER SUPREME COURT DEATH WARRANT. After receiving a supreme court warrant issued under AS 12.58.210, the commissioner shall specify the time and place of execution.

Sec. 12.58.320. MANNER OF EXECUTION. (a) The punishment of death

shall be inflicted

(1) by hanging by the neck until death is pronounced by a licensed physician; or

(2) at the election of the defendant, by continuous, intravenous administration of a lethal dose of sodium thiopental until death is pronounced by a licensed physician.

(b) A death sentence shall be carried out within a state correctional facility.

Sec. 12.58.330. RETURN OF DEATH WARRANT. After the execution the commissioner shall make a return upon the death warrant showing the time and place in which the defendant was executed.

ARTICLE 5. STAY OF EXECUTION.

Sec. 12.58.400. INCOMPETENCY OR PREGNANCY OF PERSON SENTENCED TO DEATH. If, after a sentence of death is imposed, the commissioner has reason to believe that the defendant has become incompetent to proceed with the execution or that the defendant is pregnant, the commissioner shall immediately give written notice to the court in which the sentence of death was imposed, the prosecuting attorney, and counsel for the defendant. The execution of sentence shall be stayed pending further order of the court.

Sec. 12.58.410. EXAMINATION INTO COMPETENCY. (a) On receipt of notice under AS 12.58.400 that the defendant is believed to be incompetent, the sentencing court shall examine the mental condition of the defendant in the same manner as provided for examining persons for competency to stand trial under AS 12.47.070.

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

(c) If the sentencing court finds that the defendant is competent, the court shall immediately certify the finding to the supreme court and the commissioner. The supreme court shall issue and deliver another warrant to the commissioner under AS 12.58.210, together with a copy of the certified finding. Unless the sentencing

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

Sec. 12.58.420. DISPOSITION PENDING PREGNANCY. (a) If the defendant is pregnant, the sentencing court shall immediately certify that finding to the supreme court and the commissioner. The supreme court shall issue an order staying the execution of the sentence of death during the pregnancy.

(b) When the defendant is no longer pregnant, the sentencing court shall immediately certify the finding to the supreme court and the commissioner. The supreme court shall issue and deliver another warrant under AS 12.58.210, together with a copy of the certified finding. Unless the sentencing court's finding is appealed under applicable court rule, the warrant shall specify a date of execution not less than 30 days nor more than 60 days after the date of the warrant.

ARTICLE 6. GENERAL PROVISIONS.

Sec. 12.58.900. DEFINITIONS. In this chapter,

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

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

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

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

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

(2) post-conviction relief;

(3) children's court matters under AS 47.10.010(a)(1), including waiver of children's court jurisdiction over a minor under AS 47.10;

(4) extradition;

(5) habeas corpus;

(6) probation and parole; and

(7) bail.

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

(b) **Except for appeals of a death sentence, the** [THE] court of appeals has

jurisdiction to hear appeals of sentences of imprisonment imposed by the superior court on the grounds that the sentence is excessive or too lenient and, in the exercise of this jurisdiction, may modify the sentence as provided by law and the state constitution.

* Sec. 14. The lieutenant governor shall place before the qualified voters of the state at the November 1994 general election a question advisory to the legislature of whether capital punishment should be an authorized sentence for murder in the first degree. The question shall appear on the ballot in the following form:

QUESTION

Should capital punishment for murder in the first degree as now authorized by law go into effect June 1, 1995?

Yes [ ] No [ ]

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

* Sec. 16. APPLICABILITY TO APPELLATE RULES. AS 12.58.200, added by sec. 11 of this Act, has the effect of amending Rules 204, 209, 210, and 212, Alaska Rules of Appellate Procedure, by establishing procedures and limitations on procedures relating to the filing and disposition of appeals of sentences in cases in which the death penalty is imposed.

* Sec. 17. Section 14 of this Act takes effect immediately under AS 01.10.070(c).

* Sec. 18. Except for sec. 14 of this Act, this Act takes effect June 1, 1995.

Representative Jerry Sanders

District 19

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

November 22, 1993

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

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

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

716 W. 4th Avenue • Suite 360 • Anchorage, Alaska 99501-2133 • (907) 258-8199
During Session: State Capitol • Room 13 • Juneau, Alaska 99801-1182 • (907) 465-4945

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

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

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

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

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

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

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

Jerry Sanders

ARTHUR H. SNOWDEN II
Administrative Director

Alaska Court System

303 K STREET
ANCHORAGE, ALASKA
99501

(907) 264-0547
FAX (907) 276-6985

November 12, 1993

The Honorable Robin L. Taylor, Chair
Senate Judiciary Committee
The Honorable Brian Porter, Chair
House Judiciary Committee
P. O. Box V
Juneau, Alaska 99811

Dear Senator Taylor and Representative Porter:

Thank you for your invitation to present the views of the supreme court on Senate Bill 127 and House Bill 162, relating to capital punishment.

I brought your request to the attention of the supreme court. Because our constitution leaves matters of public policy such as this to the judgment of the legislature, the court believes that it would not be proper for it to express an opinion regarding the enactment of capital punishment legislation. This is in keeping with the court's general policy of neither supporting nor opposing legislation which does not directly affect the internal operation of the judicial branch; comments are normally limited to a bill's impact on the court system's budget and workload.

The court system has previously submitted fiscal notes for both SB 27 and HB 162. These represent our best estimate of the impact these bills will have, based upon the number of capital cases which the Department of Law expects to try. We would be happy to address any questions or comments you may have concerning these notes. We will also advise you if our review of the legislation reveals any

purely technical changes which might be made to reduce the court system's workload.

Sincerely,

Arthur H. Snowden, II
Administrative Director

cc: The Honorable Jerry Sanders

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM October 27, 1993

SUBJECT: Constitutionality of House Bill 162, imposing capital punishment

TO: Representative Brian Porter, Chair
House Judiciary Committee

FROM: Jack Chenoweth
Legislative Counsel

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

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

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

I

The principal line of constitutional challenge to death penalty provisions has been through the Eighth Amendment to the United States Constitution [1] and the parallel

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[1] The Eighth Amendment to the United States Constitution provides:

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

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

The chief features of House Bill 162 have been drafted to conform to the requirements enunciated by the United States Supreme Court that apply to death penalty cases. Those requirements derive from a series of capital punishment-related decisions beginning with Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), reh. den. 409 U.S. 902, 93 S.Ct. 89, 34 L.Ed.2d 163 (1972)) (striking down death penalty statutes under the application of the Eighth Amendment when state law permitted trial juries random, unguided discretion in the imposition of a capital sentence) and culminating in the opinions issued in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (upholding against an Eighth Amendment-based challenge statutes that provide guidance to judge and juries that effectively prevented arbitrary imposition of death sentences) and Woodson v. North Carolina, 428 U.S. 280, 49 L.Ed. 2d 944, 96 S.Ct. 2978 (1976) (finding that a **mandatory** death sentence upon conviction for first degree murder violated the Eighth Amendment). The Gregg decision gives helpful direction in the drafting of capital punishment legislation, for it includes discussion relating to the requirement of a divided or bifurcated procedure in which the jury separately considers the sentence, the requirement that the jury recommending a sentence make specific findings as to the presence of applicable aggravating or mitigating factors to support its sentencing recommendation, and the requirement of mandatory appellate review.

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

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

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

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

II

The question has been asked whether, independently of the federal constitutional protection against cruel and unusual punishment, article I, section 12 of the Alaska Constitution would bar imposition of the death penalty. It is my opinion that it would not.

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

The language of this element of the state constitutional provision tracks the Eighth Amendment of the federal constitution. The Eighth Amendment prohibition is applicable to the states through the due process clause of the Fourteenth Amendment. Robinson v. California, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962), reh. den. 371 U.S. 905, 83 S.Ct. 202, 9 L.Ed.2d 166 (1962). The United States Supreme Court has concluded that imposition of the death penalty is not inherently cruel and unusual punishment and therefore not in all cases an Eighth Amendment violation. Furman v. Georgia and Gregg v. Georgia, loc. cit. The court has observed that the Eighth Amendment's prohibition against cruel punishment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 89, 78 S.Ct. 590, 2 L.Ed.2d 630, 642 (1958). Finally, the United States Supreme Court has also interpreted the cruel and unusual punishment provision so as to impart a "proportionality" test to criminal sentences, determining in Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983), that "as a matter of principle . . . a criminal sentence must be proportionate to the crime for which the defendant was convicted." 77 L.Ed.2d 637, 649.

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

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

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

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

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

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

The Alaska Constitution Convention twice took up consideration of this provision, once in preliminary discussion of language recommended by its Committee on the Preamble and Bill of Rights, and again in consideration of a delegate's amendment to that language. In each instance, the colloquy among the delegates strongly implied that the language being adopted was not intended to preclude imposition of capital punishment.

When first offered, the proposed language in question read:

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

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

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

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

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

> PRESIDENT EGAN: Are there amendments to be proposed to . . . Section 10? Mr. Ralph Rivers.
>
> DELEGATE RALPH RIVERS: I submit one.
>
> PRESIDENT EGAN: The Chief Clerk may read the proposed amendment.
>
> CHIEF CLERK: Page 4, Section 10, line 3, delete the last sentence commencing on line 3 and substitute the following: 'The administration of criminal justice shall be founded upon the principle of reformation as well as upon the need to protect the public.'
>
> . . .
>
> DELEGATE RALPH RIVERS (speaking in support of a motion to adopt): Mr. President, the reason for this [amendment] is that I think the administration of criminal justice should definitely be founded upon the need for protecting the public. I think that, secondarily, it is a very good idea for us to try to reform the people who have breached the law and become antisocial, but I don't want to completely overlook the protection of the public. I also think this business about "and not on vindictiveness" sounds a little odd. You can't legislate away that kind of sin. If a district attorney is mean, he is mean. I don't care, so I merely submit that to say that the administration of criminal justice shall be founded upon the principle of reformation as well as upon the need for protecting the public. It covers the subject better than it is now.
>
> PRESIDENT EGAN: Mr. McLaughlin.
>
> DELEGATE MCLAUGHLIN: I would like to ask the Chairman of the Bill of Rights [Committee] a question. Was it the intention of this clause to abolish capital punishment on the theory that you can't reform a dead man?
>
> DELEGATE AWES: I made the same observation as did one or two others on the Committee. However, this sentence has used almost the identical words as in other state constitutions, and in those states the supreme court upheld that it does not abolish capital punishment.

PRESIDENT EGAN: Mr. Doogan.

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

PRESIDENT EGAN: Mrs. Hermann.

DELEGATE HERMANN: Mr. President, I also do not like the word "vindictiveness". I would like to believe that there is never any vindictiveness in the punishment of people who have violated the laws of the country, though I am compelled to admit that sometimes I have seen evidences [sic] of it, but I do think that Mr. Ralph Rivers is correct in saying that the chief aim of criminal justice is the protection of the public and that the reformation and rehabilitation of the persons who have been found guilty of a crime is vastly important also, so if I understand Mr. Rivers' motion correctly, I am going to support it. I think that it is high time that some state constitution had in it some mention of the need of reformation of people who seem criminally inclined rather than the need of constantly stressing punishment for them. When we learn to have preventive instead of punitive measures on our statute books[,] we are going a long ways further toward really administering criminal justice.

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

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

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

Delegate Awes's responses concerning the relationship between the Indiana provision and that state's death penalty were equally apt: both before and since the Alaska Constitutional Convention, the Indiana Supreme Court has consistently construed the state's constitutional provision so as not to bar imposition of the death penalty. McCutcheon v. State, 155 N.E. 544 (Ind. 1927); Hawkins v. State, 37 N.E.2d 79 (Ind. 1941); Brewer v. State, 417 N.E.2d 889 (1981), cert. den. 458 U.S. 1122, 102 S.Ct. 3510, 73 L.Ed.2d 1384, reh. den. 458 U.S. 1132, 103 S.Ct. 18, 73 L.Ed.2d 1403 (1982); Williams v. State, 430 N.E.2d 759 (Ind. 1982), app. dismissed, 459 U.S. 808, 103 S.Ct. 33, 74 L.Ed.2d 47, reh. den., 459 U.S. 1059, 103 S.Ct. 479, 74 L.Ed.2d 626 (1982). And, as Delegate Awes remarked, a similar provision appears in the constitution of Wyoming (article I, section 15: "The penal code shall be framed on humane principles of reformation and prevention."). Wyoming imposes a death penalty, but there is nothing of record to note that the court has ever squarely faced a death penalty challenge grounded on article I, section 15 of that state's constitution. Substantively similar provisions also appear in the constitutions of New Hampshire (article I, section 18), Oregon (article I, section 15), and the 1889 constitution of Montana (article III, section 24), but in the case of each of these three, the respective constitutional provision includes or is accompanied by additional language explicitly or implicitly authorizing the imposition of capital punishment.

However, the Indiana precedent may be distinguished. For purposes of interpreting and applying the comparable Alaska constitutional provisions, the Indiana cases decided before Alaska's Constitutional Convention are the more pertinent. [3] The constitutional challenge raised in the earlier of the two, McCutcheon v. State, 155 N.E. 544 (Ind. 1927), was based on the clause of article I, section 18 of the Indiana constitution that disallowed use of a penal code grounded on "vindictive justice." [4]

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

[4] Specifically, the Indiana Supreme Court said:

> Nor is the punishment of death for murder in the first degree in conflict with article I, section 18 of the Constitution (section 70, Burns' R.S. 1926) -- "the Penal Code shall be founded on the principles of reformation,

(continued...)

Alaska's constitution omits that term, substituting in its place a reference to "protecting the public." The later of the two, Hawkins v. State, 37 N.E.2d 79 (Ind. 1941), disposes of the constitutional challenge merely by citing the earlier decision and concluding that the law is "settled otherwise." 37 N.E.2d 79, at 87.

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

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

III

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

A

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

---

[4](...continued)

> and not of vindictive justice." Such punishment [i.e. capital punishment] "is not * * * vindictive, but is even-handed justice" (Driskell v. State, 7 Ind. 338, 343 [(1855)]), necessarily meted out for the maintenance of the peace and the protection of the citizens of the state.
>
> McCutcheon v. State, 155 N.E. 544, at 548.

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

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

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[6] On the point of whether or not the provision of a choice of methods of execution was constitutional, the Washington Supreme Court responded:

> Defendant's final constitutional challenge to the death penalty statute raises the issue of whether allowing an individual a choice between two methods of execution is unconstitutional. . . .
>
> . . . The broader question, of whether a choice between hanging or lethal injection is unconstitutional, has never been at issue in this state.
>
> Neither defendant nor the State offers authority to support their position. Contrary to both parties' assertions, logic dictates neither result. Individual reactions to the various methods of execution and the right to choose vary greatly. In some cases, a person may be so appalled by the thought of physically hanging by the neck that the option of death by lethal injection is welcome. To others, the idea of lying strapped upon a gurney awaiting the lethal poison to seep into one's veins at an unknown time may be equally abhorrent. These individuals embrace the idea of choosing the method of their death as a way to avoid their own private terrors. But to a third type of individual, the choice itself is cruel. As they await the day of their death, they are faced not only with the terror of death itself but also with the terror of making the wrong choice on how to die. These individuals do not embrace the idea of choice; they dread its requirement that they take an active part in their own demise.
>
> To resolve this issue either way would require that, in one case or the other, the court's personal view of cruelty prevails over the views of condemned felons. By removing the choice, we impose a cruel punishment upon those who dread a particular method of execution. Retaining the right of choice, on the other hand, may impose severe psychological pressure on those who are frightened of the decision itself.
>
> On balance, on this record, we cannot agree with defendant's assertion that the choice in and of itself is necessarily cruel punishment. The record before us is devoid of any evidence relating to what psychological effect the choice of execution method has upon those sentenced to death.

(continued...)

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

B

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

In companion cases, Stanford v. Kentucky and Wilkins v. Missouri, 492 U.S. 361, 106 L.Ed.2d 306, 109 S.Ct. 2969 (1989), reh. den. 106 L.Ed.2d 635, 110 S.Ct. 23 (1989), a five-member majority of the United States Supreme Court concluded that the Eighth Amendment's "cruel and unusual punishment" provision did not forbid a state from executing persons who were juveniles when they committed the offenses for which they had been convicted. By implication, the court seemed to conclude that it would be unconstitutional, as a violation of the Eighth Amendment, for a state to impose the death penalty on one younger than 16 at the time of commission of the offense. [7/]

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

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[6/](...continued)

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

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

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

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

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

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[8] As drafted, neither HB 162 nor SB 127 now contains that kind of provision.

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

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

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

(continued...)

9/(...continued)

punishments shall not be inflicted.

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

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

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

age 10:

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

age 14:

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

age 15:

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

age 16:

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

age 17:

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

age 18:

California	Cal. Penal Code § 190.5

(continued...)

C

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

> . . . [S]tates sometimes limit the applicability of the death penalty to certain types of first degree murder, for example situations similar to those cases for which a 99 year mandatory term of imprisonment are required under Alaska law. See AS 12.55.125(a)(1)-(3). . . . .
>
> . . . I am deeply concerned with the range of sentences available to someone convicted of a capital offense, murder in the first degree. AS 12.55.125(a) currently provides for a prison term of not less than 20 years nor more than 99 years for most murders in the first degree and for mandatory terms of 99 years for some murders. Under the bill draft, to this current sentencing range would be added the punishment of death in cases determined by the jury to warrant the death sentence. The possibility that someone convicted of murder in the first degree in one case may only receive 20 years and someone convicted of murder in the first degree in another case may receive death is troubling due to the disparate range of possible sentences. This is not always a problem in other states with the death penalty, for at least in those states whose statutes I have examined, the legislature has apparently authorized only two possible sentences for a capital felony, life imprisonment or death. The disparity between life imprisonment and

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9/(...continued)

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

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

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

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

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

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

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

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

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

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

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

IV

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

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

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93-211.lmb

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